

**MAHARASHTRA ADMINISTRATIVE TRIBUNAL MUMBAI,
BENCH AT AURANGABAD**

**ORIGINAL APPLICATION NO. 446 OF 2023
(Subject – Duty Period/Pay & Allowances)**

DISTRICT : AURANGABAD

Virbahadur Kulbahadur Gurung,)
Age: 52 years, Occu: Service as Head Constable,))
R/O- Police Quarter, Kotla Colony,)
Kranti Chowk, Aurangabad.)

.... **APPLICANTS**

V E R S U S

1. The State of Maharashtra,)
Through: Additional Chief Secretary,)
Home Department, 2nd Floor, Main)
Building, Madam Kama Marg, Hutatma)
Rajguru Chowk, Mantralaya, Mumbai-400032.)

2. The Police Commissioner,)
Aurangabad, Police Commissioner Office,))
Mill Corner, Aurangabad-431001.)

... **RESPONDENTS**

APPEARANCE : Shri K.B. Jadhav, Counsel for Applicant.

: Shri A.P. Basarkar, Presenting Officer for
respondent authorities.

CORAM : **Hon'ble Justice Shri V.K. Jadhav, Member (J)**

RESERVED ON : **27.02.2024**

DATE : **03.05.2024**

O R D E R

1. Heard Shri K.B. Jadhav, learned counsel appearing for the applicant and Shri A.P. Basarkar, learned Presenting Officer appearing for respondent authorities.

2. The present Original Application is disposed of finally with the consent of both the parties at the admission stage itself.

3. By way of this Original Application, the applicant is seeking quashing and setting aside the impugned order dated 17.07.2023 passed by respondent No. 1 and the respondents be directed to treat the out of service period from 07.03.2017 to 09.05.2022 as duty period for all the purposes of service benefits and to pay him 100% pay and allowances for the said period with all consequential benefits.

4. Brief facts as stated by the applicant giving rise to the present Original Application are as follows :-

(i) The applicant was initially appointed as Police Constable by the respondents on 26.06.1989. Thereafter, the applicant came to be promoted on the post of Head Constable and posted in the office of respondent No. 2. During the said period while working on the post of Head Constable with the respondent No. 2, one crime No. I-79/2017 came to be registered against the applicant and others for the offences punishable under Sections 395, 323, 504 of I.P.C. on 06.03.2017 in Jinsi Police Station, Aurangabad and the applicant came to be arrested on 07.03.2017 with the allegations that the applicant had

conspired with the other accused persons in the said crime. Pursuant to the said registration of crime against the applicant and his arrest in connection with the said crime, the respondent No. 2 has issued suspension order dated 08.03.2017 (Annexure A-1), thereby suspending the applicant from the post of Head Constable w.e.f. 07.03.2017. It is further case of the applicant that without waiting for decision of the Criminal Case and without holding any enquiry, the respondent No. 2 has issued the dismissal order dated 07.04.2017 (Annexure A-2), thereby dismissing the applicant from service by relying the provisions of Article 311 (2) (B) of the Constitution of India.

(ii) The applicant contends that meanwhile in connection with the aforesaid crime, the charge-sheet was filed in the Sessions Court and Sessions Case No. 178/2017 was registered against the applicant and others. By judgment and order dated 29.10.2020, the Sessions Court, Aurangabad was pleased to acquit the applicant from the Sessions Case No. 178/2017. The State has not preferred any appeal against the judgment and order of the acquittal. Copy of the judgment and order dated 29.10.2020 passed

in Sessions Case No. 178/2017 is marked as Annexure A-3.

(iii) It is the case of the applicant that meanwhile the applicant had filed departmental appeal against the dismissal order dated 07.04.2017 passed by respondent No. 2 before the Hon'ble State Minister, Home Department and by judgment and order dated 09.03.2022 (Annexure A-4 collectively), the Hon'ble State Minister, Home Department has allowed the said appeal and quashed and set aside the dismissal order dated 07.04.2017 and instead withheld next increment of the applicant for one year and reinstated the applicant in service. It is also directed to the applicant to submit application within 60 days for regularization of out of service period to the State Government. The said order was communicated to the applicant by the Desk Officer, Home Department through letter dated 09.03.2022, when the respondent No. 2 also communicated the judgment and order passed in the departmental appeal by communication dated 11.04.2022.

(iv) It is the further case of the applicant that in view of the order passed in the departmental appeal by the Hon'ble State Minister, Home Department, the respondent No. 2

has issued order dated 06.05.2022 reinstated thereby the applicant in service on the post of Head Constable and directed to submit the application for regularization of out of service period to the State Government. It is further case of the applicant that in terms of the aforesaid communication and the order, the applicant has submitted application dated 19.05.2022 (Annexure A-7) to the respondent No. 1 through respondent No. 2 to regularize/ treat the out of service period from 07.03.2017 to 09.05.2022 as duty period and grant him all the pay and allowances for the said period. On 06.12.2022, the respondent No. 1 has issued show cause notice to the applicant through respondent No. 2 and informed that the action on the application of the applicant for treating the out of service period as duty period is under process in terms of the provisions of Rule 70(4)(5) of the Maharashtra Civil Services (Joining Time, Foreign Service and Payments during Suspension, Dismissal and Removal) Rules, 1981 (in short 'the Rules of 1981'). Further it is stated that the applicant is entitled for 50% pay and allowances for the out of service period and arrears will be paid only for last three years and the out of service period will be counted only for the purpose of pension and not for any other purpose. It is

directed to submit the reply within 60 days as to why the above said proposed action should not be taken against the applicant. The applicant accordingly submitted the reply to the show cause notice and also pointed out that he came to be acquitted from the criminal case and as such, he is entitled for treating the out of service period as duty period for all the purposes.

(v) It is the further case of the applicant that during pendency of the present Original Application, the respondent No. 1 has issued order dated 17.07.2023 thereby taken the final decision. The respondent No. 1 has rejected the request of the applicant for treating the out of service period as duty period for all the purposes and grant of 100% pay and allowances for the said period. It is informed that out of service period is regularized and the applicant is entitled for grant of 50% pay and allowances, but he will be entitled for arrears of the out of service period only for three years before reinstatement and the said period will be considered only for the purpose of pension. Hence, the present Original Application.

5. Learned counsel for the applicant submits that the impugned order is totally illegal and is not sustainable in the

eyes of law. Learned counsel submits that the order passed in the departmental appeal by the Hon'ble State Minister, Home Department and in view of the acquittal of the applicant in connection with the Criminal Case, the applicant is entitled for regularization of out of service period from 07.03.2017 to 09.05.2022 as duty period and all the pay and allowances for the said period.

6. Learned counsel for the applicant submits that by way of impugned order, the respondent No. 1 cannot impose another punishment on the applicant by not considering the out of service period as duty period for all the purposes. Learned counsel submits that the impugned order dated 17.07.2023 passed by respondent No. 1 is illegal, irrational, illogical and liable to be quashed and set aside and the present Original Application deserves to be allowed.

7. Learned counsel for the applicant in order to substantiate his contentions has placed reliance on the following citations :-

- (i) Ram Lal Vs. State of Rajasthan & Ors. in Civil Appeal No. 7935/2023 (Arising out of SLP (C) No. 33423 of 2018), decided on 04.12.2023.

- (ii) O.A. Nos. 303/2019 & Ors. (Shri Sukracharya S/o Baban Tekale & Ors Vs. State of Maharashtra and Ors), decided on 30.09.2022 (Aurangabad).
- (iii) O.A. No. 932/2017 (Walmik S/o Laimbaji Kande Vs. The Special Inspector General of Polcie, Aurangabad & Anr.), decided on 21.07.2022 (Aurangabad).

8. Learned Presenting Officer on the basis affidavit in reply and also on the basis of amended affidavit in reply filed on behalf of respondent No. 2 submits that the respondent No. 2 has passed the impugned order by following the due procedure and law in terms of the provisions of Article No. 311 (2)(B) of the Constitution of India. Learned Presenting Officer submits that there is no merit in the present Original Application and the same is liable to be dismissed.

9. Learned Presenting Officer placed his reliance on the following citations :-

- (i) State of Maharashtra and Anr. Vs. Surendra G. Ghodke, AIR Online 2023 BOM 1006 (W.P. No. 2470/2018).
- (ii) Baldev Singh Vs. Union of India and Ors., AIR 2006 Supreme Court 531 (Civil Appeal No. 3892/1999).

10. In the present Original Application, the applicant who was working as Head Constable pursuant to the crime registered

against him and considering the allegations made in connection with the said crime, the respondent No. 2 has passed an order dated 07.04.2017 by invoking the provisions of Article 311(2)(B) of the Constitution of India and dismissed the applicant from service.

11. Being aggrieved by the said order, the applicant has preferred departmental appeal before the Hon'ble State Minister, Home Department. By order dated 09.03.2022, the Hon'ble State Minister, Home Department quashed and set aside the dismissal order dated 07.04.2017 and instead withheld next increment of the applicant for one year and reinstated the applicant in service.

12. In the backdrop of these facts to deal with the issue of regularization of the aforesaid period, during which the applicant remained absent from duty till his dismissal is set aside. Rule 70 of the Rules of 1981 prescribes regularization of pay and allowances and the period of absence from duty where dismissal, removal or compulsory retirement is set aside as a result of appeal or review and such Government servant is re-instated. In view the same, Rule 70 of the Rules of 1981 reproduced herein below :-

“70. Regularization of pay and allowances and the period of absence from duty where dismissal, removal or compulsory retirement is set aside as a result of appeal or review and such Government servant is re-instated.-

1. When a Government servant who has been dismissed, removed or compulsorily retired is re-instated as a result of appeal or review or would have been so reinstated but for his retirement on superannuation while under suspension or not, the authority competent to order re-instatement shall consider and make a specific order-

- (a) regarding the pay and allowances to be paid to the Government servant for the period of his absence from duty including the period of suspension preceding his dismissal, removal or compulsory retirement, as the case may be; and*
- (b) Whether or not the said period shall be treated as a period spends on duty.*

(2) Where the authority competent to order re-instatement is of opinion that the Government servant who had been dismissed, removed or compulsorily retired has been fully exonerated, the Government servant shall, subject to the provisions of sub-rule (6), be paid the full pay and allowances to which he would have been entitled, had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be:

Provided that where such authority is of opinion that the termination of the proceedings instituted against the Government servant had been delayed due to reasons directly attributable to the Government servant, it may, after giving him an opportunity to make his representation within sixty days from the date on which the communication in this regard is served on him and after considering the representation, if any, submitted by him, direct for reasons to be recorded in writing, that the Government servant shall, subject to the provisions of sub-rule (7), be paid for the period of such delay, only such amount (not being the whole) of such pay and allowances as it may determine.

(3) In a case falling under sub-rule(2), the period of absence from duty including the period of suspension preceding dismissal, removal or compulsory retirement, as the case may be, shall be treated as a period spent on duty for all purposes.

(4) In a cases other than those covered by sub-rule (2), (including cases where the order of dismissal, removal or compulsory retirement from service is set aside by the appellate or reviewing authority solely on the ground of non-compliance with

the requirements of clause (2) of Article 311 of the Constitution and no further inquiry is proposed to be held the Government servant shall, subject to the provisions of sub-rules (6) and (7), be paid such proportion of the full pay and allowances to which he would have been entitled., had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be, as the competent authority may determine after giving notice to the Government servant of the quantum proposed and after considering the representation, if any, submitted by him in that connection within such period which in no case shall exceed sixty days from the date on which the notice has been served, as may be specified in the notice.

Provided that payment under this sub-rule to a Government servant (other than Government who is governed by the provisions of the Payment of Wages Act, 1936 (4 of 1936) shall be restricted to a period of three years immediately preceding the date on which orders for reinstatement of such Government servant are passed by the appellate authority or reviewing authority, or immediately preceding the date of retirement on superannuation of such Government servant, as the case may be.

(5) In a case falling under sub-rule (4), the period of absence from duty including the period of suspension preceding his dismissal, removal or compulsory retirement, as the case may be, shall not be treated as a period spent on duty, unless the competent authority specifically directs that it shall be so treated for any specified purpose :

Provided that if the Government servant so desires such authority may direct that the period of absence from duty including the period of suspension preceding his dismissal, removal or compulsory retirement, as the case may be, shall be converted into leave of any kind due and admissible to the Government servant.

Note:- The order of competent authority under the preceding proviso shall be absolute and no higher sanction shall be necessary for the grant of –

- (a) extraordinary leave in excess of three months in the case of a temporary Government servant; and*
- (b) leave of any kind in excess of five years in the case of a permanent Government servant.*

(6) The payment of allowance under sub-rule (2) or sub-rule (4) shall be subject to all other conditions under which such allowances are admissible.

(7) The amount determined under the proviso to sub-rule (2) or under sub-rule (4) shall not be less than the subsistence allowance and other allowances admissible under rule 68.

8. Any payment made under this rule to a Government servant on his reinstatement shall be subject to adjustment of the amount, if any, earned by him through an employment during the period between the date of removal, dismissal or compulsory retirement. Where the pay and allowances admissible under this rule are equal to or less than the amounts earned during the employment elsewhere, nothing shall be paid to the Government servant."

In terms of sub-rule 2 of Rule 70 of the Rules of 1981, where the authority competent to order re-instatement is of the opinion that the Government servant who had been dismissed, removed or compulsorily retired has been fully exonerated, the Government servant shall, subject to the provisions of sub-rule (6), be paid the full pay and allowances to which he would have been entitled, had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be.

13. In the instant case, on careful perusal of the order passed by the Hon'ble State Minister, Home Department, it appears that the Hon'ble State Minister firstly has not fully exonerated the applicant. The Hon'ble State Minister, Home Department is of the opinion that since the applicant came to be acquitted in connection with the criminal case, punishment as inflicted on him by the disciplinary authority i.e. respondent No. 2 is disproportionate and considering the entire aspect of the

matter, passed an order of stoppage of one increment for a period of one year without affecting further increments. In view of it, the provisions of sub-rules (2) and (3) of Rule 70 of the Rules of 1981 are not attracted and thus inapplicable to the case of the applicant.

14. In terms of sub-rule (4) of Rule 70 of the Rules of 1981, in a cases other than those covered by sub-rule (2), including cases where the order of dismissal, removal or compulsory retirement from service is set aside by the appellate or reviewing authority solely on the ground of non-compliance with the requirements of clause (2) of Article 311 of the Constitution and no further inquiry is proposed to be held the Government servant shall, subject to the provisions of sub-rules (6) and (7), be paid such proportion of the full pay and allowances to which he would have been entitled, had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be, as the competent authority may determine. The case of the applicant thus falls other than those covered by sub-rule (2) of Rule 70 of the Rules of 1981 and sub-rule (4) as observed above.

15. In this case, the respondent authorities have directed that the applicant to be paid 50% pay and allowances for the period of 3 years preceding the order passed by the appellate authority under sub-rule (5) of Rule 70 of the Rules of 1981 and the said period of dismissal is not the period spent on duty. It is clear from the wordings of the sub-rule (4) of the Rule 70 that subject to the provisions of sub-rules (6) and (7), the Government servant be paid such proportion of the full pay and allowances, as the competent authority may determine. In terms of the proviso to sub-rule (4) that any payment under this sub-rule to a Government servant shall be restricted to a period of three years immediately preceding the date on which orders for reinstatement of such Government servant are passed by the appellate authority or reviewing authority.

16. In the instant matter, the applicant has not challenged the said order of punishment of stoppage of one increment and as such, sub-rule (1) of Rule 70 of the Rules of 1981 does not come into picture. Consequently, sub-rule (4) & (5) of Rule 70 of the Rules of 1981 are squarely applicable to the case of the applicant.

17. In a case of **Ram Lal Vs. State of Rajasthan & Ors. in Civil Appeal No. 7935/2023 (Arising out of SLP (C) No. 33423 of**

2018), decided on 04.12.2023 relied upon by learned counsel for the applicant, the Hon'ble Supreme Court has dealt with the effect of acquittal in the criminal proceedings to answer question B as what is the effect of the acquittal, ordered by the appellate judge in the criminal trial, on the order of dismissal passed in the departmental enquiry. In para Nos. 24, 25 & 26, the Hon'ble Supreme Court has made the following observations :-

*“24. What is important to notice is that the Appellate Judge has clearly recorded that in the document Exh. P-3 – original marksheet of the 8th standard, the date of birth was clearly shown as 21.04.1972 and the other documents produced by the prosecution were either letters or a duplicate marksheet. No doubt, the Appellate Judge says that it becomes doubtful whether the date of birth was 21.04.1974 and that the accused was entitled to receive its benefit. However, what we are supposed to see is the substance of the judgment. A reading of the entire judgment clearly indicates that the appellant was acquitted after full consideration of the prosecution evidence and after noticing that the prosecution has miserably failed to prove the charge [See **S. Samuthiram (Supra).**]*

25. Expressions like “benefit of doubt” and “honorably acquitted”, used in judgments are not to be understood as magic incantations. A court of law will not be carried away by the mere use of such terminology. In the present case, the Appellate Judge has recorded that Exh. P-3, the original marksheet carries the date of birth as 21.04.1972 and the same has also been proved by the witnesses examined on behalf of the prosecution. The conclusion that the acquittal in the criminal proceeding was after full consideration of the prosecution evidence and that the prosecution miserably failed to prove the charge can only be arrived at after a reading of the judgment in its entirety. The court in judicial review is obliged to examine the substance of the judgment and not go by the form of expression used.

26. We are satisfied that the findings of the appellate judge in the criminal case clearly indicate that the charge against the appellant was not just, “not proved” - in fact the charge even

stood “disproved” by the very prosecution evidence. As held by this Court, a fact is said to be “disproved” when, after considering the matters before it, the court either believes that it does not exist or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist. A fact is said to be “not proved” when it is neither “proved” nor “disproved” [See Vijayee Singh and Others v. State of U.P. (1990) 3 SCC 190].”

In the instant case the applicant has not challenged the said order of punishment of stoppage of one increment passed by the Hon’ble State Minister, Home Department. In view of the same, aforesaid ratio laid down by the Hon’ble Supreme Court may not be applicable to the facts and circumstances of the present case. Further in the instant case, the respondent No. 2 has passed the order against the applicant in terms of the provisions of Article 311 (2) (B) of the Constitution of India. The Hon’ble State Minister, Home Department has considered that the said order is disproportionate for the reason that the applicant came to be acquitted in connection with the Criminal Case.

18. In O.A. Nos. 303/2019 & Ors. (Shri Sukracharya S/o Baban Tekale & Ors Vs. State of Maharashtra and Ors), decided on 30.09.2022 and O.A. No. 932/2017 (Walmik S/o Laimbaji Kande Vs. the Special Inspector General of Police, Aurangabad & Anr.), decided on 21.07.2022, this Tribunal has considered the

effect of the acquittal of the petitioner and on his acquittal, he was entitled for reinstatement in service with continuity and other consequential benefits including pay and its fixation as if he had continued in service. However, the issue raised in this Original Application and the fact is that the applicant has not challenged the order passed by the Hon'ble State Minister, Home Department with regard to the punishment inflicted on the applicant, the view taken by this Tribunal in the aforesaid Original Applications cannot be made applicable to the facts and circumstances of the present case.

19. In view of above discussions, I find no fault in the impugned order. There is no substance in the present Original Application and the same is liable to be dismissed. Hence, the following order :-

ORDER

- (i) The Original Application is hereby dismissed.
- (ii) In the circumstances, there shall be no order as to costs.
- (iii) The Original Application is accordingly disposed of.

PLACE : Aurangabad.
DATE : 03.05.2024

(Justice V.K. Jadhav)
Member (J)