IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL MUMBAI

ORIGINAL APPLICATION NO.393 OF 2017

DISTRICT : MUMBAI

Smt. Anuja Vijay Kolapate.)
Age : 43 Yrs, Working as Senior Pharmacist)
Sir, J.J. Group of Hospitals and Grand)
Medical College, Byculla, Mumbai – 8 and)
residing at A-1/903, Ekdant Cooperative)
Housing Society, Near Shankar Mandir,)
Station Road, Kalwa (W), District : Thane.)**...Applicant**

Versus

1. The Government of Maharashtra.)
Through Principal Secretary,)
Medical Education & Drugs Dept.,)
Mantralaya, Mumbai – 400 032.)

2. The Directorate of Medical Education)
& Research, Through its Director,)
having its Office at Government)
Dental College & Hospital, 4th Floor,)
St. Georges Hospital Compound,)
P.D'Mello Road, Fort, Mumbai – 1.)**...Respondents**

Mr. M.D. Lonkar, Advocate for Applicant.

Mr. A.J. Chougule, Presenting Officer for Respondents.

CORAM : A.P. KURHEKAR, MEMBER-J

DATE : 20.11.2019

JUDGMENT

1. The Applicant has challenged the impugned order dated 27.02.2017 passed by Respondent No.2 - Directorate of Medical Education & Research, Mumbai thereby rejecting the application made by him to condone the break in service.

2. In nutshell, the facts giving rise to this application are as under:-

The Applicant was initially appointed on ad-hoc basis on the post of Pharmacist by order dated 02.08.1999 for 29 days. Thereafter, with some breaks, fresh orders were issued from time to time, each for 29 days purely on ad-hoc basis. Thus, the Applicant worked as Pharmacist purely on ad-hoc basis with breaks from 02.08.1999 till 16.01.2004. By order dated 17.01.2004, he was appointed on regular basis w.e.f.17.01.2004 initially on probation for two years. Since then, he is in service. He made representations on 27.07.2011 and 28.08.2016 to condone the break of 294 days in service and to extend all consequential service benefits for the period from 02.08.1999 to 16.01.2004 in which he was worked on ad-hoc basis. However, the Respondent No.2 rejected the representation by order 27.02.2017 on the ground that his case does not fall within the ambit of Rule 48(b) of Maharashtra Civil Services (Pension) Rules, 1982 (hereinafter referred to as 'Pension Rules 1982' for brevity), and therefore, not entitled to condone the break in service. The Applicant has challenged the order date 27.02.2017 in the present O.A. contending that he is subjected to discrimination, as in the matter of colleague of the Applicant viz. Shri Kamlakar Choudhary, Pharmacist, his break of 1 year, 8 months and 17 days in service has been condoned and service benefits are extended to him. In Applicant's case, there is break of 294 days, but his representation is rejected without any valid reasons. With these pleadings, the Applicant

prayed to quash and set aside the impugned order dated 27.02.2017 and to extend all service consequential benefits.

3. The Respondent No.2 resisted the application by filing Affidavit-in-reply *inter-alia* denying the entitlement of the Applicant to the relief claimed. It is not in dispute that, initially the Applicant was appointed purely on ad-hoc basis on 02.08.1999 and with some breaks, ad-hoc appointment was continued by issuing fresh orders from time to time. It is also not in dispute that by order dated 17.01.2004, he was taken in regular service. The Respondent contends that the Applicant was continued in service as per the directions given by this Tribunal in ***O.A.411/2000 (Smt. Mangala Y. Shelke Vs. State of Maharashtra) decided on 11th August, 2000***. As such, only on the basis of Court order, he was continued in service. The Respondent sought to justify the impugned order contending that the Applicant's case does not comply requirement of Rule 48(b) of 'Pension Rules 1982' and there is no illegality in the impugned order. As regards discrimination, the Respondent pleads that the alleged reliance in the matter of Kamlakar Choudhary is of no assistance to the Applicant contending that the order passed contrary to law cannot be made basis to raise ground of discrimination. With these pleadings, the Respondent contends that the challenge to the impugned order is without any merit.

4. Heard Shri M.D. Lonkar, learned Advocate for the Applicant and Shri A.J. Chougule, learned Presenting Officer for the Respondents.

5. The whole thrust of the submission of leaned Advocate for the Applicant revolved on the point of discrimination. He submits that, in case of Shri Kamlakar Choudhary, his break in service is condoned and Applicant being similarly situated person, there was no reason to refuse benefit to him. According to him, such course of action

adopted by Respondents is violative of Article 14 of the Constitution of India.

6. Undisputedly, the Applicant was initially appointed purely on ad-hoc basis by order dated 02.08.1999. From time to time, with some breaks, fresh appointments for 29 days each were issued purely on ad-hoc basis. Later, by order dated 17.01.2004, he was appointed on regular basis. There is break of total 294 days in his service rendered on ad-hoc basis. In so far as the issuance of ad-hoc appointment to the Applicant is concerned, the Respondents state that it was done in pursuance of directions issued by this Tribunal in O.A. 411/2000 decided by this Tribunal on 11.08.2000. Para No.4 of the Judgment in the above O.A. is as follows :-

> "In these circumstances we direct the respondent nos.1 to 3 that the post of Pharmacist, if they want to fill in by giving appointment to any ad hoc appointee then they must give the same to the present applicant who is senior to respondent nos.5 and 6. But in case if there happen to be any other senior ad hoc appointee then they will be at liberty to give them appointment, but they cannot appoint respondent no.5 and 6 or any other junior ad hoc appointee or fresh ad hoc appointee."

7. Thus, it appears that in pursuance of order passed in O.A.411/2000, the ad-hoc appointment of the Applicant was continued by issuing fresh orders of 29 days each with some breaks. Suffice to say, it was because of intervention of the Court. Be that as it may, the material question is whether the Applicant is entitled to the condonation of break in the teeth of Rule 48 of 'Pension Rules 1982', which is as follows :-

> **"48. Condonation of interruption in service.**
>
> (1) The appointing authority may, by order, condone interruptions in the service of a Government servant :
> Provided that –

(a) the interruptions have been caused by reasons beyond the control of the Government servant;

(b) the total service pensionary benefit in respect of which will be lost, is not less than five years duration, excluding one or two interruptions, if any; and

(c) the interruption including two or more interruptions if any, does not exceed one year :

*[Provided further that, such service of the Government Servant shall be count as qualified service for the purposes of rule 33.]

(2) The period of interruption condoned under sub-rule (1) shall not count as qualifying service.

(3) In the absence of a specific indication to the contrary in the service record, an interruption between two spells of civil service rendered by a Government servant under Government, shall be treated as automatically condoned and the per-interruption service treated as qualifying service.

(4) Nothing in sub-rule (3) shall apply to interruption caused by resignation, dismissal or removal from service or for participation in a strike.

(5) The period of interruption referred to in sub-rule (3) shall not count as qualifying service."

8. The Respondent No.2 by impugned order rejected the representation made by the Applicant for condonation of break in service on the ground that it does not fall within the ambit of Rule 48(1) particularly Clause (b) of 'Pension Rules 1982'. There was a break of 294 days in service of the Applicant and the total service pensionary benefit lost is less than five years' duration. Therefore, the representation of the Applicant was rejected under Rule 48(b) of 'Pension Rules 1982'.

9. Before dealing with the aspect of discrimination, it is important to point out that when the Applicant was regularized in service, by order dated 17.01.2004, he was specifically made aware that break in service will not be condoned. Clause No.12 of order dated 17.01.2004 is as follows :-

"१२. त्यांचा सेवेतील खंडीत कालावधी नियमतीत करण्यात येणार नाही.

10. As such, the Applicant was regularized in service w.e.f.17.01.2004 subject to condition mentioned in appointment order which has been accepted by the Applicant. Suffice to say, in appointment order itself, there is specific stipulation that the Applicant's break in service will not be condoned. This is one of the aspect which goes against the Applicant.

11. As per Rule 48(b), the total service pensionary benefit in respect of which will be lost must be not less than five years' duration, so as to condone the break. This is condition precedent for condonation of break. The total period of service of Applicant on ad-hoc basis comes to [from 02.08.1999 to 16.01.2004] 4 years, 5 months and 14 days with 294 days break therein. This being the factual position, the matter does not fall within the ambit of Rule 48(b) of 'Pension Rules 1982'. Suffice to say, total service pensionary benefit lost is less than five years, and therefore, there is no *per se* illegality in the impugned order.

12. Now turning to the point of discrimination, the learned Advocate for the Applicant has placed on record the order dated 14.11.2003 issued in favour of Shri Kamlakar Choudhary, which is at Page No.51 of P.B, which reads as follows :-

> "उपरोक्त संदर्भ (१) वरील शासन पत्रावी प्रत या सोबत आपलेकडे पाठविण्यात येत आहे. उपरोक्त संदर्भ (२) वरील पत्रान्वये श्री कमलाकर नारायन चौधरी, औषध निर्माता, सेंट जॉर्जेस रुग्नालय, मुंबई यांचा दि. २/१२/८८ ते १९/०८/९० पर्यंत २९ दिवसांचे तत्वावर केलेली सेवा नियमित सेवेस जोडून अनंषांगी लाभ रजा, वेतनवाढी इ. सामान्य प्रशासन विभागाचे शा.नि.क्र. प्रनिम-२३८२/प्र.६६/८२/भाग-२/१३-अ, दि. ५.०२.९० चे परीच्छेद क्र.५ मधील तरतुदीखालील मंजुरीचे प्रस्ताव शासनास सादर केलेले होते. त्यावर शासनाचे उपरोक्त संदर्भ (१) वरील पत्राद्वारे वर्ग ३ व ४ चे सेवा बाबी हाताळण्याचे संपुर्ण अधिकार संचालनालयाला असल्याने संबंधीत शासन निर्णयाच्या तरतुदी खाली निर्णय घेण्याचे निर्देश दिलेले आहेत. त्या अनुषंगाने आपल्याला कळविण्सयात येते की, औषधनिर्माता वर्ग-३ चे पदावर नियुक्त्या करण्याचे अधिकार आपल्याला असल्याने वर नमुद केलेले दि. ५.२.९० चे शासन निर्णयातील परिच्छेद-५ मध्ये विहीत केल्याप्रमाणे नियमीत नियुक्ती दिनांकापूर्वी श्री. चौधरी यांनी केलेल्या सेवेच्या दरम्यान त्यांना देण्यात आलेले खंडाचे आदेश रदद् करुन ते क्षमापीत करण्यासाठी त्यांचेकडून रजेची आवेदने प्राप्त करुन खंडाच्या अवधीबददल देय व अनुज्ञेय रजा मंजुर करुन मुळ नेमणुक दिनांक २.१२.८८ पासून त्यांची सलग सेवा मानुन त्या अनुषंगाने देय होणारे लाभ रजा वेतनवाढी अनुज्ञेय असले संबंधातले आदेश आपले स्तरावर निर्गमीत करावेत.''

13. As such, by order dated 14.11.2003 referred to above, all that, directions were given to Superintendent, St. Georges' Hospital to pass

appropriate orders to condone the break by granting permissible leaves in case of Kamlakar Choudhary. Except this order dated 14.11.2003, no further order is placed on record to substantiate that thereafter any such specific orders of condonation of break in service was issued. Suffice to say, the order dated 14.11.2003 cannot be construed as an order of condonation of break in service.

14. Even assuming for a moment that any such order of condonation of break in service was passed in the matter of Shri Kamlakar Choudhary in that event also, that itself cannot be the ground to condone the break in service in the matter of Applicant. If any such order is passed contrary to law, then that itself cannot be the ground to condone the break of the Applicant as it would be amounting to perpetuate illegality. There is no applicability of concept of negative discrimination. If the order passed by the authority is found legal then only it can be taken as a ground of discrimination, so as to get similar benefit to other similarly situated employee. In this behalf, it would be apposite to refer the decision of Hon'ble Supreme Court in ***1995 SCC (1) 745 (Chandigarh Administration Vs. Jagjit Singh)*** wherein in Para No.8, the Hon'ble Supreme Court on the point of discrimination held as follows :-

> **"8.** *We are of the opinion that the basis or the principle, if it can be called one, on which the writ petition has been allowed by the High Court is unsustainable in law and indefensible in principle. Since we have come across many such instances, we think it necessary to deal with such pleas at a little length. Generally speaking, the mere fact that the respondent authority has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination. The order in favour of the other person might be legal and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the petitioner If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the respondent authority to repeat the illegality or to pass another unwarranted order. The extraordinary and discretionary power of the High Court cannot be exercised for such a purpose. Merely because the*

respondent authority has passed one illegal/unwarranted order, it does not entitle the High Court to compel the authority to repeat that illegality over again and again. The illegal/unwarranted action must be corrected, if it can be done according to law indeed, wherever it is possible, the Court should direct the appropriate authority to correct such wrong orders in accordance with law but even if it cannot be corrected, it is difficult to see how it can be made a basis for its repetition. By refusing to direct the respondent authority to repeat the illegality, the Court is not condoning the earlier illegal act/order nor can such illegal order constitute the basis for a legitimate complaint of discrimination. Giving effect to such pleas would be prejudicial to the interests of law and will do incalculable mischief to public interest. It will be a negation of law and the rule of law. Of course, if in case the order in favour of the other person is found to be a lawful and justified one it can be followed and a similar relief can be given to the petitioner if it is found that the petitioners' case is similar to the other persons' case. But then why examine another person's case in his absence rather than examining the case of the petitioner who is present before the Court and seeking the relief. Is it not more appropriate and convenient to examine the entitlement of the petitioner before the Court to the relief asked for in the facts and circumstances of his case than to enquire into the correctness of the order made or action taken in another person's case, which other person is not before the case nor is his case. In our considered opinion, such a course -- barring exceptional situations would neither be advisable nor desirable. In other words, the High Court cannot ignore the law and the well-accepted norms governing the writ jurisdiction and say that because in one case a particular order has been passed or a particular action has been taken, the same must be repeated irrespective of the fact whether such an order or action is contrary to law or otherwise. Each case must be decided on its own merits, factual and legal, in accordance with relevant legal principles. The orders and actions of the authorities cannot be equated to the judgments of the Supreme Court and High Courts nor can they be elevated to the level of the precedents, as understood in the judicial world."

15. Suffice to say, the orders passed by the Department contrary to law in one matter cannot be equated to the Judgment of the Court so as to raise the ground of discrimination, and therefore, the order in the matter of Kamlakar Choudhary, which itself is not final order is of no assistance to the Applicant. As such, the ground of discrimination which is the only base of the O.A. is unfounded.

16. The totality of aforesaid discussion leads me to sum-up that the impugned order does not suffer from any illegality and challenge to

the same is devoid of merit. The O.A, therefore, deserves to be dismissed. Hence, the following order.

ORDER

The Original Application is dismissed with no order as to costs.

Sd/-

(A.P. KURHEKAR)
Member-J

Mumbai
Date : 20.11.2019
Dictation taken by :
S.K. Wamanse.
D:\SANJAY WAMANSE\JUDGMENTS\2019\11 November, 2019\O.A.393.17.w.11.2019.Condonation of Breaks.doc