

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL,  
MUMBAI**

**ORIGINAL APPLICATION NO.20 OF 2021**

**DISTRICT: SOLAPUR  
SUBJECT: ARREARS OF THE  
PAY AND ALLOWANCES**

Smt. Surekha Nilkanth Gaikwad )  
Aged Adult, Occ. Nil (Household), )  
R/o. A/P Shelgaon (R), Tal. Barshi, Dist. Solapur. )... **Applicant**  
**(Heir of deceased Petitioner)**

IN THE MATTER OF :-

Shri Nilkanth Krushnadeo Gaikwad, )  
Aged 53 yrs, Working as Junior )  
Auditor in the offices of Assistant Director, )  
Local Funds Account, Solapur, R/o. A/P Shelgaon (R), )  
Tal. Barshi, Dist. Solapur. )... **Petitioner**

**Versus**

The Joint Director, )  
Local Funds Account, Pune Division, Pune , )  
Having Office at Accounts Treasuries Bhavan, )  
3<sup>rd</sup> Floor, In the campus of the District Collector, )  
Pune-1. )  
Through Assistant Director, Local Fund Accounts, )  
Solapur. ).. **Respondent**

**Shri Arvind V. Bandiwadekar, learned Advocate for the Applicant.**

**Smt. Kranti S. Gaikwad, learned Presenting Officer for the Respondent.**

**CORAM : M.A. Lovekar, Member (J)**

**RESERVED ON : 26.04.2022.**

**PRONOUNCED ON: 28.04.2022.**

### **JUDGMENT**

1. Heard Shri A.V. Bandiwadekar, learned Advocate for the Applicant and Smt. K.S. Gaikwad, learned Presenting Officer for the Respondent.

2. The Original Applicant (since deceased) who was husband of the present Applicant was working as Jr. Auditor in the Office of Assistant Director, Legal Funds Account, Solapur. He was due for transfer. By order dated 28.05.2018 he was transferred from Solapur to Sangli. He was aggrieved by the said order. He impugned it by filing O.A. No.514/2018 before this Tribunal. In the said O.A. he contended that the impugned order was passed in contravention of G.R. dated 09.04.2018, it was passed by the Junior Director, Legal Funds Account, Pune Division, Pune, he was not the competent authority within the meaning of the provisions of "The Maharashtra Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Act, 2005 (hereinafter referred to as "Transfer Act, 2005"), and the delegation of power by Circular dated 31.03.2015 was not in consonance with the provisions of "Transfer Act, 2005". These contentions were upheld by this Tribunal while deciding O.A. No.514/2018. Consequently, O.A. No.514/2018 was allowed, the impugned order dated 28.05.2018 was quashed and set aside and the Respondent – Department was directed to repost the Applicant on the post from which he was transferred, within four weeks from the date of the Judgment i.e. 13.02.2019.

In compliance of the order dated 13.02.2019 passed in O.A. No.514/2018, Respondent No.1 passed the order (exhibit A). However, in the said order Respondent No.1 observed that the period from 04.06.2018 to 01.03.2019 would be treated as period of unauthorized absence and consequently for the said period the Applicant was not entitled to get any pay and allowances. Being aggrieved by the said stipulation in the impugned order (exhibit A) the Applicant has approached this Tribunal.

3. Affidavit-in-Reply filed by the sole Respondent is at pages 49 to 56. To this reply letter dated 22.01.2019 issued by the Respondent to the Applicant is attached (R-1). By this letter the Applicant was directed to join immediately at the transferred place. He was intimated that his failure to obey the order could invite disciplinary action against him. To this letter dated 22.01.2019 the Applicant gave Reply (R-2) on 29.01.2019. He requested the Respondent not to initiate any disciplinary proceeding and also communicated that he would join on the post as per the order passed by this Tribunal.

4. The Applicant traversed contents of Reply of the Respondent by filing a Rejoinder which is at page 65 to 67. In the Rejoinder he contended that the order of his transfer which was set aside by this Tribunal by allowing O.A. No.514/2018 was required to be treated as *non-est* because it was passed by the authority who lacked the competency to pass it.

5. It was submitted by Shri A.V. Bandiwadekar, learned Advocate for the Applicant that since the order of transfer of the Applicant which was impugned in O.A. No.514/2018 was quashed and set aside by this Tribunal it would follow that the said order cannot be treated to have any existence in the eye of law. I have referred to various contentions raised by the Applicant to assail order of transfer dated 28.05.2018. All these contentions were upheld by this Tribunal. The order in question was held to have been passed by the authority who had no competency to do so. The circular dated 31.03.2015 purportedly delegating the authority to pass such order of transfer was held to be not in consonance with the provisions of Transfer Act, 2005.

6. It was argued by learned Advocate Shri A.V. Bandiwadekar that since the order of Transfer of the Applicant was held to be bad in law *ab-initio* he ought not to have been deprived of salary and allowances for the relevant period by treating the said period as period of unauthorized

absence. In support of this submission reliance is placed on **Ramesh Motilal Khandelwal v/s. Zilla Parishad, Akola 1992 Mh.L.J. 325**. In this case the facts were as under:-

*“A stenographer with a Zilla Parishad was by an order dated 6-12-1985 transferred to the post of Senior Assistant in the pay scale which he was drawing as a stenographer. At the time when he was transferred, a new rule was substituted by Maharashtra Zilla Parishads District Services (Recruitment) (Third Amendment) Rules, 1985, under which such transfer was not permissible. The new rule had come into force on 22-8-1985. The transfer order was ultimately reviewed by the Zilla Parishad and he was reposted in his Original post of stenographer. It was directed that the period from 6-12-1985, the date of transfer to 4-8-1986 the date on which he was reposted in this original post should be treated partly as earned leave and partly without pay. The said decision was challenged by writ petition on the ground that the period concerned could not be treated as leave and in view of illegal transfer he was entitled to be paid even though he had not worked. There was no provision in the rules under the Maharashtra Zilla Parishad and Panchayat Samitis Act dealing with the situation.”*

On these facts it was held - “The order of transfer being contrary to statutory rules was illegal and void and therefore even assuming that the petitioner did not obey the same and was absent during the intervening period, he would be entitled to the wages for the period when the illegal order was set aside.”

While arriving at the afore-drawn conclusion it was observed - “The Supreme Court has in the case of Nawabkhan Abbaskhan v/s. State of Gujarat, AIR 1974 SC 1471 held that it is not necessary to obey an order which is illegal and void and without obeying that order, that order can be challenged by the person concerned. In that case the question was whether the person who was externed should have obeyed the order before challenging it. The Supreme Court held that such an order was illegal and void being in violation of the fundamental rights of the petitioner and, therefore, it was not necessary to obey the same.”

The Applicant further relied on “**Diwakar Pundlikrao Satpute v/s. Zilla Parishad, Wardha and Ors., 2004(3) Mh.L.J. 151**. In this case,

by relying on the case of **Ramesh Motilal Khandelwal (supra)** it was held as under:-

*“17. Coming to the merits of the matter, insofar as the first grievance of the petitioner is concerned, it is undisputed, that, after considering the representations of the petitioner, the respondent - Block Education Officer has cancelled the transfer order, dated 17-1-1984 with retrospective effect, i.e. 17-9-1984, vide his order dated 21-1-1985. The petitioner, vide order dated 31-3-1985 was directed to join at Primary School Nara (Boys). The question, as to whether, the said period of 182 days could be treated as unauthorised absence, is no more res-integra.”*

Facts of the case in hand were dealt with in the following manner.

*“17.... 16. The Block Education Officer, having considered the petitioner's representation, and having realised that, the order dated 17-1-1984, was an illegal order, has himself cancelled, the said order vide order dated 21-1-1985 w.e.f. 17-9-1984. The Block Education Officer vide another order dated 31-3-1985, has directed the petitioner to join at Primary School, Nara (Boys). The order dated 24-3-1986, by which the aforesaid period of 182 days, has been treated, as unauthorised absence and the order dated 25-2-2000, by which the respondent Chief Executive Officer, has granted ex-post-facto sanction, are therefore, not sustainable in the eye of law and liable to be quashed and set aside.”*

7. The Applicant has also relied on **“Nawabkhan Abbaskhan v/s. State of Gujarat (1974) 2 Supreme Court Cases 121**. In this case it is observed:-

*“When a competent court holds such official act or order invalid, or sets it aside, it operates from nativity, i.e. the impugned act or order was never valid.”*

8. It was further submitted by learned Advocate Shri A.V. Bandiwadekar for the Applicant that during the period between 04.06.2018 to 01.03.2019 the post which had fallen vacant because of transfer of the Applicant remained vacant till the Applicant, by virtue of order of this Tribunal, rejoined on the same and during the relevant period the Applicant was not in any way gainfully employed. Correctness of this submission is not disputed by the Respondent.

9. When the ratio laid down in above referred rulings is applied to the facts of the case, the inescapable conclusion would be that the period of absence of the Applicant between 04.06.2018 to 01.03.2019 could not have been treated as period of unauthorized absence as was done while passing the impugned order. Consequently, the impugned order to this extent cannot be sustained. Hence the Order.

**ORDER**

The Original Application is allowed in the following terms.

- A) The impugned order to the extent it directs that the period between 04.06.2018 to 13.01.2019 shall be treated as period of unauthorized absence of the Applicant is quashed and set aside.
- B) The benefits flowing from this determination shall be paid to the present Applicant, wife of the Original Applicant, within one month from the date of receipt of this order.
- C) No order as to costs.

**Sd/-  
(M.A. Lovekar)  
Member (J)**

Place: Mumbai  
Date: 26.04.2022  
Dictation taken by: N.M. Naik.

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