IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL MUMBAI

ORIGINAL APPLICATION NO.255 OF 2016

DISTRICT : MUMBAI

Dr. Vijaykumar K. Patne.)
Age : 44 Yrs., Working as Medical Officer,)
Class-II, Group-A, Govt. Dispensary,)
Konkan Bhawan, Navi Mumbai and)
R/o. Arm Arcade C.H.S.Ltd., B/403,)
Sector-7, Kharghar, Navi Mumbai.)...**Applicant**

Versus

1. The State of Maharashtra.)
Through the Principal Secretary,)
Public Health Department,)
Mantralaya, Mumbai - 400 032.)

2. The Director of Health Services.)
M.S, Mumbai having office at Arogya)
Bhavan, In the campus of Saint)
Georges Hospital, P.D'Mello Road,)
Mumbai 400 001.)...**Respondents**

Mr. A.V. Bandiwadekar, Advocate for Applicant.

Mrs. K.S. Gaikwad, Presenting Officer for Respondents.

P.C. : R.B. MALIK (MEMBER-JUDICIAL)

DATE : 06.03.2017

JUDGMENT

1. The Applicant, a Medical Officer came to be transferred from Public Health Centre (PHC) Aapta, District Raigad to Public Health Centre Saivan, District Thane by the order of 30th May, 2013, but he proceeded on Medical Leave without joining at the transferred place and ultimately, he joined at the Government Dispensary, Konkan Bhavan, Navi Mumbai only on 11.8.2014. The period of 398 days was by an order dated 29th December, 2015 (Exh. 'A', Page 16 of the Paper Book (PB)) was treated as Extra Ordinary Leave without Pay under Rule 63 of the Maharashtra Civil Services (Leave) Rules, 1981 from 6.6.2013 to 9.7.2014 and as Earned Leave for the period 10.7.2014 to 11.8.2014 before he appeared before the Medical Board. That was under an apparent exercise of power under Section 50 of the Leave Rules. The said order is being impugned herein.

2. I have perused the record and proceedings and heard Mr. A.V. Bandiwadekar, the learned Advocate for the Applicant and Mrs. K.S. Gaikwad, the learned Presenting Officer (PO) for the Respondents.

3. The basic facts are not at all in dispute. The Applicant came to be transferred as already mentioned above from PHC Aapta in Raigad Distirct to PHC Saivan by the order dated 30.5.2013. He was relieved on 6.6.2013, but he did not report for duty at Saivan and then applied for Medical Leave. There is a bunch of medical documents to indicate that the Applicant remained on Medical Leave and continued to renew his Medical Leave period from time to time. Quite pertinently, the perusal of the record of this OA would show that the precise illness that the Applicant suffered from, and therefore, the precise fact of his illness is not in dispute. The first Medical Leave application and for that matter, even the subsequent ones were never rejected. No reason was given either. The learned PO, however, invited reference to a document at Exh. 'R-4' (Page 57 of the PB) which according to her, showed the reason and in the manner of speaking, even the implied rejection of the Medical Leave application, that is if we grant all latitude to the learned PO. The said application is dated 17.6.2013 from District Health Officer to the Applicant referring to his Medical Leave application of 6.6.2013 which was the first one in the line. The reason assigned was that in the order of transfer dated 30th May, 2013, it was made clear that no application for leave would be entertained at the behest of the transferred Officers,

and therefore, his Medical Leave application was rejected. In my opinion, regard being had to the ambit of this OA, falling back upon the general looking instructions in the common transfer order, aimed in all probability to secure the compliance by way of acceptance of the transfer can by no stretch of imagination be said to be the dispute being raised about the precise nature of the illness and the Medical Leave application being rejected on the ground of its merit or rather the lack of it. That being the state of affairs, it is quite clear that one has to proceed on the basis that may be as some kind of a coincidence or whatever but the Applicant fell sick at about the time he was relieved from Aapta and before joining at Saivan and no categorical rejection of Medical Leave application was made by the concerned Respondents is the State of Maharashtra in Public Health Department and the 2nd Respondent is the Director of Health Services.

4. It is quite clear from the record that the Applicant reported ultimately for work only after the place of his transfer was changed to New Mumbai and that was on 9.7.2014 by which date, he had already been on leave for 398 days. Then, he was made to wait from 10.7.2014 to 11.8.2014 so as to produce fitness certificate by the Medical Board. That was a period which came to be

treated as Earned Leave under Rule 50 of the Leave Rules while the earlier period of 398 days was treated as Extra Ordinary Leave without Pay under Rule 63 thereof. It appears from the record that otherwise taking into consideration different kind of leaves, the Applicant had to his credit substantial number of days to his credit in the leave account.

5. Rule 63 is the only source of sustenance for the Respondents to rest their case on. The said Rule deals with Extra Ordinary Leave. It provides that Extra Ordinary Leave may be granted to a Government servant in special circumstances given (a) when no other leave is admissible which is not the case here as already mentioned above and (b) when other leave is admissible but the Government servant applies in writing for the grant of Extra Ordinary Leave which is also not the case here because quite clearly and admittedly, in fact, the Applicant never applied in writing for the grant of Extra Ordinary Leave. Therefore, the other part of the said Rule is not relevant herefor. It is, therefore, quite clear that none of the ingredients of Rule 63 of the Leave Rules was present herein and recourse thereto by the Respondents was out of place and untenable. No other event took place, no other action was taken, none was even contemplated, and therefore, the

stand of the Applicant based on Rule 63 of the Leave Rules must fall to the ground and so does it.

6. In so far as the Earned Leave aspect of the matter is concerned for 33 days, in the first place, I have not been able to comprehend the justification for sending the Applicant before the Medical Board when his Medical Leave applications for all practical purposes were not viewed at even with suspicion much less were they rejected. Assuming, however, such was the need of the hour as it were, 33 days was a period too longish to be legally good one. The validity of the recourse to Rule 50 of the Leave Rules is also not free from being dubious. Rule 50(1) provides as to how the Earned Leave will be credited in the leave account of a Government servant and how it will be carried forward till the maximum admissible number of days (300). The Applicant was not a temporary employee and the other clauses of Rule 50 will even otherwise have no application to the present facts. On strict literal interpretation, therefore, which is quite permissible and possible, recourse to both the Rules above discussed, was completely misplaced. Any other course of action to be adopted has got to be preceded by compliance with the Rules of natural justice, which was not done. I need not elaborate it further.

7. Mr. A.V. Bandiwadekar relied upon an earlier order of this Tribunal in **OA 1169/2014 (Dr. Dhanraj K. Pardeshi Vs. Deputy Director of Health Services and one another) rendered by the Hon'ble Member (J) on 27.1.2015**. That was also a matter where the issue was with regard to conversion of the period of absence for a longish period to any kind of admissible leave which was in balance. The Applicant there was also a Doctor and the Respondent was the same as here. The Single Bench of this Tribunal ultimately held agreeing with the Applicant that he was kept out of duty on account of health reasons and was, therefore, entitled to get the said period adjusted against the leave admissible and in balance to his credit. In principle, the same is the state of affairs herein and this OA also should follow the same course of action as did **Pardeshi's** OA (supra).

8. Now, on behalf of the Respondents, very heavy reliance has been placed on the so called undertaking given by the Applicant before resumption of duty at his present post or posting. That was an undertaking on a stamp paper of Rs.100/- which was apparently purchased on 11th August, 2014. It is in the handwriting of the Applicant in Marathi. It is a brief document. It refers to the transfers that were made in case of the Applicant and it

then mentions that he himself was ill during 6.6.2013 and 9.7.2014 because of which he could not report for duty and then he was transferred to his present place of posting. He undertook that in so far as the period of leave was concerned, he would lay no claim for any kind of leave or any other relief in that behalf.

9. The learned PO contended with a lot of force that this is a clear instance of the Applicant going back on his words. He himself had opted out of any relief being claimed for the aforestated period. She candidly admitted that there was no Rule in existence which even made it possible far less mandated such an undertaking to be asked for or given. The issue, therefore, would be as to whether in the circumstances such as they are or they were, the Applicant could have opted out of a course of action which is legally available to him. I am very clearly of the opinion that such an undertaking cannot be effectuated by a forum of law and justice. The learned PO in support of her contention referred me to two Judgments of the Hon'ble Supreme Court. The first one is **Contempt Petition (C) No.277/2012 in SLP (C) No.26541 of 2005 (The Board of Trustees for the Port of Mumbai Vs. Nikhil N. Gupta and Another, dated 25th August, 2015**. The issue of undertaking in that matter arose in the

context of a judicial proceedings and that is sufficient enough to distinguish the present facts from the facts of **Nikhil Gupta's** case (supra). Though the learned PO wanted to contend in effect that once an undertaking always an undertaking but I refuse to go along with her because in any case, the undertaking given to the Court of Law has got entirely different hue when compared with an undertaking obtained by an employer from his employee asking him to opt out of a legitimate and lawful legal remedy. That was a matter with regard to undertaking for vacation of a certain premises.

10. The learned PO then referred me to the 2nd Judgment of the Hon'ble Supreme Court in **Civil Appeal No.3500/2006 (High Court of Punjab and Haryana and others Vs. Jagdev Singh, dated 29th July, 2016**. That was a matter where the issue was fixation of pay of a Judicial Officer and at the time of accepting a particular fixation, the said Judicial Officer had given an undertaking that should there be any over-payment, he would refund the same. It needs hardly be stressed that the facts in **Jagdev Singh** (supra) were entirely different when compared herewith.

11. In so far as this aspect of the matter is concerned, Mr. Bandiwadekar referred me to **Sushil Kumar Y. Jha Vs. Union of India : AIR 1986 SC 1636**. It was held in effect by the Hon'ble Supreme Court that as between the employer and the employee, the dominant position generally is of the employer and this fact has got to be borne in mind while considering the facts of each case. That is a principle which one must follow although the facts in **Sushil Kumar** may not have been exactly identical with the present one. Mr. Bandiwadekar cited a Judgment of the 2nd Bench of this Tribunal which spoke though me in **OA 1136/2012 (Smt. Ratna S. Thakurdesai and 17 others Vs. The State of Maharashtra and one another, datd 22.1.2016)**. In Para 23 thereof, the 2nd Bench had categorically held that any stipulation in any form which results in forfeiting the recourse to legal remedy cannot be lightly implemented.

12. It is, therefore, quite clear that the impugned order is severely susceptible to being interfered with, regardless of whatever be the jurisdictional limitations of a legal forum exercising the power of judicial review of administrative action.

13. The impugned order stands quashed and set aside. The Applicant is held entitled to get the entire period above referred to, adjusted against the leave admissible and in balance to his credit. The Respondents shall take all steps necessary including the payment of the amounts, if any, for the said period to the Applicant within a period of eight weeks from today. No adversity shall be visited upon the Applicant in that behalf. The Original Application is allowed in these terms with no order as to costs.

Sd/-
(R.B. Malik)
Member-J
06.03.2017

06.03.17

Mumbai
Date : 06.03.2017
Dictation taken by :
S.K. Wamanse.
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