

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI**

ORIGINAL APPLICATION NO.359 OF 2016

DISTRICT : THANE

Shri Pramod Deorao Yasatwar.)
Working as Drugs Inspector, Zone 3,)
Greater Mumbai and Residing at 901,)
Orion 'C', Cosmos Paradise, Opp. Devdaya)
Nagar, Thane West.)...**Applicant**

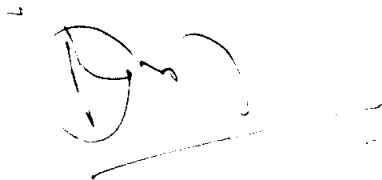
Versus

1. The State of Maharashtra.)
Through the Secretary,)
Medical Education & Drugs Dept.,)
G.T. Hospital Complex,)
Mumbai - 400 032.)
2. The Commissioner.)
Food and Drugs Administration,)
Survey No.341, Bandra Kurla)
Complex, Bandra (E), Mumbai 51.)...**Respondents**

Ms. S.P. Manchekar, Advocate for Applicant.

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

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




DATE : 03.04.2017

JUDGMENT

1. The Applicant, earlier a Drugs Inspector and pending Original Application (OA) promoted as Assistant Commissioner is aggrieved by the impugned order whereby his earlier services under Drugs Control Laboratory, Bombay were counted only for pension and not for pay fixation and arrears. He hereby wants the same even for pay fixation and arrears.

2. The Applicant is an M-Pharm. He came to be appointed as Analytical Chemist on 27.7.1989 in Drugs Control Laboratory, Kalanagar, Bandra (E), Mumbai. On 25.9.1996, he came to be promoted as Scientific Officer Group 'B' in the then applicable pay scale of Rs.6500-200-10500. In 1996 itself, he responded to an Advertisement issued by the Maharashtra Public Service Commission (MPSC) for the post of Drugs Inspector. He was ultimately selected for that post and was functioning as such, when he brought this OA. At that point in time, the Assistant Director, Drugs Control Laboratory, Bandra issued to him a Certificate in Marathi, thereby confirming that he had worked for seven years before that on the Drugs in



Schedule 'C', C(i)". It was then mentioned in the last two lines as follows :

“हे प्रमाणपत्र त्यांना महाराष्ट्र लोकसेवा आयोगाच्या जाहिरातीस अनुसरून औषध निरीक्षक या पदाकरिता त्यांनी विनंती केलेल्या पत्रानुसार देण्यात येत आहे.”

3. In the application that the Applicant made in accordance with his letter dated 11.12.1996 (in Marathi), it was mentioned by him that he had been called for interview by MPSC for the post of Drugs Inspector and for that, he needed an Experience Certificate urgently. The kind of experience that was necessary to be mentioned in the Certificate was set out quite clearly therein. At this stage, it also needs to be noted that the Applicant came to be selected as Drugs Inspector on 29.9.1997. He was relieved from the earlier job on 27.10.1997 and within 24 hours, he joined on 28.10.1997 as Drugs Inspector.

4. Turning to the Affidavit-in-reply filed on behalf of the 1st Respondent – State of Maharashtra by Shri Shivaji S. Patankar, Joint Secretary in the Department of Medical Education and Drugs, it was clearly admitted in Para 5 that the Applicant had applied for Experience Certificate and that was done after the date of the interview had already been fixed by the MPSC. He had informed the



Department about the application for the post of Drugs Inspector vide his letter of 7.12.1996 which has already figured hereinabove. According to the said deponent, as per the provisions of the G.R. of 23rd March, 1994, the Applicant was required to route his application to MPSC through the Department before it was forwarded to the MPSC. It is further pleaded that the 2nd Respondent – Commissioner of Food and Drugs Administration informed the Applicant vide the letter dated 15.7.1999 that he had not submitted his application to MPSC for that post through proper channel, however, he had intimated about the same vide his letter dated 9.12.1996 after he had the knowledge about his interview by MPSC on 23.12.1996. Mere issuance of Experience Certificate by the Assistant Director, Drugs Control Laboratory did not amount to informing the office prior to submission of Application Form to MPSC. In fact, the Applicant ought to have informed prior to its submission to MPSC as per the provisions of Finance Department Government Resolution dated 23.3.1994 and not after receiving the interview call letter.

5. In Para 11 of the said Affidavit-in-reply, it was mentioned quite clearly that the Respondent No.2 did not raise any objection to the Applicant having not submitted

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the application to MPSC through proper channel at the relevant time, but it was in fact the duty of the Applicant to submit the application through proper channel in the relevant time as per the provisions in Finance Department Government Resolution dated 23.3.1994. The contention that he was relieved from the post of Scientific Officer by Drugs Control Laboratory without terminating his services indicates that Drugs Control Laboratory had no objection about the same is also true. But both the issues were separate and the Applicant was erroneously linking two separate issues.

6. There was exchange of a few letters, and thereafter, the Applicant addressed a communication which is at Exh. 'A-4' (Page 18 of the PB (in Marathi)). The Applicant stated all about his move for an Experience Certificate on the date already mentioned above. It showed, therefore, that the Assistant Director, Drugs Control, Mumbai had no objection nor was it raised to his application for the post of Drugs Inspector. It was further mentioned that his services in that Establishment were not terminated after his selection as Drugs Inspector and straightaway, he demitted the earlier office on 27.10.1997 and assumed the post of Drugs Inspector the very next day on 28.10.1997. Had there being any objection, then very

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obviously, the No Objection Certificate itself would not have been issued. For all these reasons, he requested that his earlier services be counted also for pay fixation and arrears.

7. In view of this discussion, it is clear that a Memorandum dated 15th July, 1999 from the Food and Drugs Administration (Exh. 'A-3', Page 17 of the PB) was not exactly accurate. It was mentioned therein that the very requisition for Experience Certificate would not show that he had intimated the fact of he having applied for the post of Drug Inspector to the then employer. If, he had any proof in that behalf, he should submit the same. In fact, implicit quite clearly in that letter was the intimation.

8. Ultimately, the Government of Maharashtra in Medical Education and Drugs Department issued an order on 23rd October, 2002 (Exh. 'A-5', Page 19 of the PB). The order stated in effect that the Applicant did not make the application for the post of Drugs Inspector through proper channel, and therefore, his earlier period from 27.7.1989 to 27.10.1997 would be counted for the purpose of pensionary benefits, etc. However, it would not be counted for pay fixation and arrears. It is this order which is being questioned as to its accuracy and validity herein.

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9. I have perused the record and proceedings and heard Ms. S.P. Manchekar, the learned Advocate for the Applicant and Mr. A.J. Chougule, the learned Presenting Officer for the Respondents.

10. Apart from the facts hereinabove discussed, the Respondents have also raised the issue challenging the maintainability of this OA without having taken recourse to the departmental appeal which according to the Respondents is available to the Applicant by virtue of the relevant Rules which I shall presently deal with.

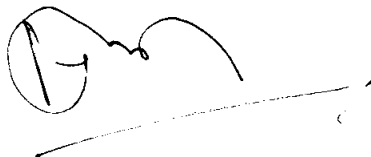
11. Now, in so far as the first aspect of the matter is concerned, the above discussion needs to be borne in mind. Even the Applicant does not seriously dispute the fact that he had not routed his application to the MPSC in what can be called as proper channel. However, that by itself is not sufficient to conclude the matter straightaway in favour of the Respondents. The Applicant has placed on record three documents at the time of addresses. His own letter making requisition for the Certificate and a letter which is Exh. 'A-4' (Page 18 of the PB) have already been discussed above. The last one is the Circular from GAD which deals with the issue of the procedure to be adopted by the State Government employees who applied for any

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other post through MPSC. It is in Marathi. It was laid down therein that in such circumstances thenceforth, the applications would be directly submitted to the MPSC and at the same time, the Office where they were working would be intimated the reference of the Advertisement, the precise examination/post applied for and the last date for submission of the application. They should make a request to their Office that before that date, they should inform as to whether they were so disposed as to grant permission to him for the said post. The Office would make sure that in the event, they had any objection, they should communicate that at least three days before last date of the submission of the form.

12. The Respondents have annexed to their Affidavit-in-reply, the G.R. of the Finance Department of 23rd March, 1994. It was mentioned in the preface that in the event of the selection by nomination, the Government was considering as to how to make the pay fixation. The first condition reads as follows :

“शासकिय कर्मचा-याने लोकसेवा आयोग किंवा तत्सम निवड मंडळाने विहित केलेल्या मार्गाने अर्ज केलेला असावा.”



13. It would become very clear by a plain reading of the two instruments hereinabove discussed that though the requirement was to make application through proper channel, but no specific format was prescribed therefor and no consequence for failure to do so was expressly or by implication provided for. Therefore, it is quite clear that the sole purpose of such a procedure being prescribed was nothing more than to make sure that the then employer had the knowledge about his employee having applied to MPSC for such a post. In fact, two decades after the selection of the Applicant as Drugs Inspector and now he having been promoted as Assistant Commissioner of Drugs, I do not think it is possible to visit any adverse consequence on the Applicant. I have already read in detail the documents of contemporaneous vintage. It would become quite clear that the very fact that the Applicant applied for the post of Drugs Inspector was well within the knowledge of his then employer and not only that but they even issued the requisite Certificate. In the Affidavit-in-reply, Paras 10 and 11 are already discussed. The averments are made which would make it very clear that at the point of time relevant hereto, the 2nd Respondent – Commissioner of Drugs also did not raise any objection to the Applicant having not applied through proper channel as it were. Further, the fact that the earlier

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service is being counted for the pensionary purposes, would itself make it very clear that they would not have done it, had the appointment of the Applicant been totally illegal. Therefore, it is very clear, in my opinion, that it was at the most a case of procedural irregularity of curable nature and nothing more, and therefore, the Applicant cannot be made to face consequences of serious nature like his pay fixation, etc. It was not the case of incurable illegality. If the earlier service can be counted for a certain purpose like pensionary benefits, then there is no reason why the same cannot be the state of affairs vis-à-vis all the other aspects of the matter. In fact, it goes without saying that if the proper pay fixation was not made, it would directly affect even the pensionary benefits, and therefore, the Respondents having adopted a particular course of action and having given something to the Applicant directly, cannot indirectly so conduct themselves as to cause prejudice to the Applicant. I must make it very clear that there is no supporting a little lapse on the part of the Applicant, but then a proper view will have to be taken, especially in the light of the relevant instruments above discussed. The Circular of the GAD dated 22nd July, 1983 discussed above and the 1994 G.R. at the end of the day, provide that the employer at the time, the said employee applied for a certain post to the MPSC should be in the



know of such a fact. There is no other purpose, at least none that I can possibly find therein and on that score, may be with a little disapproval for a slight lapse of the Applicant, but he cannot surely be made to face momentous consequences. I would, therefore, hold that the order herein impugned in so far as it refuses to count the earlier service for the purpose of pay fixation and arrears will have to be quashed and set aside. However, Ms. Manchekar, the learned Advocate for the Applicant herself in all fairness, did not dispute that the actual arrears to the Applicant would be payable only for a period of three years before the filing of this OA.

14. Turning now to the second aspect of the matter, the crux whereof, has already been mentioned hereinabove, the Respondents challenged the very tenability of this OA because the Applicant has not exhausted the appellate remedy. In the first place, this aspect of the matter is now fully governed by an unreported Judgment of the Hon'ble Bombay High Court (DB) in **Writ Petition No.9660 of 2014 (The State of Maharashtra Vs, Dr. Subhash D. Mane, dated 1st December, 2014)** and Para 9 thereof needs to be fully reproduced.



"9. The first contention raised on behalf of the Petitioner State is that the Tribunal ought not to have entertained the Original Application in view of the alternate remedy available to the Respondent. Reliance was placed by Mr. Sakhare, on Section 20(1) and (2) of the Administrative Tribunals Act, 1985. According to Mr. Sakhare, as per Rule 17 of the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979, a remedy of appeal against the order of suspension has been provided. Mr. Sakhare submitted that the reason given by the Respondent for not availing of this remedy that since the order is passed in concurrence of the Chief Minister and therefore no appellate authority will give a decision against him, is an untenable reason. He submitted therefore that the discretion used by the Tribunal in entertaining the application as improper and therefore the order be set aside. We do not find any merit in this submission. Section 20(1) of the Administrative Tribunal Act does not place an absolute embargo on the Tribunal to entertain an application if alternate remedy is available. It only states that the Tribunal shall not ordinarily entertain application unless the Tribunal is satisfied that the applicant has availed the alternate remedy. This phraseology itself indicates that in a given case the Tribunal can entertain an application directly



without relegating the applicant to the alternate remedy. In the present case, the Tribunal has found, on examination of various peculiar facts and circumstances, that, it will be futile to drive the Respondent to an alternate remedy. The Tribunal found that the order of suspension was based on the same grounds as the order of transfer, which was stayed and the order of suspension was an act of victimization. Having convinced that strong case for entertaining an application was made out, the Tribunal entertained the application. It was within the discretion of the Tribunal to do so. No absolute bar was shown, neither it exists. We are not inclined, at this state, to accede to the submission of Mr. Sakhare, and set aside the impugned order on this ground alone."

It is very clear that in the above Judgment, Their Lordships have quite clearly construed Section 20(1) of the Administrative Tribunals Act in the context of the word, "ordinarily". The whole thing is so clear as to make it unnecessary for me to add anything of my own and on this basis itself, the contention of Shri Chougule, the learned PO on behalf of the Respondents can be and is rejected.

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15. But, I would still, in brief, discuss the other angle to this particular controversy. The learned PO Shri Chougule invited reference to Rule 17(1)(iv)(a) of the Maharashtra Civil Services (Disciplinary & Appeal) Rules, 1979 (to be called "D & A Rules" hereinafter). The said Rules prescribe *inter-alia* that a Government servant, "may prefer an appeal against all or any of the following orders namely:

(i)

(ii)

(iii)

(iv)

(a) An order which denies or varies to his disadvantage his pay, allowances, pension or other conditions of service as regulated by Rules or by agreement or" (emphasis supplied).

16. Now, I will have to proceed on the assumption that to the present facts, the above referred Clause is applicable and I say so because on a plain reading thereof, it is also possible to argue that it would not apply in matters like the present one where the incumbent took up the charge of a new post of Drugs Inspector and his pay



was fixed and the grievance is about refusal to count the earlier service. But as I mentioned above, without entering a categorical finding on the applicability of the said Clause, for the present I proceed on assumption.

17. Rule 18 of D & A Rules deals with, "appellate authorities". It needs to be mentioned that there are several orders within the ambit of the appeals and in this light, Rule 18 in fact, needs to be reproduced to the extent it is germane hereto.

"18. Appellate authorities. – (1) Subject to the provisions of any law for the time being in force. –

[(i) A member of [Group A or Group B] service [Group A or Group B] including a person who belonged to any of these Classes immediately before he ceased to be in service), may appeal to.-

(a) Governor, against the orders passed by the authorities subordinate to Government imposing penalties on him; or

(b) The Governor, against the orders passed by the Government or any authority not subordinate to Government imposing penalties on him]."

(ii) a member of [Group A or Group B] service (including a person who belonged to any of those classes immediately before he ceased to be in service), may appeal to the immediate

superior of the Officer imposing a penalty upon him under Rule 5 of these rules, ["and no further appeal shall be admissible to him"];”

18. I think, there is substance in the submission of Ms. Manchekar that for all practical purposes, for any grievance with regard to pay fixation though mentioned in Rule 17, there is no appellate forum provided for the matters of pay fixation because Rule 18 specifically mentions the fact of “punishment”. It must, therefore, follow that any impugned order which imposes punishment is appealable and in the context, the appellate authority would be His Excellency the Governor of Maharashtra. However, for the present purposes, in respect of the orders regarding pay fixation, the plain reading of Rule 18 would in my view show that no appellate authority has been prescribed.

19. Appeals are not natural remedies for a litigant though once the appeal is provided, then it confers statutory right but the statutory right has to be exercised strictly in terms of the statute. The proceedings of first instance, generally and by and large, would be such as to fall within the natural jurisdiction, and therefore, for exercise of natural rights, there would be no embargo, but for an appeal, it would be a statutory remedy and if, a particular procedure is prescribed including a forum for



the said appeal, then if a particular type of orders which are also mentioned, then only those types would be subject to the appellate jurisdiction and the matter of right in that behalf. The proceedings of first instance would lie unless proscribed but appeals would not lie unless prescribed. And the judicial forum cannot by any analogical extension or by implication read something which is not there expressly or by necessary implication. This was a tangle which in my view, the learned PO despite all his best efforts could not unknot and that being the state of affairs, I can find no fault with the Applicant having brought this OA in the manner, he has done. I have entertained it and now it has to be even allowed.

20. The order herein impugned in so far as it refuses to count the earlier services of the Applicant from 27.7.1989 to 27.10.1997 for the purposes of fixation of pay and arrears is hereby quashed and set aside. It is directed that the said period shall be counted for all purposes including pay fixation. It is also clarified that the Applicant shall be entitled for the arrears only for the period of three years before filing of this OA. It is also clarified that the counting of the said period for the purposes of pensionary benefits, etc. given by the impugned order is confirmed and nothing is to be done

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thereagainst. The Original Application is accordingly allowed in these terms with no order as to costs. Compliance within two months from today.

Sd/-
(R.B. Malik)
Member-J
03.04.2017

03.04.17

Mumbai

Date : 03.04.2017

Dictation taken by :

S.K. Wamanse.

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