

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI**

ORIGINAL APPLICATION NO.594 OF 2019

DISTRICT : PUNE

1. Shri Gopinath B. Lokhande)
Since deceased through legal heirs :)
- 1-a) Smt. Varsha Gopinath Lokhande,)
Aged 45 years, Occ. Household.)
- 1-b) Kum. Pruthvi Gopinath Lokhande,)
Aged 23 years, Occ. Education.)
- 1-c) Kum. Yash Gopinath Lokhande,)
Aged 18 years, Occ. Education.)
- All R/o. B/2, Ratnagiri C.H.S. Society,)
MIDC, G-Block, Sambhaji Nagar,)
Chinchwad, Pune - 19.)
-)...Applicants
[Heirs & Legal Representatives
of deceased Applicant]**

Versus

1. The Additional Director General of Police,)
C.I.D. (M.S.), Pune.)
2. The Commissioner of Police, Aurangabad,)
Having o/at Mill Corner, Dr. B.A. Road,)
Aurangabad.)
-)...Respondents**

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

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

CORAM : SHRI A.P. KURHEKAR, MEMBER-J

DATE : 06.10.2020

JUDGMENT

1. The Applicant has challenged the orders dated 11.10.2017 and 23.07.2018 and for declaration that he is entitled to Pay and Allowances

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for the period of 215 days treating the said period as waiting period invoking jurisdiction of this Tribunal u/s 19 of Administrative Tribunal Act, 1985.

2. The admitted facts giving rise to this O.A. are as under :-

- (1) Original Applicant namely Gopinath Lokhande was serving as Assistant Inspector, Finger Prints in the office of Commissioner of Police, Aurangabad.
- (2) By order dated 20.05.2015, he was transferred from Aurangabad to Nagpur. However, he did not join at Nagpur though relieved on 27.05.2015.
- (3) The Applicant has challenged the transfer order dated 20.05.2015 by filing O.A.No.385/2015 in this Tribunal.
- (4) In O.A.385/2015, no stay to the transfer order was granted and interim relief was granted to the extent that the post of the Applicant at Aurangabad should not be fill-in till the decision of O.A.
- (5) O.A. No.385/2015 was allowed by this Tribunal by order dated 01.12.2015 thereby quashing transfer order on the ground of absence of notification of Police Establishment Board in the official gazette.
- (6) Consequent to decision in O.A.No.385/2015, the Applicant joined at Aurangabad on 29.12.2015.
- (7) The Applicant made representation on 14.01.2016 to regularize his absence of 215 days for the period from 28.05.2015 to 23.12.2015 and for grant of Pay and Allowances in view of the decision of Tribunal quashing transfer order.
- (8) Respondent No.2 – Commissioner of Police, Aurangabad by order dated 13.07.2017 initially regularized absence period by granting Earned Leave of 215 days invoking Rule 50 of Maharashtra Civil Services (Leave) Rules 1981.

- (9) Later, Respondent No.2 – Commissioner of Police by order dated 11.10.2017 cancelled the order of grant of Earned Leave dated 13.07.2017 on the ground that the power to grant such leave vest with the Appointing Authority namely Additional Director General of Police, CID, Pune (Resp.1).
- (10) The Applicant made representation on 16.10.2017 and 08.01.2018 to re-consider the order of cancellation of Earned Leave but did not get any response and ultimately filed this O.A.
- (11) During the pendency of O.A., Respondent No.1 regularized the absence of 215 days by granting Earned Leave of 149 days and treating remaining 66 days absence as extra Earned Leave.
- (12) During the pendency of O.A., Applicant Shri Gopinath Lokhande died on 22.03.2020, and therefore, his legal representatives were substituted in place of deceased.

3. Shri Bhushan A. Bandiwadekar, learned Counsel for the Applicant made following submissions to justify the reliefs claimed :-

- (a) Transfer order dated 20.05.2015 was set aside by the Tribunal in O.A.No.385/2015 on the ground of competency and legality of Police Establishment Board and in effect transfer order being passed without jurisdiction, it is *non-est* in law and there was no obligation on the part of Applicant to join or to obey the transfer order immediately.
- (b) Transfer order dated 20.05.2015 was void *ab-initio*, and therefore, even if the Applicant remained absent for 215 days, he is entitled to pay and allowances of the said period.
- (c) Initially, leave was rightly treated as Earned Leave by Assistant Commissioner of Police by order dated 13.07.2017, and therefore, it could not have been modified to the detriment of the Applicant.

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- (d) After cancellation of 215 days by order dated 11.10.2017, the Respondents have not re-credited 215 days Earned Leave in the leave account of the Applicant which was earlier deducted in view of the order of 13.07.2017. Had Respondents re-credited 215 days in his leave account, there would have been enough Earned Leave at his credit so as to grant entire period of 215 days as Earned Leave.
- (e) Alternatively, the Respondents be directed to re-calculate the Earned Leave and to grant Earned Leave of 215 days.

4. The issue posed for consideration in the present O.A. is whether the Applicant is entitled to pay and allowances of 215 days i.e. from 28.05.2015 to 28.12.2015 in which he was admittedly absent on duty. True, initially Respondent No.2 by order dated 13.07.2017 granted Earned Leave of the absence of 215 days invoking Rule 50 of Maharashtra Civil Services (Leave) Rules, 1981, but later realizing that the power vests with Respondent No.1 only, by order dated 13.07.2018 (Page No.41 of O.A.), 149 days were adjusted as Earned Leave which was at his credit and remaining 66 days was treated as Extra-Ordinary Leave. Indisputably, the competent authority for grant of such Extra-Ordinary Leave is appointing authority i.e. Respondent No.1, and therefore, the Applicant cannot take the benefit of earlier order dated 13.07.2017 whereby his absence period of 215 days was granted as Earned Leave.

5. Smt. K.S. Gaikwad, learned Presenting Officer has pointed out that there was no stay to the transfer order dated 20.05.2015 and interim relief was granted to the extent that the post of the Applicant at Aurangabad should not be filled-in till the decision of O.A. She, therefore, submits that the Applicant himself absented from duty though he was obliged to join at Nagpur having relieved on 27.05.2015. She, therefore, submits that this amount to misconduct and the Applicant cannot ask for pay and allowances of unauthorized absence. She submits that in fact, the Department has sympathetically considered the

Applicant's case and regularized his absence period by granting Earned Leave which was at his credit and by granting Extra-Ordinary Leave of remaining period.

6. As such, indisputably, there was no stay to the transfer order dated 20.05.2015 and the Applicant being Government servant was obliged to join at Nagpur in view of transfer order dated 20.05.2015. True, he has challenged the transfer order by filing O.A, but there being no stay to the transfer order, he cannot be allowed to contend that because of filing of O.A, he was justified in not joining at Nagpur. It may be noted that the Applicant remained absent even making any application for leave or any other ground and choose to remain absent voluntarily. This being the position, the absence of the Applicant is definitely unauthorized absence from duty and whenever there is unauthorized absence of an employee, the employer can exercise its discretion either to condone unauthorized absence by accepting the explanation, if any, given by the Applicant by sanctioning leave for the period of unauthorized absence in which event, misconduct can be stood condoned. The employer can also treat the unauthorized absence as misconduct and may hold enquiry and impose punishment for the misconduct. Suffice to say, the conduct of the Applicant in not joining at Nagpur and remaining absent even without making an application for leave is definitely reprehensible and cannot be countenanced in service law.

7. The reliance placed by the learned Advocate for the Applicant on the decision rendered in **O.A.194/2012 (Kutubuddin G. Khan Vs. Superintendent of Police, Pune) decided on 06.09.2012** and decision of Hon'ble High Court in **2004(3) Mh.L.J. 151 (Diwakar P. Satpute Vs. Zilla Parishad, Wardha & Ors.)** is hardly of any assistance to the Applicant in the present situation.

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8. In **Kutubuddin Khan's** case (cited supra), the employee was suspended in contemplation of departmental enquiry for non-compliance of transfer order. In that case, after transfer, the Applicant therein submitted an application for grant of Medical Leave with Medical Certificate but it was refused on the ground that the employee should first join the place where he is transferred. It is on that background, the suspension order was quashed by this Tribunal with the finding that in view of application for grant of Medical Leave, the suspension was totally arbitrary. As such, in fact situation, the suspension order was quashed. This Judgment is hardly of any assistance to the Applicant in the present situation.

9. In **Diwakar Satpute's** case (cited supra), the Petitioner was transferred by Block Education Officer vide order dated 17.09.1984 and on representation made by the Petitioner, the Block Education Officer himself having realized that the order of transfer dated 17.01.1984 was illegal order, he himself cancelled the same with retrospective effect. It is in that context, the Petitioner therein was held entitled for pay and allowances of the absence period. From this Judgment, it cannot be culled out as a general proposition of law that whenever there is unauthorized absence and the order of transfer is cancelled, the employee is entitled for pay and allowances of the absence period.

10. Only because transfer order of the Applicant dated 20.05.2015 was set aside by the Tribunal on merit, that itself *ipso-facto* does not entitle the Applicant to claim pay and allowances of the unauthorized absence. Indeed, as a Government servant, he was duty bound to join at the place where he is transferred, when there was no stay to the transfer order by the Tribunal. True, the transfer order dated 20.05.2015 was quashed by the Tribunal on the ground that the Police Establishment Board (PEB) was not notified in the Official Gazette as required in law. In other words, the PEB which passed an order of transfer was legally flawed and on that ground, the transfer order was quashed. Consequent to transfer

order, the Applicant joined at Aurangabad on 29.12.2015. The submission advanced by the learned Advocate for the Applicant that the transfer order was *non-est* in law, and therefore, it entitles the Applicant to remain absent and claim pay and allowances is fallacious and misconceived.

11. In such situation, all that the employer in its discretion can regularize unauthorized absence by granting Earned Leave considering Earned Leave at his credit. The Respondent No.1 by order dated 23.07.2018 granted 149 days Earned Leave under the assumption that only 149 days leave was at his credit and remaining 66 days was granted as Extra-Ordinary Leave. However, the Respondent No.1 failed to see that 215 days Earned Leave which was deducted from the Earned Leave Account of the Applicant in view of order dated 13.07.2017 was later cancelled by order dated 11.10.2017, and therefore, 215 days Earned Leave ought to have been re-credited in the account at the time of passing the impugned order dated 23.07.2018.

12. The perusal of Extract of Service Book (Page No.115 of P.B.) reveals that in terms of order dated 13.07.2017, 215 days Earned Leave was deducted from the Earned Leave Account of the Applicant. However, thereafter when the said order was cancelled by Respondent No.2 vide order dated 11.10.2017, then Earned Leave of 215 days ought to have been re-credited to the Earned Leave Account of the Applicant. However, they have not given re-credit of 215 days Earned Leave and proceeded ahead while passing the impugned order dated 23.07.2018. At the time of order dated 23.07.2018, 149 days was found at his credit, and therefore, 149 days Earned Leave was granted and remaining 66 days leave was granted as Extra-Ordinary Leave. Had 215 days leave was re-credited in the account of the Applicant, there would have been enough balance of more than 300 days to grant entire period of 215 days as Earned Leave. However, the Respondent No.1 re-credited 215 days Earned Leave at his credit account only on 02.08.2019 i.e. after passing

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of impugned order. This needs to be rectified and to that extent only, interference of this Tribunal is warranted. The learned P.O. Smt. K.S. Gaikwad fairly concede that at the time of passing impugned order firstly 215 days Earned Leave ought to have been re-credited to the leave account of the Applicant, but it was remained to be done inadvertently and credit of 215 days was given belatedly only on 10.08.2019.

13. The totality of aforesaid discussion leads me to conclude that the Applicant is not entitled to pay and allowances of unauthorized absence of 215 days. He is entitled to treat absence period as Earned Leave by re-calculating Leave Account, in view of above observations and inclined to impose cost of Rs.5,000/- on the Respondents, as the Applicant is unnecessarily dragged to the litigation for the mistake for not re-crediting to 215 days Earned Leave before passing the impugned order. Hence, I pass the following order.

ORDER

- (A) The Original Application is allowed subject to cost of Rs.5,000/-.
- (B) The impugned order dated 23.07.2018 is quashed and set aside.
- (C) The Respondents are directed to re-credit 215 days Earned Leave which was remained to be credited to the Earned Leave Account of the Applicant and thereafter considering entire Earned Leave at his credit shall pass appropriate order of grant of 215 days Earned Leave.
- (D) The said exercise be completed within a month and if legal heirs of deceased found entitled for encashment of Earned

Leave considering his balance Earned Leave, then the said benefit be extended to them in accordance to Rules.

Sd/-

(A.P. KURHEKAR)
Member-J

Mumbai
Date : 06.10.2020
Dictation taken by :
S.K. Wamanse.

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