

IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL, MUMBAI

REVIEW APPLICATION NO.07 OF 2020
IN
ORIGINAL APPLICATION NO.895 OF 2019

- 1) Shri Vijay Bapu Kamble,)
Police Sub-Inspector, Azad Maidan Police Station,)
R/at 102, 'A' wing, New Police Officers Quarters, behind)
Ghatkopar Police Station, Ghatkopar (W), Mumbai-86.).... Applicant

V/s

1. The State of Maharashtra, through Addl. Chief)
Secretary, Home Dept. Mantralaya, Mumbai 400 032.)
2. The Commissioner of Police, O/at Crawford Market)
Fort, Mumbai.)
3. Joint Commissioner of Police, (Law & Order),)
Crawford Market, Fort, Mumbai.)... Respondents

Shri M.D. Lonkar, learned Counsel for the Applicant

Ms S.P. Manchekar, learned Chief Presenting Officer for the Respondent

CORAM : SHRI A.P. KURHEKAR, MEMBER(J)

DATE : 03.11.2020.

ORDER

1. Being aggrieved by the order passed in O.A.No.805/2019 dated 16.06.2020, the Applicant has filed this Review Application under Order 47 of CPC r/w Section 22 (3)(f) of Administrative Tribunal Act, 1985.

2. Shortly stated facts giving rise to the present R.A. are as follows:-

The Applicant was serving as Police Sub-Inspector, Dharavi Police Station, Mumbai and by order dated 03.01.2006, he was suspended in view of registration of Crime No.365/2005 under Section 302 of Indian Penal Code. He was prosecuted in Sessions Case No.220/2006 and by judgment dated

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13.04.2007, he was convicted for imprisonment for life and fine of Rs.1000/-. In view of conviction, the Applicant was dismissed from service by order dated 16.09.2009 under Article No.311(2)(a) of Constitution of India and his period of suspension from 31.12.2005 till the date of dismissal was treated as suspension period under Rule 72 of Maharashtra Civil Services (Joining Time, Foreign Service and Payments during Suspension, Dismissal and Removal) Rules, 1981 (hereinafter referred to as 'MCS Rules 1981' for brevity). However, he was acquitted by the Hon'ble High Court in Criminal Appeal No.416/2007 by judgment dated 01.09.2014 with finding that prosecution has failed to establish the offence beyond reasonable doubts. Consequent to acquittal, the Applicant was reinstated in service by order dated 08.09.2015. Simultaneously, the D.E. was also initiated against the Applicant and punishment of reduction to lower time scale of pay on the post of PSI for one year was imposed by order dated 22.11.2017. In appeal, the punishment was modified and punishment of strict warning was imposed. The Disciplinary Authority thereafter issued show cause notice on 05.04.2019 as to why his out of service period should not be treated as out of service period for all purposes. After considering the reply of the Applicant, the Disciplinary Authority passed order dated 06.07.2019 and granted 50% pay and allowances restricted to the monetary benefits of preceding three years invoking Rule 70(4)(7) of 'Rules 1981'.

3. The Applicant has challenged the order dated 06.07.2019 in O.A.No.805/2019 which came to be dismissed by order dated 16.06.2020 by this Tribunal against which present Review Petition is filed.

4. Shri M.D.Lonkar, learned Counsel for the Applicant sought to contend that there is apparent error on the face of record and in view of the discovery and production of representation dated 13.11.2017 now tendered in R.A., the order of dismissal of O.A. needs to be reviewed. In this behalf, he raised the following points :-

(a) The period of suspension from 03.01.2006 to 16.09.2009 has been treated as such without considering it afresh after acquittal of the Applicant in criminal case and secondly no show cause notice was given to the Applicant before passing any such order as mandated under Rule 72(5) of 'Rules 1981'.

(b) The Applicant was acquitted by the Hon'ble High Court on 01.09.2014. However, he was reinstated in service on 08.09.2015. According to him, the Applicant has already made representation for reinstatement in service on 13.11.2014 but the copy of the same could not be produced in earlier round of litigation i.e. in O.A.805/2019 and the same is being filed in R.A. Therefore, the Applicant ought to have been reinstated in service w.e.f. 13.11.2014 but his representation was ignored and reinstatement order was issued belatedly on 08.09.2015 which has caused loss of Pay & Allowances to the Applicant.

(c) The period out of duty from 17.09.2009 to 08.09.2015 ought to have also considered as a duty period in view of acquittal of the Applicant in criminal case.

5. Whereas, Ms S.P. Manchekar, learned Chief Presenting Officer in first instance submits that there is no apparent error on the face of record so as to exercise the jurisdiction of review as contemplated under Order 47 of CPC. She submits that this Court has considered all the relevant aspects and rightly dismissed the O.A. However, she fairly concedes that no such show cause notice as contemplated under Rule 72(5) of 'Rule 1981' was given to the Applicant before treating the period from 03.01.2006 to 16.09.2009 as suspension period as such.

6. Present Review Petition is filed under Order 47, Rule 1 of CPC, which is as follows:-

"1. Application for review of judgement. – (1) Any person considering himself aggrieved,-

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,
- (b) by a decree or order from which no appeal is allowed, or
- (c) by a decree on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgement to the Court which passed the decree or made the order."

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7. Having gone through the record and on thoughtful consideration to the submission advanced at bar, in my opinion, the review needs to be allowed to the extent of two aspects. The first aspect is about reconsideration of the order regarding period of suspension after giving notice to the Applicant and second aspect is about grant of pay & allowance from the date of representation i.e. 13.11.2014.

8. After conviction of the Applicant by order dated 16.09.2009, the Applicant was dismissed from service invoking Article 311(2) (a) of the Constitution of India by order dated 16.09.2009. The perusal of order dated 16.09.2009 (Page 71 of PB) reveals that before passing of order, the show cause notice dated 10.11.2008 as to why he should be dismissed from service was issued. However, as per order dated 16.09.2009, there was no personal service could not be affected due to change of address, and therefore, notice dated 10.11.2008 fixed on the outer door of house. By this order, suspension period from 31.12.2005 till 16.09.2009 was treated suspension as such under Rule 72(6) of 'Rules 1981'. However, the Applicant was later acquitted by the Hon'ble High Court and in view of acquittal, he was reinstated on 08.09.2015. Thereafter, the show cause notice dated 05.04.2014 was given to him as to why the period from 17.09.2009 to 08.09.2015 was treated as out of duty period. The Applicant has given his reply on 23.04.2019. In representation, the Applicant claimed full pay & allowance in view of his acquittal. However, his period from 17.09.2009 to 08.09.2015 was treated as out of duty period (in order, it is wrongly mentioned as suspension period). Thus, material to note that notice dated 05.04.2019 was restricted to treatment of out of service period only. The show cause notice dated 05.04.2019 is at page No.255 to 256 of PB which clearly shows that it was restricted to the out of duty period.

9. Thus, what transpires from the record that at the time of reinstatement while deciding the issue of out of duty period, no notice regarding treatment to suspension period was given as contemplated under Rule 72(5) of Rules 1981 which is condition precedent. Thus neither notice was given nor issue of treatment to the period of suspension was reconsidered which ought to have been considered by passing specific order to that effect after acquittal of the Applicant on giving opportunity to the Applicant as mandated under Rule 72(5) of 'Rules 1981' which *inter-alia* provides for the steps to be taken while reinstating the Government servant in service. It provides

for specific order of the Competent Authority regarding pay & allowance of the suspension period. Rule 72(3) of 'Rules 1981' provides that while reinstating a Government servant in service, the competent authority has to form its opinion as to whether suspension was wholly unjustified or otherwise and then to pass further order regarding pay & allowance. Whereas, Rule 72(5) of 'Rules 1981' provides for issuance of notice to a Government servant while considering treatment to the period of suspension. At this juncture, it would be apposite to reproduce Rule 72(3) and (5) of 'Rules 1981' which are material for the present O.A.

72. Re-instatement of a Government servant after suspension and specific order of the competent authority regarding pay and allowances etc., and treatment of period as spent on duty.-(1) When a Government

(2) Notwithstanding anything contained in Rule 68,.....

(3) Where the authority competent to order reinstatement is of the opinion that the suspension was wholly unjustified, the Government servant shall, subject to the provisions of sub-rule (8), be paid the full pay and allowances to which he would have been entitled, had he not been suspended:

Provided that where such authority is of the opinion that the termination of the proceedings instituted against the Government servant had been delayed due to reasons directly attributable to the Government servant, it may, after giving him an opportunity to make his representation within sixty days from the date on which the communication in this regard is served on him and after considering the representation, if any, submitted by him, direct, for reasons to be recorded in writing that the Government servant shall be paid for the period of such delay only such amount (not being the whole) of such pay and allowances as it may determine.

(4) In a case falling under sub-rule(3),

(5) In a cases other than those falling under sub-rules (2) and (3), the Government servant shall, subject to the provisions of sub-rules (8) and (9), be paid such amount (not being the whole) of the pay and allowances to which he would have been entitled. Had he not been suspended, as the competent authority may determine, after giving notice to the Government servant of the quantum proposed and after considering the representation, if any, submitted by him in that connection within such period which in no case shall exceed sixty days from the date on which the notice has been served, as may be specified in the notice."

10. Now turning to the facts of the present case, admittedly, no such show cause notice as contemplated under Rule 72(5) was given to the Applicant. Indeed, the competent authority has not at all pass separate order regarding period of suspension

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after acquittal of the Applicant. In this behalf, all that learned C.P.O. tries to contend that as the order regarding suspension was already passed by the authority while dismissing the Applicant on 16.09.2009, there was no requirement of reconsidering the said issue. This submission is totally contrary to law and unacceptable. In terms of Rule 72(3) and (5) of Rules 1981, the competent authority after reinstatement of the Applicant was required to consider whether suspension was wholly unjustified or otherwise and ought to have given the show cause notice as mandated in Rules 1981 referred to above. However, admittedly this is not done. This aspect was not specifically urged while deciding O.A.805/2019 and as such, it being apparent error on face of the record and breach of provisions of rules being legal issue it can be corrected under Order 47, Rule 1 of CPC.

11. Another issue is about inaction and delay on the part of Respondent No.2 to reinstate the Applicant immediately after acquittal by the Hon'ble High Court. He was acquitted by the judgment dated 01.09.014. However, he was reinstated by order dated 08.09.2015. Now, in R.A. the Applicant has filed a copy of representation dated 13.11.2014 contending that he could not produce it in O.A. and therefore, it being matter of record, he is entitled for pay and allowances from the date of representation. The copy of representation is at page no.37 of review. It bears endorsement of office of Respondent No.2 as an acknowledgement/receipt of the representation. In representation, he had requested for immediate reinstatement in service in view of acquittal by the Hon'ble High Court. Significant to note that there is no denial about representation dated 13.11.2014. Indeed, the Respondents have not filed counter affidavit about receipt of representation dated 13.11.2014. As such, it is crystal clear that immediately after acquittal, the Applicant has made representation on 13.11.2014 for immediate reinstatement in service but Respondent no.2 sat over the matter and no decision was taken on representation. He was reinstated belatedly by order dated 08.09.2015 causing loss of pay and allowances to the Applicant. Indeed the Respondent No.2 was under obligation to take note of the acquittal of the Applicant by Hon'ble High Court by judgment dated 01.09.014 and on his own ought to have passed the order about reinstatement without loss of time. Regretfully, despite representation dated 13.11.2014, Respondent No.2 did not pass any order within reasonable time and

belatedly reinstated the Applicant by order dated 08.09.2015. While dealing with this aspect, this Tribunal observed that the Applicant was entitled for pay and allowances prior to order dated 08.09.2015. However, now in R.A. the representation dated 13.11.2014 is brought on record. The filing of representation and its acknowledgement is not denied by the Respondents. It is the part of official record. Therefore, the Applicant cannot be deprived of pay and allowances from the date of representation dated 13.11.2014. Indeed, in para no.16 of the order of O.A.805/2019, the Tribunal has observed that "Applicant had remained silent for one year and had the Applicant made any special representation after acquittal in criminal case perhaps he would have been justified the claim of back wages from the date of representation." As the copy of representation is now forthcoming on record, the acknowledgement which is not disputed, he cannot be allowed due to inaction and lethargy on the part of Respondent No.2 and entitled to suffer pay and allowances from the date of representation.

12. In this behalf, reference can be made to **(2013) 11 ACC 67 (State Bank of India & Anr. V/s Mohammed Abdul Rahim** in that case the Applicant was acquitted on 22.02.2002 and made representation for reinstatement on 22.04.2002. However, he was reinstated in service belatedly on 07.11.2002. The Hon'ble Supreme Court, therefore, granted back wages from the date of his representation.

13. As such, to the extent above discussed, the review needs to be allowed.

14. However, in so far as the submission advanced by the learned Counsel for the Applicant that in view of acquittal, the Applicant was entitled to pay and allowances for out of duty period i.e. from 17.09.2009 to 08.09.2015 this issue already decided by this Tribunal in detail and he was held not entitled for pay and allowances for the said period. While doing so, this Tribunal considered the following decisions:-

- "1. **1999(3) Mh.L.J.351 (S.P. Naik Vs. Board of Trustees, Mormugao Port Trust, Goa & Anr.).**
2. **(1996) 11 SCC 603 (Ranchhodji C. Thakore Vs. Superintendent Engineer, Gujarat Electricity Board, Himmatnagar & Anr.).**
3. **(1997) 3 SCC 636 (Krishnakant R. Bibhavnekar Vs. State of Maharashtra & Ors.).**

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4. (2004) 1 SCC 121 (*Union of India Vs. Jaipal Singh*).
5. (2005) 8 SCC 747 (*Baldev Singh Vs. Union of India & Ors*).
6. (2007) 1 SCC 324 (*Banshi Dhar Vs. State of Rajasthan & Anr.*).

15. The conspectus of these decisions as held by this Tribunal in O.A.805/2019 is that the acquittal in Criminal Case *ipso facto* does not entitle the employee to claim back wages for the period he was out of service on account of conviction in criminal case. Subsequent acquittal though obliterate conviction, it does not operate retrospectively to wipe out the legal consequences of the conviction. The legal proposition of law expounded in the authorities cited *supra* leaves no manner of doubt and it is no more *res integra* that there could be no automatic entitlement to full back wages because of subsequent acquittal in criminal case. The Applicant was convicted for the offence under Section 302 of IPC but later he was acquitted by the Hon'ble High Court giving benefit of doubt. In such situation, it would be deleterious to the maintenance of discipline if such person is given full back wages for the period on which he was not on duty as a matter of course on his acquittal. Suffice to say, in this behalf, I see no error in the judgment delivered in O.A. and the claim of the Applicant for 100% back wages for out of duty period is devoid of merit.

16. The totality of the aforesaid discussion of law and fact leads me to conclude that Review Application deserves to be allowed to the extent of two aspects as discussed above and O.A. deserves to be allowed partly. Hence, the following order :-

ORDER

(A) Original Application is allowed partly.

(B) Respondent No.2 is directed to reconsider the issue of pay and allowances to the Applicant for the period of suspension from 03.01.2006 to 16.09.2009 afresh after giving notice to the Applicant and to pass appropriate order in accordance to rules 72 of 'Rules 1981'.

(C) The Applicant is held entitled for pay and allowances from the date of representation i.e.13.11.2014 and it be paid accordingly.

(D) The above exercised be completed within two months from today.

(E) The claim of the Applicant for 100% pay and allowances for out of duty period is rejected and order dated 06.07.2019 about pay and allowances from 17.09.2009 to 08.09.015 is maintained.

(F) No order as to costs.

Sd/-

(A.P. KURHEKAR)
Member-J

Place : Mumbai
Date : 03.11.2020
Dictation taken by : VSM
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