

(2015) 04 BOM CK 0323
In the Bombay High Court
Case No : Writ Petition No. 514 of 2015

Deelip Harishchandra Jadhav

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 18-04-2015

Acts Referred:

Citation : (2015) 4 ABR 36 : (2015) 6 ALLMR 728 : (2015) LabIC 3063 : (2016) 1 MhLj 417

Hon'ble Judges : S.S. Shinde, J;P.R. Bora, J

Bench : Division Bench

Advocate : M.R. Andhale, for the Appellant; D.V. Tele, AGP, Advocates for the Respondent

Judgement

S.S. Shinde, J—Writ Petition No. 514 of 2015 is filed with following prayers:--

"B. The impugned Judgment and Order dated 4.9.2009 passed by the Ld. Member of Maharashtra Administrative Tribunal, Aurangabad Bench Aurangabad in Original Application No. 1024/1999, may kindly be quashed and set aside and all the pensionary benefits may be given to the petitioner, by issuing writ against the respondent Nos. 1 to 5, by treating the period 13.06.1965 to 29.06.1966 as pensionable period by condoning the broken period in service of the petitioner.

C. The respondent Nos. 1 to 5 may kindly be directed or ordered to reconsider the pensionary benefits with all the consequential benefits to the petitioner."

Writ Petition No. 6146 of 2014 is filed with following prayers:

"B. The impugned Decision/Order bearing Outward No. Pra.Ka.Na./Ashta/A3/2013/2789 dated 03.04.2013 passed by the respondent No. 3, may kindly be quashed and set aside and the period of petitioner from 13.07.1965 to 29.07.1966 may be treated as service period with continuation for pensionary benefits, by issuing writ against the respondent Nos. 1 to 5.

C. The respondent Nos. 1 to 5 may kindly be directed or ordered to rectify the

mistake committed in service book by the concerned authority, mentioning the Issue No. 3 in the Decision and Order dated 3.4.2013 and revises the pay-scale benefits may be given for pensionary benefits purposes to the petitioner.

D. The amount recovered by the respondent No. 5 against the excess payment of Gratuity vide Letter dated 3.1.2013, may kindly be declared as illegal, by issuing writ against the respondents."

2. The learned counsel appearing for the petitioner submits that, the Respondent Authorities failed to consider the service period from 13th July, 1965 to 29th July, 1966 of the petitioner for pensionary benefits. It is submitted that, the petitioner was eligible for pensionary benefits even for the service period from 1st August, 1966 to 31st July, 1967. However, the said benefit is denied to the petitioner. It is submitted that, the petitioner joined his service on 13th July, 1965 and he was continued till 29th July, 1966 and the said period has not been taken into account as a service period in Service Book maintained by the respondent authority concern. It is submitted that, the petitioner was selected for C.T.I. Training at Kanpur, therefore, the period earlier to that required to be considered in service book and seniority list purposes. It is submitted that, the seniority lists were published firstly on 1st January, 1968 and secondly on 1st December, 1972 and thereafter on 18th April, 1983. The employees who are juniors than the petitioner were shown to be a senior wrongly and the respondents have given them the higher pay-scale. It is submitted that, the reasons assigned by the Respondent Authority in its order dated 3rd April, 2013 are not sustainable. It is submitted that, in view of the judgment of the Hon"ble Supreme Court in the case of Indian Bank and Another Vs. N. Venkatramani, AIR 2007 SC 3159 : (2007) 115 FLR 190 : (2007) 10 JT 530 : (2007) 10 SCALE 475 : (2007) 10 SCC 609 : (2008) 1 SCC(L&S) 697 : (2007) 9 SCR 570 : (2008) 1 SLJ 443 : (2007) AIRSCW 5722 : (2007) 6 Supreme 253 the issue of age broken period for pension benefits deserves to be considered. The learned counsel appearing for the petitioner also placed reliance on the judgment of Division Bench of this Court in Writ Petition No. 4404/2004 in the case of Mrs. Shubhada Anant Karve v. State of Maharashtra & Ors. decided on 23rd August, 2004 and submits that, applying the same ratio in the said judgment in the present case also the Respondent ought to have condoned the break in service since power of relaxation is possessed by the respondent. It is submitted that, the gratuity amount paid to the petitioner is tried to be recovered on the ground that, the amount was paid in excess. It is submitted that, the petitioner was not at fault for excess payment by the Respondents, and therefore, the same should not have been recovered from his pension amount. It is submitted that, the Maharashtra Administrative Tribunal has dismissed Original Application filed by the petitioner totally on unsustainable reasons, and therefore, both the Petitions deserve to be allowed.

3. On the other hand, the learned Additional Government Pleader appearing for Respondent Nos. 1 to 4 invited our attention to the affidavit in replies filed in

both the Writ Petitions and submitted that, before joining C.T.I. Training the petitioner had tendered his resignation and left me service on his own accord. The said fact was noticed by the Maharashtra Administrative Tribunal bench at Aurangabad and after considering the same, the Original Application was dismissed. It is submitted that, the petitioner filed Original application No. 1024/1999 before the MAT bench at Aurangabad. The applicant in the said application prayed for deemed date of promotion. The Tribunal found that, the applicant has received the benefits i.e. deemed date of promotion in pursuant to the Government Resolution dated 24th May, 1984 in accordance with the order passed by the Tribunal, Bench at Mumbai dated 18.12.1996. It is submitted that, in the said proceedings, the petitioner did not ask for condonation of break in his service. It is further submitted that, the petitioner has already received the benefit of revised pay-scale, and therefore, is not entitled for further benefits. It is submitted that, in the year 1976, Government had revised pay scales of their employees. In that revision of pay scale, Rs. 365-760 pay scale was fixed for Craft Instructors. On the basis of guidelines given by Pay Commission, pay has been fixed. Subsequently, the petitioner's pay was also fixed in the pay scale of Rs. 365-760. In this revision of pay, question of Machinist, Grinder, Fitter, etc. did not arise because pay scale was not fixed tradewise but it was fixed cadrewise. It is submitted that, in the seniority list which is placed on record by the Petitioner along with Petition, the petitioner is shown at Sr. No. 425 and one Mr. Thakre was shown at Sr. No. 430. It is submitted that, the petitioner has enclosed incomplete copy of seniority list dated 18th March, 1983. In the seniority list published on 18th March, 1983, the petitioner is shown at Sr. No. 470 and his date of joining is 3rd August, 1967, but name of Mr. Thakare is not seen in that list. It is submitted that, the date of joining of the petitioner is shown as 3rd August, 1967, but the petitioner has not raised any objection regarding his date of joining, it means that, applicant has accepted that he joined duty on 3rd August, 1967. It is further submitted that, the Respondent Authorities rectified mistake while taking joining entry date of appointment order i.e. 26th July, 1967 was entered as date of joining instead of his actual joining date i.e. 2nd August, 1967. Hence the concerned Authority has rectified the said mistake and mentioned the correct date of joining i.e. 2nd August, 1967 in the Service Book. Subsequently, next date of increment is also changed. It is submitted that, the petitioner as per procedure had signed in column 8 every year. The petitioner's contention cannot be accepted that, he had no knowledge about his joining date in service record. Therefore, relying upon the averments in the affidavit in reply filed in both the Petition, the learned Additional Government Pleader submits that, both the Petitions may be dismissed.

4. We have given careful consideration to the submissions advanced by the learned counsel appearing for the petitioner and the learned Additional Government Pleader appearing for the Respondent/State. With their able assistance perused the pleadings in the Petition, annexures thereto, replies filed on behalf of Respondent Nos. 1 to 4 in both the Petitions and also the Original

Record and Proceedings received from the MAT for our perusal. Upon perusal of the impugned order passed by the MAT bench at Aurangabad, it is abundantly clear that, the MAT observed that, if the petitioner was aggrieved by the wrong fixation of pay by order dated 1st December, 1997, the original application should have been filed immediately. However, the application was filed on 16.06.1999, which is barred by limitation. Upon careful perusal of the judgment of the MAT, it appears that, the petitioner retired on superannuation on 30th April, 1999. He approached the Tribunal by filing Petition on 16th June, 1999. The petitioner filed Writ Petition No. 2843 of 1989, which was transferred to Tribunal at Mumbai and registered as T.A. No. 26 of 1995. In the said matter, the respondents therein contended that, in the years 1970 and 1972, the applicant was found ineligible for promotion although considered and therefore, he was not entitled to benefit of Government Resolution dated 24th May, 1984. After rejecting such contention, the Division Bench of Tribunal at Mumbai directed the respondents to fix the pay of the applicant as per decision dated 24th May, 1984 irrespective of the consideration whether pay fixation was issued on 1st December, 1997 although difference was paid later on in December, 1998. The Tribunal has also noticed the contents of the representation dated 24th December, 1998 filed by the petitioner to the respondents that, he claimed amount of House Rent for the period April, 1984 to December, 1997, interim relief as per IIIrd Pay Commission for the period March, 1985 to December, 1985 and difference regarding surrender of salaries received by him between April, 1984 to December, 1997. The Tribunal has observed that, the prayers made in the representation to respondents by the petitioner referred hereinabove and prayers in the application before the MAT had no correlation. It is also observed that, the factual details confirm that, prayers under the belief that period of service at Dhule and training at Kanpur is treated as break period, is a misconception and applicant, the petitioner herein, has received the benefits or he was entitled to have a deemed date of promotion w.e.f. 16th December, 1970 or 5th October, 1972, on the basis of that, he shall be entitled to notional pay as per Government Resolution equal to the pay of the persons next junior to him drawing a salary higher than his salary. It is also observed by the MAT that, in earlier round of litigation Division Bench at Mumbai has not at all referred to period 13th September, 1965 to 29th July, 1966 during which the applicant was serving at Dhule as Machinist or period between 22nd August, 1966 to 30th July, 1967 during which he was sent for training at Kanpur, as break period. Tribunal has directed the respondents to consider the case of the applicant under Government Resolution dated 24th May, 1984 and fix the salary of the applicant at par with a junior drawing higher than him. It is not in dispute that, this exercise was done by the Department and order to that effect was issued keeping in view the Government Resolution dated 24th May, 1984.

5. Upon considering the findings recorded by the MAT, in our opinion, the said judgment and order deserves no interference for two reasons, firstly in the earlier round of litigation, the Division Bench of MAT at Mumbai has not referred

to period 13th July, 1965 to 29th July, 1966 during which period, the applicant was serving at Dhule as Machinist or period between 22nd August, 1966 to 30th July, 1967 during which, he was sent for training at Kanpur, as break period. By way of filing another application belatedly, the petitioner prayed for condoning the aforementioned period as a break period, and therefore, the MAT has rightly observed that, if any wrong fixation of pay by order 1st December, 1997 is taken as cause of action, the original application filed on 16th June, 1999 is barred by limitation. Secondly, the contention of the petitioner that, he was not aware about his date of joining of service with the respondents in service record till he retired cannot be considered as the service record of the petitioner clearly indicate 3rd August, 1967 was the date of joining the duty. Therefore, the petitioner after he retired from the service prays for change in his service record, deserves no consideration and in our opinion, the said prayer has rightly been turned down by the respondents.

6. At the cost of repetition, there is inordinate delay in praying for condonation of break period in service of the petitioner from 13th June, 1965 to 29th July, 1966 when the service record of the petitioner is consistent in showing that, the petitioner joined on 2nd August, 1967. Therefore, viewed from any angle, the petitioner's prayer for treating period from 13th June, 1965 to 29th June, 1966 as pensionable period by condoning the break period, deserves no consideration and same prayer stands rejected. As a sequel, there is no question of giving direction to reconsider the issue of pensionary benefits of the petitioner. As already observed, we do not find any infirmity or perversity, or any cogent and valid reason for causing interference in the impugned order passed by the MAT, and therefore, the prayer of the petitioner to quash and set aside the impugned order stands rejected. The reliance placed by the learned counsel appearing for the petitioner on Government Resolution dated 11th March, 1992 issued by the Government of Maharashtra in Education and Employment Department is wholly misplaced in the facts of the present case and the said Government Resolution is not applicable in the facts of the present case, inasmuch as, the petitioner's service record shows joining date as 2nd August, 1967.

7. So far prayer of the petitioner that, the amount recovered from the petitioner by Respondent No. 5 against the excess payment of Gratuity vide letter dated 03.01.2013 may be declared as illegal deserves consideration. Though the respondents have filed the reply, no material is placed on record to show that, the excess payment made to the petitioner was by misrepresentation or fraud, and therefore, the respondent authorities were not entitled to recover the said payment. This Court (Coram R.M. Borde & S.S. Shinde, JJ.) in Writ Petition No. 7227 of 2011 decided on 24th August, 2012 after considering the exposition of the Hon'ble Supreme Court in the case of Syed Abdul Qadir and Others Vs. State of Bihar and Others, (2009) 1 JT 385 : (2009) 1 SCALE 36 : (2009) 3 SCC 475 : (2009) 1 SCC(L&S) 744 : (2009) 3 SLJ 38 , in particular paras 57 to 59 thereof, in para No. 6 reached to the conclusion that, the amount has been paid to the petitioner towards salary and not on account of any misrepresentation or fraud

on the part of employee. The amount, allegedly paid by the employer, was by applying a wrong principle for calculating the pay. The petitioner therein also cannot be attributed with the knowledge to the effect that the amount, that has been paid to him, is more than what has been admissible to him. Recovery is being effected on account of fixation of pay in view of the order passed by the employer on 08.02.2000, after a long gap and that too, after retirement of the employee on attaining age of superannuation, cannot be countenanced and accordingly Division Bench of this Court quashed and set aside the order impugned in that Petition and directed the employer to return back the amount recovered.

8. In the facts of the present case also, as already observed, the amount which was paid to the petitioner towards gratuity and not on account of any misrepresentation or fraud on the part of the petitioner. The amount, allegedly paid by the employer towards gratuity by playing a wrong method of calculating the amount, the petitioner also cannot be attributed with the knowledge to the effect that the amount, that has been paid to him, is more than what has been admissible to him. Therefore, the recovery on account of mistake in calculating the amount of gratuity by the respondents could not have been recovered from the petitioner. Therefore, Writ Petition No. 6146 of 2014 to the extent of prayer clause "D" deserves to be allowed. Accordingly, the impugned communication dated 3rd January, 2013 issued by Respondent No. 5 for recovery of excess payment of Gratuity from the petitioner is declared as illegal. The directions issued by the respondents relating to recovery of amount allegedly paid to the petitioner stand quashed and set aside. If at all any recovery is made by the respondents from the salary/pensionary benefits admissible to the petitioner shall be returned to the petitioner, as expeditiously as possible, and in any case within six months from today.

9. In the light of above, Writ Petition No. 514 of 2015 stands dismissed and Writ Petition No. 6146 of 2014 is partly allowed in terms of prayer clause "D". Writ Petitions stand disposed of accordingly.