

(2003) 07 BOM CK 0004

In the Bombay High Court

Case No : Writ Petition No. 5227 of 2002

Madanlal Sharma

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 14-07-2003

Acts Referred:

Bombay Civil Services Rules, 1959 — Rule 156
Constitution of India, 1950 — Article 311(2)
Maharashtra Civil Services (Discipline and Appeal) Rules, 1979 — Rule 4(1)
Maharashtra Civil Services (Pension) Rules, 1982 — Rule 10(1)

Citation : (2004) 1 ALLMR 216 : (2004) 1 MhLj 581

Hon'ble Judges : P.V. Kakade, J;B.H. Marlapalle, J

Bench : Division Bench

Advocate : Party in Person, for the Appellant; K.B. Chaudhary, Assistant Government Pleader for respondent Nos. 1, 2, 3 and 5 and S.V. Kurundkar, for the Respondent

Final Decision : Allowed

Judgement

B. H. Marlapalle, J.—In this third round, the petitioner - a freedom fighter, has assailed the decision dated 15-11-2002, of the Maharashtra Administrative Tribunal, Mumbai, in rejecting Miscellaneous Application No. 182 of 2002, as well as, Transfer Application No. 4 of 1996 (Writ Petition No. 941 of 1987).

2. On obtaining graduation degree in Arts, the petitioner came to be appointed as Social Education Organizer in the Community Projects and National Extension Service Blocks, by order dated 12th July, 1954 passed by the Secretary - Development Projects, Hyderabad State. He came to be absorbed under the new Bombay State with effect from 1-11-1956 consequent to the States Reorganisation Act, 1956, as he was prior to the said date, working in the Marathwada Region of the erstwhile Hyderabad State and consequent to the Bombay Reorganization Act, 1960, he became an employee of the State of Maharashtra with effect from 1-5-1960. On formation of the Zilla Parishads pursuant to the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961, he

came to be deputed temporarily to the Zilla Parishad, Nanded, and was posted at Kinwat. As per the directions issued by the Divisional Commissioner, Aurangabad, he was deputed for training for the 7th Job Course of Social Education Organizers" Training Centre at Udaipur, held from 10-8-1963 and while he was on training, the Chief Executive Officer, Zilla Parishad, Nanded, passed an order on 2-11-1963 and suspended the petitioner purportedly under Rule 156 of the Bombay Civil Services Rules, 1959, on the ground that the petitioner was found to be unsuitable as a trainee and had become a nuisance to the training centre. It was stated in the said order, that the petitioner would draw subsistence allowance at an amount equal to the leave on half average pay and, in addition, the dearness allowance admissible as per Rule 151 of the Bombay Civil Services Rules, 1959 (For short, hereinafter referred to as "B.C.S.R.").

3. There was no further progress for initiating any departmental enquiry against the petitioner pursuant to the suspension order dated 2-11-1963 though the petitioner was recalled from the training centre and was transferred at Nanded, under the Panchayat Samiti. The training course was from 8th August, 1963 till the end of December, 1963 and the said deputation for training was terminated by order dated 2nd January, 1964. By order dated 27th July, 1964 he was directed not to leave the headquarter without prior permission of the Block Development Officer and on 24th August, 1964, on his application, he was allowed to go to Kinwat. On 6th October, 1964, he addressed a letter to the Chief Executive Officer, Zilla Parishad, Nanded, from Hyderabad, and furnished his address there. He requested for payment of salary from 1-11-1962 to 1-11-1963 as it was not paid to him and the payment of subsistence allowance from 2-11-1963 onwards. He also stated in the said letter, that while leaving headquarter on 24th August, 1964, he had furnished the temporary address as C/o. G. P. O., Hyderabad, and the said was required to be noted as per the new address furnished therein. A copy of this letter was also addressed to the Block Development Officer, Panchayat Samiti, Nanded, and submitted under certificate of posting. The petitioner went on making representations for subsistence allowance from time to time and nothing further was done in that regard by the Chief Executive Officer, Zilla Parishad, Nanded.

4. The Deputy Director of Education, Aurangabad, issued an office order on 4-1-1969 and cancelled the temporary attachment of the petitioner under the Zilla Parishad, Nanded, and posted him under the Government College of Education (Junior) at Nanded with effect from 30-12-1968 in place of Shri N. B. Kulkarni. This order also stated further that as the petitioner was under suspension. Shri Kulkarni would continue to work in place of the petitioner. There is no proof that this order was served on the petitioner and it appears that the same was served on him, for the first time, on or about 25th April, 1971 when the petitioner had reported in the office of the Chief Executive Officer for duty and he was informed that his temporary attachment was withdrawn by the Deputy Director of Education and he was posted under the Junior College of Education.

Thereafter, the Government of Maharashtra issued an order dated 30th September, 1970 and the post of Social Education Organizer/Extension Officer (Social Education) was held to be equivalent to the post of Junior Extension Officer (Education) - District Technical Service (Class-III) (Education Grade III) in the pay scale of Rs. 150 to 300.

5. On 12-5-1978, the Deputy Director of Education, Aurangabad, passed an order and appointed Shri B. D. Deshmukh - Deputy Education Officer, Zilla Parishad, Nanded, as the Enquiry Officer. The said Enquiry Officer framed a charge-sheet and served the same on the petitioner vide his letter dated 10-7-1978. By letter dated 15-7-1978, the petitioner submitted his reply to the Deputy Director of Education and the same was forwarded to the Enquiry Officer. The enquiry proceeded ex pane and it appears that the Enquiry Officer submitted his report dated 3-11-1978 vide his communication dated 20-11-1978. The Enquiry Officer noted that the petitioner was guilty of negligence, insubordination and carelessness and he proposed the punishment of removal from service on the major charge of remaining absent for 14 years and also on the basis of other charges. The enquiry report submitted by Shri Deshmukh was forwarded by the Deputy Director of Education, Aurangabad, to the petitioner vide letter dated 2nd January, 1979 and the said authority had proposed to remove the petitioner from service on the ground that he had been found guilty of the charges levelled against him by the Enquiry Officer. He was called upon to submit his explanation within 15 days. However, prior to the appointment of the Enquiry Officer in May, 1978, the Deputy Director of Education had approached the Secretary to the Government, Education Department, vide his letter dated 25th January, 1974, pointing out that the Divisional Commissioner could not be the competent authority to take disciplinary action against the petitioner and the power of major punishment to be inflicted on an allocated Government servant vested with the Government in the Administrative Department concerned and, therefore, it was the Government alone to inflict the major punishment on the petitioner. A proposal regarding punishment to be inflicted on the petitioner was purportedly submitted to the Government vide his letter dated 8-5-1972, By communication dated 8-10-1980, the Department of Education of the Government of Maharashtra informed the Director of Education, that under the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979 [For short, hereinafter referred as "M.C.S. (D. A.) Rules"], it was the Deputy Director of Education who was the competent disciplinary authority for the petitioner. In spite of these clarifications, nothing further was done in respect of the second show cause notice issued to the petitioner on 2nd/3rd January, 1979 by the Deputy Director of Education. It appears that the entire case was put in cold storage and the petitioner attained the age of superannuation on 11-10-1984 and he stood retired on reaching the age of superannuation on 31-10-1984 in view of the provisions of Rule 10(1) of the Maharashtra Civil Services (Pension) Rules, 1981 (For short, hereinafter referred to as "the Pension Rules").

6. By letter dated 10-11-1986, he was informed that the final decision would be

taken soon. As no further progress was intimated to the petitioner, he approached this Court by filing Writ Petition No. 941/1987 on or about 13th April, 1987 and challenged the legality of the suspension order dated 2-11-1963 along with its continuation and prayed for subsistence allowance, as well as, salary for the entire period right from 2-11-1962. The Junior Administrative Officer in the office of the Deputy Director of Education, Aurangabad, filed affidavit in reply in Writ Petition No. 941/1987 and stated that the petitioner was dismissed from service by order dated 6th January, 1987. However, a copy of the same order of dismissal was not placed on record along with the said affidavit in reply. The Junior Assistant Education Officer, Zilla Parishad, Nanded, in his affidavit in reply dated 24th November, 1987 also reiterated the factum of the dismissal order dated 6th January, 1987 and brought the same on record. The petitioner was thus made aware of the dismissal order in November/December, 1987 and it was contended that the said order could not be served by the Principal of the Government Junior College of Education, as the petitioner's address was not available. The said dismissal order stated that as per the Enquiry Officer's Report, the petitioner remained absent continuously for 7-8 years and he was being dismissed for the same reason. The order of suspension dated 2-11-1963 passed by the Chief Executive Officer, Zilla Parishad, Nanded, was approved under Rule 39 of the M.C.S. (D. & A.) Rules vide the said dismissal order.

7. Writ Petition No. 941/1987 came to be transferred to the Maharashtra Administrative Tribunal on its establishment and it came to be re-registered as Transfer Application No. 4 of 1996. It was decided by the Division Bench of the Tribunal on 25-9-1998 and was partly allowed by directing payment of salary at the rate of Rs. 700/- from 4-8-1963 to 2-11-1963 and payment of subsistence allowance from 2-11-1963 to 3-11-1978 and further payment of subsistence allowance from 4-11-1978 to 11-10-1984 with interest at 12 percent. This order came to be challenged in Writ Petition No. 1454/1999 and the said petition was allowed and the order of the Tribunal dated 25-9-1998 came to be quashed and set aside by following the decision of the Apex Court in the case of State of Maharashtra and Others Vs. Chhaya and Others, , which decision had confirmed the view of this Court, that a Division Bench of the Tribunal must consist of a Judicial and Administrative Member and the Chairman, though a retired Judge of the High Court, could not be treated as an Administrative Member in a Division Bench consisting of himself and a Judicial Member. In the second round, the Transfer Application came to be placed before the Tribunal and by order dated 9-11-2000, it came to be decided but with a split verdict of the Division Bench. It was thereupon placed before the Honourable Chairman of the Tribunal and by his order dated 14-12-2000, he agreed with the view taken by the Judicial Member and the said majority view was pronounced by order dated 6-2-2001.

8. Writ Petition No. 3441 of 2001 came to be filed by the Chief Executive Officer, Zilla Parishad, Nanded, assailing the order passed by the Tribunal, directing payment of salary as well as subsistence allowance. This petition was allowed by us vide our decision dated 21st March, 2002 and Transfer Application No. 4/1996

came to be remanded for fresh decisions on the points set out therein. On remand, it appears that the petitioner moved Miscellaneous Application No. 182/2002 for challenging the dismissal order dated 6-1-1987, for the first time, and may be pursuant to the observations made by us in our decision of remand. This application, as well as, the Transfer Application No. 4/1996 has been dismissed by the Tribunal, on the ground of delays and laches.

9. This petition raises the following issues for our considerations :

(A) Whether the order of suspension dated 2-11-1963 and its continuation is legal and valid;

(B) Whether the petitioner was entitled for payment of salary for the period from 2-11-1962 to 1-11-1963 and for the payment of subsistence allowance or salary from 2-11-1963 till the date of his superannuation;

(C) Whether the challenge to the suspension order dated 2-11-1963 and also the relief for payment of salary, as well as, subsistence allowance was hit by limitation u/s 21 of the Administrative Tribunals Act, 1985 (For short, hereinafter referred to as "the Act");

(D) Whether the dismissal order dated 6-1-1987 is vitiated on account of non-payment of salary and subsistence allowance, during the period of suspension;

(E) Whether the said dismissal order is a nullity in law; and

(F) Whether the challenge to the dismissal order suffers from delays and laches.

10. The order of suspension dated 2-11-1963 was issued by the Chief Executive Officer, Zilla Parishad, Nanded, purportedly pursuant to the directions issued by the Divisional Commissioner, Aurangabad, on 26-10-1963. The reason for suspension, as set out in the order was that the petitioner was found to be unsuitable as a trainee and he had become a nuisance to the training centre at Udaipur. The suspension order did not indicate that a departmental enquiry was contemplated against the petitioner into the alleged act of becoming a nuisance to the training centre. This order was purportedly passed under Rule 156 of the B.C.S.R. However, the said rule deals with suspension of a Government servant under arrest or against whom proceedings have been taken either for his arrest for debt, or on a criminal charge, or who is detained under any law providing for preventive detention. It is thus clear that the provisions of Rule 156 of the B.C.S.R. were not applicable in the case of the petitioner on the charge of his becoming a nuisance at the training centre at Udaipur and, more so, when the suspension order did not indicate that either a criminal case was registered against him or he was detained by the Police.

11. There is no dispute between the Zilla Parishad, as well as, the Education Department, that the petitioner was all along a Government servant and he was attached to the Zilla Parishad, Nanded, temporarily. The suspension order dated 2-11-1964 was passed by the Chief Executive Officer, Zilla Parishad, Nanded,

solely as per the directions of the Divisional Commissioner, Aurangabad, vide his communication dated 26-10-1963. Section 253-A came to be incorporated under the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961, by amendment Maharashtra 43 of 1964. The said section deals with the power of State Government to allot Government Servants, etc. for a limited period. The Chief Executive Officer, Zilla Parishad, had no authority either under the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 or the B.C.S.R. which was applicable to the petitioner at the time when the suspension order was issued. This is also clear from the note dated 8/9th March, 1966 put up by the Deputy Director of Education, Aurangabad, to the Director of Education, pointing out that the suspension order dated 2-11-1963 issued by the Chief Executive Officer was invalid in view of the Government Circular dated 1-4-1965. The Under Secretary to the Government of Maharashtra in the Rural Development Department, by his letter dated 12th August, 1965, addressed to the Chief Executive Officer, Zilla Parishad, Nanded, intimated that the major punishment could be inflicted on the petitioner only after he was repatriated to the Education Department in view of the Government Resolution dated 29-8-1964.

12. The petitioner's service from 1-11-1956 was governed by the B.C.S.R. and subsequently under the M.C.S. (D. & A.) Rules. Rule 6 of the M.C.S. (D. & A.) Rules is regarding disciplinary authorities for imposing penalty specified in Rule 5 on any Government servant. Whereas Rule 7 deals with the authority to institute proceedings and Rule 8 deals with the procedure for imposing major penalties. The Deputy Director of Education is the disciplinary authority under Rule 6 of M.S.C.R. and not the Chief Executive Officer of Zilla Parishad. No departmental proceedings were initiated against the petitioner till 30-11-1968 and the record shows that right from the day the suspension order was issued, the Chief Executive Officer, Zilla Parishad, Nanded, was engaged in communications with the Department of Education, pointing out that the petitioner was not an employee of the Zilla Parishad nor he was deputed in the service of the Zilla Parishad and, therefore, further proceedings were required to be taken by the Education Department alone. Nothing was done. Thus, the suspension order was issued by an officer who was not a disciplinary authority in respect of the petitioner and the suspension order was continued after 30-12-1968 and thereafter the charge-sheet was issued on 10-7-1978, while he continued to be under suspension.

13. It is well established that the order of suspension cannot be issued as a matter of routine and an order of suspension can be issued when a disciplinary enquiry is pending or is contemplated, as is clear from Rule 4(1) of the M.C.S. Rules and for the other reasons stated therein. In the case of *Devidas Tulshiram Bute v. State of Maharashtra* 1999 (1) C.L.R. 661, nine officers of the State Government in Co-operative Department, came to be suspended by an order dated 29th June, 1998, pursuant to the assurance given by the Minister concerned on the floor of the House. This Court while staying the suspension order by the interlocutory order dated 18-11-1998, observed as under:

"During the hearing for admission of this petition, we specifically asked the State Government as to whether any departmental inquiry has been commenced against any one of the petitioners and the reply on behalf of the Government was that no departmental inquiry has been commenced against any of the petitioners to this date. To our specific query as to whether any of the petitioners is being criminally proceeded against and whether any criminal investigation by the police is being conducted against any one of them. Shri Namjoshi, the learned Special Prosecutor made a statement that as of today no F.I.R. or investigation is pending against any one of the petitioners. The record prima facie shows that none of the petitioners is being proceeded against departmentally. It is clear that none of them is being proceeded against criminally, no complaint has been filed against any one of them and no investigation whatsoever has been commenced against any one of them.

It is settled law by several judgments of this Court as well as the Apex Court that suspension is not to be resorted to as a matter of rule. It is to be taken as a last resort and only if the inquiry cannot be fairly and satisfactorily completed without the delinquent officer being away from the post."

14. We must also consider the provisions of Rule 14 of the M.C.S. (D. & A.) Rules. This provision empowers the Chief Executive Officer of the Zilla Parishad as an appointing authority for the purpose of placing a Government servant under suspension and to initiate disciplinary proceedings against him, if the services of the Government Servant are lent to the Zilla Parishad. An analogous provision to Rule 14 of the M.C.S. (D. & A.) Rules was not incorporated under the B.C.S.R. and, therefore, it is clear that the Chief Executive Officer, Zilla Parishad, Nanded, when he issued the order of suspension dated 2-11-1963 did not have such a right.

15. Indefinite continuation of suspension has always been declared invalid by a catena of decisions where it was demonstrated that for continuation of the suspension, the employee was not responsible. In addition, if the disciplinary authority did not proceed by issuing chargesheet and appointing the Enquiry Officer so as to initiate departmental proceedings within a reasonable period from the date of suspension, such suspension order continued for years together, gets vitiated and, therefore, it is required to be declared as invalid as well as illegal. We may in this regard refer to the decision of the Apex Court in the case of K. Sukhendar Reddy Vs. State of Andhra Pradesh and Another, .

16. The respondents have taken a lame defence that the petitioner was absconding and this allegation is not only imaginary but far from the record. As noted earlier, the petitioner had addressed a letter dated 6-10-1964 to the Chief Executive Officer, Zilla Parishad, Nanded, regarding his change of address and praying for the release of salary from 1-11-1962 as well as the payment of subsistence allowance from 2-11-1963. He had given his new address, as well, in the said communication. The letter dated 1st June, 1971 addressed by the Chief Executive Officer, Zilla Parishad, Nanded, to the Divisional Commissioner,

Aurangabad, recites the petitioner's continued request for release of subsistence allowance and guidance in that regard was sought, more so, in view of the order dated 4-1-1969 passed by the Deputy Director of Education u/s 253A of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961. It is also an admitted fact that the petitioner had submitted a representation on 5th April, 1971 addressed to the Principal, Junior College of Education at Nanded, stating that he had reported for duty in the office of the Chief Executive Officer at Nanded on 20-3-1971 and he was informed that consequent to the order passed by the Deputy Director of Education on 4-1-1969, he was repatriated and posted back in the Department of Education. He reiterated his demand for payment of salary, as well as subsistence allowance and stated that the order of suspension ceased to exist after he reported for duty on 20-3-1971. It is clear that this representation remained unanswered. The petitioner had also addressed a letter dated 10-5-1964 to the Deputy Director of Education and brought to his attention, that he was illegally suspended. The charge-sheet dated 10-7-1978 was served on the petitioner. He had furnished his reply dated 15-7-1978. No doubt, he did not participate in the domestic enquiry but nonetheless the enquiry was completed and the report dated 2-11-1979 came to be submitted. The story of the petitioner "absconding" has been invented by the respondents solely on the ground that the petitioner was in Port Blair in 1964 and he had sought permission to join the employment of the State of Rajasthan.

17. Rule 16(1) of the Maharashtra Civil Services (Conduct) Rules, 1979, states that no Government servant shall, except with the previous sanction of the Government, engage directly or indirectly in any trade or business or undertake any other employment. Seeking permission to join the employment of another State did not mean that the petitioner had undertaken or engaged himself in the employment of the State of Rajasthan. Even though he was at Port Blair in 1964, the respondents could not take a plea that the petitioner had abandoned the Government service, more so, when he was under suspension and he was driven to starvation on account of non-payment of salary from 1-11-1962 onwards. The Tribunal, in its order dated 25-9-1998 had specifically recorded a finding that the petitioner was due to receive his salary from 2-11-1963. No defence has come forward as to why the petitioner was not paid salary for the period prior to his suspension by order dated 2-11-1963 and it is evident that even before he was deputed for training at Udaipur, he was not paid his salary. The respondents have thus turned their back as an employer to their responsibility of payment of salary and initiate the disciplinary proceedings within a reasonable time from the date of issuance of the suspension order. Even otherwise, the provisions analogous to Rule 16(1) of the Maharashtra Civil Services (Conduct) Rules appear in Rule 638 of the B.C.S.R. and it is stated that a Government servant on leave may not take any service or accept any employment without obtaining the sanction of a competent authority. In neither case, the petitioner had acted contrary to the Maharashtra Civil Services (Conduct) Rules or the B.C.S.R. Till 1979, the petitioner was governed by the

provisions of Rule 151 of B.C.S.R. for payment of subsistence allowance.

As per provisions of Rule 151(1)(ii)(a) of the B.C.S.R., a Government servant under suspension was entitled for subsistence allowance at an amount equal to the leave salary which the Government servant would have drawn if he had been on leave on half average pay or on half pay and in addition dearness allowance based on such leave salary. The proviso states that where the period of suspension exceeds six months, the authority which made or is deemed to have made the order of suspension shall be competent to vary the amount of subsistence allowance for the subsequent period. It is nowhere provided in the said rule, that it does not apply unless the Government servant under suspension has furnished an undertaking in the prescribed form, as claimed by the respondents and accepted by the Tribunal. The respondents have probably placed reliance on instructions which state that no payment under Sub-clause (1) of Rule 151 shall be made unless the Government servant furnishes a certificate to the effect that he had not accepted any private employment or engaged himself in trade or business during the period in question. The petitioner's letters referred to hereinabove right from 1964 to 1978 were the proof, sufficient to meet the requirement of these instructions. The defence thus taken by the respondents, that the petitioner was absconding and, therefore, the enquiry could not be initiated or he was not entitled for subsistence allowance, is farfetched and imaginary.

18. Coming to the issue of the challenge to the suspension order, suffering from delays and laches, we do not agree with the view taken by the Tribunal in the impugned decision. When Writ Petition No. 941/1987 was admitted by this Court, the issue of delays or laches was not left open and the petition came to be transferred and re-registered as Transfer Application No. 4/1996. For this application, which came to be transferred and was not filed before the Tribunal, in our considered view, the provisions of Section 21 of the Act did not apply and, therefore, it was not open for the Tribunal to hold that the approach of the petitioner in challenging the suspension order suffered from delays and laches and that the provisions of Section 21 came in his way. The language of Section 21 of the Act is unambiguous and said section does not apply to the applications which have been registered on transfer either from the High Court or from the Subordinate Courts. Even otherwise, the petitioner had a continuous cause of action in challenging the suspension order. At the first place, he was not paid his salary/subsistence allowance right from 1962 and no disciplinary action was initiated by issuing a charge-sheet till May, 1978. Though the second show cause notice was issued on 2/3rd January, 1979, furnishing a copy of the Enquiry Officer's Report, no further action was taken by the respondents till the petitioner reached the age of superannuation in October, 1984. His pensionary dues were not settled and, in addition, by communication dated 10-11-1986, he was informed by the Department of Education, Zilla Parishad, Nanded, that the enquiry initiated against him was not concluded and the final decision would be taken as early as possible, as was informed to him earlier by letter dated

22-10-1986 by the Deputy Director of Education at Aurangabad. The Tribunal failed in gross error in holding that the petitioner's challenge to the order of suspension suffered from delays and laches and, therefore, the provisions of Section 21 of the Act, came in his way.

19. Now, coming to the legality and validity of the dismissal order, we must note that it suffers from infirmities on all counts, the first and foremost being the denial of salary and subsistence allowance right from November, 1962 or August, 1963 onwards. The petitioner was driven to starvation by the acts of the respondents and no justification has come forward on behalf of the respondents regarding this failure except to say that the petitioner himself remained absent from duty and he was absconding. Such a statement is not only based on conjectures but it appears to be wholly speculative. In spite of our repeated queries and having examined all the files submitted before us thoroughly, there is neither any document to show that the petitioner had accepted any other employment, private or public, after he was suspended nor is there anything to show that he was issued a show cause notice either by the Zilla Parishad or by the Deputy Director of Education, calling upon him to show cause in respect of this alleged voluntary abandonment of service or the petitioner absconding from duty.

A Constitution Bench of the Supreme Court in the case of Ghanshyam Das Shrivastava Vs. State of Madhya Pradesh, , while dealing with the provisions of Article 311(2) of the Constitution, held, inter alia, that the delinquent Government Officer failing to attend enquiry due to paucity of funds resulting from non-payment of subsistence allowance, vitiates the enquiry. The officer was placed under suspension by order dated 21st October, 1964 with effect from 30th October, 1964 and was directed to remain at Jagdalpur during the said period. The departmental enquiry was initiated and he did not participate in the same. On 28th May, 1965, the Enquiry Officer submitted his report holding all the charges proved and recommended that the delinquent be dismissed from service, which order was passed on 8th June, 1966. His challenge by filing a writ petition failed before the High Court at Jabalpur. He stated before the Apex Court, that he could not defend himself before the Enquiry Officer, more so, because he was staying at Rewa during the suspension which was about 500 kilometers away from Jagdalpur where the enquiry was conducted and no subsistence allowance was paid to him on account of which he had no money to go to Jagdalpur to face the enquiry. The Supreme Court declared that the enquiry was vitiated and the entire action including the order of dismissal was set aside.

20. In the instant case, right from October, 1964, the petitioner kept on informing the respondents his address at Hyderabad and persisted his claim for payment of salary, subsistence allowance, as well as, illegal action of suspension. The papers indicate that the Director of Education had submitted the disciplinary enquiry papers to the State Government way back in 1972 and nothing further happened till May 1978 when the Enquiry Officer was appointed. The laxity

shown initially by the Chief Executive Officer, Zilla Parishad, Nanded, and subsequently by the Deputy Director of Education at Aurangabad, in dealing with the petitioner's case, smacks of nothing short of utter negligence. As the petitioner was kept away from work by the respondents, by denying him the benefit of his salary/subsistence allowance, the entire proceedings resulting into the dismissal order dated 6-1-1987 are required to be held as vitiated.

21. As per the provisions of Rule 10(1) of the Pension Rules, the petitioner attained the age of superannuation on 11th October, 1984 and he stood retired on superannuation on 31st October, 1984 (on attaining the age of 58 years). This retirement on reaching the age of superannuation is automatic unless an order of extension is passed by the competent authority. The retention of the petitioner in the Government service was never ordered by the competent authority by invoking the powers under Rule 12 of the Pension Rules. It is also well known that, in case, the Government servant has been charged of causing loss to the exchequer, misappropriation of funds, falsification of record or any such serious misconduct, the disciplinary enquiry could be continued or initiated even after reaching the age of superannuation. In case of an enquiry which is initiated while the Government servant was in service, it is necessary that an order is passed intimating the delinquent that the enquiry proceedings shall be continued even after he had attained the age of superannuation, lest it shall be presumed that the enquiry came to an end and the delinquent was allowed to retire honourably. On reaching the age of superannuation, the retirement is automatic unless the competent authority passes an order otherwise. This is one more reason of the order of dismissal dated 6-1-1987 being illegal and void ab initio.

22. The charge-sheet dated 10-7-1978 had levelled in all nine charges against the petitioner and they could be listed as under:

"(1) That, while undergoing training for the 7th Job course of Social Education Organizers" Training Centre at Udaipur, held from 10-8-1963, you have violated the rules of discipline for trainees and showed indifference and negligence in your duties as a trainee;

(2) That, you were asked to vacate hostel by the Deputy Director, Vidya Bhawan Social Education Centre, Udaipur, during training period for the course of irritation of rules of the hostel, but you failed to comply with his instructions deliberately and created nuisance;

(3) That, you were ordered to report to Nanded after termination of your deputation by the Chief Executive Officer, Zilla Parishad, Nanded, vide his letter dated 2-1-1964 but you failed to do so and proceeded to Port Blair (Andaman) without permission from the competent authority;

(4) That, you have sought employment with the Government of Rajasthan without obtaining prior permission of Zilla Parishad, Nanded;

(5) In spite of clear instructions from the Administration Office, Zilla Parishad,

Nanded, not to leave P. S. Nanded without prior permission during suspension period, you left Nanded under some pretext, or other and did not turn up;

(6) In order to avoid enquiry proceedings, you have given vague and bogus address and intentionally delayed the enquiry for which the responsibility of avoiding enquiry lies on you;

(7) You are in habit of making unnecessary and unwanted correspondence with the higher authorities by name by disregarding the proper channel;

(8) The permission to leave headquarters for 2 days during suspension period was granted by B.D.O., Panchayat Samiti, Nanded, But since 24-8-1964, you have neither reported to P. S. Nanded or to Junior College of Education, Nanded, after repatriation. Thus, absconded and remained unauthorized absent from duty till this time for about 14 years;

(9) Though the punishment such as warning, holding of 3 increments was imposed on you on account of your misbehaviour in P. S. meeting held on 4-3-1963, non-submission of tour diaries, not attending the usual duty, not taking over the charge of the section etc. you cared less for this and did not show any improvement in your daily routine and attitude."

23. We have elaborately dealt with the factual position and more so, in regard to the non-availability of any material alleging the misbehaviour of the petitioner which became a nuisance in the training centre. Even in support of the charge of indifference and negligence as a trainee, there is no material on record in the form of a report from the training centre by the competent authority including the allegation that he failed to comply with the instructions of the Deputy Director of Vidya Bhavan Social Education Centre at Udaipur. There is nothing on record that the petitioner came to be employed under the employment of Government of Rajasthan at any time. While he was under suspension and that too without payment of salary/subsistence allowance, he could not have been forced to be available at Nanded alone and the contention that by leaving headquarters he committed misconduct, is far-fetched. In his letter dated 6-10-1964, the petitioner had furnished his address at Hyderabad in clear and correct words and this address was again intimated to the respondents from time to time. He had also stated in the said letter that the earlier address of C/o. Post Master, Hyderabad, was temporary and the new address was, therefore, set out. The allegation that the petitioner remained absent for a long period of 14 years and absconded is again a fiction of imagination and we may refer to the petitioner's representation dated 5th April, 1971 wherein he stated that on 20-3-1971, after waiting for a long period of suspension, he reported for duty to the Chief Executive Officer, Nanded, on 20-3-1971 and he was informed about the repatriation order and was directed to report to the Deputy Director of Education. When he sought the relieving letter, the same was not given to him. Subsequently, in his letter dated 15-7-1978, in reply to the charge-sheet, he again reiterated regarding the illegal suspension being continued indefinitely. It is

evident that the Enquiry Officer in his report dated 2-11- 1978 did not take into consideration the explanation furnished by the petitioner in reply to each of the charges.

24. The dismissal order dated 6-1-1987 in the first part, has regularized the petitioner's suspension, as ordered by the Chief Executive Officer, Zilla Parishad, Nanded, and in the second part, it states that the petitioner was found to be guilty of remaining absent for 7 to 8 years by the Enquiry Officer and, therefore, he was being dismissed from service right from the date of suspension. The charge-sheet stated that the petitioner remained absent for 14 years and the dismissal order stated that the Enquiry Officer held him guilty of remaining him absent for 7 to 8 years. Notwithstanding this controversy being resolved, it is pertinent to note that the dismissal by the said order is retrospective from the date of suspension i.e. 2-11-1963. In service jurisprudence, the retrospective dismissal is invalid and thus void ab initio.

In this regard, we may refer to a Division Bench decision of this Court in the case of Assaram Raibhah Dhage v. Executive Engineer and Ors. 1989 (2) C.L.R. 331. The dismissal order impugned was dated 11th March 1986 and it stated that the termination was ordered retrospectively with effect from 1st March, 1986. While setting aside the said order of termination and directing full payment of salary, as if the petitioner had continued to be in employment, a Division Bench of this Court, observed in para 3 of the judgment, as under:

"The petitioner's learned Counsel Miss Purohit is perfectly justified in making a grievance that it is unthinkable that an employee's services can be terminated with retrospective effect, as done in the present case. We join learned Counsel in her astonishment. For that matter, one of the conditions in the letter of appointment is that if the petitioner desired to resign he was liable to pay one month's salary or give one month's notice. It is, therefore, ironical that on the other hand, the petitioner's services were terminated with retrospective effect."

25. Under the Pension Rules, a Government servant is required to give notice for retirement prior to the age of superannuation or salary in lieu of notice. Similarly, if the officer is being compulsorily retired in public interest, he is required to be given three months salary or pay in lieu thereof. The petitioner's dismissal from service with retrospective effect viz., the date of order of suspension i.e. 2-11-1963, has astonished us, if not, shocked, on the face of the facts of this case and more particularly, the apathy shown by the respondents in the petitioner's case for more than 20 years. No doubt, the disciplinary authority has the right to award the punishment of dismissal or removal from service, consequent to the disciplinary proceedings initiated against the service rules. In the instant case, the question of treating the order of dismissal as operative from 6.1.1987 by following the decision of the Apex Court, in the case of The Gujarat Mineral Development Corporation Vs. Shri P.H. Brahmbhatt, , does not arise for the simple reason that the petitioner had already retired on reaching the age of superannuation on 31st October, 1984 and the disciplinary proceedings initiated

against him stood automatically lapsed in the absence of any specific order passed by the competent authority, continuing with the proceedings. It is worthy to note that once the enquiry was completed and the Enquiry Officer's report was forwarded to the petitioner vide the second show cause notice dated 2nd/3rd January, 1979, nothing further remained in the disciplinary enquiry had for all practical purposes, the enquiry part of it stood concluded. The competent, authority failed to act on the said show cause notice even till the petitioner reached the age of superannuation and stood superannuated on 31-10-1984 by operation of Rule 10(1) of the Pension Rules.

26. We now come to the last issue of the Tribunal's order dismissing the Miscellaneous Civil Application for amendment on the ground of delay. If regards be had to Section 21 of the Act, there is an enabling provision empowering the Tribunal to entertain the applications filed beyond limitation, if the Tribunal is satisfied of the reasons explained. In a belated challenge to an order of dismissal, the Tribunal is required to examine the same and record a finding. In the instant case, the Tribunal stated thus :--

"There is no dispute that even before the writ petition was received by Aurangabad Bench of the Tribunal, the respondents had already filed their affidavit in reply together with certain documents. Most of the documents comprising the departmental enquiry papers and the order of dismissal dated 6-1-1987, Thus, when the reply was filed, as on that date the petitioner was aware that an order of dismissal was passed by the respondents. Then the matter went to the High Court on a couple of occasions. Even in the subsequent order dated 21st March, 2002, it has been observed by the High Court that the question of delay will have to be considered, provided the petitioner seeks amendment to the petition. In that context, the petitioner claims that he is ignorant of entire proceedings. He himself had appeared before the High Court. He must have seen the order of dismissal when he had argued the case before the High Court. He has also appeared when the O. A. was disposed of by this Tribunal of Aurangabad Bench. Thus, during the entire period, the petitioner was aware of the order of dismissal. Despite this at no stage, he had made any attempt, seeking the declaration that the said order be quashed and set aside.

We are, therefore, inclined to hold that the order dated 6th January, 1987 cannot be set aside in the manner prayed for by the petitioner. That relief is hopelessly barred by the period of limitation. Thus, the M. A. seeking the amendment will have to be dismissed."

We agree with the Tribunal, that the petitioner was aware about the dismissal order when the respondents filed affidavit in reply in Writ Petition No. 941/1987 and that he did not take any steps to amend the petition or the Transfer Application in Writ Petition No. 1454/1999. Similarly, even in the second round, when he was impleaded as respondent in Writ Petition No. 3441/2001, he had not taken steps for challenging the order of dismissal. We cannot be unmindful to the fact that the Transfer Application No. 4/1996 was allowed by the Tribunal and

he was directed to be paid the monetary benefits till he reached the age of superannuation, by order dated 25-9-1998. After Writ Petition No. 1454/1999 was disposed of and remanded by us by order dated 29-5-1999, the Transfer Application No. 4/1996 came to be decided by a Full Bench of the Tribunal and by majority decision, his claim for full salary for the period from 4-8-1963 to 2-11-1963, minus Rs. 700/-, was allowed and, in addition, his claim for subsistence allowance for the period from 2-11-1963 to 3-11-1978 at half the rate was upheld. The claim for subsistence allowance for the period from 4-11-1978 to 11-10-1984 was allowed with interest at 12 percent, by order dated 6-2-2001. The petitioner appeared as party in person and on attaining the age of superannuation, he stood retired on 31-10-1984 and, therefore, could not expect anything more than the payment of salary for the intervening period. Under such circumstances, the petitioner's challenge to the order of dismissal in the Miscellaneous Application filed in the last round before the Tribunal could not have been rejected and such a rejection would not be free from being called as a highly technical approach.

In the case of A. Sagayanathan and others Vs. Divisional Personal Officer, S.B.C. Division, Southern Railway, Bangalore, , a three Judges Bench of the Supreme Court was dealing with a case of promotion at the instance of the railway employee. The promotions effected in 1983 were the subject-matter of challenge and the Tribunal had found that the appellants were too late in agitating their grievance and solely on that ground the Tribunal did not enter into the merits of the appellant's complaint. While remanding the matter for fresh decision to the Tribunal, the Apex Court observed in para 4, thus:--

"It is not disputed that the juniors of the appellants had been promoted. However, respondent's Counsel submits that the juniors were promoted for justifiable reasons. Whatever may be the reasons which promoted the respondent to promote the juniors in preference to the appellants, the fact is that the appellants had a genuine grievance insofar as they had been superseded by their juniors. This was precisely the dispute which the Tribunal ought to have considered, but unfortunately it did not do so by reason of the delay."

27. Thus, the issue of delay by itself need not detain the Tribunal in entertaining a genuine grievance agitated before it and more specifically the issue of recovery of salary, subsistence allowance or the punishment of dismissal or removal. In the instant case, we have noted that ex facie the actions of the respondents could not be sustained and it is manifest from the record that the respondents acted in utter disregard to the service rules and the service jurisprudence. In addition, the Tribunal failed to examine the implications of such a dismissal order purportedly passed on 6-1-1987 when the petitioner had retired from Government service as on 31-10-1984 pursuant to the provisions of Rule 10(1) of the Pension Rules. In service matters, when the grievance relates to continued denial of legitimate financial dues and the punishment of loss of job, a combined approach of head and heart is required to be followed. This is not a case where

the delinquent employees sat quiet for all the times and suddenly appeared before the Court/Tribunal. In fact, the record suggests that he was persistently following the respondents and praying from time to time the release of salary, as well as, subsistence allowance. The last letter of 10th November, 1986 addressed by the Education Department, Zilla Parishad, Nanded, to the petitioner, also indicated that the enquiry initiated against him awaited the final decision from the competent authority which was promised to be expedited.

28. In the result, we allow the petition and quash and set aside the impugned order of the Tribunal. We hold that:

- (a) the order of suspension dated 2-11- 1963 is illegal and void ab initio,
- (b) the disciplinary proceedings initiated against the petitioner are vitiated on account of non-payment of salary and subsistence allowance in view of the law laid down by the Constitution Bench of the Apex Court in the case of Ghanshyam Das Shrivastava Vs. State of Madhya Pradesh, .
- (c) the petitioner was all along an employee of the State Government (Department of Education) and he is entitled for salary for the entire period till 31-10-1984 as if on duty,
- (d) the dismissal order dated 6th January, 1987 is a nullity in law, and
- (e) the challenge to the suspension order did not suffer from delays/laches.

We direct the Deputy Director of Education, Aurangabad, to calculate the salary of the petitioner from August, 1963 onwards till 31-10-1984 and by deducting the amount already deposited by the Chief Executive Officer, Zilla Parishad, Nanded, as well as, the Deputy Director of Education, with the Tribunal, deposit the balance amount with the Registry of this Court, within a period of four weeks from today.

The balance amount deposited by the Chief Executive Officer, Zilla Parishad, Nanded, as well as, the Deputy Director of Education, Aurangabad, and lying with the Tribunal, shall be paid to the petitioner forthwith on his approach to the Registry of the Tribunal.

The Chief Executive Officer, Zilla Parishad, Nanded, shall not be entitled to claim the refund of the amount deposited with the Tribunal even from the Government (Department of Education).

29. Rule made absolute in the above terms. No costs.

30. Writ to go forthwith.