

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.2581 OF 2005

Asharam s/o Muktaji Shikare
(Since deceased through his L.Rs.)

1. Vimal w/o. Asaram Shikare,
age : 68 years, Occu.: Household,
2. Dnyandeo s/o Asaram Shikare,
age : 49 years, Occu.: Agriculture,
3. Sanjay s/o Asaram Shikare,
Age : 40 years, Occu.: Agriculture,
All r/o. Umbre, Tal. Rahuri,
District Ahmednagar

PETITIONERS

VERSUS

1. The State of Maharashtra,
Through Secretary,
Rural Development Department,
Maharashtra State, Mantralaya,
Mumbai
2. The Chief Executive Officer,
Zilla Parishad, Ahmednagar
3. The Education Officer (Primary),
Zilla Parishad, Ahmednagar
4. The Block Education Officer,
P.S. Akole,
Dist. Ahmednagar

RESPONDENTS

Mr. A.S. Shelke, Advocate for the Petitioners
Mr. S.B. Pulkundwar, A.G.P. for respondent No.1
Mr. S.T. Shelke, Advocate for respondent Nos.2 to 4

**CORAM : T.V. NALAWADE AND
SANGITRAO S. PATIL, JJ.**

JUDGMENT RESERVED ON : 20th JUNE, 2017

JUDGMENT PRONOUNCED ON : 11th JULY, 2017

JUDGMENT (PER : SANGITRAO S. PATIL, J.) :

Heard the learned counsel for the contesting parties and the learned A.G.P.

2. The deceased petitioner was serving as a Primary Teacher in Zilla Parishad, Ahmednagar. Crime No. III-10/27 of 1987 was registered against him in Police Station, Akole, District Ahmednagar for the offence punishable under Section 66 (1) (b) of the Bombay Prohibition Act and under Section 110 punishable under Section 117 of the Bombay Police Act. He was arrested on 26th February, 1987 and produced on 27th February, 1987 before the learned Judicial Magistrate First Class, Akole with the chargesheet. The deceased petitioner pleaded guilty and accordingly, he was convicted and sentenced to suffer imprisonment till rising of the Court and to pay a fine of Rs. 200/-, in default to suffer simple imprisonment for ten days.

3. Respondent No. 2 – Chief Executive Officer,

Zilla Parishad, Ahmednagar passed an order on 19th February, 1988 and dismissed the deceased petitioner from service on the ground that he was convicted and sentenced as stated above and the deceased petitioner himself had informed by letter dated 8th August, 1987 that he had not filed any appeal against his conviction and sentence.

4. It seems that the deceased petitioner then filed an appeal before the Sessions Court and then Revision Application No.116 of 1994 before the High Court against his conviction and sentence. The Revision Application came to be allowed and the conviction and sentence passed against the deceased petitioner came to be set aside and S.T.C. No.103/1987, in which he was convicted, came to be remanded for trial before the learned Judicial Magistrate First Class, Akole. Accordingly, the said case was re-tried and ultimately, the deceased petitioner came to be acquitted on 15th November, 2003. In the meanwhile, the deceased petitioner attained the age of superannuation on 31st March, 2002.

5. The petitioner made a representation before respondent No.2 on 27th November, 2003 and claimed salary

in respect of the period from the date of termination of his services till the date of his attaining the age of superannuation and all the retiral benefits including the pension and gratuity in respect of the period from 1st April, 2002 onwards.

6. Respondent No.2 passed an order on 16th November, 2004 and set aside the order dated 19th February, 1988 terminating the services of the deceased petitioner that was passed consequent upon his conviction and sentence and ordered that the deceased petitioner should be paid the admissible subsistence allowance under Rule 68 of the Maharashtra Civil Services (Joining Time, Foreign Service and Payment during Suspension, Dismissal and Removal) Rules, 1981 ("the Rules of 1981", for short), in respect of the period from 9th March, 1988 to 31st March, 2002. Respondent No.2 further issued a notice dated 16th November, 2004 to the deceased petitioner to show cause as to why the period from 9th March, 1988 to 31st March, 2002, which is the period of deemed suspension, should not be treated as the period of suspension only and why the said period should not be excluded from consideration for the purposes of salary, increments,

leave, pension, etc.

7. The deceased petitioner replied the show cause notice on 22nd November, 2004. He conceded to the statement made in the show cause notice dated 16th November, 2004 that the period from 9th March, 1988 to 31st March, 2002 should be treated as the period of suspension and further expressed his approval for payment of subsistence allowance only in respect of the said period. However, he requested respondent No.2 to treat the said period as qualifying service for the purpose of pension and prayed for grant of pension accordingly.

8. Respondent No. 2 considered the explanation of the deceased petitioner and passed the impugned order on 6th January, 2005 treating the period from 9th March, 1988 to 31st March, 2002 as the period of suspension only and ordered payment of subsistence allowance in respect of the said period. Respondent No.2 declined to treat the said period as a qualifying service for the purpose of pensionary benefits. The petitioner has challenged the said part of the order passed by respondent No.2 in the present petition.

9. During the pendency of the petition, due to demise of the petitioner, his widow and two sons, being his legal heirs, came to be subsisted in his place.

10. The learned counsel for the petitioners submits that respondent No.2 wrongly resorted to the provisions of Rule 70 of the Rules of 1981 for denying the claim of the petitioner for treating the period from 9th March, 1988 to 31st March, 2002 as a qualifying service for the purpose of pension. He further submits that the deceased petitioner was never suspended under any of the clauses under Rule 4 of the Maharashtra Zilla Parishads District Services (Discipline and Appeal) Rules, 1964 ("the Rules of 1964", for short). Therefore, neither Rule 70 nor Rule 72 of the Rules of 1981 was applicable and the deceased petitioner was entitled to claim full salary during the period from the date of his pension till the date of his attaining the age of superannuation and full pension after he attained the age of superannuation. In support of this contention, he relied on the judgment in the following cases:-

- (i) ***Baban Shriram Wafare Vs. Zilla Parishad, Ahmednagar, 2002 (3) Mh.L.J. 390***
- (ii) ***Balvantrai Ratilal Patel Vs. State of Maharashtra, AIR 1968 SC 800***
- (iii) ***Bhaurao Jairam Kadam Vs. Nanded Zilla Parishad, Nanded CLR 2000 3 322***
- (iv) ***Smt. Khairunnissa Rasool Golandaj Vs. State of Maharashtra (through the Secretary, Public Health Department) and the Commissioner Employees State Insurance Scheme, 2015 (3) ALL M.R. 287***
- (v) ***Nanuram Vs. State of Maharashtra and others 2017 (3) Mh.L.J. 251***
- (vi) ***Dnyaneshwar Vs. State of Maharashtra 2015 (1) Mh.L.J. 761***
- (vii) ***Dattatraya Vasudeo Kulkarni Vs. Director of Agriculture, Maharashtra and others 1984 Mh.L.J. 406***

11. On the other hand, the learned counsel for respondent nos.2 to 4 submits that the deceased petitioner, on his admitting guilt, was convicted and sentenced for the offence punishable under Section 66 (1) (b) of the Bombay Prohibition Act and under Section 110 punishable under Section 117 of the Bombay Police Act. He pointed out to the order dated 19th February, 1988 passed by respondent No.2 wherein there is specific mention that the petitioner himself informed respondent

No.2 vide letter dated 8th August, 1987 that he had not filed any appeal against his conviction and sentence. Therefore, the deceased petitioner came to be terminated from service. The order of termination was served on him on 9th March, 1988. He pointed out to the provisions of sub-rule (1) (b) of Rule 3 of the Rules of 1964. Respondent No.2 was empowered to place the deceased petitioner under suspension because of institution of criminal case for the above-mentioned offences in which he was convicted on the next date of his arrest. He submits that the deceased petitioner subsequently filed appeal and then revision challenging his conviction and sentence. According to him, the appeal and revision application filed by the deceased petitioner would amount to the continuation of the trial. Therefore, in view of sub-rule (4) of Rule 3, the deceased petitioner would be deemed to have been placed under suspension from the date of the order of his dismissal till the date on which he attained the age of superannuation. According to him, as per Rule 72 (5) of the Rules of 1981, the discretion was vested in respondent No. 2 to consider the representation of the deceased petitioner and to decide entitlement of the deceased petitioner to the pay/pension by treating the period of suspension as

the suspension only or a period spent on duty. He submits that in view of the judgment in the case of ***Vishwanath s/o Narayan Dhole Vs. The State of Maharashtra and others*** in ***Writ Petition No. 4065 of 1994***, decided by this Court on 23rd June, 2010, the deceased Petitioner was not entitled to claim that the period from the date of his dismissal to the date of his attaining the age of superannuation should be treated as a period spent on duty for the purposes of getting the pensionary benefits. He, therefore, prays that the Writ Petition may be dismissed.

12. As per the show-cause notice dated 16th November, 2004, respondent No. 2 specifically informed the deceased petitioner that as per the provisions of sub-rule (4) of Rule 3 of the Rules of 1964 and in view of the Government Resolution dated 12th June, 1986, the period from 9th March, 1988 to 31st March, 2002 is required to be treated as a period of suspension and accordingly, it has been treated so. He called upon the deceased petitioner to show cause as to why the subsistence allowance, which has been sanctioned to the deceased petitioner in respect of the said period, should not be confirmed and as to why the said period

should not be considered for the purpose of his pay, increments, leave, pension, etc.

13. In the reply dated 22nd November, 2004, the deceased petitioner unequivocally accepted the decision of respondent No. 2 to treat the period from 9th March, 1988 to 31st March, 2002 as the period of suspension of the deceased petitioner and to accept payment of subsistence allowance only in respect of that period. With this specific admission on the part of the deceased petitioner, he was estopped from challenging the said decision subsequently. Once it is held that the period from 9th March, 1988 to 31st March, 2002 was the period of deemed suspension of the deceased petitioner, the provisions of Rule 72 of the Rules of 1981 would be very much applicable. The said Rule empowered respondent No. 2 to use his discretion in the matter of deciding whether or not the above-referred period shall be treated as the period spent on duty and whether pay and allowances also should be paid or not. As per sub-rule (5) of Rule 72, respondent No. 2 had a discretion to decide as to what amount (not being the whole) of the pay and allowances should be paid to the deceased petitioner. Accordingly, respondent No. 2 rightly

issued a notice to show cause on 16th November, 2004 and after considering the reply dated 22nd November, 2004 filed by the deceased petitioner, passed the impugned order.

14. Though the petitioner was acquitted of the above mentioned offences considering the fact that the petitioner, who was holding a respectable post of a Primary Teacher, was convicted and sentenced on his own admission for the offences of unlawfully consuming liquor and misbehaving in a public place under the influence of liquor, respondent No. 2 rightly used his discretion in not treating the period from 9th March, 1988 to 31st March, 2002 as a period spent by the deceased petitioner on duty for the purpose of even pensionary benefits. Respondent No. 2 rightly refused the full salary to the deceased petitioner in respect of the said period and pension as well on the basis of full salary. The judgment in the case of **Vishwanath s/o Narayan Dhole** (supra), cited by the learned counsel for respondent No. 2, would be very much applicable to the facts of the present case.

15. It seems that respondent No. 2 has wrongly quoted Rule 70 instead of Rule 72 in the impugned order.

However, it is well settled that if the exercise of a power can be traced to a legitimate source, the fact that the same was purported to have been exercised under a different power does not vitiate the exercise of the power in question. Moreover, mere mention of a wrong provision of law, when the power exercised is available even though under a different provision, is by itself not sufficient to invalidate the exercise of that power.

16. Considering the peculiar facts of the present case we hold that respondent No. 2 has rightly exercised the discretion vested in him in refusing continuity of service for the purpose of pensionary benefits as claimed by the petitioner, the judgments cited above by the learned counsel for the petitioners, which are distinguishable on facts, would not be helpful to the petitioner to claim the reliefs prayed for.

17. Considering the above facts and circumstances of the case, we are not inclined to interfere with the impugned order passed by respondent No. 2. The Writ Petition is devoid of any substance. It is liable to be dismissed. In the result, we pass the following order:-

O R D E R

- (i) The Writ Petition is dismissed.
- (ii) Rule is discharged.
- (iii) No costs.

[SANGITRAO S. PATIL]
JUDGE

[T.V. NALAWADE]
JUDGE

npj/wp2581-2005