

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.6433 OF 2015

VINAYKRAO RANGNATHRAO MULI (DIED)

L.Rs.

SMT. PADMABAI W/o. VINAYAKRAO MULI ..PETITIONER

VERSUS

PATHRI MUNICIPAL COUNCIL AND OTHERS ..RESPONDENTS

...

Mr. Gopalrao Ambadasrao Borikar, Party in Person.

Mr. M. P. Tripathi, Advocate for Respondent No.1.

Mr. S. G. Karlekar, AGP for Respondent No.4.

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**CORAM : S. V. GANGAPURWALA &
SUNIL K. KOTWAL, JJ.**

Reserved for Judgment on : 18.07.2018.

Judgment Pronounced on : 24.08.2018.

JUDGMENT (Per S. V. Gangapurwala, J.) :-

1. Petitioner is legal heir of the deceased Vinayakrao Rangnathrao Muli. The deceased Vinayakrao was dismissed from service on 18.08.1992 by the Chief Officer (Respondent No.3). The petitioner assails the order of reversion of deceased Vinayakrao dated 30.04.1992 and the dismissal order dated 18.08.1992. The petitioner also assails the order as passed in the Civil Revision and claim consequential benefits, such as arrears of salary, pension, family pension to the petitioner.

2. The case has a chequered history.

3. The deceased Vinayakrao was appointed as a Naka Jawan in octroi section of Municipal Council, Pathri on 11.02.1965. The Municipal Council passed Resolution giving promotion to the deceased Vinayakrao as octroi clerk. The Resolution is passed on 25.06.1979.

4. It is the case of the petitioner that respondent no.3 did not enforce the Resolution of the Municipal Council. Therefore, deceased Vinayakrao filed an Appeal before respondent no.4. The respondent No.3 sought sanction for issuing formal order of promotion. On or about 7.11.1988, respondent No.4 informed respondent no.3 that there is no need of formal sanction order from Respondent No.4 for promoting deceased Vinayakrao. The deceased Vinayakrao was promoted as an octroi clerk under order of Respondent No.3 dated 13.01.1989 with effect from January 1989. The deceased Vinayakrao filed an Appeal before Respondent No.4 claiming deemed date of promotion as an octroi clerk with effect from 29.06.1979 with consequential benefits. It is the case of the petitioner that the Appeal filed by the petitioner for grant of deemed date was never decided. However, on 20.02.1992, respondent no.3 passed an order dated 30.04.1992 reverting the petitioner to the post of octroi peon. The deceased Vinayakrao filed an Appeal/Revision before respondent no.4.

On 11.05.1992, respondent no.4 granted stay to the order of reversion and on 13.05.1992 the deceased Vinayakrao requested respondent no.3 to allow him to join as octroi clerk as per the order of stay passed by respondent no.4. The respondent no.3 did not allow him to join the post of octroi clerk and asked him to join as octroi peon. On the ground that deceased Vinayakrao did not join at the reverted post, respondent no.3 passed an order on 18.08.1992, dismissing the deceased Vinayakrao from service. The deceased Vinayakrao approached the Collector requesting to allow him to join and set aside the order of dismissal, but the Collector did not pass any order. Thereafter, the deceased Vinayakrao on 28.12.1992 approached to the Director of Municipal Administration by filing an Appeal under Section 79 of the Maharashtra Municipal Act, 1965. On 28.12.1992, Director informed deceased Vinayakrao that the Appeal is sent to respondent no.4 for disposal, however, no steps were taken for disposing the Appeal by respondent no.4. Thereafter, deceased Vinayakrao filed Civil Suit bearing No.56/1993 alongwith an Application for temporary injunction. The Civil Judge, Senior Division, Parbhani, under order dated 31.12.1994 allowed temporary injunction application and directed respondent nos.1 and 2 to allow deceased Vinayakrao to join his duties as octroi clerk till the disposal of the Suit.

5. On or about 03.01.1995, deceased Vinayakrao was allowed to join the duties as an octroi clerk. The respondent nos.1 and 2 challenged the order passed on temporary injunction application before the District Judge. The District Judge granted stay to the injunction order and on 31.01.1995. Pursuant thereto the deceased Vinayakrao was directed to be removed from service. The order of the District Judge was challenged before the High Court, matter was remanded back to the District Court. The District Judge allowed the Miscellaneous Appeal. The order of temporary injunction in favour of the deceased Vinayakrao was set aside. The Civil Suit filed by the deceased Vinayakrao was dismissed observing that the Suit is not maintainable. In the meantime, during the pendency of the Civil Suit, the deceased Vinayakrao had also filed Writ Petition in this Court bearing Writ Petition No.694/1994. The pursis was filed to the effect that the petitioners would proceed with the Civil Suit and the petition was disposed of as withdrawn. Eventually, the Civil Suit was dismissed, as being without jurisdiction. Thereafter, the present Writ Petition is filed.

6. The petitioners is represented by the Power of Attorney Gopalrao Borikar. He was referred to the committee. The committee opined that he is competent to address the Court. The Power of Attorney holder of the petitioner submitted that the respondent no.4 never decided

the Appeal filed by the petitioner against the order of reversion, though, stay was granted. According to him, the Resolution was passed by Municipal Council on 25.06.1979 granting promotion to deceased Vinayakrao. However, the order was passed by respondent no.3 only on 13.01.1989 promoting deceased Vinayakrao to the post of octroi clerk. The Appeal filed by the deceased Vinayakrao for giving deemed date of promotion was never finally decided.

7. Though, Respondent No.3 subsequently reverted the petitioner, the order of reversion was stayed by the Commissioner. In view of that, the reversion order could not have taken effect. The Commissioner never finally decided the Appeal filed by the deceased Vinayakrao against the order of reversion. The order of reversion, in fact was never served upon deceased Vinayakrao, as at that time he was serving at Head Quarter, Pathri and was thereafter, on leave. According to the petitioner, on 14.05.1984 the Director of Municipal Administration issued an order that the provisions of Maharashtra Civil Services Rules as modified from time to time and orders issued in that behalf by Government shall *mutatis mutandis* apply to the Municipal employees. The respondent no.3 being the appointing authority was competent to issue the promotion orders and there was no need for sanction from the Superior Authority. The respondent no.3 was wrongly representing respondent no.4 that

proposal for approval to the promotion is sent to respondent no.4, when infact the same was not required. On wrong premise, the Respondent passed an order reverting the deceased Vinayakrao. The earlier Writ Petition was withdrawn, as Civil Suit was pending and it was decided to prosecute the Civil Suit. As the Court has held that the Suit is not maintainable and without jurisdiction, the present Writ Petition is perfectly maintainable and the filing of earlier Writ Petition would not affect the present proceeding. The Suit was eventually dismissed in the year 2014 and thereafter, immediately the present Writ Petition is filed. According to the Power of Attorney holder, the act of respondent no.3 not allowing the petitioner to join as a octroi clerk, inspite of the order of stay to the reversion by the Respondent No.4 is illegal. The deceased Vinayakrao was qualified to be promoted as a octroi clerk. The other persons promoted alongwith deceased Vinayakrao were continued on the promotional post, though their qualification was non-metric. No notice was also issued prior to reverting deceased Vinayakrao.

8. It is further submitted that deceased Vinayakrao was permanent employee. Without issuing show cause notice and without conducting departmental enquiry, an order of dismissal was issued. The same is bad in law.

9. Pursuant to the interim order of injunction, the petitioner was allowed to join as an octroi clerk after the order of dismissal dated 18.08.1992 was issued. After the injunction order was vacated, the deceased Vinayakrao was again removed from the service on 03.02.1995. It is submitted that the action is illegal and void *ab initio*, deceased Vinayakrao deserves to be reinstated as an octroi clerk with all consequential benefits. The deceased Vinayakrao died on 18.02.2007.

10. Mr. Tripathi, learned counsel for the Respondent-Municipal Council submits that the present writ petition is not maintainable on account of delay and latches. The petitioner is challenging the orders passed in the year 1992 and 1994 in the instant petition filed in March 2015. On the ground of delay and latches, the writ petition deserves to be dismissed. The petitioner had earlier filed Writ Petition No.694 of 1994. The same came to be withdrawn. Withdrawal amounts to dismissal. In view of that, the present writ petition is not tenable. The learned counsel relies on the judgment of the Apex Court in case of **Sarguja Transport Service Vs. State Transport Appellate Tribunal, Madhya Pradesh, Gwalior** reported in 1987 (1) SCC 5.

11. The learned counsel submits that though, the promotion orders were issued, the Director of

Municipal Administration had directed to reconsider the promotion granted to deceased Vinayakrao, as he did not possess minimum qualification of S.S.C.. In view of that, he was reverted. He did not join the reverted post and insisted for the post of octroi clerk. Notices were given to him to join as an octroi peon. The notices were issued on 08.05.1992, 11.05.1992, 14.05.1992, 15.06.1992, 23.06.1992 and 06.07.1992. As deceased Vinayakrao in spite of various notices issued, did not join as an octroi peon, eventually, he was dismissed on 18.08.1992. According to the learned counsel, the absenteeism of deceased Vinayakrao is a deliberate action. It amounts to abandonment of service and as such the dismissal order is issued, the same is legal and proper. The Appeal filed by deceased Vinayakrao before the Standing Committee was also dismissed on account of delay. Though, it is submitted that deceased Vinayakrao filed an Appeal to the Additional Commissioner against the dismissal order, however, no communication is received by the Municipal Council from the office of Commissioner. The learned counsel submits that considering all the aforesaid aspects, no illegality is committed in dismissing deceased Vinayakrao. Civil Suit filed by him is also dismissed.

12. We have considered the submissions canvassed by the respective parties.

13. It is a fact that the deceased Vinayakrao was appointed as a Naka Peon/Jawan on 11.02.1965. It also appears from the record placed before us that Resolution was passed on 25.06.1979 by the Municipal Council to promote deceased Vinayakrao as a octroi clerk. On 13.01.1989 order is issued by the Respondent No.3, promoting the deceased Vinayakrao to the post of octroi clerk in the pay scale of 250-7-285. The deceased Vinayakrao had joined the promotional post of octroi clerk immediately and was officiating as an octroi clerk. In the meantime, deceased Vinayakrao had filed an Appeal before respondent no.4 claiming deemed date of promotion with effect from 25.06.1979. There is no record to show that the said Appeal was eventually decided. On or about 30.04.1992, respondent no.3 reverted deceased Vinayakrao from the post of octroi clerk to octroi peon. This order of reversion was challenged by him by filing Appeal/Revision before respondent no.4. The respondent no.4 on or about 11.05.1992, stayed the order of reversion. The respondent no.4 was the competent authority to hear the Appeal against the order of reversion. The Competent Authority had granted stay to the order of reversion on 11.05.1992. In view of that, it is erroneous on the part of the respondent no.3 to suggest that though, numerous notices were issued to the petitioner from 08.05.1992 to 06.07.1992 directing deceased Vinayakrao to join as octroi peon, he did

not join, as such, absented himself and made liable for dismissal.

14. On 11.05.1992 the order of reversion was stayed. The respondent no.3 was duty bound to allow deceased Vinayakrao to officiate on the post of octroi clerk. The deceased Vinayakrao was all the time making applications requesting respondent no.3 to allow him to join as an octroi clerk, but he was not allowed to join as octroi clerk and was directed to join as octroi peon, the same would be contrary to the order of the Appellate Authority in an Appeal filed by the deceased Vinayakrao, wherein stay was granted to the order of reversion. We asked the respective parties as to the eventual result of the Appeal filed by the deceased Vinayakrao against the order of reversion, none of the parties could point out the status of the same or in what manner the Appeal concluded.

15. The provisions of the Maharashtra Civil Services Rules are made applicable to the employees of Municipal Council as per the Notification dated 14.05.1984.

16. The deceased Vinayakrao was permanent employee, it cannot be said that he has absented from duties. He was all the time requesting the respondent no.3 to allow him to join as an octroi clerk in view of the order of stay granted by respondent no.4 to the order of reversion, but respondent no.3 was insisting him to join as octroi

peon against the order passed by the Appellate Authority. It was certainly not the case of abandonment of service. The deceased Vinayakrao being permanent employee could not have been removed from the service without departmental enquiry. The respondent no.3 acted in high handed manner. The show cause notice was also never issued to the deceased Vinayakrao before dismissing him from service. In such a scenario, the order of dismissal was absolutely illegal. Even, the reversion order was without any notice to deceased Vinayakrao, the same being illegal against the principles of natural justice, certainly cannot be sustained.

17. The Respondents have raised technical objection that the writ petition is not maintainable, in view of the disposal of the earlier Writ Petition bearing No.694 of 1994.

18. It would be seen that, against the order of dismissal deceased Vinayakrao had filed an Civil suit, the same was pending and the Writ Petition was filed. The petitioner filed a pursis to the effect that he has decided to proceed with the Civil Suit and as such withdrew the Writ Petition. This Court allowed the petitioner to withdraw the Writ Petition. It was with a view to prosecute the Civil Suit the Writ Petition was withdrawn. In the year 2014, eventually, the Civil Court came to the conclusion that it has no jurisdiction to entertain

such a Suit and dismissed the Suit for want of jurisdiction. In such contingencies, the disposal of earlier Writ Petition would certainly not be an impediment to entertain the present Writ Petition. The Apex Court in case of **Sarguja Transport Service** (*supra*) has held that withdrawal of petition under Article 226 without permission to institute fresh petition, would render the fresh petition on the same cause of action not maintainable.

19. The earlier Writ Petition bearing No.694/1994 was withdrawn on the premise that the Civil Suit is filed, the same is pending and the petitioner could not have prosecuted two remedies at one and the same time so elected to prosecute the Civil Suit. The Court allowed the writ petition to be withdrawn on the basis of the pursis filed by the petitioner. In purshis it was stated that petitioner would prosecute the Civil Suit. After long drawn proceedings, in the year 2014, the Civil Court eventually decided that it has no jurisdiction, as such, dismissed the Civil Suit for want of jurisdiction. In such circumstances, it cannot be said that the present petition would not be maintainable. That would be against the principles of Ubi Jus Ibi Remedium (where there is a right there is a remedy). The earlier Civil Suit is dismissed on the ground that Civil Court has no jurisdiction. The earlier Writ Petition was disposed of as withdrawn, with a view that the petitioner would prosecute Civil Suit filed by him.

In view of that, there would be no impediment to entertain the present petition.

20. In the result, the Writ Petition is allowed. The order of reversion dated 30.04.1992 and the order of dismissal dated 18.08.1992 are quashed and set aside. The deceased Vinayakrao would attain the age of superannuation on 30.10.1996, as such, his services would be counted till 30.10.1996 as an octroi clerk. He will be notionally reinstated on the post of octroi clerk. As deceased Vinayakrao did not actually work on the said post, we are not inclined to grant back wages. However, he would be entitled for retiral benefits and pension, as is permissible in law. Eventually, petitioner no.1 would also be entitled for family pension, retiral benefits. The pension/family pension shall be disbursed expeditiously, preferably within (04) four months.

21. Writ Petition is accordingly allowed in the above terms. No costs.

(SUNIL K. KOTWAL)
JUDGE

(S. V. GANGAPURWALA)
JUDGE

Devendra
Nandkumar
Kale

Digitally signed
by Devendra
Nandkumar Kale
Date: 2018.08.30
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