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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5418 OF 2006

Mahesh Narayan Gawade
(since deceased)

1. Smt. Minal Mahesh Gawade & anr.

...Petitioners
(Legal heirs of deceased
petitioner)

Vs.

Deputy Commissioner of Police

...Respondent.

.....
Mr. N.V. Bandiwadekar, Advocate for the petitioners.

Mr. O.M. Kulkarni, AAGP for the State / Respondent No.1.

.....

**CORAM : SMT. V.K. TAHILRAMANI ACTING C.J.
AND M.S.KARNIK, J.**

DATE : 1st FEBRUARY, 2018.

JUDGEMENT (PER M.S.KARNIK, J.) :-

The challenge in this petition is to an order dated 20/12/2005 passed by the Maharashtra Administrative Tribunal, Mumbai Bench, Mumbai ('the Tribunal' for short) in O.A. No.595

of 2005. Before the Tribunal the petitioner challenged the order dated 7th September, 2004 by which the period of suspension from 27th March, 1994 to 28th February, 1996 has been treated as suspension period and the period from 29th February, 1996 to 19th December, 2002 i.e. the period not spent on duty due to dismissal, has been treated as continuous service only for the purpose of pensionary benefits.

2. The following facts are material :-

The petitioner while working as a Police Constable was placed under suspension with effect from 27/3/1994. A criminal case under Section 8 (c), 21 and 29 of the N.D.P.S. Act, 1985 was registered against him. By order dated 29/2/1996 the petitioner was dismissed from service in exercise of powers under Article 311 (2) (b) of the Constitution of India. The Tribunal by order dated 30th September, 2002 quashed and set aside the order of summary dismissal and the petitioner was reinstated in service by an order dated 13/12/2002.

3. In the criminal case the petitioner was acquitted by the judgment and order dated 14th / 15th May, 1997. No appeal was preferred against the acquittal.

4. The petitioner was thus under suspension from 17/3/1994 to 28/2/1996. By virtue of the dismissal he was not in service from the period 29/2/1996 to 19/12/2002. A show cause notice dated 20th July, 2004 was issued to treat the period of suspension as such. By impugned order dated 7th September, 2004 the period of suspension was treated as under suspension. The period between dismissal and reinstatement viz 29/2/1996 to 19/12/2002 has been treated as continuous service only for the purpose of pensionary benefits.

5. In the challenge to the order dated 7/9/2004 the Tribunal dismissed the O.A. The Tribunal was of the opinion that though the petitioner was acquitted in the criminal case, however, other three accused persons were found guilty and punished. The Tribunal observed that the petitioner was found by the pancha in the company of the other accused who were

convicted and the petitioner was also arrested. Considering the fact that the petitioner is a police constable who was found in the company of drug traffickers leading to his arrest, the Tribunal was of the opinion that the suspension of the petitioner cannot be said to be unjustified.

6. Heard learned Counsel. Learned Counsel for the petitioner in all fairness submitted that he may not be able to support the order passed by the Tribunal in so far as treating the period of suspension as suspension period. He however submits that by the impugned order dated 7th September, 2004 the respondents have virtually modified the order passed by the Tribunal on 30th September, 2002 in O.A.No.502 of 1999. It would be material to quote para 8 of the order passed by the Tribunal :-

“8. In this result, therefore, we hold that the order of dismissal of liable to be quashed and set aside. The Respondents are at liberty to initiate such proceedings against the Applicant if deemed fit and proper. In view of the aforesaid circumstances, the order of dismissal is liable to be set aside and the Applicant is liable to be reinstated.

We are inclined to hold that the Applicant should be reinstated without the back-wages but with continuity in service. With these directions and observations, the Petition is allowed with no order as to costs.”

7. Learned Counsel for the respondent supported the order passed by the Tribunal and contended that as the petitioner was tried for other serious offence under N.D.P.S. Act, the order passed by the Tribunal calls for no interference.

8. We find substance in the contention advanced by the learned Counsel for the petitioner. The Tribunal while reinstating the petitioner has clearly mentioned that he should be reinstated without back-wages but with continuity in service. This order dated 30th September, 2002 was not challenged by the respondents and in fact they acted on this order and reinstated the petitioner. Once the Tribunal has granted reinstatement with continuity in service, in our opinion, the respondents by impugned order dated 7th September, 2004 were then not justified in passing an order treating the period from

29/2/1996 to 19/12/2002 i.e. the period from dismissal of the petitioner till reinstatement as continuous service only for the purpose of pensionary benefits.

9. We are therefore inclined to allow this petition to the limited extent of setting aside the order dated 7th September, 2004. The action on the part of the respondents in treating the period from 29/2/1996 to 19/12/2002 as continuous service only for the purposes of pensionary benefits is illegal and contrary to the order passed by the Tribunal in O.A.No. 502 of 1999.

10. It would be material to quote the provisions of Rule 71 of the Maharashtra Civil Services (Joining Time, Foreign Service and Payments during Suspension, Dismissal and Removal) Rules. The relevant portion reads thus :-

“Rule 71. Regularization of pay and allowances and the period of absence from duty where dismissal, removal or compulsory retirement is set aside by a Court of Law and such Government servant is reinstated.

(1) Where the dismissal, removal or compulsory retirement of a Government servant is set aside by a Court of Law and such Government servant is reinstated without holding any further inquiry, the period absence from duty shall be regularised and the Government servant shall be paid pay and allowances in accordance with the provisions of sub-rule (2) or (3) subject to the directions, if any, of the Court.

(2) (a) Where the dismissal, removal or compulsory retirement of a Government servant is set aside by the Court solely on the ground of non-compliance with the requirements of clause (2) of article 311 of the Constitution, and where he is not exonerated on merits, the Government servant shall, subject to provisions of sub-rule (7) of rule 70 be paid such amount (not being the whole) of the pay and allowances to which he would have been entitled had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be, as the competent authority may determine after giving notice to the Government servant of the quantum proposed and after considering the representation, if any, submitted by him, in that connection within such period which in no case shall exceed 60 days from the date on which the notice has been served, as may be specified in the notice.”

11. Undoubtedly under Rule 71 the respondents are

permitted to pass appropriate orders regarding regularization of pay and allowances and the period of absence from duty where dismissal, removal or compulsory retirement is set aside by a Court of Law and such Government servant is reinstated. However, once the Tribunal has already passed an order granting reinstatement with continuity of service but without back-wages, the issue in so far as grant of continuity of service stands concluded. The respondents could not have then by exercising the power under Rule 71 modified the order passed by the Tribunal. By holding that the period in question should be treated as continuous service only for the purpose of pensionary benefits, the respondents have virtually modified the order passed by the Tribunal. As indicated earlier, the issue in so far as treating the period as continuous service already stands concluded by the order of the Tribunal. The same cannot be reopened in the purported exercise of the power under Rule 71.

12. We accordingly direct the respondents to treat the period from 29/2/1996 to 19/12/2002 as continuous service for

all purposes including pension except monetary benefits. The order passed by the Tribunal is therefore set aside to a limited extend indicated above.

13. The Writ Petition is partly allowed.

14. Rule is partly made absolute with no order as to costs.

(M.S.KARNIK, J.)

(ACTING CHIEF JUSTICE)