

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 984 OF 2016

Jayvijay Shrikant Pandit	...Petitioner
Versus	
The State of Maharashtra & Ors.	...Respondents

Mr. Nitin Dalvi for Petitioners
Mr. N. C. Walimbe – AGP for State - Respondents.

**CORAM: SMT. V. K. TAHILRAMANI, Acting C. J. &
M. S. SONAK, J.**

DATE : 13 JUNE 2018

ORAL JUDGMENT :

- 1] Heard the learned counsel for the parties.

- 2] Rule. With the consent of and at the request of the learned counsel for the parties, Rule is made returnable forthwith.

- 3] The challenge in this petition is to the judgment and order dated 30th November 2015 made by the Maharashtra Administrative Tribunal (MAT) dismissing the petitioner's Original Application No. 227 of 2015. The petitioner, by

instituting Original Application No. 227 of 2015 had challenged the respondents order dated 30th October 2014 treating his period of service from 1st April 2011 to 20th July 2012 as '*dies non*'. It is the case of the petitioner that this period has to be treated as period spent on duty for all legal purposes and the petitioner is consequently entitled to all benefits on such basis.

4] The petitioner was appointed as a Naib Tahsildar on 28th July 2004 subject to clearance of a departmental examination as is prescribed. The petitioner did appear for the departmental examination within the prescribed period i.e. on 16th December 2008 but for reasons not attributable to the petitioner, the petitioner's result was withheld. On the ground that the petitioner failed to clear the departmental examination within the prescribed period, the petitioner's services came to be terminated by order dated 5th October 2010.

5] The petitioner then instituted Original Application No. 57 of 2011 before the MAT challenging the termination order dated 5th October 2010. By judgment and order dated

21st February 2012, the MAT allowed Original Application No. 57 of 2011 and set aside the termination order dated 5th October 2010. The respondents instituted a petition bearing writ petition no. 865 of 2013 before this Court challenging the MAT's order dated 21st February 2012 which was dismissed by this Court on 2nd August 2013. The respondents then carried the matter by filing a special leave petition before the Hon'ble Supreme Court which was also dismissed. This means that the order of the MAT dated 21st February 2012, by which the MAT set aside the termination order dated 5th October 2010 has attained finality.

6] After the reinstatement of the petitioner, the respondents have made an order dated 30th October 2014 treating the period from 1st April 2011 to 20th July 2012 as '*dies non*'. This means that this period would not count for any service benefits, including retiral benefits. The petitioner challenged this by instituting Original Application No. 227 of 2015. By the impugned judgment and order dated 30th November 2015, MAT has dismissed the petitioner's Original Application No. 227 of 2015. Hence, the present petition.

7] Mr. Dalvi, the learned counsel for the petitioner submits that once the petitioner's termination came to be set aside, the petitioner was entitled to all consequential benefits including continuity of service, back-wages etc. The petitioner submits that the order dated 30th October 2014 renders the service of the petitioner before the said date worthless. He submits that even the principle of *no work no pay* cannot apply in the present case because the petitioner could not work on account of the illegal termination order issued to him.

8] In any case, and without prejudice, Mr. Dalvi submits that there is absolutely no justification, for treating this period as '*dies non*'. Mr. Dalvi submits that the MAT was not at all justified in referring to the petitioner's leave record prior to his termination and on such basis conclude that the petitioner was a habitual absentee. Mr. Dalvi submits that such past leave record was quite irrelevant to the issue which arose before the MAT in Original Application No. 227 of 2015. For all these reasons, Mr. Dalvi submits that the impugned judgment and order made by the MAT may be

set aside and the petitioner may be granted all the reliefs prayed for by him in Original Application No. 227 of 2015.

9] Mr. Walimbe, the learned AGP submits that there is no jurisdictional error in the impugned judgment and order made by the MAT. He submits that the petitioner remained unauthorizedly absent from 31st October 2010 to 1st April 2011 only to avoid the service of the termination order dated 5th October 2010. Mr. Walimbe points out that even otherwise, from 27th January 2007 to 27th September 2007, the petitioner remained absent for 244 days and even later on, the petitioner was absent for 5 days and 32 days. Mr. Walimbe submits that from this it is clear that the petitioner was a habitual absentee and there is absolutely no error in making the order dated 30th October 2014 treating the period between 1st April 2011 to 20th July 2012 as '*dies non*'.

10] Mr. Walimbe submits that in terms of the law laid down by the Hon'ble Supreme Court in ***Sukhdeo Pandey vs. Union of India & Anr. [(2007) 7 SCC 455]***, the principle of *no work no pay* is applicable to a case of this nature and the MAT has rightly invoked such principle in order to

dismiss the petitioner's Original Application No. 227 of 2015. Mr. Walimbe submits that the order treating the period as '*dies non*' is in accordance with the Maharashtra Civil Services (Leave) Rules, 1981 and therefore, there is no case made out to interfere with the same. For all these reasons, Mr. Walimbe submits that this petition may be dismissed.

11] Rival contentions now fall for our determination.

12] In the present case, we are only concerned with the legality and validity of the order dated 30th October 2014 treating the period of petitioner's service between 1st April 2011 to 20th July 2012 as '*dies non*'. Therefore, at least *prima facie*, the period prior to 1st April 2011 is quite irrelevant and on basis of any alleged absence of the petitioner for the period prior to 1st April 2011, the MAT, was not entirely justified in denying at least some limited reliefs to the petitioner.

13] The record does indicate that the petitioner was absent for 244 days between 27th January 2007 to 27th

September 2007. The petitioner was also absent for 5 days between 3rd December 2007 to 7th December 2007. The petitioner was also absent between 15th May 2008 to 15th June 2008. The record is not quite clear as to whether such absence was regularized or not. However, as noted earlier, since this absence pertains to the period prior to 1st April 2011, such absence whether regularized or not is not very relevant for determining the legality and validity of the order dated 30th October 2014 which was impugned by the petitioner in Original Application No. 227 of 2015.

14] Admittedly, the issue of the petitioner's termination by order dated 5th October 2010 has attained finality. Despite this, the respondents, by order dated 30th October 2014 have treated the period between 1st April 2011 to 20th July 2012 as '*dies non*'.

15] We are unable to agree with the contention of Mr. Dalvi that this was not a fit case to invoke the doctrine of *no work no pay*. The circumstances of this case are such that this doctrine could have and has been rightly invoked by the MAT relying upon the decision of the Hon'ble Supreme

Court in the case of *Sukhdeo Pandey* (supra). In this case, the Hon'ble Supreme Court has held that it is well settled principle in service jurisprudence that a person must be paid if he has worked and should not be paid if he has not. In other words the doctrine of '*no work, no pay*' is based on justice, equity and good conscience and in the absence of valid reasons to the contrary, it should be applied. The termination was on account of failure on the part of the petitioner to clear the departmental examination within the prescribed period. Ultimately, it was noted that the petitioner deserved yet another opportunity to answer and clear the departmental examination. On these basis, termination order may have been set aside but it cannot be said that the circumstances were such as would entitle the petitioner to salary and other emoluments during the period he has not actually worked. Accordingly, we see no jurisdictional error or perversity in the view taken by the MAT denying the petitioner salary and back-wages for the period during which the petitioner has not actually worked.

16] However, we find that the consequence of declaring the period as '*dies non*' means and implies that such period

will not be taken into consideration for any purposes including in particular, for purposes of computing the qualifying service for retiral benefits. This, in our opinion, is quite a harsh consequence. Once, the termination order came to be set aside, no doubt, the respondents had the right to make an appropriate order for determining the status of the period when the petitioner was out of service on account of the termination order. However, in determining the status of such service, reasonable approach is expected from the respondents.

17] The reasonability in the present case might have been denial of arrears but to treat the period as '*dies non*', appears to be a harsh and disproportionate consequence. This is not a case where absence of the petitioner between 1st April 2011 to 20th July 2012 can be said to be an unauthorized absence. During this period, the termination order dated 5th October 2010 was in operation and consequently, the petitioner, was precluded from attaining duties. If the '*dies non*' treatment is permitted to stand, then, it is possible that the period is treated as a break in service thereby rendering the petitioner's services prior to

1st April 2011 virtually worthless. Such treatment will unduly impact the retiral benefits which the petitioner may be entitled to in terms of his service conditions. Therefore, some modification is warranted.

18] For the aforesaid reasons, we modify the impugned judgment and order and in substitution of the order made, we pass the following order :

(A) The order dated 30th October 2014 stands modified as hereinafter;

(B) For the period between 1st April 2011 to 20th July 2012, the petitioner shall not be entitled to any salary, emoluments or arrears;

(C) However, the period between 1st April 2011 to 20th July 2012 shall be taken into consideration for continuity of service, and computation of qualifying service for retiral benefits. This means that the order dated 30th October 2014 treating this period as '*dies non*' is set aside for this limited purposes.

(D) Rule is made partly absolute to the aforesaid extent. There shall be no order as to costs.

(M.S. SONAK, J.)

(ACTING CHIEF JUSTICE)

CHANDKA