

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

WRIT PETITION NO. 10978 OF 2017

Sanchareshwar Madhavrao Kadam,
Age-31 years, Occu-Service, Junior Clerk
On the Establishment of Court of Civil Judge
JD & JMFC, Gangakhed, Dist. Parbhani

...PETITIONER

VERSUS

1. Principal District Judge, Parbhani
2. The Registrar General, High Court
Judicature at Bombay, Mumbai
3. The State of Maharashtra
through the Principal Secretary,
Law and Judiciary Department,
Mantralaya, Mumbai

...RESPONDENTS

Mr.S.M. Deshmukh, Advocate for petitioner.
Mr.C.K.Shinde, Advocate for respondents No. 1 and 2.
Mr.P.N.Kutti, AGP for respondent No.3/State.

**CORAM : SUNIL P. DESHMUKH &
S.M. GAVHANE, JJ.**

DATED : 21-08-2019

ORAL JUDGMENT : [PER: S. M. GAVHANE, J.] :-

1. Rule. Rule made returnable forthwith. Heard finally with the consent for the parties.

2. By this petition under articles 226 and 227 of the Constitution of India, the petitioner Junior Clerk on the

establishment of Civil Judge, Junior Division, Gangakhed, Dist. Parbhani, has claimed following reliefs in terms of prayer clauses (B) and (C):-

(B) The order passed by the respondents 1 and 2 respectively in representation dated 07-07-2016 and appeal dated 07-01-2017 may kindly be quashed and set aside, by issuing writ of certiorari, mandamus or any other appropriate writ, order or directions in the like nature.

(C) The break/interruption caused technically in the service of petitioner may kindly be condoned & appropriate directions may kindly be issued to the respondents to protect the pay of petitioner retrospectively.

3. There is no dispute that on 05.10.2010 initially petitioner joined services as junior clerk on the establishment of Civil Judge, Junior Division, Degloor, Dist. Nanded. In 2013 recruitment process was initiated by all districts through out State of Maharashtra. As the parents of the petitioner were old aged and looking to their health, after taking permission and no objection from the Principal District Judge, Nanded, petitioner applied for the post of junior clerk in Parbhani district. The Principal District Judge, Parbhani selected in all 19 candidates and the petitioner was at serial No.8 in the said select/wait list. The Principal District Judge, Parbhani was then pleased to appoint the petitioner as a Junior Clerk on the establishment of Civil Judge, Junior Division, Jintur.

4. Further, there is no dispute that thereafter, the Principal District Judge, Nanded by its order relieved the petitioner and then the petitioner joined on the establishment of the Civil Judge, Junior Division, Jintur on 07.07.2015 and worked there up to 30.09.2015. However, due to reduction in strength of courts the petitioner was terminated by the Principal District Judge, Parbhani with effect from 30.09.2015. Subsequently, the petitioner was again accommodated as a Junior Clerk and was posted on the establishment of Civil Judge, Senior Division, Parbhani on 07.11.2015. In April 2016, he was again transferred and posted as Junior Clerk on the establishment of Civil Judge, Junior Division, Gangakhed and since 26.04.2016, he is working on the said establishment.

5. Petitioner contends that due to above technical eventualities, there is break in his service from 01.10.2015 to 06.11.2015. Said break in service is of just 1 month and 6 days. As a result of this, the petitioner has lost his service from 05.10.2010 to 30.09.2015 i.e. (4 years 11 months and 25 days) and his pay after subsequent absorption was reduced at initial stage of the time scale.

6. It is in the aforesaid circumstances, the petitioner had submitted representation dated 07.07.2016 before the Principal District Judge, Parbhani, requesting to condone the break in his service and to provide pay protection. Unfortunately, it came to be rejected on 03.08.2016. Thereafter, the petitioner availed remedy of administrative appeal under Rule 17 of Maharashtra Civil Services (Discipline & Appeal) Rules, 1979, by submitting representation/appeal dated 07-01-2017 before the High Court. But, it also came to be rejected, as per letter dated 07.03.2017 of Registrar (Adm.), High Court of Bombay, Bench at Aurangabad. Moreover, vide letter dated 26.04.2017 of the Registrar (Administration) of High Court of Judicature of Bombay, Bench at Aurangabad, the petitioner was informed about the inability to provide him reasons behind rejection of his administrative appeal and his application in this respect was rejected and filed. Therefore, the petitioner is before this Court for the reliefs stated earlier, as there is no other efficacious and effective remedy available to him.

7. Mr. Deshmukh, learned counsel for the petitioner submitted that the respondents do not dispute aforementioned

contention of the petitioner regarding his initial appointment in the judicial district Nanded and his subsequent appointment in judicial district Parbhani after his selection, after taking part in the recruitment process conducted in Parbhani district with no objection or permission given by the Principal District Judge, Nanded. So also, respondents do not dispute the contention of the petitioner regarding break in service while the petitioner was working in Parbhani district. Learned counsel for the petitioner by inviting our attention to Rule 48 of Maharashtra Civil Services (Pension) Rules, 1982 submitted that the petitioner is entitled to condone the break in service and to protect his pay retrospectively and other directions as claimed in the petition.

8. Learned counsel for the petitioner has relied upon the decision of division bench of this Court in the case of *Atul S/o. Vyankatesh Deshpande Vs District Judge and others 2005 (1) Mah. L.R. 653* to submit that even after transfer of an employee from one judicial district to another judicial district on his request, if he suffers break in service, which results in interruption in service on account of lower placement in the transferee judicial district, the break in his service can be condoned and his last pay drawn in the

district where he was serving before transfer can be protected and therefore according to learned counsel, break in service of the petitioner can be condoned and his pay can be protected. The petitioner in the said case was a clerk working in the District Court, Osmanabad. He had filed the petition initially to challenge the order of termination dated 12.05.1995 passed by the learned District Judge, Osmanabad. This termination took place because of the transfer of the petitioner from district Jalgaon to Osmanabad district sought by the petitioner himself. The petitioner was working earlier in the District Court at Jalgaon. He was selected as clerk on 03.05.1986 and was given an appointment on 01.06.1986. He passed the Lower Standard Departmental Examination on 05.07.1990. It is happened that that petitioner's father who was residing at Osmanabad, passed away due to cancer and his mother was sick suffering from paralysis. He, therefore, sought transfer to Osmanabad sometime in April, 1993. As per the condition of transfer recorded in the Government Resolution dated 19.09.1975, which formed part of the requirements for such transfers, the original appointment of the Government servant had to be in conformity with the Recruitment Rules and he had to put in not less than three years in the earlier cadre. The petitioner was fulfilling

those conditions. On account of his transfer in the District Court, Osmanabad, the petitioner was placed at serial No.163 of the seniority list. It is the case of the petitioner that the date of his continuous officiation should be reckoned from 1986 and if that date is taken into consideration, he should have been placed at serial No.126 after the incumbent at serial No.125. However, on account of lower placement in the seniority list, the petitioner suffered break in service and it resulted in interruption in his service from 05.06.1995 to 08.10.1995. It is at that stage that being aggrieved by the resultant termination that the petitioner filed the writ petition and the same was later on admitted.

8.1. The petitioner in the case of *Atul s/o. Vyankatesh Deshpande (Supra)* was working as a clerk. In paragraph Nos. 6, 7 and 10 of said decision it was observed thus :

“6. Sofaras the Rules for inter-district Transfer of Subordinate Judicial Staff are concerned, Rule 6 of the Rules is a relevant rule. Rule 6 reads as under:

“6. The applicants who desire to get transfer shall have to accept the following conditions and to give undertaking to that effect in the form annexed herewith as Annexure 'A'.

1. His/her appointment and posting on Inter-District Transfer shall be treated as a fresh recruitment

on the establishment of the District, where he/she is to be posted on transfer except for counting his/her earlier service period for fixation of his/her pay and for pension purpose."

When one considers the above rule, the rule states that the appointment and posting after inter-district shall be treated as a fresh recruitment on the establishment of new District. There is an exception to the said rule that the earlier service period will be counted for the purpose of pay fixation and for pension purpose. This being the position even as per the plain reading of the rule the petitioner's pay has to be fixed at least at the pay which he was drawing before his transfer to another district. So far as the petitioner is concerned, the petitioner was drawing last basic pay of Rs.1090 in the pay-scale of Rs.950-20-1150 -EB-25-1500. This was the position in April, 1993. The pay of the petitioner on his transfer to Osmanabad at Rs.1090 was initially protected. However, when the petitioner was taken back after his termination, the pay was reduced to Rs.950/- from Rs.1090/-. Thus, prima facie this fixation of pay of the petitioner on the lower pay is clearly contrary to Rule 6(i) of the Rules.

7. *Similarly, if the petitioner's earlier service is to be counted for pension purpose also, the so-called break in service will have to be condoned. So far as that part is concerned, there is a specific rule. Rule 48 of the Maharashtra Civil Services (Pension) Rules, 1982, permits the appointing authority to condone the interruption in service. Even on the construction placed by the respondents leading to the interruption in service, the break in service deserves to be condoned. It is only when the break in service is condoned that the petitioner will get the benefit of Rule 6 (i) of the Rules for the purpose of pension. In our view, the petitioner is entitled to the same. Accordingly, we accept the submission of Shri Badve that the petitioner's pay fixation should be done correctly considering his last pay drawn by him. Before his transfer from Jalgaon to Osmanabad and his service period should be treated as*

continuous for all purposes including pension but except seniority.

10. For the reasons stated above, we partly allow the petition. The break in service of the petitioner is condoned. We direct the respondents to carry out correct pay fixation of the petitioner on the basis of last pay drawn by him in Jalgaon Court before his transfer to Osmanabad. We further direct the respondents that the service of the petitioner will be considered as continuous for all purposes except seniority. So far as the seniority is concerned, we expect the High Court on its Administrative side to consider the submissions of the petitioner and if entertained, to give correct placement in the cadre of Clerks in Osmanabad district in that case, the petitioner will move up in the seniority of Clerks and would be eligible for further promotions on the basis of said placement. Rule is made partly absolute. No order as to costs. Record brought from the District Court, Osmanabad, be returned. Petition partly allowed.

9. So also, learned counsel for the petitioner has referred circular dated 28.02.2017 of Law and Judiciary Department of Government of Maharashtra. Clauses 3, 4 and 5 of the said circular reads thus:

3. The Hon'ble Supreme Court in the case of State of Uttar Pradesh & Ors Vs Arvind Kumar Srivastava reported in 2015 (1) SCC 347 has laid down similar principle, thus:

“Normal rule is that when a particular set of employees is given relief by the Court, all other identically situated persons need to be treated alike by extending that benefit. Not doing so would amount to discrimination and would be violative of Article 14 of the Constitution of India. This principle needs to be applied in service matters more emphatically as the service

jurisprudence evolved by this Court from time to time postulates that all similarly situated persons should be treated similarly. Therefore, the normal rule would be that merely because other similarly situated persons did not approach the Court earlier, they are not to be treated differently”

4. In view of the above, all the departments are hereby directed to take action according to the above directions given by the Hon'ble Maharashtra Administrative Tribunal, reiterating the legal position expounded by the Hon'ble Supreme Court.

5. The aforesaid directions be also brought to the notice of the offices under the administrative control of the departments.

10. Mr.Shinde, learned counsel for respondents No. 1 and 2 referring the affidavit-in-reply of the Registrar (Legal and Research), High Court, Appellate Side, Bombay submitted on behalf of said respondents, submitted that interruption in service of the petitioner is caused due to retrenchment on account of strength of the courts, hence interruption/break in service is not liable to be condoned as per the Maharashtra Civil Services Rules and especially as per Rule 48 of the Maharashtra Civil Services (Pension) Rules, 1982. There is no provision in the Maharashtra Civil Services Rules to condone break in service caused due to retrenchment of employee of government. Representation as well as appeal have been accordingly rejected by respondents No. 1 and 2. It is submitted

that whenever there is retrenchment, junior most employee is liable to be retrenched as per rules and therefore, the petitioner was rightly retrenched on account of reduction of number of Courts. Since the petitioner was appointed afresh as per order No.820 dated 05.11.2015, his pay was liable to be fixed at the initial stage of the pay prescribed for the said post for junior clerk in the light of Rule 11 (1) (a) of the Maharashtra Civil Services (Pay) Rules. Since the petitioner has been given appointment afresh after retrenchment, his earlier service period was not liable to be taken into account for the purpose of pay protection and seniority and thus as per the new appointment, his pay has been rightly fixed at initial stage. It is submitted that the provisions of Rule 6 of the Rules for inter-district transfer of subordinate judicial staff are neither relevant, nor applicable in any manner to the facts situation and the claim of the petitioner. Therefore, there is no question of protection of pay of the petitioner. It is submitted that the decision relied upon by the petitioner is not applicable to this case, as the petitioner has not been absorbed in Parbhani Judicial district on inter-district transfer basis and he was appointed on recruitment.

11. Mr. Shinde, learned counsel has referred to the decision

of division bench of this Court reported in *2017 DGLS (Bom) 599 Dashrath Gangaram Gorme Vs Hon'ble High Court of Bombay and others*. In the said case petitioner had accepted the order of termination of his service and had accepted the fresh appointment. In paragraphs 38 and 39 it was observed thus:

“38. A perusal of Rule 48 (4) of the Maharashtra Civil Services (Pension) Rules clearly indicates that Rule 48 (3) shall not apply to the interruption caused by resignation, dismissal, removal from the service. Since the services of the petitioner were terminated, the petitioner could not invoke Rule 48(3) of the Maharashtra Civil Services (Pension) Rules by alleging break in service between 27-09-1983 and 15-11-1983.

39. In our view, since the provision for condonation of break in service in this case could not have been invoked by the petitioner at all, the learned District Judge could not have condoned the alleged break in service on any ground whatsoever. In our view, the High Court on the administrative side rightly considered the provisions under Rule 48 of the Maharashtra Civil Services (Pension) Rules and rightly rendered a finding that the appointment of the petitioner on 15-11-1983 being a fresh appointment after the services of the petitioner were terminated w.e.f. 27-09-1983 under Rule 48(4) of the Maharashtra Civil Services (Pension), Rules, interruption caused by the dismissal could not be condoned. Respondent No.1, in the impugned order, has also rightly considered an admitted fact that for a period of 17 years the petitioner did not raise any objection about his seniority and had suddenly filed a grossly belated application for condonation of so called break in service and for consequential reliefs. In our view, though no specific period is provided in the Rules for making an application for condonation of break in service, it has to be made within a reasonable period.

12. We have carefully considered the pleadings of the parties, documents referred by them and the submissions made by the learned counsels for both the sides.

13. Rule-6 of the Inter-district Transfers of Sub-ordinate Staff referred earlier in paragraph (6) in the case of *Atul s/o. Vyankatesh Deshpande* (Supra), has no application to the present case, as here it is not the case that the petitioner has been transferred from Judicial District Nanded to Parbhani Judicial District, but admittedly on 05-10-2010 the petitioner joined services as a Junior Clerk on the establishment of Civil Judge, Junior Division, Degloor, Dist. Nanded and then after he was selected as a Junior Clerk in the recruitment held in Parbhani district, he had joined on 07.07.2015 as a Junior Clerk in the Court of the Civil Judge, Junior Division, Jintur, Dist. Parbhani.

14. As regards submission of Mr.Deshmukh, learned counsel for the petitioner relying upon decision in the case of *Atul s/o. Vyankatesh Deshpande* (supra) that break in service of the petitioner can be condoned and his pay can be protected is concerned, after the petitioner was selected as per the list prepared

by the Principal District Judge, Parbhani, he was appointed as a Junior Clerk on the establishment of Civil Judge, Junior Division, Jintur, District - Parbhani as per order dated 30.06.2015 w.e.f. 01.07.2015 (Exh.III) of the Principal District Judge, Parbhani. Thereupon, he was relieved by the Civil Judge, Junior Division, Degloor as per office order dated 06.07.2015, on the basis of order of the Principal District Judge, Nanded dated 4/6.07.2015 to enable the petitioner to join as Junior Clerk in the Court of Jintur as per above order of the Principal District Judge, Parbhani. Accordingly, service book of the petitioner with last pay certificate was sent to the concerned court. There is no dispute that the petitioner joined in the Court of Civil Judge, Junior Division, Jintur on 07.07.2015 and he worked in the said Court till 30.09.2015 and he was terminated w.e.f. 30.09.2015 (AOH) as the Court of Joint Civil Judge, Junior Division, Jintur was disbanded. Admittedly, again the petitioner was accommodated as a Junior Clerk and posted on the establishment of Civil Judge, Senior Division, Parbhani on 07.11.2015. Thus, there was break in service of the petitioner between 01.10.2015 and 06.11.2015. From the aforementioned admitted facts, it is clear that the petitioner had taken part in the recruitment process held in Parbhani Judicial District after obtaining permission and no-objection

from the Principal District Judge, Nanded and as he was selected in the said process, he was relieved from the Court of Nanded District and then he had joined in the Court at Jintur in Parbhani district. In the case of *Atul s/o. Vyankatesh Deshpande* (Supra) also after the petitioner in the said case was transferred from Jalgaon district to Osmanabad district, there was break in his service due to lower placement but still his break in service was condoned and pay which he was drawing while serving in Jalgaon district was protected. Considering the facts referred to above of the present case, applying decision in the case of *Atul s/o. Vyankatesh Deshpande* (Supra), the break in service of the petitioner can be condoned and his pay on the date of termination of his service can also be protected.

15. Coming to the second submission of the learned Counsel for the petitioner that the petitioner is entitled to condone the break in service from 01.10.2015 to 06.11.2015, in view of Rule 48 of the Maharashtra Civil Services (Pension) Rules and to protect his pay, it is relevant to refer Rules 45 and 48 of the Maharashtra Civil Service (Pension) Rules. Said rules read thus :-

“45. Forfeiture of service on dismissal or removal -

Dismissal or removal of a Government servant from a service or post entails forfeiture of his past service.

48. Condonation of interruption in service. - (1) The appointing authority may, by order, condone interruptions in service of a Government servant :

Provided that-

(a) the interruptions have been caused by reasons beyond the control of the Government servant:

(b) the total service pensionary benefits in respect of which will be lost, is not less than five years duration, excluding one or two interruptions, if any; and

(c) the interruption including two or more interruptions if any, does not exceed one year.

Provided further that, such service of the Government servant shall be counted as qualified service for the purposes of Rule 33.

(2) The period of interruption condoned under sub-rule (1) shall not count as qualifying service.

(3) In absence of a specific indication to the contrary in the service record, an interruption between two spells of civil service rendered by a Government servant under Government, shall be treated as automatically condoned and the pre-interruption service treated as qualifying service."

(4) Nothing in sub-rule (3) shall apply to interruption caused by resignation, dismissal or removal from service or for participation in a strike.

(5) The period of interruption referred to in sub-rule (3) shall not count as qualifying service."

In the present case, from the admitted facts referred

earlier, it is clear that after selection of the petitioner as a Junior Clerk on the establishment of the District Court, Parbhani, he was relieved by the Civil Judge, Junior Division, Degloor, Dist. Nanded and then he joined in the Court of Civil Judge, Junior Division, Jintur as a Junior Clerk, as per order dated 30.06.2015. Thereafter, his services were terminated with effect from 30.09.2015 by the Principal District Judge, Parbhani by order dated 30.09.2015, due to disbandment of the Courts and particularly the Court of Joint Civil Judge, Junior Division, Jintur. As such, said termination of the petitioner was due to retrenchment. Said termination does not amount to dismissal or removal of the petitioner from service. Admittedly, thereafter by order dated 05.11.2015, the petitioner was appointed as a Junior Clerk on adhoc basis in the Court of Civil Judge, Senior Division, Parbhani and then he was transferred to the Court of Civil Judge, Junior Division, Gangakhed and he is working there since 26.04.2016. Since the termination of the petitioner from 30.09.2015 to 05.11.2015 was due to retrenchment and it was not dismissal or removal, interruption in service caused during the said period i.e. 01.10.2015 to 06.11.2015 can be said to be caused by reason beyond control of the petitioner and therefore said interruption can be condoned, since said interruption was not

caused by resignation, dismissal or removal from service, in view of Rule 48(1)(a) of the Maharashtra Civil Services (Pension) Rules, for the purpose of pension, as applicable. Similarly, since the termination of the petitioner for the aforesaid period was not for dismissal or removal and his termination was simplicitor termination, there cannot be forfeiture of his past service as per Rule 45. Once it is held that the petitioner is entitled to condone interruption in service for the period referred to above, his pay, which he was drawing on the date of termination i.e. 30.09.2015 has to be protected. In the above circumstances, decision in the case of *Dashrath Gorme (Supra)* relied upon by the learned Counsel for respondent Nos.1 and 2 cannot be suitably made applicable to the present case to state that petitioner is not entitled to condonation of break in service in view of Rule 48, as the facts of the present case are different from the said decision. As per facts of the said decision, the petitioner was terminated from service after noticing his absence on the table during duty hours and there was also delay of 17 years to file application to condone break in service. Therefore, argument advanced by the learned Counsel for the respondent Nos.1 and 2 relying upon the decision in the case of *Dashrath Gorme (Supra)* that the petitioner is not entitled to

condone break in the service is not acceptable.

16. In view of above discussion, we quash and set aside the impugned orders and condone the break in the service of the petitioner between 01.10.2015 and 06.11.2015 and direct to treat service of the petitioner as continuous service for the purpose of pension, as applicable. So also, we direct to protect the pay of the petitioner, which he was drawing on 30.09.2015, when he was terminated from service.

17. Petition is thus allowed and rule is accordingly made absolute in aforesaid terms.

[S.M. GAVHANE, J.]

[SUNIL P. DESHMUKH, J.]