

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

WRIT PETITION NO.460 OF 2016

Shri.Salim Babu Shaikh

..Petitioner

V/s.

The State of Maharashtra

Through The Principal Secretary & Anr.

..Respondents

Ms.Nazia S.A. Shaikh for the Petitioner.

Mr.P.P. Pujari, AGP for the Respondent-State.

Mr.Kalpesh Patil i/b Mr.A.R. Kapadnis for Respondent No.2.

CORAM : C.V. BHADANG, J.

DATE : 20th DECEMBER 2019

P.C.

1. The challenge in this petition is to the order dated 21st April 2012 passed by the second respondent/Disciplinary Authority, thereby treating the period of absence of the petitioner from 07th August 2005 till reinstatement, as not eligible to be counted for any purpose, including for entitlement to the petitioner pensionary benefits.

2. The brief facts are that the petitioner who is in employment of the Zilla Parishad, Nashik was departmentally proceeded against, for having remained absent from duty. In the

enquiry the petitioner admitted to the charges as leveled but claimed that on account of medical ground he could not remain present. The Disciplinary Authority accepting the enquiry report, by an order dated 21st June 2010 awarded punishment of removal from service. The petitioner challenged the same before the Appellate Authority namely the Divisional Commissioner at Nashik in EMP Appeal No.16 of 2011. The Appellate Authority found that the punishment imposed was quite harsh in the context of the misconduct proceed. The Appellate Authority found that there are no serious charges of embezzlement or otherwise against the petitioner and he remained absent on account of medical reasons. Therefore, the punishment of removal from service was not justified. In view of this, the Appellate Authority by an order dated 28th March 2012 allowed the appeal filed by the petitioner and instead awarded a punishment of permanent debarring of three annual increments. After this order was passed the petitioner has been reinstated. However, by the impugned order dated 21st April 2012 the second respondent in addition to the punishment awarded by the Appellate Authority has directed that the period of absence from 07th August 2005 till reinstatement shall be treated as absence without leave and shall not be counted for the purposes of the pensionary benefits.

3. I have heard learned counsel for the petitioner and learned counsel for the respondent and perused record.

4. It is submitted by the learned counsel for the petitioner that once the Appellate Authority awarded the punishment of permanent debarring of three annual increments, it was not open to the Disciplinary Authority to modify the said order by imposing an additional penalty of treating the period of absence as not eligible for being counted for the pensionary benefits. It is submitted that the impugned order results into the petitioner being debarred from getting pensionary benefits.

5. The learned counsel for the second respondent has supported the impugned order. It is submitted that the Appellate Authority has not given any direction as to how the period of absence is to be treated and therefore it was open to the second respondent to pass necessary order as to the treatment of the period of absence. It is submitted that the petitioner was in the habit of remaining absent and therefore, the period of absence has rightly been treated as in eligible to be counted for the purposes of the pensionary benefits.

6. The learned counsel for the second respondent submitted that there is an alternate remedy to the petitioner of challenging the impugned order in a departmental appeal. Secondly, it is also contended that there is delay in approaching this Court, inasmuch as the impugned order which is of the year 2012 is sought to be challenged in the year 2015.

7. I have considered the circumstances and the submissions made. It is evident that the Appellate Authority found that the punishment initially imposed on the petitioner of removal from service was excessive and therefore has set aside the order passed by the Disciplinary Authority and directed that three annual increments of the petitioner shall be permanently barred. It is true that there is no specific order as to how the period of absences is to be treated. However, this in my considered view, would not clothe the second respondent to further add to the penalty/punishment by directing that the period of absences shall not be counted for the purposes of the pensionary benefits. This would eventually amount to imposition of punishment over and above, the penalty which was found to be appropriate by the Appellate Authority. In that view of the matter, the impugned order to the extent treating the period of absence as not eligible for the purposes of the computation of the

pensionary benefits, under Rule 63 (6) of the Maharashtra Civil Services (Leave) Rules, 1981, cannot be sustained.

8. Insofar as the contention about the petitioner having alternate remedy is concerned, I am not inclined to accept the same, as the petition has already been admitted and rule is issued on 16th April 2018. That apart the impugned order ex-facie not maintainable in the face of the order passed by the Appellate Authority. In that view of the matter, the petition is allowed. The impugned order as to the extent, directing that the period of absence shall not be counted for the purposes of the pensionary benefits, is hereby set aside. Rule is made absolute in the aforesaid terms, with no order as to costs.

[C.V. BHADANG, J.]