IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 5544 OF 2006

Vitthoba s/o Punjaji Sambhare
Age : 51 years, occ : service
As a Section Officer, Zilla
Parishad, Jalna. **Petitioner**.

Versus

1. The State of Maharashtra

2. The Chief Executive Officer,
Zilla Parishad, Jalna. **Respondents**

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Mr. D.R. Irale Patil, Advocate for the petitioner.
Mr. R.D. Sanap, A.G.P. for respondent No.1.
Mr. V.C. Patil (Ashtekar), Advocate holding for
Mr. U.B. Bondar, Advocate for respondent No.2.

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CORAM : N.J. JAMADAR, J.

Date : 25th March 2021.

ORAL JUDGMENT.

The challenge in this petition is to an order dated 23rd May 2006 passed by the Divisional Commissioner, Aurangabad in Appeal No. 2005/DB/Appeal/Cell/32 preferred by the petitioner, under Rule 13 of the Maharashtra Zilla Parishad District Services (Discipline and Appeal) Rules, 1964 (the Rules 1964), whereby the appeal preferred by the petitioner against the order of imposition of the penalty of withholding three increments and recovery of a sum of Rs. 2407/-, passed by the Chief Executive Officer, Zilla Parishad, Jalna, by an order dated 2nd May 2000, came to be dismissed.

2. Shorn of unnecessary details, the background facts leading to this petition can be stated as under :-

During October 1996 to April 1998 the petitioner was working as a Senior Assistant under Block Education Officer, Panchayat Samiti, Bhokardan. As many as 17 Central Primary Schools and few high schools in Bhokardan Taluka were under the supervision of the Block Education Officer. The Headmasters of Central Primary Schools used to prepare the monthly salary bills of the teachers and forward the same to the Block Education Officer for onward transmission to the Block Development Officer. Such reports, received from the schools, were consolidated by the petitioner under the supervision of the Block Education Officer.

3. One Mr. L.Z. Ahire was posted in the Primary School Nanza, Central Primary School, Sirajgaon Mandap. Mr. Ahire had furnished an incorrect date of his birth. Though he was born on 3rd March 1940, Mr. Ahire gave a declaration in the prescribed format indicating his date of birth to be 3rd June 1942. Even the Headmaster of the school, wherein Mr. Ahire was working,

submitted the monthly statement indicating the same date of birth. In the meanwhile, the petitioner was transferred to the Health Department, w.e.f. 22nd April 1998. Thereafter a notice was served on the petitioner on 7th June 1999 calling upon the petitioner to show cause as to why action should not be taken for not taking steps to retire the said Mr. Ahire as he had completed the age of superannuation on 31st March 1998 itself. The petitioner furnished an explanation on 16th June 1999 pointing out that not only Mr. Ahire had furnished an incorrect date of birth, but even the statement submitted by the Headmaster of the school wherein Mr. Ahire was working, had given his date of birth as 3rd June 1942. The petitioner was, thus, not responsible for the said act.

4. The Chief Executive Officer, Zilla Parishad, Jalna (respondent No.2) did not find the explanation of the petitioner worthy of acceptance. Opining that the petitioner was attempting to shift the responsibility on others, the respondent No. 2 gave a final notice on 29th February 2000 to show cause as to why the penalty of withholding three annual increments, with each increment being withheld for three years, be not imposed and why the excess payment made to Mr. Ahire from 01.04.1998 to 28.02.1999, excluding the pension, be not recovered.

5. The petitioner gave detailed explanation on 3rd March 2000. However, respondent No. 2 did not properly consider the explanation submitted by the petitioner. Eventually, the respondent No. 2 rejected the explanation and imposed the penalty of withholding three annual increments (each annual increment to be stopped for three years) and recovery of a sum of Rs. 2407/-, being 1/3rd of the excess remuneration paid to Mr. Ahire.

6. Being aggrieved by and dissatisfied with the aforesaid penalty, the petitioner preferred appeal under Rule 13 of the Rules 1964. By the impugned order dated 23rd May 2006, the Divisional Commissioner, Aurangabad was persuaded to dismiss the appeal holding, *inter alia*, that the order passed by respondent No. 2 on 2nd May 2000 was in conformity with the provisions of the Rules 1964 and no interference was warranted therein

7. Being further aggrieved, the petitioner has invoked the writ jurisdiction of this Court.

8. While issuing the Rule, this Court had granted interim relief and stayed the effect and operation of the impugned orders.

9. An affidavit-in-reply is filed on behalf of respondent No. 2. It is contended that respondent No. 2 has imposed the impugned penalty in conformity with Rule 6 of the Rules 1964. Neither there is any illegality in the procedure of imposing the penalty nor the penalty can be said to be disproportionate to the gravity of the misconduct. Respondent No. 2 has, thus, prayed for dismissal of the writ petition.

10. I have heard Mr. Irale Patil, the learned Counsel for the petitioner, Mr. R.D. Sanap, the learned A.G.P. for respondent No. 1 and Mr. V.C. Patil, learned Counsel for respondent No.2-Zilla Parishad.

11. The learned Counsel for the petitioner mounted a two-fold challenge to the impugned order. The first and foremost, the impugned orders suffer from the vice of exercise of the authority to impose the penalty in breach of the prescription under the Rules 1964. The penalty of withholding three increments, each increment to be withheld for a period of three years, could not have been imposed without holding a proper disciplinary enquiry wherein the petitioner is provided an effective opportunity of defending the charges levelled against him. In the circumstances of the case, the impugned penalty, according to the learned Counsel for the petitioner, cannot be

termed a minor penalty as the effect of withholding of the increments entailed prejudicial consequences on the pensionary benefit. Disguised as the minor penalty, the petitioner was made to face prejudicial consequences without following the mandatory procedure prescribed under the Rules, urged the learned Counsel for the petitioner.

12. Secondly, according to the learned Counsel for the petitioner, in the facts of the case, the petitioner could not have been fastened with the liability for the continuation of service of Mr. Ahire beyond the period of superannuation. There is material on record to indicate that the concerned employee as well as the Headmaster of the school, wherein the said employee was posted, had furnished an incorrect date of birth. The petitioner, who was to simply collect the record, had no means to ascertain the correct date, and, therefore, could not have been held responsible for the said continuation beyond the period of superannuation.

13. In opposition to this, the learned Counsel for respondent No. 2, submitted that it was the responsibility of the petitioner to ensure that the concerned employee is retired when he attained the age of superannuation. Since the petitioner did not perform his duty diligently, respondent No. 2 was made to

pay remuneration to Mr. Ahire for the period for which he was not entitled to continue in service. As only penalty of withholding three increments is imposed, there was no requirement of holding departmental enquiry, urged the learned Counsel for respondent No. 2.

14. The learned A.G.P. supported the impugned orders.

15. To begin with the uncontroverted facts. It is not in dispute that the petitioner was working as a Senior Assistant to the Block Education Officer, Panchayat Samiti, Jalna from October 1996 to April 1998. Nor there is much controversy over the fact that Mr. L.Z. Ahire, who was then working at Primary School Nanza, Central Primary School, Sirajgaon Mandap, continued to serve till 28th February 1999, though he had attained the age of superannuation on 31st March 1998. The substance of imputation against the petitioner was that the petitioner did not diligently perform his duty and ensure that Mr. Ahire was retired from service on the date he attained the superannuation. Indisputably, the first show-cause notice was issued on 7th June 1999, to which the explanation was submitted by the petitioner on 16th June 1999. Respondent No. 2 did not find the explanation satisfactory and issued final show-cause notice on 29th February 2000 and after considering the

explanation dated 3rd Marcy 2000, imposed the penalty as indicated above, by order dated 2nd May 2000. It is nobody's case that the departmental enquiry, as envisaged by the provisions of Section 6 of the Rules 1964, for imposing major penalty, was conducted. In contrast, it is the case of the respondents that the penalty came to be imposed by following the procedure prescribed under Rule 7 of the Rules 1964.

16. The pivotal question which arises for consideration is, whether in the facts of the case, the imposition of penalty of withholding three increments, each increment being withheld for a period of three years, without holding departmental enquiry in conformity with the provisions of Rule 6 of the Rules 1964, is valid and sustainable?

17. The learned Counsel for the petitioner strenuously urged that the imposition of penalty of withholding three increments, in the case at hand, by no stretch of imagination, can be termed a minor penalty. In effect, the petitioner was deprived of the increments for 9 years. The actual effect and implication of the penalty cannot be lost sight of. Such a penalty could not have been imposed without holding a proper disciplinary proceedings, urged Mr. Irale Patil, the learned Counsel for the petitioner.

18. In order to lend support to this submission, the learned Counsel for the petitioner placed a very strong reliance on a Division Bench Judgment of this Court in the case of ***Narendra Motiram Vs Additional Commissioner, Nagpur and others, [2006 (5) Mh.L.J. 229***], wherein the Division Bench was confronted with the question whether awarding of punishment of withholding two increments permanently is a major punishment and whether such punishment can be imposed by the Disciplinary Authority without holding departmental enquiry. Following a judgment of the Supreme Court in the case of ***Kulwant Singh Gill vs. The State of Punjab, 1990 (2) Current Labour Reports 686***, the Division Bench concluded that the punishment of withholding two increments permanently is admittedly the punishment which would fall in the category of major punishment and, by necessary implication, such punishment could not have been imposed by the Zilla Parishad without conducting appropriate departmental enquiry.

19. The Division Bench extracted the following observations of the Supreme Court in the case of Kulwant Singh Gill (supra) :-

> "*Withholding of increments of pay simpliciter undoubtedly is a minor penalty within the meaning of Rule 5(iv). But sub-rule (v) postulates reduction to a lower stage in the time-scale of pay for a specified period with further*

directions as to whether or not the Government employee shall earn increments of pay during the period of such reductions and whether on the expiry of such period the reduction will or will not have the effect of postponing the future increments of his pay. It is an independent head of penalty and it could be imposed as punishment in an appropriate case. It is one of the major penalties. The impugned order of stoppage of two increments with cumulative effect whether would fall within the meaning of Rule 5(v)? If it so falls Rules 8 and 9 of the Rules require conducting of regular enquiry. The contention of Shri Nayar, learned counsel for the State is that withholding two increments with cumulative effect is only a minor penalty as it does not amount to reduction to a lower stage in the time-scale of pay. We find it extremely difficult to countenance the contention. Withholding of increments of pay simpliciter without any hedge over it certainly comes within the meaning of Rule 5(iv) of the Rules. But when penalty was imposed withholding two increments i.e. for two years with cumulative effect, it would indisputably mean that the two increments earned by the employee was cut off as a measure of penalty for ever in his upward march of earning higher scale of pay. In other words the clock is put back to a lower stage in the time- scale of pay and on expiry of two years the clock starts working from that stage afresh. The insidious effect of the impugned order, by necessary implication, is that the appellant employee is reduced in his time-scale by two places and it is in perpetuity during the rest of the tenure of his service with a direction that two years' increments would not be counted in his time-scale of pay as a measure of penalty. The words are the skin to the language which if pealed off its true colour or its resultant effects would become apparent. When we broach the problem from this perspective the effect is as envisaged under Rule 5(v) of the Rules. It is undoubted that the Division Bench in Sarwan Singh v. State of Punjab & Ors., I.L.R. 1985 2 P & H. 193, P.C. Jain, A.C.J. speaking for the division bench, while considering similar question, in paragraph 8 held that the stoppage of increments with cumulative effect, by no stretch of imagination falls within clause (v) of Rule 5 or in rule 4.12 of Punjab Civil Services Rules. It was further held that under clause (v) of Rule 5 there has to be a reduction to a lower stage in the time-scale of pay by the competent authority as a measure of penalty and the period for which such a reduction is to be effective has to be stated and on restoration it has further to be specified whether the reduction shall operate to postpone the future increments of his pay. In such cases withholding of the increments

> *without cumulative effect does not at all arise. In case where the increments are withhold with or without cumulative effect the Government employee is never reduced to a lower stage of time scale of pay. Accordingly it was held that clause (iv) of Rule 5 is applicable to the facts of that case. With respect we are unable to agree with the High Court. If the literal interpretation is adopted the learned Judges may be right to arrive at that conclusion. <u>But if the effect is kept at the back of the mind, it would always be so, the result will be the conclusion as we have arrived at. If the reasoning of the High Court is given acceptance, it would empower the disciplinary authority to impose, under the garb of stoppage of increments, of earning future increments in the time scale of pay even permanently with expressly stating so. This preposterous consequences cannot be permitted to be permeated. Rule 5(iv) does not empower the disciplinary authority to impose penalty of withholding increments of pay with cumulative effect except after holding inquiry and following the prescribed procedure. Then the order would be without jurisdiction or authority of law, and it would be per se void</u>. considering from this angle we have no hesitation to hold that the impugned order would come within the meaning of Rule 5(v) of the Rules; it is a major penalty and imposition of the impugned penalty without enquiry is per se illegal".*
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> (emphasis supplied)

20. The aforesaid observations make it abundantly clear that it is not the mere outward texture of the penalty (withholding of increments) that is decisive. What has to be looked at is the effect of the impugned order. The Supreme Court has, thus, observed that when penalty was imposed withholding two increments i.e. for two years with cumulative effect, it would indisputably mean that the two increments earned by the employee were cut off as a measure of penalty for ever in his upward march of earning higher scale of pay. In other words, the clock is put back to a lower stage in the time scale of

pay and on expiry of two years the clock starts working from that stage afresh. The insidious effect of such order by necessary implication, is that the employee is reduced in his time-scale by two places and it is in perpetuity during the rest of the tenure of his service with a direction that two years' increments would not be counted in his time-scale of pay as a measure of penalty.

21. If the aforesaid consequences are appreciated, in the facts of the instant case, I find that the impugned order is more insidious. Three increments are to be withheld. Each increment to be withheld for a period of three years. The grievance of the learned Counsel for the petitioner that it would effectively mean that the petitioner would not get an increment for 9 years, cannot be said to be unfounded. In the light of the aforesaid pronouncement, I am not persuaded to agree with the submission on behalf of the respondents that the impugned penalty could have been legitimately imposed without holding a proper disciplinary proceedings under Rule 6 of the Rules 1964. The challenge is, thus, legally sustainable.

22. The matter can be looked at from a slightly different perspective. Rule 10 of the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979 prescribes the procedure for

imposing minor penalties. Sub-rule (2) of Rule 10 is of material significance. It provides that notwithstanding anything contained in Clause (b) of sub-rule (1), if in a case it is proposed to withhold increments of pay and such withholding of increments is likely to affect adversely the amount of pension payable to the Government servant or to withhold increment exceeding three years or to withhold increments of pay with cumulative effect for any period, an inquiry shall be held in the manner laid down in sub-rules (3) to (27) of Rule 8, before making any order of imposing on the Government servant any such penalty. Undoubtedly, such a provision does not find place in Rule 7 of the Rules 1964. However, the concern of providing for a proper disciplinary enquiry where the seemingly minor penalty of withholding of increments has the consequence of adversely affecting the pensionary benefit or otherwise impact emoluments to be drawn by a Government servant, for a considerable period, becomes explicit. In the case at hand, since the increments of the petitioner were to be withhold for a period of 9 years, holding of a proper disciplinary enquiry was necessary.

23. On the merits of the matter, I am mindful of the limits of exercise of the writ jurisdiction. This Court would not

be justified in delving into the adequacy of the material on the strength of which Disciplinary Authority entered into the finding of guilt and imposed the penalty. However, nature of the imputation cannot be lost sight of. The Disciplinary Authority as well as the Appellate Authority seem to have fallen into an error in not giving due weight and consideration to the explanation of the petitioner that the concerned employee had made an incorrect declaration about his date of birth and the same mistake was committed by the Headmaster of the school, where he was posted. The monthly statement submitted by the Headmaster of the school (page 23 and 24), indicates that the date of birth of Mr. Ahire was mentioned as 3rd June 1942. In the declaration made by Mr. Ahire under Rule 116 (14) of the Maharashtra Civil Services (Pension Rules), 1982 also his date of birth was mentioned as 3rd June 1942. The impugned orders do not record that there was material which *ex facie* indicated that the aforesaid record was incorrect and yet the petitioner did not take remedial action. Thus, on the merits of the matter, on the touchstone of the principle of Wednesbury unreasonableness, the impugned orders become suspect.

24. The upshot of aforesaid consideration is that the order of withholding of three increments, each increment being

withheld for three years, and recovery, passed by the Disciplinary Authority cannot be said to have been passed in conformity with the provisions of Rules 1964. As the said penalty partakes the character of a major penalty, it could not have been passed without holding a departmental enquiry. The Appellate Authority, which is statutorily enjoined, under Rule 21 of the Rules 1964, to examine whether the procedure prescribed in the Rules had been complied with and, if not, whether such non-compliance has resulted in failure of justice, also failed to advert to the legality of the procedure adopted for imposing the penalty.

25. Consequently, the impugned orders deserve to be quashed and set aside. Hence, the following order.

ORDER

(i) The petition stands allowed in terms of prayer clause 'B'.

(ii) The order bearing No. ZPJ/ Education/PRA-11/ PEN/2000/2010, dated 2nd May 2000 passed by respondent No. 2 and the order dated 23rd May 2006 passed by the Divisional Commissioner in Appeal No. 2006/DB/Appeal/ Cell/32 stand quashed and set aside.

(iii) Rule made absolute in aforesaid terms.

(N.J. JAMADAR, J.)

VD_Dhirde