

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

WRIT PETITION NO.8439 OF 2018

Shri Sambhaji Maruti Gutte,
Age : 40 years, occ. Service at
Peon (under suspension),
r/o c/o Residential Deaf & Dumb
School, Kamla Nagar, Hingoli,
Tal. Hingoli, Dist. Hingoli

...PETITIONER

VERSUS

1. State of Maharashtra,
Through its Secretary,
Social Justice and Special
Assistance Department,
Mantralaya, Mumbai
2. Divisional Social Welfare
Officer/Regional Deputy
Commissioner, Aurangabad
Division, Aurangabad
3. District Social Welfare Officer,
Group A, Zilla Parishad,
Hingoli, Dist. Hingoli
4. Shri Jyotiba Phule Seva Trust,
Nanded, 7, Laxminarayan
Apartment, Wadiya Factory area,
Shivaji Naqgar, Nanded,
Through its Secretary
5. Residential Deaf and Dumb
School, Hingoli, Tal. Hingoli,
Dist. Hingoli

...RESPONDENTS

Mr A.V. Indrale Patil, Advocate for the petitioner;
Mrs G.L. Deshpande, A.G.P. for respondent nos.1 & 2;
Mr V.S. Panpatte, Advocate for respondent no.3;
Mr P.G. Gunale, Advocate for respondent nos.4 & 5;
Mr P.G. Rodge, Advocate for applicant in C.A. No.7599 of 2019

**CORAM : UJJAL BHUYAN
AND
M.G. SEWLIKAR, JJ.**

**(Date of reserving the
judgment : 17-03-2021**

**Date of pronouncing the
judgment : 05-04-2021)**

JUDGMENT (Per Ujjal Bhuyan, J.)

Rule. Rule made returnable forthwith. Heard learned Counsel for the parties finally, by consent.

2. By filing this petition under Article 226 of the Constitution of India, petitioner seeks quashing of suspension order dated 14-12-2005 and further seeks a direction to the respondents to pay him subsistence allowance for the period of suspension along with interest.

3. Case of the petitioner as pleaded in the writ petition is that following a due process he was selected and came to be appointed as Peon in the respondent no.5 school in the year 1992. It is stated that petitioner was eligible and qualified for appointment to the post of Peon. Respondent

no.5 school is being managed by respondent no.4 receiving grants-in-aid from the Government since the year 1996.

4. Proposal for approval of the appointment of the petitioner as Peon was forwarded by respondent nos.4 and 5 to the District Social Welfare Officer, Hingoli, who after due consideration granted approval by order dated 10-09-1999. District Social Welfare Officer, Hingoli i.e., respondent no.3 by subsequent order dated 26-07-2000 granted permanent approval to the appointment of the petitioner as Peon.

5. According to the petitioner, he was working sincerely and honestly as Peon in the respondent no.5 school. However, without following any due process and with a *mala fide* intention, respondent nos.4 and 5 terminated the service of the petitioner from the post of Peon with effect from 16-02-2002, vide order dated 16-07-2002. Petitioner has stated that the allegations made by respondent nos.4 and 5 for terminating the service of the petitioner were incorrect and those were made without following the principles of natural justice.

6. Aggrieved by the order of termination from service dated 16-07-2002, petitioner preferred appeal before the Divisional Social Welfare Officer, Aurangabad Division, Aurangabad i.e., respondent no.2 being the appellate authority. The said appeal was registered as Appeal No.9/2004.

7. Appellate authority issued notice to respondent no.3 as well as to respondent nos.4 and 5. After hearing the matter, respondent no.2 passed appellate order dated 30-11-2005 whereby termination order of the petitioner dated 16-07-2002 was set aside with further direction to reinstate the petitioner in service. It was, however, observed that if respondent no.4 wanted to proceed against the petitioner for committing alleged misconduct then it was at liberty to initiate appropriate proceeding in accordance with law.

8. Despite the above appellate order dated 30-11-2005, petitioner was not reinstated in service immediately. Ultimately respondent nos.4 and 5 allowed the petitioner to resume his duty in the post of Peon on 13-12-2005. Accordingly, petitioner joined the post of Peon on 13-12-2005 itself and submitted joining report.

9. Immediately on the next day i.e., on 14-12-2005, respondent no.4 issued suspension order in respect of the petitioner thereby placing him under suspension pending initiation of departmental enquiry. However, it was mentioned in the suspension order that petitioner would be entitled to subsistence allowance as admissible.

10. On 02-01-2006 respondent no.4 issued letter to the petitioner informing him that a departmental enquiry was contemplated against him in which petitioner should co-operate with the enquiry committee. However, the proposed enquiry never took off and no departmental proceedings were drawn up against the petitioner. In the meanwhile, petitioner continued to remain under suspension. However, he was not paid the required subsistence allowance.

11. When petitioner insisted upon respondent nos.4 and 5 for payment of subsistence allowance, it was shown that petitioner was working in the post of Watchman in the respondent no.5 school on contract basis and approval to such appointment was obtained from the concerned District Social Welfare Officer.

12. Petitioner has contended that such action on the part of respondent nos.3 to 5 was not only improper but was also illegal and arbitrary. Petitioner was appointed against a clear and permanent vacancy in the post of Peon in which post he was placed under suspension in contemplation of departmental enquiry. However, neither there was any enquiry nor any subsistence allowance paid to the petitioner. That apart, it was totally unnecessary for the respondents to have shown that petitioner was working in the post of Watchman in the respondent no.5 school and working in the said post on contract basis. Highlighting the above facts

and ventilating his grievance, petitioner submitted representation dated 17-09-2007 before respondent no.3 requesting the said respondent to revoke the order of suspension and thereafter to pay him his regular salary. However, no steps have been taken on the said representation of the petitioner.

13. It is in such circumstances that the present writ petition came to be filed in the year 2018 seeking the reliefs as indicated above.

14. This Court by order dated 25-07-2018 had issued notice.

15. Respondent nos.4 and 5 have filed a common affidavit-in-reply. Stand taken in the affidavit is that the writ petition suffers from delay and laches, besides suppression of material facts. While admitting that the petitioner was appointed in respondent no.5 school in the post of Peon approval to which was granted initially on 10-09-1999 and thereafter on 26-07-2000, it is however, stated that while serving in the respondent no.5 school petitioner was involved in the kidnapping of a girl student from the school on 16-02-2002. That apart, he had remained unauthorizedly absent from duty for about three months. In such circumstances, respondent nos.4 and 5 took the view that petitioner had abandoned his service and therefore, started taking steps to fill up the said post of Peon, whereafter one Shri Madhav Tukaram Munde was selected for appointment to the

post of Peon earlier held by the petitioner. Ultimately respondent no.4 was constrained to terminate the service of the petitioner vide order dated 16-07-2002 and by separate order of even date Shri Madhav Tukaram Munde came to be appointed in the post of Peon with effect from 17-07-2002 whereafter he is in continuous service. As a matter of fact, service of Shri Madhav Tukaram Munde in the post of Peon was confirmed with effect from 01-04-2004 vide order dated 02-07-2004.

15.1. Respondent no.3 has also granted approval to the appointment of Shri Madhav Tukaram Munde in the post of Peon effective from 01-04-2004.

15.2. Petitioner belatedly filed Appeal No.9/2004 before respondent no.2 challenging his termination order dated 16-07-2002. It is stated that without considering the subsequent appointment of Shri Madhav Tukaram Munde and the approval granted to such appointment, respondent no.2 i.e., appellate authority by order dated 30-11-2005 allowed the appeal by quashing the termination order dated 16-07-2002 and directing reinstatement of the petitioner. However, liberty was granted to respondent nos.4 and 5 to hold departmental enquiry against the petitioner, if considered necessary.

15.3. Since there was no vacant post of Peon in the respondent no.5 school to reinstate the petitioner as per the appellate order dated 30-11-2005, petitioner was not allowed to join any permanent post but on paper only it was shown that he was allowed to join. Answering respondents have admitted that vide order dated 14-12-2005 petitioner was placed under suspension.

15.4. Contrary to what is stated above, respondent nos.4 and 5 have stated that by way of sympathy petitioner was allowed to work in the school hostel from January, 2006 on honorarium basis.

15.5. When the petitioner made representation on 17-09-2007 for revocation of suspension order and threatened hunger strike, respondent no.4 negotiated with the petitioner whereafter an amicable settlement was reached whereby respondent no.4 assured the petitioner to appoint him in a class IV post after sanction of additional posts in the respondent no.5 school. Petitioner agreed to the same. While withdrawing the hunger strike, petitioner agreed that he would not claim salary and/or subsistence allowance in the post of Peon.

15.6. From January, 2006 to May, 2013 petitioner worked in the hostel of respondent no.5 school on honorary basis and honorarium for the said period was released to the petitioner.

15.7. After sanction of additional posts including the post of Watchman in respondent no.5 school, respondent no.4 vide order dated 11-06-2013 appointed the petitioner to the post of Watchman with effect from 18-06-2013 and approval to such appointment was granted by respondent no.3. Thus, from 18-06-2013 petitioner is in service in respondent no.5 school in the post of Watchman receiving regular salary.

15.8. Petitioner has filed Writ Petition No.5439 of 2018 before this Court challenging his suspension by deliberately suppressing material facts as set out in the reply affidavit. Besides, the present writ petition suffers from delay and laches. Therefore, the writ petition should be dismissed.

16. Petitioner has filed re-joinder affidavit. It is stated that following the appellate order dated 30-11-2005, respondent nos.4 and 5 had reinstated the petitioner but on the very next day he was placed under suspension in contemplation of departmental enquiry. However, neither any departmental enquiry has been conducted till date nor any subsistence allowance been paid to the petitioner though more than fifteen years have elapsed since then.

16.1. Contention of respondent nos.4 and 5 that there was amicable settlement between them and the petitioner has been specifically denied.

In view of the representation made by the petitioner respondent nos.4 and 5 had assured the petitioner that he would be paid subsistence allowance, besides the departmental enquiry would be completed. However, neither of the two has materialized.

16.2. Petitioner has also specifically denied the statement made by respondent nos.4 and 5 that petitioner worked as Hostel Attendant from January, 2006 to May, 2013 on honorary basis, while admitting that in the year 2013 respondent nos.4 and 5 had shown that petitioner was appointed in the post of Watchman on honorary basis which had the approval of respondent no.3. However, since the year 2005 there was no appointment order issued in favour of the petitioner either in the post of Watchman or in the post of Peon. Consequently, petitioner continued to remain under suspension.

16.3. Regarding appointment of Shri Madhav Tukaram Munde to the post of Peon in which the petitioner was working, it is submitted that approval granted to Shri Munde was conditional and the same was made subject to outcome of the proceedings instituted by the petitioner. Besides, petitioner represented before the District Social Welfare Officer on 08-12-2004 not to continue anybody in the post of Peon in which he was working in view of the proceeding instituted by him.

16.4. It is further stated that respondent nos.4 and 5, with a view to show that petitioner was appointed to the post of Watchman in the hostel and was paid some amount, sought approval of such appointment but the competent authority cancelled such approval on 09-06-2017 on the ground that such appointments in temporary posts being illegal were accordingly cancelled. It is asserted that such stand taken by respondent nos.4 and 5 in the reply affidavit is only with a view to deprive the petitioner from his legitimate right of seeking reinstatement and payment of subsistence allowance.

17. Civil Application No.7599 of 2019 has been filed by Shri Madhav Tukaram Munde to intervene in the proceedings of Writ Petition No.8439 of 2018.

18. On 13-06-2019, learned Counsel for respondent no.3 made a submission that the writ petition suffers from delay and laches. Responding to such submission, this Court observed that such submission was difficult to comprehend. Petitioner was under suspension for fourteen years. While the suspension had not been revoked, it was submitted on behalf of respondent no.3 that as the challenge to such suspension was not made earlier it should continue. Expressing the view that such a situation should not be allowed to continue, this Court held that if the

petitioner was still under suspension pursuant to the order dated 14-12-2005 and no penalty had been imposed upon the petitioner then the suspension order would stand revoked.

19. In the proceedings held on 03-10-2019, learned Counsel for respondent no.5 submitted that petitioner was subsequently appointed as Watchman and continued till 2017 whereafter approval was not granted. Petitioner had filed Writ Petition No.7832 of 2019 challenging the same. In view of such submission, this Court directed that the present writ petition be tagged along with Writ Petition No.7832 of 2019.

20. On 04-12-2019 learned Counsel for respondent nos.4 and 5 submitted that petitioner had filed another writ petition being Writ Petition No.7832 of 2019. Responding to such submission, learned Counsel for the petitioner submitted that as a matter of fact, petitioner had not filed Writ Petition No.7832 of 2019 and that petitioner had never signed the said writ petition. This Court noted that petitioner had filed affidavit stating that respondent no.4 by making false and fabricated signature of the petitioner appeared to have filed the said writ petition along with other petitioners. In the circumstances, the previous direction for tagging of the two cases was reiterated.

21. When the matter was finally heard on 17-03-2021 this Court directed that Writ Petition No.7832 of 2019 disposed of on 14-10-2019 be tagged with the present case.

22. Submissions made by learned Counsel for the parties are on pleaded lines. Therefore, a detailed reference to the same is considered not necessary. However, the submissions so made have received the due consideration of the Court.

23. Before proceeding with the core issue raised in the writ petition, it would be apposite to advert to Writ Petition No.7832 of 2019. The said writ petition was heard along with two other writ petitions being Writ Petition No.7831 of 2019 and Writ Petition No.7833 of 2019. Altogether six petitioners had filed the writ petition and at sr. no.5 the name of the present petitioner appears. Prayer made in the said writ petition was to quash communication dated 09-06-2017 issued by respondent no.3. From the body of the writ petition, we do not find any particular averment made in respect of the present petitioner i.e., in which post he was working, etc. Insofar the communication dated 09-06-2017 was concerned, it was stated that by the said communication appointments of the petitioners had been cancelled.

24. This Court by order dated 14-10-2019 took the view that petitioners should have been heard before cancelling their appointments. In fact, the impugned communication was quashed while giving liberty to the authority to take a fresh decision in the matter on merit but after giving a hearing to the petitioners.

25. Interestingly, in the office note dated 26-06-2019 it was mentioned that the memo was not sworn on behalf of other petitioners.

26. Petitioner has vehemently denied that he had filed Writ Petition No.7832 of 2019 and this has been reiterated by learned Counsel for the petitioner at the time of hearing. However, this court is of the view that if petitioner's name was misused and his name was included as a petitioner in Writ Petition No.7832 of 2019 fraudulently, he should have filed necessary application in the said writ petition itself for deleting his name from the writ petition and for dismissal of the same for committing fraud. This is one lacuna which has remained on the part of the petitioner.

27. However, notwithstanding the same, the question which is before the court is as to whether respondent nos.4 and 5 can continue the suspension order of the petitioner dated 14-12-2005 for an indefinite period, that too without payment of any subsistence allowance ?

28. To answer the above question, let us briefly highlight the admitted facts. Petitioner was appointed as Peon in respondent no.5 school and was working as such since the year 1992. The said post of Peon is a regular and permanent post. Respondent no.5 receives grants-in-aid from the Government. Appointment of the petitioner to the post of Peon received approval of respondent no.3 on 10-09-1999 which was thereafter granted permanent approval on 26-07-2000. Petitioner was terminated from service on 16-07-2002, with effect from 16-02-2000. Petitioner filed appeal against such termination before respondent no.2 being Appeal No.9/2004. By the appellate order dated 30-11-2005 respondent no.2 set aside the dismissal order of the petitioner and directed his reinstatement while granting liberty to respondent nos.4 and 5 to proceed against the petitioner departmentally, if so advised. Complying with the appellate order dated 30-11-2005 petitioner was reinstated in service in the post of Peon on 13-12-2005. However, on the very next day i.e., on 14-12-2005 petitioner was placed under suspension pending drawal of departmental proceedings. As of today no departmental proceeding has been initiated against the petitioner and no subsistence allowance has been paid to him. The appellate order dated 30-11-2005 has not been challenged before any higher forum by anybody. As a result, the said appellate order has attained finality.

29. According to respondent nos.4 and 5 after termination of the service of the petitioner they had appointed Shri Madhav Tukaram Munde in the post of Peon vide order dated 16-07-2002 in which post he continues to serve. Such appointment has also received approval from respondent no.3. While admitting about and acknowledging the appellate order dated 30-11-2005 and also about placing the petitioner under suspension vide order dated 14-12-2005, it is stated that out of sympathy petitioner was allowed to work in the hostel of respondent no.5 school from January, 2006 on honorary basis whereafter he was appointed to the post of Watchman by order dated 11-06-2013 in which post petitioner received salary.

30. Interestingly, in the reply affidavit of respondent nos.4 and 5 though the said respondents referred to the appointment of the petitioner to the post of Watchman in respondent no.5 school, they did not mention about the communication dated 09-06-2017 of respondent no.3 whereby such appointment amongst others was cancelled or about filing of Writ Petition No.7832 of 2019 though the reply affidavit was filed on 14-07-2019.

31. We have already noted the vehement denial of the petitioner about any amicable settlement reached by him with respondent nos.4 and 5 and the fact that he was allowed to work as Hostel Attendant from January, 2006 on honorary basis. It is the further stand of the petitioner that though

in the year 2013 respondent nos.4 and 5 claimed petitioner was appointed as Watchman, no such appointment order came to be issued since the year 2015.

32. The situation which does emerge is that petitioner's termination from service in the post of Peon was set aside by the appellate authority with further direction to reinstate him in service. This decision of the appellate authority has attained finality. In compliance to such direction, respondent nos.4 and 5 reinstated the petitioner in service in the post of Peon on 13-12-2005 but on the very next day i.e., on 14-12-2005 he was placed under suspension which fact has been admitted by respondent nos.4 and 5 in the reply affidavit.

33. The legal consequence of an employee being placed under suspension is that he continues to retain or hold lien over the said post. The vacancy caused in the post due to suspension of the incumbent is only temporary during the period of suspension. Since the employee continues to retain or hold lien over the post, he is paid subsistence allowance during the period of suspension. Therefore, when a post falls vacant due to suspension of the incumbent, such vacancy is purely temporary and cannot be filled up on a permanent basis. Any appointment made to such a vacancy would be subject to outcome of the suspension. If the suspension is revoked, the subsequent appointee will

have to move out. The subsequent appointee can only stake claim to permanent appointment only upon the suspended employee being dismissed, removed or compulsorily retired from that post; none of which has taken place in the present case.

34. Suspension by its very nature is not a punishment as is understood in service jurisprudence. It is a temporary measure to ensure that the domestic enquiry or departmental proceeding against the delinquent can be conducted smoothly. Therefore, suspension of the delinquent or an employee cannot be continued for an indefinite period. That apart, during the period of suspension the employee or the delinquent would be entitled to subsistence allowance in accordance with law. Non payment of subsistence allowance to a suspended employee would not only be illegal being in violation of the relevant legal provisions but would also be violative of the right to life under Article 21 of the Constitution of India.

35. In the present case petitioner was placed under suspension on 14-12-2005. More than fifteen years have gone by since then. During this entire period neither has he been paid any subsistence allowance nor any departmental proceeding has been initiated against him. By any standard, fifteen years is a long period in the service life of an employee. Though initial suspension of the petitioner might have been justifiable but such prolonged suspension that too without holding any departmental

proceeding and without payment of subsistence allowance has become arbitrary and oppressive. As rightly pointed out by this Court in the order dated 13-06-2019, such a situation cannot be allowed to continue. We may usefully refer to the operative portion of the order dated 13-06-2019, which reads thus:-

“4. In case, the petitioner is still under suspension pursuant to the order dated 14-12-2005 and no further penalty has been imposed upon the petitioner, then the suspension shall stand revoked.”

36. Insofar the Civil Application filed by Shri Madhav Tukaram Munde is concerned, we have already discussed above that his appointment to the post of Peon in the respondent no.5 school can only be during the suspension period of the petitioner. Considering the grievance raised and the relief sought for by the petitioner, Shri Madhav Tukaram Munde is neither a necessary nor a proper party to the present proceeding where the issue relates to legality and validity of the prolonged suspension of the petitioner and non-payment of subsistence allowance.

37. Thus, having regard to the discussions made above, we hereby set aside and quash the suspension order of the petitioner dated 14-12-2005 and direct that he be reinstated in the post of Peon in respondent no.5 school forthwith. We direct respondent nos.4 and 5 to pay subsistence allowance to the petitioner for the period he remained under suspension

within a period of three months from the date of receipt of a copy of this order. We further direct respondent nos.4 and 5 to take a decision as to regularization of the service of the petitioner during the period of suspension which would however be without prejudice to any decision that respondent nos.4 and 5 may take regarding holding of departmental proceeding against the petitioner, in accordance with law. Let such decision be taken within the aforesaid period of three months.

38. Writ Petition is accordingly allowed. However, there shall be no order as to costs.

39. Rule is made absolute in above terms.

40. Consequently, Civil Application No.7599 of 2019 stands disposed of.

(M.G. SEWLIKAR)
JUDGE

(UJJAL BHUYAN)
JUDGE

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