

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7936 OF 2023

Shri.Shamshuddin Hanif Shaikh ... Petitioner.

V/s.

The State of Maharashtra & Anr. ... Respondents.

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Mr. Ashish S.Gaikwad for the Petitioner.

Mr. N.K.Rajpurohit AGP for Respondent No.1 & 2.

.....

**CORAM : NITIN JAMDAR, AND
MANJUSHA DESHPANDE, JJ.**

DATE : 26 October 2023.

P.C. :

The Petitioner herein is serving as Police Head Constable at Satara, he has challenged the orders passed by the Maharashtra Administrative Tribunal, Mumbai in Review Application No.10/2022 dated 23 December 2022 and Order dated 30 March 2021 passed by the Maharashtra Administrative Tribunal in Original Application No.102/2022.

2 The Petitioner herein has challenged the order passed by the Superintendent of Police, Satara, dated 19 December 2019, whereby the period of his absence from duty between 27 December 2018 to

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29 October 2019, for the period of 307 days, for absence from duty, has been regularised, amongst which 50 days are treated as Commuted leave, 97 days as Earn Leave, and 166 days as leave without pay.

3 The said order passed by the Respondent No.2 Superintendent of Police- Satara was challenged and further direction was sought to treat the aforesaid period of 307 days as compulsory waiting period and release, the pay and allowances of the intervening period with interest thereon as admissible leave under the law.

4 It was the case of the Petitioner before the Tribunal, that while working as Head Constable at Satara, by an order dated 19 December 2018, he came to be transferred under Section 22N(1) of the Maharashtra Police Act, 1951 on Administrative ground from police Headquarters (Prosecution squad) to Mhaswad Police Station. He came to be relieved on 20 December 2018. According to the Petitioner, the said transfer order was not justified for his security purposes. Being aggrieved by the said order he submitted his resignation on 20 December 2018. The Petitioner on 29 December 2018, was informed that he should address his grievance at the orderly room during the office hours. Accordingly on 5 January 2019 he made an application for cancellation of his transfer, on the ground that, only 4 years had left for his retirement and also he was not keeping well and was undergoing medical treatment. Therefore, he requested for cancellation of his transfer order. According to him he

was called in the orderly room on various occasions and ultimately on 11 October 2019, his transfer order was cancelled and he came to be posted at Prosecution Squad, Satara. The Petitioner joined on 30 October 2019. Considering that he was not on duty for a period between 27 December 2018 to 30 October 2019, the question of regularisation of the said period was before the authorities and therefore, by order dated 18 December 2019 the Respondent No.2 Dy.Superintendent of Police, Satara, has been pleased to pass an order regularizing the period of absence of the Petitioner resorting to Rule 50(2), 61(1) and 63(c) Maharashtra Civil Services (Leave) Rules, 1981. Invoking the said Rules the period between 22 December 2018 to 14 February 2019 was converted into leave. From 15 February 2019 to 22 May 2019 the period of 97 days was treated as Earned Leave and from 23 May 2019 to 29 October 2019 the period of 160 days was treated as leave without pay. Thus accordingly period of absence of 307 days has been regularised by the concerned authority.

5 Being aggrieved with the same the Petitioner filed the Original Application No.102/2020 before the Maharashtra Administrative Tribunal, (MAT) Mumbai. The learned Member of the MAT, after hearing the said Original Application has been pleased to dispose the said Original Application. Taking into consideration the relevant provisions of Leave rules and also the conduct of the Petitioner the learned Member in his order has observed that, the Applicant is not justified in challenging the said order, because he has absented

himself from the duty for a period of 307 days without permission. If at all he had any grievance about his transfer he should have filed appropriate proceedings against the transfer order. He has not challenged the said order to seek legal remedy, which was available to him. Had he challenged the same he would have been justified in not joining the transferred posting. Without joining he has absented himself, which is a breach of service conditions and amounts to misconduct. The authorities could have proceeded to take action against him for such misconduct, however instead of taking any action the period of absence has been regularized by treating the period of absence as leave period, by taking a liberal approach.

6 The Tribunal has further observed that as per Rule 10 of the Maharashtra Civil Services (Leave) Rules 1981, Leave is a permission granted by the competent authority to remain absent from duty. It is his discretion to grant or refuse leave, leave cannot be claimed as of right. In the present case even though the Applicant had not made any application considering the balance leave admissible at his account, the liberal approach has been taken by the authorities. Just because his order of transfer has been cancelled by itself does not mean that the said order of transfer was illegal and it would not justify the absence of the Petitioner for a period of 307 days. The Applicant was under obligation to obey the transfer order, which was not obeyed, therefore, the learned Member of MAT has dismissed the original application, finding no illegality in the order dated 18 December 2019.

7 The Petitioner thereafter filed a Review Application, seeking Review of order in Original Application No.102/2022. In the said Review Application the Tribunal has observed that, the Applicant has not raised any new grounds and the Tribunal has already decided the original application on its merits. Therefore, considering that no new ground is made out the Review was not tenable.

8 The learned Member of the Tribunal has made specific query to the Applicant, whether he had challenged the transfer order and whether he has made any application for grant of leave to which his response was that neither he had made any application for leave nor he had challenged the transfer order dated 18 June 2018. Thus, it was clear that the Petitioner was absent unauthorisedly.

9 The learned Member has observed that when the applicant was enquired as to how much leave was there to his credit on the day of passing of impugned order dated 18 December 2019. He has fairly conceded that except 50 days commuted leave and 97 days Earned Leave there was no other leave to his credit. The balance of 160 days which was not at all to his credit was treated as leave without pay. This shows liberal and sympathetic approach towards the Petitioner and therefore, there is no error apparent in the impugned order.

10 Considering the limited scope of Review as provided under Order 47 Rule 1 of Civil Procedure Code, there is no new important

material or evidence which has been discovered and which could not be produced even after exercising due diligence. Therefore, so far as the Petitioners case was concerned there was no new material on the basis of which powers of the Review could be exercised. In view of the same the Review Application was dismissed by the Tribunal vide order dated 30 March 2021.

11 The Petitioner is challenging both the orders passed in Original Application No.102/2021 as well as Review Application No.10/2022 before this Court. It is challenged, on the ground that as effect of cancellation of his order of transfer, the necessary consequence should have been that, the transfer dated 19 December 2018 would stand cancelled automatically with retrospective effect . As a result the Petitioner should have been granted all the benefits arising therefrom, like being posted at the very place from where he was transferred, continuation of service without withholding pay and allowances and no further explanation should have been sought from the Petitioner. So also, the period of his absenteeism should not be treated as period of leave without permission.

12 After considering the arguments for the Petitioner, learned AGP for the Respondent and also going through the writ Petition and its annextures, it transpires that, undoubtedly when the Petitioner was transferred he has not joined the transferred place nor he has challenged the said transfer order. The transfer being an incidence of service, Government employee is bound to join the

transferred place or if he had any grievance about the transfer, he is at liberty to challenge the said Transfer order. The Petitioner has not resorted to anyone of the above remedies. In fact, he has willfully remained absent from his duty. Therefore, though the said transfer order has been subsequently cancelled, that would not automatically confer the benefits as claimed by the Petitioner.

13 So far as regularization of his period of absenteeism is concerned the Petitioner accepts that he had not made any application for leave. So also, he had not made any application for regularization of his leave. According to him as a consequence of cancellation of his transfer order his absence should have been regularized. According to him for the misconduct of absenteeism there is a separate procedure provided under the Bombay Police (Punishments and Appeals) Rules, 1956. Therefore, he has prayed that the said order of 19 December 2019 should be quashed and the Petitioner be directed to treat the period of 307 days as compulsory waiting period and to release the pay and allowances admissible to him for the said period with interest thereon.

14 So far as the said prayers are concerned the Tribunal after taking in to consideration the reply filed by the Government has rightly observed that the Applicant has absented himself from duty since transfer was not convenient to him. The said conduct is in fact breach of service conditions and amounts to misconduct. However the authorities have taken a liberal approach by treating said period

of absence as leave period. Therefore, the order of regularizing period of absence dated 18 December 2019 cannot be faulted with. The said view has again been maintained in the subsequent order in Review. Considering that under Rule 10 of Maharashtra Civil Services Rules (Leave), leave is a permission granted by the Competent Authority to remain absent from duty. The said cannot be claimed as of right.

15 Hence considering that in spite of there being no formal application for leave the period of absence has been regularized by the authorities. More than necessary liberal approach is already taken by the authorities. Hence orders passed by Maharashtra Administrative Tribunal in Original Application No.102/22 and Review Application No.10/22 needs no interference. The Writ Petition stands dismissed.

(MANJUSHA DESHPANDE, J.)

(NITIN JAMDAR, J.)