

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.8103 OF 2023

1. The State of Maharashtra,
Medical Education & Drugs Department,
Gokuldas Tejpal Hospital Campus,
9th Floor, Mantralaya, Mumbai - 400 032

2. The Commissioner,
Medical Education & Research,
Mumbai- 400 001

3. The Dean,
Sassoon General Hospital,
Pune-411001

...Petitioners

Versus

Vitthal Tulshiram Jadhav,
Age 53 years, Occ-Service,
Working as X-ray Technician,
at Swami Ramanand Teerth
Rural Medical College & Hospital,
Ambejogai, Dist. Beed.

...Respondent

...

Mr. N.K. Rajpurohit, AGP for the Petitioners-State.
Mr. Vaibhav A. Sugdare for Respondent.

...

CORAM : DHIRAJ SINGH THAKUR &
SANDEEP V. MARNE, JJ.
DECIDED ON : 5 JULY 2023.

JUDGMENT (*Per – Sandeep V. Marne, J.*):

. Rule. Rule is made returnable forthwith. Heard finally with the consent of the learned AGP for the Petitioners-State and the learned Counsel for the Respondent.

2 This Petition is filed by the State Government challenging the judgment and order dated 2 February 2022 passed by Maharashtra Administrative Tribunal (**Tribunal**) allowing Original Application No.50 of 2019 filed by Respondent. By that judgment and order, the Tribunal has directed that initial temporary service of Respondent be computed only for the purpose of pension.

3 Respondent is a Project Affected Person (**PAP**) and has been issued a certificate to that effect by the District Rehabilitation Officer, Beed on 30 November 1999. On the strength of this PAP certificate, Respondent was engaged on the post of X-ray Technician on temporary basis for a period of 60 days on 13 March 2000. Though the appointment was temporary, he was placed on pay scale of Rs.5,000-8,000 plus admissible allowances. His services were continued even after expiry of period of 60 days. An advertisement was issued on 19 May 2007 for filling of the post of X-ray Technician on regular basis. Respondent applied in pursuance of the advertisement and participated in the selection process. He was however not selected. He filed Original Application No.320 of 2007

before Aurangabad Bench of the Tribunal. However, since it was found that Respondent was less meritorious in the selection, the Original Application was dismissed. On account of dismissal of his Original Application, the General Hospital, Parbhani terminated Respondent from service by order dated 28 December 2007.

4 Respondent challenged the Tribunal's order as well as the termination order before this Court, Bench at Aurangabad by filing Writ Petition No.79 of 2008. During the course of hearing of that Petition, this Court enquired whether any post of X-ray Technician was vacant and accordingly the State Government placed before this Court a communication addressed by the Deputy Director of Health Services, Aurangabad, dated 11 August 2009 to the effect that one post of X-ray Technician was kept vacant and that the Government was willing to accommodate Respondent against that post. Noting the said statement made on behalf of the State Government, the Writ Petition was disposed of on 11 August 2009. Accordingly, Respondent came to be granted regular appointment to the post of X-ray Technician vide order dated 25 May 2009 issued by Sassoon General Hospital, Pune. It appears that Respondent filed Contempt Petition No.23 of 2010 before this Court, Bench at Aurangabad citing non-compliance of the order of this Court on the ground that the appointment was given to him was temporary. The Contempt Petition was rejected on 27 June 2011. There is however no

dispute to the position that what is granted to Respondent on 25 May 2009 is a regular appointment to the post of Ex-ray Technician.

5 Respondent thereafter made representation dated 15 February 2014 for counting his past service from 27 March 2000 for grant of financial upgradation/time bound promotion. The request was rejected vide communication dated 15 March 2016 on the ground that there was break of about 2 years in his two services. Respondent has approached the Tribunal by filing Original Application No.1145 of 2016 which was disposed of on 20 July 2018 with a direction to the Petitioner-State to look into the matter and take a suitable decision. The Petitioner-State however rejected Respondent's case vide order dated 27 September 2018 holding that his past services cannot be counted considering long break in service.

6 Respondent challenged the decision dated 27 September 2018 before the Tribunal by filing Original Application No.50 of 2019. In his Original Application, Respondent sought a relief of counting his past services from 27 March 2000 for pension and pensionary benefits as well as the benefits that he sought in his previous application dated 15 February 2014. The prayers made in the Original Application are reproduced below:

“A Original Application may pleased be allowed;

B By order or directions it may be declared that the impugned order dated 27-09-2018 issued by the respondent no.1 be quashed and set aside.

C By order or directions it may be declared that the applicant is entitle to have benefits of Government Resolution dated 4-04-1983 for counting his past services from his initial appointment from 13-03-2000 for pension and pensionary benefits.

D By order or directions the respondent no.1 and 2 be directed to take into consideration the provisions of Govt. Resolution dated 21st January 1989 re: project affected persons for grant of benefits of continuous service from his date of appointment from 27-03-2000 as X-ray Technician in the office of the Civil Surgeon at Parbhani and he be given all consequential benefits arising out of it.

E By order or directions respondent no.2 be directed to give benefits as prayed in application dated 15-02-2014.

F Pending hearing and final disposal of this Original Application the order dated 27-09-2018 issued by the respondent no.1 be stayed.”

7 The Tribunal has proceeded to partly allow the Original Application by directing that Respondent’s past services be counted only for the purpose of pension.

8 Appearing for the Petitioners-State Mr. Rajpurohit, the learned AGP would submit that the Tribunal has erred in allowing the Original Application of Respondent. That the Respondent’s past appointment was against PAP category whereas he was subsequently appointed on regular basis is altogether different (VJ-A) category. Thus, therefore, there is no connection between the two services. He would further submit that there is long gap of two years in the two appointments and therefore, Respondent’s past services cannot be counted even for the purposes of pension. He would draw our attention to Rule 33 of the Maharashtra Civil Services (Pension) Rules, 1982 (**Pension Rules**) and particularly the

words “followed without interruption” in support of his contention that there was interruption in the two services of Respondent. He would also rely upon Rule 47 of Pension Rules in support of his contention that interruption results in forfeiture of past services. Without prejudice, he would submit that under Rule 48, the period of interruption in service is required to be ignored while computing past services but the Tribunal has erroneously directed counting of the entire period (including interruption) as qualifying service for pension. He would therefore pray for setting aside the order of the Tribunal.

9 Mr. Sugdare, the learned Counsel appearing for the Respondent would oppose the Petition and support the order passed by the Tribunal. He would submit that though Respondent had prayed for counting of past services for various purposes, the Tribunal has granted relief only for the purpose of pension. That, therefore, this is not a case where this Court should exercise power of superintendent and interfere with the decision of the Tribunal. He would submit that Respondent has already suffered on account of Petitioners’ conduct in exploiting his services on temporary basis for a long period and also on account of his termination and the least that the Respondent must get now his computation of the period as qualifying service for pension.

10 Rival contentions of the parties now fall for our consideration.

11 A short issue that arises for our consideration is whether the temporary services rendered by Respondent from 13 March 2000 to 28 December 2007 can be computed as qualifying service for pension. We have already narrated facts of the case above, from which it is clear that Respondent was terminated from service on 28 December 2007 only on account of dismissal of his Original Application filed challenging his non-selection in regular selection process. He questioned his termination before the High Court in Writ Petition No.79 of 2008 and while examining the validity of his non-selection in the regular selection process, this Court raised an enquiry as to whether a vacancy still existed for accommodation of the Respondent. After ascertaining that a vacancy did exist as well as after recording willingness on the part of the Petitioner-State Government that Respondent can be appointed against that vacant post, the Writ Petition filed by the Respondent was disposed of on 11 August 2009. Petitioner-State Government accordingly appointed Respondent regularly on the post of X-ray Technician by order dated 25 May 2009. Thus, Respondent's regular appointment as X-ray Technician is relatable to the regular selection process initiated while he was in temporary service and he is ultimately appointed in pursuance of that selection process. There is thus direct connection between Respondent's regular appointment and the selection process in which he had participated. If Respondent was to be granted the relief by the tribunal itself, his services would not have been terminated. His

termination was on account of pendency of litigation before this Court, in which he ultimately succeeded.

12 Rule 33 of the Maharashtra Civil Services (Pension) Rules, 1982 provide for counting of past services for pension and provides thus:

“33. Service rendered under Government followed without interruption by confirmation counts in full as service qualifying for pension. A Government servant who holds a permanent post substantively or holds a lien or a suspended lien or a certificate of permanency on the date of his retirement, the entire temporary or officiating service rendered under Government followed without interruption by confirmation in the same or another post, shall count in full as service qualifying for pension except the service rendered against one of the posts mentioned in rule 57.

Note.- The benefit of above rule should also be extended to Government servants who have rendered service in temporary post in the former Civil Supplies Department including those re-employed after the break, provided they agree to refund the terminal gratuity, if any, received by them on their retrenchment from the former Civil Supplies Department (In order to avoid hardship, the gratuity may be refunded in monthly instalments not exceeding rupees twenty). Competent authorities are authorised to condone where necessary, breaks not exceeding 3 years. In cases where break exists, the terminal gratuity referred to above should be refunded within three months from the date of the order of the competent authority condoning the break and the right to count the service under the above rule does not accrue until the gratuity is wholly refunded. The condonation should be postponed until the Ex-Civil Supplies Department personnel actually pass the examination, if any, required for confirmation and are actually confirmed. The benefit of condonation of break should be allowed only in those cases in which breaks have occurred on account of discharge from service for want of post and not on any other ground, e.g., voluntary resignation etc. and in computing the period of break, the terminal leave availed of by the persons concerned, should also be taken into account. The leave salary is not, however, refundable.”

Thus, in respect of a Government servant holding a permanent post at the time of his retirement, his entire temporary or officiating service rendered without any interruption is required to be counted towards pension.

13 In the present case the only defence taken by the Petitioner-State for refusing to count Respondent's past service is the interruption caused in his two services. The provision relating to condonation of interruption in services is found in Rule 48 of the MCS (Pension) Rules, which reads thus:

"48. Condonation of interruption in service.-(1) The appointing authority may, by order, condone interruptions in the 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 benefit in respect of which will be lost, is not less than five years duration, excluding one or two interruptions, if any; and
- (d) 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 the 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."

14 After considering the provisions of Rule 48 of Pension Rules, we are of the view that the Respondent's case is fully covered by the said Rule. The interruption was caused by reason beyond control of Respondent and the period of interruption does not exceed five years. In fact, the interruption was caused on account of order passed by the Tribunal dismissing Original Application filed by the Respondent challenging his non-selection for regular appointment. Ultimately Respondent is found to be entitled for regular appointment by this Court and the Petitioners-State have granted him regular appointment by order dated 25 May 2009. In this circumstances, in our view, this is a fit case where interruption in service deserved to be condoned.

15. The submission of Mr. Rajpurohit that there is difference between categories under which he was appointed in two spans of appointment does not appeal to us. Mere difference in type of reservation availed by him in initial temporary appointment (PAP) and subsequent regular appointment (VJ-A) will not defeat his case, otherwise covered by Rule 48.

16 The Tribunal has granted limited relief of computation of past service for pension only. The Tribunal has not committed any jurisdictional error in partly allowing Respondent's Original Application. In these circumstances, we are of the view that no case is made out for interference by this Court in exercise of its writ jurisdiction.

17 We are however of the view that the order of the Tribunal would needs slight correction. This is because sub rule 5 of Rule 48 of the Pension Rules provides that period of interruption shall not count as qualifying service. The Tribunal has not directed exclusion of period of interruption from computation of service for pension. Therefore, it would be necessary for this Court to direct deletion of period of interruption while computing past services of Respondent for pension. Therefore, it is clarified that while computing past services of the Respondent, the entire period of interruption in service from 28 December 2007 to 24 May 2009 be excluded while counting qualifying service.

18 With the above directions, the Writ Petition is disposed of. There shall be no orders as to costs. Rule is made partly absolute.

SANDEEP V. MARNE, J.

DHIRAJ SINGH THAKUR, J.