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

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WRIT PETITION NO.10200 OF 2022

The Deputy Commissioner of Police }
Wireless Division, Mumbai }
Having office at New Administrative Building }
20th floor, M. K. Road, }
Mumbai-32 } .. Petitioner
(Org. Respondent)

Versus

Shri Sanjay Govind Parab }
Aged-46 years, working as Police Head Constable }
[Wireless] [Buckle No.11934] in the office }
Of East Region Wireless Control Room }
Chembur, Mumbai-70. }
R/o. L/3/C, Flat no.703, }
Sankalp C. H. S. Pratiksha Nagar }
Sion, Mumbai-22. } .. Respondent
(Org. Appellant)

...
Mrs. Reena A. Salunkhe, Assistant Government Pleader for the
petitioner-State.
Mr.Gaurav Bandiwadekar, Advocate for the respondent.

...

**CORAM : A.S. CHANDURKAR &
RAJESH S. PATIL, J**

Date on which the arguments concluded : 26th JULY, 2024.
Date on which the judgment is delivered : 6th SEPTEMBER, 2024

JUDGMENT : (PER : A. S. CHANDURKAR, J)

1. Rule. Rule made returnable forthwith and heard learned
counsel for the parties. The challenge raised in this writ petition is
to the judgment dated 02/05/2022 passed by the learned
Member, Maharashtra Administrative Tribunal, Mumbai thereby

allowing the Original Application preferred by the respondent and setting aside the order dated 22/04/2021 by which the absence of the respondent from duty for a period of 271 days from 02/06/2019 to 27/02/2020 was treated as absence without leave.

2. Facts relevant for considering the challenge as raised are that the respondent came to be appointed as Police Head Constable on 04/07/1998. On 30/05/2019, he was transferred from Mumbai to Dhule. The respondent challenged the said order of transfer by filing Original Application No.524 of 2019. The respondent however was relieved on 01/06/2019 for joining at the place of transfer. He sought interim relief in the proceedings filed before the Tribunal but on 12/06/2019 interim relief was refused. The petitioner however did not join the place of transfer. Ultimately on 20/01/2020, the Tribunal allowed Original Application No.524 of 2019 and set aside the order of transfer dated 30/05/2019. Thereafter, the petitioner was permitted to join on his original post on 28/02/2020. The petitioner made an application on 04/03/2020 seeking pay and allowances for the period from the date of the order of transfer till he re-joined duty. The Deputy Commissioner of Police on 22/04/2021 refused to grant any pay and allowances for the period of absence from

02/06/2019 to 27/02/2020. By referring to the provisions of Rule 29 of the Maharashtra Civil Services (General Conditions of Services) Rules, 1981, the respondent's absence was treated as without pay. Being aggrieved, the respondent preferred Original Application No.439 of 2021 before the Tribunal. The learned Member was of the view that since the order of transfer was set aside on 20/01/2020 by the Tribunal, it was non-est. It ought to be treated as an order that never came in existence. It was held that refusal to grant any interim relief in the earlier Original Application would not deprive the respondent from receiving his pay and allowances. The order dated 22/04/2021 denying relief to the respondent was quashed and it was directed that he be paid pay and allowances for the period from 02/06/2019 to 27/02/2020. Being aggrieved, the Deputy Commissioner of Police, Wireless Division Mumbai has filed this writ petition.

3. Mrs. Reena Salunkhe, the learned Assistant Government Pleader for the petitioner submitted that the Tribunal erred in holding that the order of transfer dated 30/05/2019 was non est as it was set aside by the Tribunal in the earlier proceedings initiated by the respondent. Referring to the order passed in the earlier Original Application, it was submitted that since the Police

Establishment Board as required to be constituted under Section 22J-3 of the Maharashtra Police Act, 1951 (for short, 'the Act of 1951') had not been properly constituted, the order of transfer dated 30/05/2019 had been set aside. The respondent had challenged the said order before the Tribunal and after hearing him, interim relief was refused by the Tribunal. This interim order was not challenged by the respondent and it operated till the said Original Application was ultimately decided on 20/01/2020. Under the service Rules, it was incumbent upon the respondent to have joined at the place of transfer as interim relief was refused in the proceedings filed by him. The respondent however did not join at the place of posting for a period of 271 days. It was only after the Tribunal allowed the Original Application and set aside the order of transfer dated 30/05/2019 that he re-joined at his original post. Such conduct was unbecoming of a Government servant and hence, he could not be permitted to take advantage of such conduct. Reliance was placed on the decisions in *S. C. Saxena Vs. Union of India and Others*, (2006) 9 Supreme Court Cases 583 and *Sukhdeo Pandey Vs. Union of India and Another*, (2007) 7 SCC 544 to urge that the Tribunal was not justified in directing payment of pay and allowances for the period when the respondent did not discharge duties. It was thus submitted that

the impugned order was liable to be set aside and the Original Application ought to be dismissed.

4. Mr. Gaurav Bandiwadekar, learned counsel for the respondent opposed aforesaid submissions. According to him, since the Tribunal had quashed the order of transfer dated 30/05/2019 on the ground that it was contrary to the provisions of Section 22J-3 of the Act of 1951, the respondent was entitled to the relief that was rightly granted by the Tribunal. As the order of transfer was quashed, the respondent would be entitled to be restored to the post in which he was placed prior to issuance of the said order. The respondent could not be faulted for not complying with an invalid order of transfer dated 30/05/2019 and hence the Tribunal was justified in holding that the said order was non est. The consequential reliefs in the form of pay and allowances for the period of absence was rightly granted. In support of the impugned judgment of the Tribunal, the learned counsel placed reliance on the decisions in *Nawabkhan Abbaskhan Vs. The State of Gujarat*, (1974) 2 SCC 121, *Ramesh Motilal Khandelwal Vs. Ramesh Parishad, Akola*, 1992 Mh.L.J. 325 and *Diwakar Pundlikrao Satpute Vs. Zilla Parishad, Wardha and Ors.* 2004 (3) L.L.N. 790. It was thus submitted that there was no

reason to interfere with the order passed by the Tribunal and the writ petition was liable to be dismissed.

5. We have heard the learned counsel for the parties at length and their assistance we have perused the documents on record. Before considering the challenge as raised, it would be necessary to refer to certain relevant aspects that have occurred prior to passing of the impugned order by the Tribunal. On 30/05/2019, an order of transfer was issued to the petitioner by which his services were transferred from Mumbai to Dhule. This order was challenged in Original Application No.524 of 2019. The respondent sought interim relief by praying for stay of the order of transfer dated 30/05/2019. The Tribunal considered the said prayer and on 12/06/2019 declined to grant any interim relief by observing that prima facie, there was compliance of the provisions of Section 22N-2 of the Act of 1951. Despite this order, the respondent did not join at his place of transfer and remained absent from duty. The ground on which the Tribunal interfered with the order of transfer was that the Police Establishment Board had not been constituted in the manner prescribed by Section 22J-3 of the Act of 1951. On that basis, the Tribunal held that the order of transfer was not sustainable in law on the ground that there was non-

adherence to the requirements of the Act of 1951. The Tribunal also considered the submission made on behalf of the respondent that as he was already subjected to punishment in the departmental enquiry for alleged misconduct, his transfer on the same allegation was punitive. While dealing with this submission, the Tribunal in paragraphs 14 and 15 observed as under:-

14. Insofar as the submission advanced by the learned Counsel for the Applicant that the Applicant was already subjected to punishment in D.E. for the alleged misconduct, and therefore, the order of transfer on the same allegation of misconduct is punitive is concerned, I find no merit therein. True, the Applicant was subjected to punishment in D.E. while he was serving at Mumbai and it is on this background, he was transferred from Mumbai to Dhule. He was held guilty in departmental proceeding. As such, it is in the light of proved misconduct, PEB though it appropriate to transfer him to Mumbai. Apart, as per Minutes of PEB he was overdue. As such, this is not a case where transfer was affected on unsubstantiated complaint where it can be termed as punitive transfer. Suffice to say in present case, it cannot be said that transfer amounts to double punishment as sought to be canvassed by the learned Counsel for the Applicant.

15. Though, the impugned order cannot be termed punitive it is not sustainable in law in view of non compliance of mandatory provisions of Section 22J-3 of 'Act 1951'. The PEB which had recommended itself is not legally constituted PEB for the reasons discussed above. The Tribunal has therefore no alternative except to quash the impugned transfer order.

(emphasis supplied)

6. On that basis, the order of transfer dated 30/05/2019 was set aside and the respondent was directed to be reinstated within a period of two weeks from the date of the order. The petitioner did not challenge this judgment of the Tribunal dated 20/01/2020.

The respondent thereafter on 04/03/2020 made a request for grant of pay and allowances for the period from the date of the order of transfer till he joined on service which was a duration of nine months. On 22/04/2021, the Deputy Commissioner of Police passed an order by referring to Rule 29 of the Maharashtra Civil Services (Conditions of Services) Rules 1989, (sic 1981) and held that the period from 02/06/2019 to 27/02/2020 being 271 days was treated as period of absence without pay. As the respondent made another application with the superior Authorities, the Office of the Police Commissioner informed the Deputy Commissioner of Police on 16/06/2021 that the order dated 22/04/2021 treating the period of absence of the respondent as without pay had been maintained.

7. From the aforesaid events, it becomes clear that (a) though the respondent prayed for grant of stay to the order of transfer dated 30/05/2019, the Tribunal in Original Application No.524 of

2019 declined to grant any interim relief on 12/06/2019 (b) while quashing the order of transfer dated 30/05/2019, the Tribunal in paragraphs 14 and 15 of the order passed in Original Application No.524 of 2019 specifically observed that the order of transfer was not punitive and that the respondent was overdue for transfer. The transfer order could not be said to have been effected on the basis of an unsubstantiated complaint. It is only for the reason that there was non-compliance of the provisions of Section 22J-3 of the Act of 1951 that the order of transfer was set aside. It is on the basis of these aspects that the issue with regard to entitlement of the respondent to pay and allowances for the period of absence for a duration of 271 days will have to be determined.

8. The Tribunal in the impugned order has held that the order of transfer dated 30/05/2019 was being set aside as non-est and hence the respondent was entitled to pay and allowances for the period of absence. Another ground that has weighted with the Tribunal is the reference to Rule 29 of the Maharashtra Civil Services (General Conditions of Services) Rules 1981 in the communication dated 22/04/2021 which provision was not at all relevant in the circumstances. By holding that the order of transfer dated 30/05/2019 was required to be treated as never

having come into existence, the Tribunal granted relief to the respondent and directed payment of pay and allowances for the period of absence of 271 days to the respondent. While doing so, it relied upon the decisions on which the learned counsel for the respondent has also placed reliance in this Court to which reference has been made in paragraph 4 (supra).

9. At the outset, it must be noted that the respondent is holding the post of Police Head Constable (Wireless) and is a member of the disciplined force. Being aggrieved by his order of transfer dated 30/05/2019, he had challenged the said order by approaching the Tribunal and had prayed for interim relief. The Tribunal refused to grant any interim relief by its order dated 12/06/2019. The respondent did not choose to challenge that order any further. On the contrary, he preferred to remain absent from duty without permission. His absence continued for 271 days till his Original Application was allowed on 20/01/2020. We may in this regard refer to the observations made by the Supreme Court in *S. C. Saxena (supra)* that a Government servant cannot disobey a transfer order by not reporting at the post of posting and then going to a Court to ventilate his grievances. It is his duty to first report for work at the place of transfer and make a

representation in case he has any personal problem. It was further observed that the tendency of not reporting at the place of posting and indulging in litigation was required to be curbed.

In our view, there was no justification whatsoever on the part of the respondent for not complying with the order of transfer even after his prayer for interim relief was refused by the Tribunal. The respondent chose, at his own will, to defy the order of transfer and preferred to remain absent. His conduct reveals scant regard for the due process of law especially when he himself had approached the Tribunal for challenging the order of transfer. This conduct of the respondent of failing to report for duty at the place of transfer even after being denied interim relief deserves to be deprecated.

10. We further find that the Tribunal was not justified in ignoring the observations made in its earlier order dated 20/01/2020. In paragraphs 14 and 15 of the order dated 20/01/2020, the Tribunal itself had recorded a finding that the respondent was overdue for transfer and that there was no material on record to hold that the transfer order dated 30/05/2019 was punitive in nature. Rather, it observed that it could not be said that on the basis of an unsubstantiated

complaint he had been transferred. This would indicate that the respondent in any event was eligible for being transferred and it is only on account of non-constitution of the Police Establishment Board that compelled the Tribunal to interfere with the order of transfer. By failing to notice these aspects which were recorded in its earlier order dated 20/01/2020, the Tribunal misdirected itself and proceeded to grant relief to the respondent.

11. Another aspect that has weighed with the Tribunal is the reference made to Rule 29 of the Maharashtra Civil Services (General Conditions of Services) Rules, 1981 in the order dated 22/04/2021 by which the respondent was denied pay and allowances for the period of absence. It is to be noted that the relevant Rule applicable is Rule 29 of the Maharashtra Civil Services (Joining Time, Foreign Service and Payments During Suspension, Dismissal and Removal) Rules, 1981. Rule 29 reads as under :-

“29. Overstayal.—A Government servant who does not join his post within his joining time is entitled to no pay or leave salary after the end of the joining time. Willful absence from duty after the expiry of joining time may be treated as misbehaviour for the purpose of Rule 27 of Maharashtra Civil Services (General Conditions of Services) Rules, 1981.”

It is on this basis that the respondent was denied payment of pay and allowances for the period of his absence. It is well settled that incorrect reference to a provision of law under which the impugned action is taken would not invalidate such action for this reason if the authority taking such action otherwise has jurisdiction to do so. Reference can be usefully made to the decision in *N. Mani Vs. Sangeetha Theatre and Others (2004) 12 SCC 278*. Instead of referring to Rule 29 of the Maharashtra Civil Services (Joining Time, Foreign Service and Payments During Suspension, Dismissal and Removal) Rules, 1981, the said authority has referred to the Maharashtra Civil Services (General Conditions of Services) Rules 1981. As the Deputy Commissioner of Police had the necessary authority to deny pay and allowances to the respondent for the period of his unauthorised absence, incorrect mention of an inapplicable provision would not invalidate the order.

12. Coming to the decisions on which the learned counsel for the respondent had placed reliance before the Tribunal which decisions are also pressed into service before us, we find that the ratio of the said decisions cannot be applied to the case in hand. In *Ramesh Motilal Khandelwal (supra)*, the employee concerned

was holding the post of Stenographer and he was transferred to the post of Senior Assistant. It was noted that the said employee had been transferred from higher post to a lower post. Though his pay had been protected, it was held that such order of transfer was not permissible under the amended Rules. The Court found that though the word “transferred” had been used, it was an order which amounted to reduction in rank and was thus punitive in nature. On that basis, the Court proceeded to hold the said employee entitled to wages in his original pay-scale. We do not find as to how the ratio of this decision can be applied to the facts of the present case. The Tribunal itself in the earlier proceedings initiated by the respondent held that the order of transfer was not punitive and that the respondent even otherwise was due for transfer.

Coming to the decision in *Diwakar Pundlikrao Satpute (supra)*, the facts therein indicate that the employee came to be transferred on 17/01/1984. He made a representation and the Block Educational Officer realised that his earlier order dated 17/01/1984 was an illegal order. He therefore cancelled the said order. The employee was held entitled to his salary for the intervening period. The said decision is also distinguishable in the

facts of the present case and the ratio thereof cannot be made applicable.

13. It is also necessary to bear in mind that permitting an employee to disregard his order of transfer despite having failed to obtain any interim relief from the Tribunal would result in serious consequences. Having approached the Tribunal for quashing the order of transfer and having failed to obtain any interim relief, such employee having disregarded the order of transfer cannot seek pay and allowances for the period of his unauthorised absence. Rule 29 referred to above treats such wilful absence from duty as misbehaviour. His joining at the place of transfer would have been subject to final outcome of the proceedings. However, granting him the benefit of pay and allowances for the period of unauthorised absence would amount to granting premium for such conduct of disobedience of the order passed by the Tribunal.

14. For aforesaid reasons, we find that the Tribunal committed a grave error in holding the respondent entitled to pay and allowances for the period of his unauthorised absence by treating the order of transfer that was set aside to be non-est. Hence, the writ petition is allowed. The judgment dated 02/05/2022 passed

in Original Application No.493 of 2021 is set aside. The Original Application stands dismissed.

15. Rule is made absolute in aforesaid terms with no order as to costs.

[RAJESH S. PATIL, J.]

[A.S. CHANDURKAR, J.]