

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL,
BOMBAY BENCH, MUMBAI.

ORIGINAL APPLICATION NO.763/2001.

Dated: 27.2.2004.

Hon'ble Shri Anand Kumar Bhatt, Member (A),
Hon'ble Shri S.G.Deshmukh, Member (J).

1. V.B.Kharat,
Bansode Chawl,
Lokmanya Nagar,
Pada No.3,
Thane (West) - 400 606.

2. S.M.Samant,
A/2-403, Raghukul CHS,
Parsik Nagar,
Kalwa,
Dist. Thane.

3. D.K.Barbate,
Mahavir Apartments,
Bhandaralli,
Thane (West).

(By Advocate Shri R.Ramesh)

...Applicants.

vs.

1. Union of India,
through the Secretary,
Ministry of Home Affairs,
North Block,
New Delhi - 110 001.

2. The Registrar General of India,
2/1, Mansingh Road,
Koteh House Annexe,
New Delhi - 110 001.

3. The Director of Census Operations,
Maharashtra,
Exchange Building,
Sir Shivsagar Ramgulam Marg,
Ballard Estate,
Mumbai - 400 038.

(By Advocate Shri R.K.Shetty)

...Respondents.

: O R D E R (ORAL) :

{Anand Kumar Bhatt, Member (A)}

The following relief has been sought by the applicant in
the present O.A. :

(a) that this Hon'ble Tribunal be pleased to hold and
declare that the Respondents in-action in not passing



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orders to regulate the period, from 1.3.1995 to 21.1.1997/5.10.1997 is illegal, arbitrary and bad in law.

(b) that this Hon'ble Tribunal be pleased to direct the Respondents to treat the entire period from 1.3.1995 to 21.1.1997/5.10.1997 as duty for all purposes and further direct them to pay them all arrears on that basis and also pay them the future increments till date with consequential arrears, fixation etc.

(c) that this Hon'ble Tribunal be pleased to direct the Respondents to pay the consequential arrears as a result of the said refixation with interest @ 18% p.a. from the due date till payment.

(d) that this Hon'ble Tribunal be pleased to permit the Applicants to file this application jointly since the cause of action is the same for all the Applicants. The reliefs sought are common and all the applicants have a common interest in the subject matter of the O.A.

(d-1) that this Hon'ble Tribunal be pleased to hold and declare that the impugned orders dated 26.4.2002 have been passed without notice to any of the Applicants and therefore the same are illegal, arbitrary and liable to be quashed and set aside.

(d-2) that this Hon'ble Tribunal be pleased to hold and declare that the Applicants are entitled to count their past services rendered prior to 1.3.1995 as duty for all purposes.

(d-3) that this Hon'ble Tribunal be pleased to hold and declare that the Applicants are entitled to count the period from 1.3.1995 to 27.1.1997 as duty for all purposes.

(d-4) that this Hon'ble Tribunal be pleased to quash and set aside the order dt. 26.4.2002 in respect of each of the Applicants.

(d-5) that this Hon'ble Tribunal be pleased to direct the Respondents to count the services rendered by the Applicants prior to 1.3.1995 as LDC as duty for all purposes in respect of each of the Applicants.

(d-6) that this Hon'ble Tribunal be pleased to direct the Respondents to count the period from 1.3.1995 to 27.1.1997 as duty for all purposes in respect of all the applicants.

(e) that such other and further order or orders be passed as the nature and circumstances of the case may require.

(f) that costs of this Application be provided for."

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The facts, in brief, are that the applicants who were working in the office of the Directorate of Census Operations, Maharashtra were promoted from the category of Chowkidar to the post of LDC on 23.8.1994. On 23.1.1995 reversion orders were issued and on 28.2.1995 posting orders were issued. The applicants filed OA No.72/1995 challenging the order of reversion. Apart from the present applicants, there were two more applicants in OA 72/1995. The Tribunal in its Judgment given on 10.12.1996 directed that "Applicant No.5 in OA No.72/95 be treated as regularised and the remaining four applicants [which included present applicants] be allowed one more time to appear for the examination and till that time they should continue as LDCs. The applicants were taken back on duty on 21.10.1997, however, they were dis-continued vide order dt. 28.1.1997. The applicants filed C.P. No.46/97 for implementation of the Judgment of the Tribunal. The Tribunal after perusal of the results of the special qualifying examination declared that out of the remaining four applicants D.K.Barbate has passed and he be regularised, while the other applicants who have been continued as LDCs as per the Judgment dt. 10.12.1996 be given another chance to appear in the Special Qualifying Exam. It was further directed by the Tribunal that the Respondents pay the salary of the applicants from 28.1.1997 till 5.10.1997. The Respondents had gone in Writ Petition No.354/99 against the order in C.P. which was disposed of by the High Court by order dt. 30.3.1999. The present applicant No.3 filed Writ Petition No.3325/2000 for counting the period from 1.3.1995 to 5.10.1997 as on duty. The High Court disposed of the same on 13.7.2000 with liberty to the petitioner to approach the Tribunal for the relief claimed. After that the applicants have



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come to the Tribunal in the present O.A. The applicants have stated that their period of absence from 1.3.1995 to 27.1.1997 had not been dealt with by the Tribunal in their Judgment dt. 10.12.1996. However, in C.P. No.46/97 in OA No.72/95 the Tribunal allowed the applicants' salary and allowances as LDC from 28.1.1997 to 5.10.1997 (both dates inclusive). Now, their grievance is in regard to 1.3.1995 to 27.1.1997. The respondents vide order dt. 26.4.2002 informed the applicants that for the unauthorised absence from 1.3.1995 to 27.1.1997, the period of absence has been treated as wilful absence and dies non for all purposes viz. loss of pay, increment, leave etc. The applicants have stated that they had put in about 16 to 17 years of service as on 1.3.1995 and if the said service is not counted then on superannuation they may be deprived of pension and other retiral benefits on account of less qualifying service.

2. In the reply submitted by the Respondents it has been stated that the Tribunal in the order dt. 25.1.1995 granted status quo against the reversion order dt. 23.1.1995. As reversion had already taken effect, the status quo resulted in the applicants' continuing in the reverted post of Chowkidars. The applicants, however, refused to join as Chowkidars and then filed Contempt Petition for non-compliance of the status quo order. The C.P. was discharged by the Tribunal by its order dt. 30.6.1995. The applicants remained unauthorisedly absent as they refused to work in the lower post of Chowkidar. The respondents have cited the ratio in various Judgments of the Apex Court where it has been held that even if an order of reversion or transfer is illegal, if an employee does not obey the said order pending

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its challenge in a Court of Law, he cannot be eligible to draw wages/salary and therefore, the present prayer of the applicants deserves to fail. The Tribunal did not direct the respondents to grant the applicants salary or wages in the posts of either Chowkidars or LDC during the period of unauthorised absence. As this relief was not granted during the pendency of the said O.A. it is deemed to have been rejected and hence is barred by the principles of constructive res judicata. The cause of action for payment of wages or salary from 1.3.1995 to 21.1.1997 is barred by limitation as merely by approaching the Hon'ble High Court and securing a liberty to approach the Tribunal the delay in approaching the Tribunal cannot be condoned.

3. In the oral submissions, Shri Ramesh on behalf of the applicants stated that the dies non order of 26.4.2002 by the respondents would mean break in service. However, as per rule show cause notice had to be given, which has not been done. The applicants' entire past service cannot be erased. He has drawn attention to Rule 27 (2) of CCS (Pension) Rules, where the appointing authority may commute retrospectively the periods of absence without leave as 'Extraordinary Leave'. He has stated that as per Government of India decision the period of absence not covered by grant of leave has to be treated as dies non for all purposes viz. increment, leave and pension and this would mean that for the purposes of pension, unless pension sanctioning authority exercises his power under Rule 27 of CCS (Pension) Rules to treat the period as leave without allowance, the entire past service will stand forfeited. Shri Ramesh stated that looking to the fact of pendency of OA in the Tribunal and the



order of status quo, the respondents action in declaring the said period as dies non is arbitrary and illegal. The present order has been passed 5 years after the earlier OA was disposed of.

4. For Respondents, Shri R.K.Shetty stated that the provision under Rule 27 (2) of CCS (Pension) Rules is discretionary and the Tribunal should not interfere in the discretionary powers given to the Executive. He cited the ratio of the Apex Court in Paluru Ramakrishniah & Ors. {1989 SC 47}, in which it has been held that 'principle of no work no pay' is applicable where notional promotion is granted with retrospective effect.

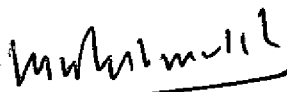
5. We have considered the case. The applicants were given relief by the Tribunal in OA No.72/95 in which an order was passed on 10.12.1996. The direction in regard to present applicants were that the respondents should announce the results of the applicants in the Special Qualifying Examination. If they have passed, they should be regularised and if they have failed, another opportunity to be given to the applicants to appear in the said examination. Whereas technically on their reversion the applicants did not work on the post of lower post of Chowkidar, the fact stands that during the period of unauthorised absence the OA was pending in the Tribunal and the applicants ultimately got the relief from us. Taking this fact into consideration, the orders dt. 26.4.2002 of the Respondents do not seem to be in accordance with the spirit of the order of the Tribunal dt. 10.12.1996. The applicants were reverted after serving continuously as LDC for more than a decade and their not working in the post of Chowkidars is understandable, if not justifiable. Depriving the applicants of the long years of


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service before 1.3.1995 for pensionary purposes ~~it~~^{he} looks too harsh and to some extent vindictive. On the other hand, we agree that because of their refusal to work on the reverted post, the applicants would not be entitled to wages/salary for the period of absence. Looking to facts and circumstances of the case, in the absence of things if the dies non as declared by the respondents is converted to EOL, the pensionary benefits are not affected because of non-counting of previous service. Accordingly, it is ordered that the period of absence from 1.3.1995 to 27.1.1997 be regularised as EOL. It is clarified that the consequent benefit would be applicable to pension and other pensionary benefits and not for salary/wages, increment and leave for the period of 1.3.1995 to 27.1.1997.

6. The O.A. is partly allowed. No costs.


(S.G. DESHMUKH)
MEMBER(J)


(ANAND KUMAR BHATT)
MEMBER (A)

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