

15 September 2023.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8821 OF 2019

Anil Dnyanoba Jawalkar and Ors. ...Petitioners

V/s.

Pune Municipal Corporation and Ors. ...Respondents

Ms. Jane Cox a/w. Mr. Ghanshyam Thombare i/by. Ms. Karishma Rao, for the Petitioners.

Mr. Abhijit Kulkarni a/w. Mr. Gourav Shahane, Mr. Krishna Jaybhay for the Respondents.

CORAM : SANDEEP V. MARNE, J.

Reserved on : 8 September 2023.

Pronounced on : 15 September 2023.

JUDGMENT :

1. **Rule.** Rule made returnable forthwith. With the consent of the parties, taken up for final hearing.

2. This petition is filed by 14 employees of Pune Municipal Corporation challenging judgment and order dated 31 October 2017 passed by the Industrial Court, Pune

15 September 2023.

dismissing Complaint (ULP) No. 110/2011. The complaint was filed by Petitioners alleging unfair labor practice under Items 5 and 9 of the Schedule-IV of Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (**MRTU & PULP Act**) for application of Old Pension Scheme.

3. Petitioners claim to have been engaged as daily wage cleaners in the Vehicle Depot of Pune Municipal Corporation in the year 2001. It appears that an agreement was executed between the Municipal Administration and recognized Labour Union, under which it was agreed to grant regular appointments to daily workers against vacant posts under the provisions of Section 53 of the Maharashtra Municipal Corporations Act, 1949. The General Body by its Resolution No.347 adopted in its meeting dated 23 September 2005 granted approval for grant of regular appointments against various vacant posts in Vehicle Depot of the Municipal Corporation as per the Roaster and Seniority. In pursuance of the approval granted by the Municipal Corporation, the office of the Additional Municipal Commissioner issued order dated 30 December 2005 granting regular appointments to 14 Petitioners on the post of Cleaner in the pay scale of Rs.2,610-5,500/-.

15 September 2023.

4. The Government of India formulated New Defined Contributory Pension Scheme for Central Government employees appointed on/or after 1 November 2004 which envisaged contributions to be made both by employer and employee for the purpose of creation of pension fund, through which the employees are to be paid annuity after their retirement. The State of Maharashtra adopted the Defined Contributory Pension Scheme (**DCPS**) for the State Government employees by issuing GR dated 31 October 2005. The scheme was made applicable to State Government employees appointed on or after 1 November 2005. Thus for employees who were appointed in State service upto 31 October 2005, they were governed by the provisions of Pension Scheme applicable under the provisions of Maharashtra Civil Services (Pension) Rules 1982, as well as GPF scheme (together referred to as 'Old Pension Scheme'). However, those joining services on or after 1 November 2005 are governed by the provisions of the DCPS. The provisions of Maharashtra Civil Services (Pension) Rules, 1982 were also accordingly amended.

5. The Pune Municipal Corporation adopted the DCPS of the State Government as employees of the Pune Municipal Corporation are governed by the provisions of the Maharashtra Civil Services (Pension) Rules.

15 September 2023.

6. Since the actual date of appointment of Petitioners is 30 December 2005, they are being governed by the provisions of DCPS. Petitioners therefore filed Complaint (ULP) No. 110/2011 before the Industrial Court for application of Old Pension Scheme on the ground that the decision to grant them regular appointments was taken by the Municipal Corporation on 23 September 2005 i.e. prior to the coming into vogue of the DCPS. The Industrial Court has however proceeded to dismiss the Petitioners' complaint by judgment and order dated 31 October 2017 which has led to filing of the present petition by the Petitioners.

7. Appearing for the Petitioners, Ms. Cox the learned counsel would submit that Petitioners cannot be governed by the provisions of DCPS since they were already in municipal service since the year 2001 and decision to regularize them was taken by Resolution on 23 September 2005. That similar decision was also adopted by the General Body for appointment of 23 firemen on the same day i.e. on 23 September 2005. The appointment orders of firemen were issued immediately on 25 October 2005, on account of which they are being governed by the provisions of Old Pension Scheme. However, there was delay on the part of Municipal Administration in issuing appointment orders in respect of Petitioners, which were issued belatedly on 30 December

15 September 2023.

2005. That Petitioners cannot be made to suffer on account of delay on the part of Municipal Administration.

8. Ms. Cox would also rely upon the judgment of this Court in *Khilari Rajendra Eknath and Others V/s. The State of Maharashtra and Others* in Writ Petition No.2270 of 2021 decided on 28 April 2023, in which this Court has made applicable the Old Pension Scheme to staff of this Court for whom advertisement for recruitment was issued prior to the cut-off date 1 November 2005.

9. *Per-contra*, Mr. Kulkarni the learned counsel appearing for Respondent- Municipal Corporation would oppose the petition and support the order passed by the Industrial Court. He would submit that since Petitioners are appointed in municipal service on 30 December 2005, the provisions of DCPS has rightly been made applicable to them. That pension contributions are being deducted from Petitioners for the last 18 long years and that it would be too late in a day now to reverse the clock and make the provisions of Old Pension Scheme applicable to them. He submits that the Industrial Court has rightly considered the entire case put up by the Petitioners and there is no perversity in the findings recorded by the Industrial Court.

15 September 2023.

10. Having heard the submissions canvassed by the learned counsels for the parties, the short issue which arises for consideration is whether the Old Pension Scheme applicable under the provisions of Maharashtra Civil Services (Pension) Rules, 1982 can be made applicable to Petitioners, for whom decision for appointment was taken before 1 November 2005 but were actually appointed in municipal service after 1 November 2005.

11. As observed above, DCPS was introduced for the first time by the Central Government and has been made applicable from 1 January 2004 by amending the provisions of Central Government Civil Services (Pension) Rules, 1972. On account of litigations with regard to applicability of New Pension Scheme, the Central Government has so far issued two Office Memoranda amending the scheme. Earlier, Office Memorandum dated 17 February 2020 was issued by the Department of Pension and Pensioners Welfare, Government of India directing that the Government Servants who were declared successful in recruitment results declared on or before 31 December 2003 against the vacancies occurring before 1 January 2004 but who joined the Government Service on or after 1 January 2004, would be governed by the provisions of Old Pension Scheme. Subsequently, another Office Memorandum dated 3 March 2023 issued by the Central Government under which the Government Servants

15 September 2023.

were appointed against a post or vacancy which was advertised/notified for recruitment/appointment prior to modification of Old Pension Scheme but actually joined service on or after 1 January 2004, would also be governed by the Old Pension Scheme.

12. Though the concept of New Pension Scheme is adopted by the State Government in lines with the New Pension Scheme introduced by the Central Government, the State Government has not so far issued any Government Resolution on lines with the Office Memorandum dated 3 March 2023 issued by the Central Government. Therefore, this Court was required to step in and direct applicability of provisions of Old Pension Scheme to all those who participated in selection/advertisement initiated prior to 1 November 2005 but were actually appointed in service after 1 November 2005. In *Khilari Rajendra Eknath* (supra), this Court was concerned with applicability of Old Pension Scheme to Clerks appointed on establishments of this Court, whose selection process was initiated by issuance of advertisement on 20 June 2005 but all of them were issued appointment orders on 28 December 2005. Taking note of the Office Memorandum dated 3 March 2023, this Court directed that the Petitioners therein would be governed by the provisions of New Pension Scheme. This Court held in paras-22, 23, 29, 30, 31 as under :

15 September 2023.

22. The Central Government took note of various judicial pronouncements as well as representations received from the affected employees whose appointments were made against posts/vacancies advertised/notified for recruitment prior notification of the DCPS. The GOI, Ministry of Personnel, Public Grievances and Pensions issued Office Memorandum dated 03.03.2023 directing as under:

"4. The matter has been examined in consultation with the Department of Financial Services, Department of Personnel & Training, Department of Expenditure and Department of Legal Affairs in the light of the various representations/references and decisions of the Courts in this regard. **It has now been decided that, in all cases where the Central Government civil employee has been appointed against a post vacancy which was or advertised/notified for recruitment/appointment, prior to the date of notification for National Pension System ie. 22.12.2003 and is covered under the National Pension System on joining service on or after 01.01.2004, may be given a one-time option to be covered under the CCS (Pension) Rules, 1972 (now 2021). This option may be exercised by the concerned Government servants latest by 31.08.2023.**

5. Those Government servants who are eligible to exercise option in accordance with para-4 above, but who do not exercise this option by the stipulated date, shall continue to be covered by the National Pension System.

6. The option once exercised shall be final.

15 September 2023.

7. The matter regarding coverage under the CCS (Pension) Rules, 1972 (now 2021), based on the option exercised by the Government servant, shall be placed before the Appointing Authority of the posts for which such option is being exercised for consideration, in accordance with these instructions. In case the Government servant fulfills the conditions for coverage under the CCS (Pension) Rules, 1972 (now 2021), in accordance with these instructions, necessary order in this regard shall be issued latest by 31 October, 2021. The NPS account of such Government servants, shall, consequently, be closed w.e.f. 31 December, 2023.

8. The Government servants who exercise option to switch over to the pension scheme under CCS (Pension) Rules, 1972 (now 2021), shall be required to subscribe to the General Provident Fund (GPF). Regarding account of the corpus in the NPS account of the Government servant, Controller General of Accounts (CGA) has furnished the following clarification vide letter No.1(7)(2)/2010/cia./TA III/390 dated 14.11.2019 & I.D. Note No.TA-3-6/3/2020- TA-III/cs-4308/450 dated 23.12.2022;

i. Adjustment of Employees' contribution in Accounts: Amount may be credited to individual's GPF account and the account may be recasted permitted up-to-date interest (Authority-FR-16 & Rule 11 of GPF Rules).

ii. Adjustment of Government contribution under NPS in Accounts: To be accounted for as (-) Dr. to object head 70-Deduct Recoveries under Major Head 2071- Pension and other Retirement benefit-Minor Head 911-Deduct Recoveries of over payment (GAR 35 and para 3.10 of List of Major and Minor Heads of Accounts).

iii. Adjustment of increased value of subscription on account of appreciation of investments - May

15 September 2023.

be accounted for by crediting the amount to Govt. account under M.H. 0071 - Contribution towards Pension and Other Retirement Benents 300-Other Receipts (Note under the above Heard in LMMHA)."

23. Thus, so far as employees of the Central Government are concerned, they have been given an option to opt for Old Pension Scheme in case they have been appointed against a post or vacancy advertised for recruitment prior to the date of Notification of DCPS. We have already observed above that, the State Government has adopted the DCPS formulated by the Central Government vide Notifications dated 22.12.2003 and 30.12.2003 by way of issuance of the G.R. dated 31.10.2005. The recitals to the G.R. make it amply clear that the State Government has essentially followed the Scheme formulated by the Government of India. Therefore, we see no reason why the State Government should not follow the provisions of Office Memorandum dated 03.03.2023 as well. If the State Government adopts the provisions of the Office Memorandum dated 03.03.2023, petitioners who are appointed against the posts advertised before 01.11.2005 would be governed by the provisions of the Old Pension Scheme. We are therefore of the considered view that since the State Government has adopted the Scheme formulated by the Central Government for Defined Contributory Pension Scheme, the changes effected to the Scheme by the Central Government (based on Judicial pronouncements) should also be made applicable to the Officers and employees of the State Government *inter alia* would consequently apply to the Officers and members of the staff of the High Court as well.

29. In the present case, the advertisement was issued on 20.06.2005 and the last date for submission of Application was 11.07.2005. The written test was also conducted on 09.08.2005 which was cleared by the Petitioner. They also cleared typing test prior to 01.11.2005. The appointment order is issued subsequently. The legislature in its wisdom

15 September 2023.

has not used the term "appointment on or after 1.11.2005" in Sub-Rule (2) of Rule 2 of the M.C.S. (Pension) Rules, 1982. The M.C.S. (Pension) Rules, 1982 would not apply to the persons who are recruited on or after 01.11.2005 meaning thereby that the said Rule would not apply to the persons whose recruitment process had commenced after 01.11.2005. The M.C.S. (Pension) Rules, 1982 shall apply to persons recruited in government services prior to 01.11.2005 though appointment orders are issued subsequent to 01.11.2005.

30. Resultantly, the Writ Petition succeeds. It is declared that Petitioners shall be governed by the provisions of the Old Pension Scheme in vogue prior to 1.11.2005, as well as General Provident Fund Scheme. Petitioners shall not be governed by the provisions of the Defined Contributory Pension Scheme introduced vide G.R. dated 31.10.2005. The Petitioners' contribution to DCPS be credited to their GPF Accounts. The modalities as suggested in para-8 of the Office Memorandum dated 03.03.2023 issued by the Government of India be adopted while switching over Petitioners from DCPS to Old Pension Scheme.

31. We hope and trust that the State of Maharashtra would issue Office Memorandum similar to Office Memorandum dated 03.03.2023 issued by the Central Government clarifying that in all cases where State Government employee has been appointed against a post or vacancy which was advertised/notified for recruitment/appointment prior to the date of notification for Defined Contributory Pension Scheme i.e. 31.10.2005 and is covered under the Defined Contributory Pension Scheme on joining service on after 01.11.2005, may be given one time option to be covered under the The M.C.S. (Pension) Rules, 1982. Such an office memorandum would avoid further litigation.

13. Thus the law now appears to be settled that even if an employee is appointed after coming into force of the

15 September 2023.

New Pension Scheme, if his selection process is initiated prior to introduction of New Pension Scheme, he would be governed by the provisions of Old Pension Scheme.

14. The only difference in the present case is that there is no initiation of selection process/advertisement as such. Petitioners were already in municipal service *albeit* as daily wage Cleaners in the Vehicle Depot of the Municipal Corporation since the year 2001. The General Body of the Municipal Corporation took a decision to absorb them in service against available vacant posts under the provisions of Section 53 of the Mumbai Municipal Corporation Act. Accordingly, a Resolution was adopted by the Municipal Corporation on 23 September 2005. The issuance of the appointment order was however delayed and the same was issued on 30 December 2005. Issuance of appointment order was merely a ministerial act, as the decision to absorb the Petitioners in service was already taken on 23 September 2005. In such a situation, the case of the Petitioners would actually stand on a higher footing than the Central Government employees governed by the Office Memorandum dated 3 March 2023 or the Petitioners in ***Khilari Rajendra Eknath*** (supra) where such employees had merely participated in the selection, but were yet to be selected for appointment when the New Pension Scheme became applicable. In the present case, a decision was taken to appoint

15 September 2023.

Petitioners on 23 September 2005. Thus as compared to the employees who merely had participated in selection process, the Petitioners are situated on a much higher pedestal where the General Body had already granted approval for their appointments on 23 September 2005.

15. In that view of the matter, considering the modifications to the Pension Scheme implemented by the Central Government, as well as the law laid down by this Court in ***Khilari Rajendra Eknath***, Petitioners are required to be extended the benefit of applicability of Old Pension Scheme. Since the order of the Industrial Court is passed on 31 October 2017, it did not have the benefit of subsequent decisions taken by the Central Government as well as the law expounded by this Court in ***Khilari Rajendra Eknath*** on 28 April 2023. Instead of remanding the matter to the Industrial Court for fresh consideration, I am of the view that the relief in favour of the Petitioners can be granted by this Court so as to obviate any further litigation on the issue.

16. Accordingly, the Writ Petition succeeds. Judgment and order dated 31 October 2017 passed by the Industrial Court, Pune in Complaint (ULP) No. 110/2011 is set aside. It is directed that the Petitioners would be governed by the provisions of Old Pension Scheme in vogue prior to 1

15 September 2023.

November 2005 as well as the General Provident Fund Scheme. Petitioners shall not be governed by the provisions of the New Defined Contributory Pension Scheme introduced vide G.R. dated 31 October 2005. The Petitioners' contributions to DCPS be credited to their GPF Accounts. The modalities as suggested in para-8 of the Office Memorandum dated 3 March 2023 issued by the Government of India be adopted while switching over Petitioners from DCPS to Old Pension Scheme.

17. The Writ Petition is accordingly allowed. Rule is made absolute.

(SANDEEP V. MARNE, J.)

NEETA
SHAILESH
SAWANT

Digitally
signed by
NEETA
SHAILESH
SAWANT
Date:
2023.09.16
15:23:29
+0530