

Court No. - 33**Reserved**
A.F.R.**Case :-** WRIT - A No. - 67274 of 2015**Petitioner :-** Nirupama Malviya**Respondent :-** State Of U.P. And 5 Others**Counsel for Petitioner :-** Arti Raje**Counsel for Respondent :-** C.S.C.,Ashok Kumar
Yadav,Shivendra**Hon'ble J.J. Munir,J.**

1. This writ petition has been instituted by Nirupama Malviya praying that a *mandamus* be issued, commanding the respondents to place the petitioner under the old pension scheme and provide all benefits of that scheme, treating her to be placed/ appointed on 25.11.2004 as a Lecturer in Economics (General Category) in terms of the order of the Secretary, Uttar Pradesh Secondary Education Services Selection Board, Allahabad dated 25.11.2004. A further direction has been sought commanding the respondents to deduct the requisite sum of money from the petitioner's salary in the same manner as in the case of any other lecturer, serving under the old pension scheme.

2. The facts giving rise to this petition merit a brief reference. The Uttar Pradesh Secondary Education Service Selection Board, Allahabad (for short, 'the Selection Board') advertised various posts of Lecturers in the subject of Economics to be filled up through direct recruitment *vide* Advertisement No.1 of 2003 for girls colleges, recognized by the State Government and managed by private managements. The petitioner applied for the post of a lecturer in response to the advertisement. The petitioner sat the written examination held by the Selection Board on 03.08.2003 at the Colonelganj Inter College, Allahabad. The result of the written examination was declared

on 26.09.2004 and duly published in newspapers. The petitioner was declared successful. The petitioner's roll number was 020811333. The Selection Board invited the petitioner to interview *vide* call letter dated 08.10.2004, the interview being scheduled on 29.10.2004, along with educational testimonials in original, besides other necessary documents, mentioned in the call letter. The petitioner appeared at the interview. The Selection Board drew up and published a panel of selected candidates, mentioning their names and the colleges where they had been placed *vide* notification dated 01.12.2004 issued by the Secretary to the Selection Board. The petitioner was shown to be placed with the Sanatan Dharm Kanya Inter College, Sadar, Meerut.

3. Upon allotment of the college, the petitioner went to the Sanatan Dharm Kanya Inter College, Meerut to join her duties. The Principal of the college, however, refused to accept her joining report, saying that she is in need of a lecturer in Economics and Sociology. The District Inspector of Schools-II, Meerut issued a memo dated 25.01.2005 to the Secretary of the Selection Board, regarding the petitioner's absorption. The District Inspector of Schools intimated the Secretary of the Selection Board that the Principal of the Sanatan Dharm Kanya Inter College, Meerut had intimated him of the fact that she has the requirement for a lecturer in Economics and Sociology. It was, therefore, not possible to post the petitioner with the said college. It was also recommended that the petitioner be adjusted in some other institution or district, and that for the institution, a candidate be sent, who is a lecturer in Economics and Sociology. The petitioner then sent an application to the Secretary of the Selection Board dated 27th January, 2005,

requesting that she may be placed with some institution in District Allahabad or Lucknow.

4. The State Government issued a Government Order No. सा-3-379/दस-2005-301(9)-2003 dated 28th March, 2005, introducing the contributory pension scheme, instead of the pension-cum-general provident fund scheme. The contributory pension scheme was introduced for new recruitments made after 1st April, 2005 as the Government Order dated 28th March, 2005 shows. The Secretary of the Selection Board on 07.07.2005 allotted the Janta Girls Inter College, Alam Bagh, Lucknow to the petitioner. The petitioner went to the Janta Girls Inter College, Alam Bagh, Lucknow to join duties. The petitioner was, however, not permitted to join by the said college on the ground that one Smt. Anita Singh, Assistant Teacher with the Janta Inter College aforesaid had filed a writ petition, being Writ Petition No. 5356 (S/S) of 2005, where she had been granted an interim order dated 03.10.2005. The college, therefore, took a stand that the petitioner be absorbed in some other institution. The District Inspector of Schools-II, Lucknow addressed a memo dated 20.10.2005 to the Secretary of the Selection Board, apprising him of the inability of the Janta Inter College, Alam Bagh, Lucknow to appoint the petitioner because of the stay order passed by the Lucknow Bench of this Court.

5. The petitioner, in the face of this consistent obstruction of her rights, filed Civil Misc. Writ Petition No. 74936 of 2005 for an appropriate direction to the Selection Board and the Authorities to ensure her placement. The writ petition was dismissed on the ground of lack of territorial jurisdiction with liberty to the petitioner to file a writ petition, if so advised, before the Lucknow Bench. The petitioner then filed a writ petition,

being Writ Petition No. 3371 (S/S) of 2006, seeking enforcement of her rights to be placed and appointed with a suitable institution. The Lucknow Bench of this Court *vide* order dated 21.04.2006 directed the Secretary of the Selection Board to ensure appointment of the petitioner in any other institution, within a period of one month. It was then that the Adhyaksha, Zila Panchayat, Sant Ravidas Nagar, Bhadohi issued a letter of appointment dated 01.08.2006 in the petitioner's favour appointing her with the Zila Panchayat Balika Inter College, Gyanpur, Bhadohi. The petitioner joined the said college on 02.08.2006. The petitioner was transferred from the Zila Panchayat Balika Inter College, Gyanpur, Bhadohi to the Gauri Pathshala Inter College, Allahabad *vide* transfer order dated 08.01.2010 passed by the Additional Director of Education (Secondary), Uttar Pradesh. In compliance with the transfer order dated 08.01.2010, passed by the Additional Director of Education aforesaid, the petitioner joined her duties at the Gauri Pathshala Inter College, Allahabad.

6. The petitioner says that she is working with the Gauri Pathshala Inter College, Allahabad on a regular basis till date. The petitioner has approached the respondent Authorities time and again since 1st January, 2007, moving applications for the purpose of placing her under the old pension scheme. The basis of the petitioner's claim is that she was selected by the Selection Board in terms of Advertisement No. 1 of 2003, and similarly situate selectees have been extended the benefit of the old pension scheme. The petitioner last represented the matter on 15.11.2015 to the District Inspector of Schools-II, Allahabad (now Prayagraj), praying that her case be considered for placing her under the old pension scheme and providing all benefits appended to that scheme in the same manner as other

selectees, who were selected in the recruitment process initiated on the basis of Advertisement No. 1 of 2003.

7. The grievance of the petitioner is that till date she has not received any response from the District Inspector of Schools, Prayagraj or any other Authority competent. The petitioner further says that the delay in the issue of appointment letter and joining the institution at Lucknow, is not on account of the petitioner's fault. The petitioner says that it is settled law that on account of a mistake or inaction of others, the one who gets delayed in the realization of his/ her rights, cannot be made to suffer the consequences of the delay. The petitioner says that she is entitled to the benefit of the old pension scheme in the same manner as any appointee appointed prior to 1st April, 2005, because she is indeed selected and directed to be appointed by the statutory Authority, the Selection Board, *vide* order dated 01.12.2004, allotting her the Sanatan Dharm Kanya Inter College, Sadar, Meerut. The new pension scheme was introduced much later on 28th March, 2005 w.e.f. 01.04.2005. The petitioner's right antedate to a time much prior to the introduction of the new pension scheme. It is on the said basis that the petitioner has moved this Court, praying that a *mandamus* be issued in the terms indicated.

8. In the counter affidavit filed on behalf of the District Inspector of Schools-II, Allahabad (now Prayagraj) dated 12th September, 2017, it is averred in Paragraph No.4 that the petitioner has claimed her date of appointment to be 25.11.2004, and on that basis a right to pension under the old pension scheme, which is not admissible to her as she has joined service on 02.08.2006 at the Zila Panchayat Balika Inter College, Gyanpur, Bhadohi as a lecturer in Economics. The

case of the District Inspector of Schools is that it is with reference to the petitioner's actual date of joining service that her right to receive pension would be governed. The new pension scheme has been introduced w.e.f. 01.04.2005 in terms of the Government Order dated 28.03.2005, whereas the petitioner's appointment is one made on 02.08.2006. She cannot, therefore, claim the benefit of the old pension scheme.

9. A rejoinder affidavit has been filed in answer to the counter affidavit filed by the District Inspector of Schools. The stand taken about the petitioner's right in the writ petition has been reiterated and it is the petitioner's case that her right to appointment would be governed by her first appointment ordered by the Selection Board. The delay in placement, on account of obstructing college managements, cannot defeat her rights to be governed by the old pension scheme.

10. Heard Ms. Arti Raje, learned Counsel for the petitioner in support of this petition and Mr. Dinesh Kumar Singh, learned Additional Chief Standing Counsel on behalf of respondent Nos. 1, 3, 4 and 5. No one appears on behalf of respondent Nos. 2 and 6.

11. The question is that, the petitioner being selected pursuant to a recruitment process that commenced much before the new pension scheme was introduced and directed to be appointed as well, before the cut-off date, under the Government Order dated 28th March, 2005 i.e. 01.04.2005, is she entitled to trace her rights to the date of her placement order issued by the Selection Board for the purpose of determining the applicable pension scheme.

12. To the understanding of this Court, the petitioner's right is traceable to a recruitment process that commenced much before the new pension scheme was introduced. More than that, the petitioner's right to be appointed was crystallized in terms of the placement order dated 01.12.2004, issued by the Selection Board. In the normal run of things, the petitioner, who reported promptly for joining the Sanatan Dharm Kanya Inter College, Sadar, Meerut, decidedly before 25th January, 2005, when the District Inspector of Schools wrote his letter to the Selection Board, saying that the management of that college are not willing to accommodate and permit the petitioner to join, if permitted to join duties at any time after 01.12.2004 and before 25.01.2005, would have been within the cut-off date without cavil. Whoever faltered, that led to the delay in the petitioner's appointment, was attributable either to the Secretary of the Selection Board in choosing the college to place the petitioner, or a recalcitrant college at Meerut, which did not permit the petitioner to join. By now, it is common knowledge in this state of which judicial notice may be taken, that colleges, run by private management, hinder and resist candidates selected by the Statutory Selection Board from joining their institutions. The devices are many. One of them is through the judicial process also, where an officiating candidate, not regularly selected, may make out a case for an interim order, pending hearing of his/ her substantive claim to something like regularization, permitting the candidate to continue. This happened in the petitioner's case with the college at Lucknow.

13. This is not to say that the placement there is at all relevant for the purpose of judging the petitioner's right to be appointed or that the interim order, operating in the case of the college at Lucknow, was undesirably obtained, but the reality of

the matter is that a regularly selected candidate does suffer postponement of the fruits of his/ her appointment, notwithstanding his/ her finally crystallized rights. An order by the Selection Board, preparing a panel list of candidates and allocating an institution to a particular candidate, is not a mere selection, but a crystallized right of the candidate under sub-Rule (8) and sub-Rule (10) of the Uttar Pradesh Secondary Education Services Selection Board Rules, 1998 (for short, 'the Rules of 1998'), that has to be enforced by the District Inspector of Schools under Rule 13 of the aforesaid Rules. The management of the institution is obliged to comply with the directions given by the District Inspector of Schools to appoint in accordance with the allocation of institution made to a selected candidate by the Selection Board. There is a complete mechanism for enforcement of the Board's selection and allocation under Rule 13 of the Rules of 1998.

14. It is not the subject matter of the controversy here, if the District Inspector of Schools was in error or the Board in carrying out the Board's allocation in favour of the petitioner, first made on 01.12.2004. The crux of the matter is that the petitioner's right stands crystallized, when the college was allocated by the Selection Board, and she reported to the concerned college, where it is presumed that the District Inspector of Schools would have issued necessary directions to the concerned college. The District Inspector of Schools did report back to the Board, which shows that he issued the necessary direction to appoint. If he did not, that too would be inaction on the part of the District Inspector of Schools.

15. Now, it would be a great travesty of justice if the petitioner is made to suffer either on account of the inaction or lethargy of

the Selection Board, or the District Inspector of Schools or their callousness in selecting the appropriate institution to place the petitioner while allocating. If the institution, where the petitioner was first allocated, had not resisted her appointment or the District Inspector of Schools had enforced it, she would have joined well before the cut-off date under the Government Order dated 28th March, 2005, introducing a new pension scheme. The petitioner's rights cannot turn upon mere fortune dependent upon a chance of her date of joining being placed on the right side of the cut-off date. A crystallized right under the statute must move on surer ground about time when it comes into effect. It cannot be made dependent upon inaction or lethargy of Authorities about enforcement, or on the correctness of their choice to realize that right for the petitioner.

16. This Court is, therefore, of opinion that the petitioner would be entitled to trace her rights, as already said, either to the date when the allocation order was issued on 01.12.2004 or at any time before 25.01.2005, when the District Inspector of Schools, Meerut referred the matter to the Secretary of the Selection Board to allocate another college in same district or another district for the petitioner. The petitioner's right would, therefore, be traceable to a point of time, well before the cut-off date; not after it, when, in fact, she succeeded in securing an appointment letter from the allocated college after failing on two occasions, resisted by managements.

17. A similar question arose before a learned Single Judge of this Court in **Mahesh Narayan and others v. State of U.P. and others, 2019 SCC OnLine All 5325**, where after considering a wealth of authorities, some running contra as well, it was held:

"21. From the perusal of judgments of *Satyesh Kumar Mishra* (Supra) and *Firangi Prasad* (Supra), there is no doubt on the point that similar dispute was before this Court in the matter of *Satyesh Kumar Mishra* (Supra), which was dismissed by this Court against which Special Appeal Defective No. 480 of 2016 is pending. It is also not disputed that legal issue involved in the matter of *Satyesh Kumar Mishra* (Supra) was also before Division Bench of this Court in the matter of *Firangi Prasad* (Supra) where the Court has clearly held that on the fault of appointing authority in issuing appointment letter, petitioners cannot be put any type of disadvantage. It appears that at the time of deciding the matter of *Satyesh Kumar Mishra* (Supra), judgement of *Firangi Prasad* (Supra) was not placed before this Court, therefore, without considering the same, decision was given in the matter of *Satyesh Kumar Mishra* (Supra). Under such facts and circumstances, judgement of *Satyesh Kumar Mishra* (Supra) is per incuriam and cannot be treated as precedent in the present case and will not come in the rescue of respondents.

22. The controversy and question of law involved in the present case is squarely covered with the judgement of *Firangi Prasad* (Supra) as well as other judgments relied upon by learned counsel for the petitioners and Courts have taken consistant view that respondents cannot by their inaction deprive a candidate to his legitimate right.

23. So far as facts of the case are concerned, there is no dispute on the point that pursuant to advertisement No. A-3/E-1/2000, advertisement was issued in news paper on 22.12.2000 and as per order of this Court dated 29.12.2001 passed in Special Appeal No. 485 (S/B) of 2001 (supra), there was no legal impediment in completion of recruitment process, but dut to inaction on the part of respondents, it was completed only after dismissal of writ petition on 05.07.2005. Final selected list of selected candidate was published in daily newspaper 'Dainik Jagran' dated 12.03.2006 and thereafter appointment letters were issued. It is also not disputed that in between again in subsequent advertisement No. A-3/E-1/2002, recruitment was completed and candidates had been granted appointment prior to 01.04.2005 and getting the benefit of 'Old Pension Scheme'.

24. Therefore, considering the facts and circumstances of the case and legal position discussed herein above, writ petition is partly allowed and petitioners are excluded from the effect and operation of Notification dated 28.03.2005 and 07.04.2005 as it is in violation of Article 14 of Constitution of India as well as law laid down by the Courts."

18. The decision of the learned Single Judge in **Mahesh Narayan** (*supra*) was appealed by the State to the Division Bench, which upheld the same, approving the principle followed by the Single Judge *vide* their Lordships' judgment and order rendered in **Special Appeal Defective No. 117 of 2021, State of U.P. and others v. Mahesh Narain and others**, decided on **19.02.2021**.

19. The question and the principle, that is involved here, fell for consideration of the Madras High Court in a very recent decision in **B. Vallipavai v. State of Tamilnadu and others, 2023 SCC OnLine Mad 5035**. It arose before the Court in **B. Vallipavai** (*supra*) in the context of a different statutory regime relating to that State. The facts, giving rise to the issue in **B. Vallipavai**, may best be recapitulated the way these have been described by the learned Judge:

"2. The fifth respondent school, namely Arulmigu Subramaniaswamy Andavar Girls Higher Secondary School run by the temple through HR&CE Department. It is an aided institution and governed by the provisions of Tamilnadu Recognised Private School Regulations Act, 1973 and Rules, 1974. A vacancy was arose for the post of B.T. Teacher(Science) in the fifth respondent school on 09.11.2002 due to voluntary retirement of Tmt. Kanchana Mallika on 08.11.2002. Therefore, the fifth respondent sought permission to fill up the said post in the month of December 2002 on the recommendation of the fourth respondent dated 10.02.2003 to fill up the post of B.T. Assistant. On such permission, the fifth respondent had notified vacancy in the District Employment Exchange and requested a list of suitable candidates by

letter dated 02.03.2003. The District Employment Exchange had furnished list of candidates to the fifth respondent school by letter dated 28.03.2003. Accordingly, the petitioner was directed to receive call letter from the fifth respondent for interview to be held on 10.04.2003.

3. The petitioner appeared for interview and on her merit and ability, the fifth respondent school selected her and appointed as B.T. Assistant by order dated 17.04.2003. She had joined in the service on the same day. Her appointment was approved by the fourth respondent by the proceedings dated 31.07.2004. But it was with effect from 17.04.2003. She has been enrolled for Teachers Provident Fund and she was given TPF No. 339415. While being so, the fourth respondent by the proceedings had informed the petitioner that her appointment was made after 01.04.2003 and as such, as per the Government Order in GO(Ms). No. 259 dated 06.08.2003, she had not been eligible for TPF scheme and directed to get new number under the Contributory Pension Scheme for deductions. Therefore, the petitioner made representation requesting to continue her in the old pension scheme."

20. The Court took into consideration the principle that right to be governed by the old pension regime would be governed by the rules and the pension scheme that was in force, when process of recruitment commenced. The learned Judge took into consideration the decision of a Division Bench of the Uttarakhand High Court in **Special Appeal No. 330 of 2013, State of Uttarakhand v. Balwant Singh, decided on 26.06.2014**, the decision of the Delhi High Court in **M.R. Gurjar v. Union of India, 2021 SCC OnLine Del 569** and the authority of the Supreme Court in **P. Ranjitharaj v. State of Tamilnadu and others, 2022 SCC OnLine SC 508**, and held:

"10. ... The contributory pension scheme was brought into force from 01.01.2004, whereas vacancy arose for the post of B.T. Assistant as early as on 09.11.2002 itself. After obtaining permission from the third respondent to fill up the vacancy, the fifth respondent requested the

District Employment Exchange for list of suitable candidates by letter dated 02.03.2003 itself. After furnishing of the list of candidates, the petitioner was called for interview to be held on 10.04.2003. Therefore, the option to continue the old pension scheme must be extended to all those persons who were participated in the selection prior to the crucial date, but however got appointment letter after crucial date. Though GO. No. 259 dated 06.08.2003 with effect from 01.04.2003 and the old pension scheme will not apply to the Government service who are appointed on or after 01.04.2003.

11. The process of appointment was started from the date of vacancy and ended with the issuance of appointment orders. GO.Ms. No. 259 (Finance) Pension dated 06.08.2003, which brought in a New Pension Scheme with retrospective operation. Because of the retrospective operation of the New Pension Scheme, no employer and employee would have forethought that appointments made after 01.04.2003 would not be eligible for the Old Pension Scheme. In fact the petitioner had been enrolled for Teacher Provident Fund and she was given TPF No. 339415. Therefore, her request was accepted and she had been enrolled under the old pension scheme.

12. That apart, the learned counsel for the petitioner produced office memorandum issued by the Government of India on 03.03.2023, considering the representation submitted from Government servants appointed on or after 01.10.2004 requesting for extending the benefit of the pension scheme under Central Civil Services (Pension) Rules, 1972 (now 2021) on the ground that their appointment was made against the post/vacancies advertised/notified for recruitment prior to notification for National Pension System referring to court judgments on various Hon'ble High Courts and Hon'ble Central Administrative Tribunals decided that in all cases where the Central Government civil employee has been appointed against a post or vacancy which was advertised/notified for recruitment/ appointment prior to the date of notification for national pension scheme i.e. 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). The said option may be exercised by the Government servants latest by 31.08.2023. In fact the Government of India also called for

list of pending cases of employees seeking conversion from contributory pension scheme to old pension scheme by the letter dated 19.02.2023, in which following details were called for:

(i) *The details of employees in your department in Secretariat and under your control viz., Heads of Department, Public Sector Undertakings, Statutory Boards and Government Societies for whom orders have been issued for conversion from Contributory Pension Scheme to Old Pension Scheme with authority (G.O. No. and Date along with a copy along with case history from 2003 to till date.*

(ii) *The details of employees seeking Old Pension Scheme from Contributory Pension Scheme either under the ambit of Government Orders/Clarifications/Court Orders and pending court cases/pending cases with specific case history may be forwarded for consolidation and taking a final decision in the matter after due examination.*

13. Therefore, the retrospective amendment/change affecting the vested or accrued rights of employees, adversely affecting their pension, was declared to be invalid as held by the Hon'ble Supreme Court of India in the case of *Chairman, Railway Board v. C.R. Rangadhamaiah*, (1997) 6 SCC 623."

21. It would be an added buttress to premise the petitioner's right that her right to be governed by the old pension scheme, would be traceable to the date of commencement of the recruitment process. There appears to be consensus of opinion on the issue, amongst various High Courts, including the Supreme Court's approval to the principle that rights crystallize about the governing pension regime, like other rights, with reference to the date on which the process of recruitment commenced.

22. This is quite apart from the principle on which this Court finds for the petitioner that the petitioner's right stands crystallized on the date the letter of allocation was issued, and

for the most, the day when the District Inspector of Schools declined to enforce the allocation and secure an appointment for her, which was well before the cut-off date.

23. In the result, this petition succeeds and is **allowed**. Let a *mandamus* issue to each of the respondents, commanding them to treat the petitioner governed by the General Provident Fund-cum-Pension Scheme, that was in vogue prior to enforcement of the contributory pension scheme in terms of Government Order No. सा-3-379/दस-2005-301(9)-2003 dated 28th March, 2005 and to ensure deduction/ payments of contribution towards retiral benefits for the petitioner accordingly.

24. Costs easy.

Order Date :- 19.10.2023
Anoop