IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 8987 OF 2014

Dr. Shafat Hussain Shafaquat Hussain Talib,
Age : 66 years, Occu. : Pensioner,
R/o : Plot No. 25/26, Opp. Himayat Baug,
Professor's Colony, Near Delhi Gate Lake,
Aurangabad .. Petitioner

Versus

1. The State of Maharashtra,
Through the Secretary,
Medical Education & Drugs Department,
Mantralaya Annex, Mumbai

2. The State of Maharashtra,
Through the Secretary,
Finance Department,
Mantralaya, Mumbai

3. The Dean,
Medical College, Aurangabad

4. The Accountant General,
Maharashtra State, Nagpur .. Respondents

Shri S. V. Adwant, Advocate for the Petitioner
Shir K. G. Patil, A. G. P. for the Respondents

CORAM : S. V. GANGAPURWALA AND
V. L. ACHLIYA, JJ.

CLOSED FOR JUDGEMENT ON : 04TH MARCH, 2015
JUDGEMENT PRONOUNCED ON: 08TH MAY, 2015

<u>JUDGMENT</u> *(Per S. V. Gangapurwala, J.)* **:**

1) Rule. Rule returnable forthwith. With the consent of parties taken up for final hearing.

2) Mr. Adwant, the learned counsel for the petitioner states that, the petitioner had joined Government service with the Government Medical College, Aurangabad. The petitioner till the date of retirement that is 28.02.2006 possessed following degrees --

(a) MBBS
(b) MD (General Medicine)
(c) MD (Chest & TB)
(d) FCAI, New Delhi
(e) Ph. D in Medicine

3) The learned counsel submits that, the gratuity is to be paid in accordance with the limit fixed vide Government Resolution dated 05.05.2009. The cut-off date that is 01.09.2009

specified in Government Resolution dated 21.08.2009 is declared unconstitutional by the Apex Court in a case of **"Association of College and University Superannuated Teacher V/s Union of India and others"** dated 30.01.2013. As such the petitioner is entitled for gratuity of Rs. 7,00,000/- (Rs. Seven Lacs Only).

4) The learned counsel submits that, petitioner is entitled for pension that is 50% amount on the basis of last salary drawn. The learned counsel further submits that, the petitioner is entitled for 3 non compounded increments as per the Government Resolution dated 10.11.2009, more particularly, Clause 8.8 (iii). The learned counsel further submits that, the Non Practicing Allowance paid to the petitioner has to be considered and added in the basic pay. According to the learned counsel pension payable is defined in Rule 60 of Maharashtra Civil Services (Pension) Rules. Rule 9 (36) of the Pension Rules defines pay. Rule 9 (36) (ii) lays down that other emoluments which may be classified as pay by the Government is included in the definition of pay. The provision as stood prior to 05.05.1990 would be applicable to the petitioner. There can not be any change in the Service Rules detrimental to the petitioner. The learned counsel relies on the judgment of the Division Bench of this Court in a case of **Narharrao S/o Bhagwantrao**

Deshpande V/s State of Maharashtra and Others reported in **2002 (5) Mh. L. J. 265.** The learned counsel also relies on the judgment of the Apex Court in a case of **K. C. Bajaj and Others V/s Union of India and Others** reported in **2014 (3) SCC 777.** According to the learned counsel, the case of the petitioner is covered by the Government Resolution dated 10.11.2009. The petition as such be allowed.

5) Mr. Patil, learned Additional Government Pleader submits that, the Government Resolution dated 10th November, 2009 provide three non compounding increments would not be applicable to the petitioner who has retired on 28.08.2006, in view of the fact that the same is effective from 01.09.2008 and the petitioner had already retired on 28.02.2006. The learned A. G. P. further submits that the Non Practicing allowance can not be added in basic pay as per the definition of pay as exist in Rule 9 (36). The provision as appearing on the date of retirement of the petitioner will have to be considered. As such the non practicing allowance can not be added in the basic pay and considered for payment of pension.

6) Mr. Adwant the learned counsel submits that, as per the Government Resolution dated 10th November, 2009, more

particularly, clause 2(1) (vii) the revised pay scale will be implemented with effect from 01st January, 2006. There is no rational in fixing the said cut-off date on 01.09.2008.

7) We have considered the submissions canvassed by the learned counsel for the respective parties. Before we advert to the respective contentions it would be appropriate to refer to the relevant rules of Maharashtra Civil Services (Pension) Rules, 1982.

> ***"Rule 6 (1):***
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> *Any claim to pension or Family Pension shall be regulated by the provisions of these rules in force at the time when a Government servant retires or is retired or is discharged or dies, as the case may be:*
> *Provided that, if during his service, changes disadvantageous to him are introduced in the rules, to which he became subject on entry into the service of Government, his pension shall not be less than that which would have been admissible but for the introduction of such changes."*
>
> ***"Rule 9 (36):***
>
> *Pay means the amount drawn monthly by a Government servant as -*
>
> > *(i) the pay (including special dearness pay) which has been sanctioned for a post*

held by him substantively or in an officiating capacity, or to which he is entitled by reason of his position in a cadre; and
(ii) personal pay, and special pay; and
(iii) any other emoluments which may specially classed as pay by Government."

"Rule 60:

(1) The "Pensionable pay" means the average pay earned by a Government servant during the last ten months service.
(2) In case of a government servant who was in service on 1st March, 1976 and retires on or after that date and where the provisions of sub-rule (1) operate disadvantageously to him, his pensionable pay shall be based on the average pay earned during the last 36 months of service.
(3) For the purpose of sub-rules (1) and (2) above, 'pay' means the pay as defined in rule 9 (36) (i)."

8) Petitioner in the present petition has claimed following reliefs -

[I] The gratuity as per Government Resolution dated 21.08.2009 of Rs. 7,00,000/- (Rs. Seven Lacs) be paid to the petitioner.

[II] The qualifying services for pension be calculated as twenty years and the petitioner be paid pension on the basis of 50% of last salary drawn.

[III] The petitioner be paid three non compounded advance increments as per point No. 8 (i) of Government Resolution dated 10.11.2009.

[IV] The petitioner be paid pension of the basis of last salary drawn after including non practicing allowance of 35% and the amount of three non compounded advance increments in his basic pay.

9) As far as claim of the payment of gratuity of Rs. 7,00,000/- (Rs. Seven Lacs) is concerned the said issue is no longer res integra. As per the judgment of the Apex Court in a case of **"Association of College and University Superannuated Teacher V/s Union of India and others"** referred supra, the cut of date of 01.09.2009 specified in Government Resolution dated 21.08.2009 is declared unconstitutional. The petitioner as such is entitled for gratuity of Rs. 7,00,000/- (Rs. Seven Lacs).

10) It also cannot be matter of debate that, petitioner would be entitled for pension on 50% of last salary drawn. The

same is also now the settled position of law.

11) The other question is about the claim of the petitioner with regard to three non compounded advance increments. The same is claimed pursuant to the Government Resolution dated 10th November, 2009 particularly clause 8 (iii). The said clause in its entirety suggests that, the said benefit of three non compounded increments is given as a incentive for the teachers who are in service and possessing the qualification laid down. It is not a matter of dispute that, petitioner possesses the said required qualification. However, Clause 10 of the of the said Government Resolution makes it applicable with effect from 01.09.2008 and only to those who are in service on said date. On 01.09.2008 the petitioner was not in service. The petitioner has not challenged the cut of date prescribed in the said Government Resolution nor has challenged clause 10 of said Government Resolution. In light of that, the said benefit of three non compounded increments can not be extended to the petitioner.

12) The petitioner claims that, the non practicing allowance which was received by the petitioner should be added in his basic pay. Pensionable Pay is prescribed under Rule 60, Clause 3 of Rule 60 which was amended on 05.05.1990 with effect

from 01.01.1986 lays down that for the purpose of Sub–rule 1 and 2 pay means Pay as defined in Rule 9 (36) (i). Rule 9 (36) (i) describes the pay including Special Dearness Pay sanctioned for the post held by him substantively or in a officiating capacity or to which he is entitled by reason of his post in the cadre. Prior to the amendment of 05.05.1990 the pensionable pay included apart from the pay as defined in Rule 9 (36) (i) personal pay, special pay and any other emoluments which may be specially classfied as pay by Government as laid down into Sub-rule (ii), (iii) of Rule 36. It is not disputed that, the petitioner had entered into service in the year, 1975 and had retired on attaining the age of superannuation in February, 2006.

13) The non practicing allowance can be construed as a emolument which the petitioner was receiving. Clause (ii) and (iii) of Rule 36 does not form a part of pay to compute the pensionable pay as per Rule 60, however, the same is with effect from 01.01.1986 vide amendment dated 05.05.1990. The petitioner had entered Government service in the year, 1975 which is prior to the said amendment. Reference will be necessary to the proviso of Rule 6 (1). The proviso to said Rule 6 (1) very succinctly lays down that, if during the service, changes disadvantageous to the Government Servant are

introduced in the rules his pension shall not be less than that which would have been admissible before the introduction of such changes. At the time when the petitioner entered the service, for the purpose of pension the non practicing allowance was allowed to be added to his basic pay. The service conditions could not be changed detrimental to the interest of the petitioner. The Division Bench of this Court in a case of **Narharrao S/o Bhagwantrao Deshpande V/s State of Maharashtra and Others** reported in **2002 (5) Mh. L. J. 265** has considered and held that, the said Rule 60 (3) of the Pension Rules would apply only to those employees who entered into the Government service on or after 05.05.1990. In view of the said dictum the petitioner would be entitled to claim addition of non practicing allowance in the definition of pay for the purpose of pension.

14) Considering the above, we pass the following order -

ORDER

A] The petitioner is entitled for gratuity of Rs.7,00,000/- (Rs. Seven Lacs). The respondent shall pay the same.

B] The petitioner is entitled for pension amount that is 50% of the last salary drawn and by adding non practicing allowance to his pay. The respondent shall pay the same to the petitioner expeditiously.

15) Rule is accordingly made partly absolute. No costs.

[V. L. ACHLIYA, J.] **[S. V. GANGAPURWALA, J.]**

sam/March. 15