IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.7865 OF 2014

Bandopant Kishanrao Pathak,
Age: 59 years, Occu: Nil,
R/o. Behind Prasad Hospital,
Dhanubai Plot, Parbhani **PETITIONER**

VERSUS

1] The State of Maharashtra,
Town Planning & Municipal Administration
Department, Mantralaya, Mumbai

2] Director of Municipal Administration
Varli, Mumbai

3] Divisional Commissioner Aurangabad
Dist. Aurangabad.

4] District Collector Parbhani
Dist. Parbhani

[Copy to be served in the office of
Government Pleader High Court of Bombay
Bench at Aurangabad]

5] Chief Officer,
Municipal Council Gangakhed
Tq.Gangakhed, Dist. Parbhani **RESPONDENTS**

WITH

WRIT PETITION NO.7876 OF 2014

Vishnu Shrinivasrao Khalikar,
Age: 59 Years, Occu: Nil,

R/o. Tivat Galli, Gangakhed,
Tq. Gangakhed, Dist. Parbhani **PETITIONER**

VERSUS

1] The State of Maharashtra,
Town Planning & Municipal Administration
Department, Mantralaya, Mumbai

2] Director of Municipal Administration
Varli, Mumbai

3] Divisional Commissioner Aurangabad
Dist. Aurangabad.

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5] Chief Officer,
Municipal Council Gangakhed
Tq.Gangakhed, Dist. Parbhani **RESPONDENTS**

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Mr. P.R.Katneshwakar, Advocate holding for Mr. Arun V. Rakh, Advocate for the petitioners.
Mr.S.B.Yawalkar,AGP for Respondent Nos.1 to 4
Mr.S.V.Munde, Advocate for Respondent No.5

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CORAM: S.S.SHINDE &
SANGITRAO S.PATIL,JJ.

Reserved on : 13.04.2016
Pronounced on : 28.04.2016

JUDGMENT: [Per S.S.Shinde, J.]:

1] These Writ Petitions are filed seeking directions to the respondents to grant pensionary benefits i.e. gratuity and leave encashment and amount of arrears of 6th pay commission to the petitioners as per the Government Resolution dated 2nd February, 2008, and further seeking directions to respondent nos. 1 and 2 to pay the pension from their Department i.e. Accountant General, Nagpur as per Government Resolution dated 2nd February, 2008.

2] It is the case of the petitioners that in the year 1979 and 1983 respectively, the petitioners were appointed as Clerks by respondent no. 5 Municipal Council Gangakhed. The petitioners have been given promotions as well as other service benefits regularly. As per the orders dated 30.04.2013 and 30.11.2012, the petitioners got retired from services from the posts of Assistant Accountant as well as Tax Valuer and Administrative Service, and from the post of Labour Supervisor respectively on attaining the age of superannuation. It is further the case of the petitioners that the Government of Maharashtra has passed Resolution on 02.02.2008 whereunder the employees, who were working in the various Municipal Councils, were treated as employees of the State Government. It means, by the said Resolution, the petitioners' services stood absorbed in the cadre of Maharashtra State Nagar Parishad Karmachari [in short 'MSNPK']. The petitioners have placed on record the copy of the said Government Resolution. It is further the case of the petitioners that they have rendered near about 35 and 29 years of service respectively under the control and supervision of respondent no.5 Municipal Council Gangakhed.

3] The learned counsel appearing for the petitioners further submits that the services of the petitioners have been absorbed by the State Authority in the cadre of Maharashtra State Nagar Parishad Karmachari in 2008 and 2010 respectively. However, till date, no effective steps have been taken by the respondents to grant pensionary benefits i.e. gratuity and leave encashment to the petitioners, as per the said Government Resolution. It is submitted that the petitioners are not getting pension from respondent no. 5 regularly, therefore, it is necessary to direct respondent no.1 to pay pension to the petitioners from the office of Accountant General, Nagpur. It is submitted that though the petitioners have repeatedly made representations, they have not been given pensionary benefits from the respondents till today. It is submitted that respondent nos. 2 and 3 have also passed the order dated 4th November, 2010, wherein it is clearly mentioned that the services of the petitioners are absorbed finally in the cadre of MSNPK. The learned counsel appearing for the petitioners invited our attention to the copies of letters written by respondent no. 4 and the order dated 4th November, 2010, issued by respondent no.2. It is submitted that since the petitioners have been absorbed in the cadre of the MSNPK, and also the respondent authorities have clearly mentioned that all these employees are treated as State employees, they are entitled to get all the benefits, as has been mentioned in the Maharashtra Civil Services Rules as well as in the Pension Rules thereunder. But till date, the petitioners could not get such benefits. He further invited our attention to the provisions of the Notification dated 11th January, 2007, issued by the Urban Development Department. By the said

Notification, the Rules have been framed governing the services of the employees of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships State Services. The said Rules of 2006 have been framed for absorption, recruitment and conditions governing the services of the said employees. The learned counsel invites our attention to the definition of the absorbed employees and submits that the 'absorbed employee' means an Existing Employee in the service of any Municipal Council absorbed in any Grade of any Service in accordance with these Rules. He further submits that the Absorption Authority has already included the names of the petitioners in the list of absorbed employees, and therefore, the petitioners are entitled to get pensionary benefits from the respondent – State, having been absorbed as State employees.

4] In pursuance of the notices issued

to the respondents, respondent no. 2 filed affidavit-in-reply on 05.05.2005 and additional affidavit on 11.04.2016. Relying upon the said reply / additional affidavit, the learned AGP appearing for the respondent – State submits that respondent no. 2 has issued detailed orders on 18th October, 2014 and 27th March, 2015, clearly stating how and when to make payment of retired employee of the Council. It is submitted that due to ill-financial position of the Municipal Council, the Municipal Council was not able to pay the pension amount to the petitioners. It is further submitted that the petitioners are receiving pension from the concerned Municipal Council, and therefore, the petitioners contention that they are not receiving pension, is not correct.

5] One more affidavit-in-reply has been filed on behalf of respondent nos. 2 to 4 by one U.S. Gute. Relying upon the averments in the said reply, the learned AGP appearing for the Respondent – State submits that the petitioners were never given appointment in the Government Employment. They have not worked with the Government and therefore, they are not entitled to receive pension from the Government of Maharashtra. The Municipal Council has already granted benefits of pension to the petitioners. It is submitted that at the relevant time there were 15 vacancies in the Parbhani District, and therefore, only 15 employees were appointed on the vacant posts and other employees could not be appointed. The learned AGP invites our attention to the provisions of Rule 5 [6] of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships State Services [Absorption, Recruitment and Conditions of Service] Rules, 2006 [in short 'the said Rules, 2006'] and submits that the said Rule provides for absorption of existing employees in the State services. However, in the present case, the petitioners were never appointed in the State Cadre on any particular post, they never worked on any post in the State Cadre, and therefore, they are not entitled to get pensionary benefits from the State Government. The pay fixation of the employees absorbed in the State Cadre is done as per Rules 10 and 11 of the MCS [Pay] Rules, 1981 which clearly states that the pay fixation of an employee will be done only after appointment to the Government Service / another post. In the present case, the petitioners after getting orders of being absorbed in the State Cadre were not actually appointed or given the postings in the Sate Cadre. So the question of their getting pay in the cadre and retirement benefits does not arise. It is true that both the petitioners exercised options and opted for appointment to the posts in the State Government employment. However, there were no vacancies available and the petitioners retired as the employees of the Municipal Council Gangakhed. Both of them are getting pension from the Municipal Council, Gangakhed. It is submitted that if the petitioners are allowed to draw pension in the pay scale requested by them, there will be a chaotic situation throughout State of Maharashtra, because without making proper appointment against vacant post, the petitioners would not be entitled to become part and parcel of the Maharashtra State Municipal Council Employees Cadre. Therefore, the learned AGP submits that both the Petitions being devoid of any merits, may be rejected.

6] Respondent no. 5 filed affidavit-in-reply. Relying upon the affidavit-in-reply, the learned counsel appearing for respondent no. 5 submits that respondent no. 5 has calculated the benefits admissible to the petitioners. The petitioner in Writ Petition No.7865/2014 is entitled for leave encashment amount of Rs.2,76,060/- and gratuity amount of Rs.2,64,825/-. The total amount is due towards Municipal Council of Rs.5,80,885/-. Municipal Council has already paid Rs.1,73,140/-, and the balance amount due i.e. Rs.3,67,745/-, would be paid to him as per the availability of funds. The petitioner in Writ Petition No.7876/2014 is entitled for leave encashment amount of Rs. 2,36,670/-, gratuity amount of Rs.1,99,520/- and the arrears of 6th Pay Commission of Rs.1,37,918/-. The total amount due towards Municipal Council is Rs.5,74,108/-. The Municipal Council has already paid Rs.1,39,640/-, and the balance amount due i.e. Rs.4,34,468/-, would be paid to him as per the availability of funds.

7] We have considered the submissions of the learned counsel appearing for the parties at length. With their able assistance, perused the pleadings in the Petition, annexures thereto, replies filed by the respondents, the Notification dated 11th January, 2007 and the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships State Services [Absorption, Recruitment and Conditions of Service] Rules, 2006. In the said Rules, 2006, Rule 2, clauses (a) and (b) define 'Absorbed Employee' and 'Absorption Authority' respectively. Clauses (a) and (b) of Rule 2 of the said Rules, 2006, read thus:

> *(a) "Absorbed Employee" means an Existing Employee in the service of any Municipal Council absorbed in any Grade of any Service in accordance with these Rules;*
>
> *(b) "Absorption Authority" means an authority constituted under Rule 6;*

The scheme of Rule 5 of the said Rules, 2006, provides for absorption of existing employees of Municipal Council.

Rule 5 (1) lays down the eligibility criteria of the existing employees of the Municipal Council, who can be considered for absorption in the State Services. Sub-rule (2) of Rule 5 of the said Rules, 2006, gives option to the employee to be absorbed in the State Services. Sub-rule (3) of Rule 5 of the said Rules, 2006, states that, the Absorption Authority shall examine the eligibility of each Existing Employee as per the criteria laid down in sub rule (1) and (2) and if such employee is found eligible, his / her name should be forwarded to the Director for inclusion in the list of eligible Existing Employees. The list of such eligible existing employees, who have opted for absorption shall be prepared by the Director, in view of sub-rule (4) of Rule 5 of the said Rules, 2006. Sub-rule (5) of Rule 5 of the said Rules, 2006, reads thus:

(5) The inter se seniority of

eligible Existing Employees in each Grade of each Service in which they are to be absorbed shall be determined on the basis of the period of continuous service rendered by them in the scale of pay equivalent to or higher than the scale of pay of the Grade on which they are to be absorbed.

Sub-rule (6) of Rule 5 of the said Rules, 2006, reads thus:

(6) The vacancies in the Service, as and when they occur, shall be filled by appointment of an Existing Employee whose name appear in the list prepared as per sub rule (4) above. The appointment shall be strictly based on the seniority in the above list, will continue till the above list is exhausted.

8] Rule 6 of the said Rules, 2006, provides for constitution of Absorption Authority.

9] In the present case, sub-rule (6) of Rule 5 of the said Rules, 2006, is relevant. Admittedly, in case of the petitioners, they were not appointed on any post in the State Services by invoking sub-rule (6) of the said Rules, 2006. According to the learned AGP appearing for the respondent – State, there were no vacancies in the State Services to appoint / absorb the petitioners. Therefore, unless employee from the list of eligible existing employees is absorbed by invoking Rule 6 in the Services, he cannot seek benefit of sub-rule (10) of the said Rules. It is only when the employee from the eligible existing employees is actually appointed on any vacant post in the State Service, he is entitled to draw pension under Rule 10 of the said Rules, 2006. As already observed, admittedly, the petitioners were not appointed in the service on particular posts for want of vacancies. Therefore, they cannot seek the benefit of Rule 10 of the said Rules, 2006. The petitioners are already receiving pension from the respondent

Municipal Council. Affidavits-in-replies filed in both the Petitions by the Municipal Council makes it clear that the petitioner in Writ Petition No.7865/2014 is entitled for leave encashment amount of Rs.2,76,060/- and gratuity amount of Rs.2,64,825/-. The total amount is due towards Municipal Council of Rs.5,80,885/-. Till today, Municipal Council has paid Rs.1,73,140/-, and the balance amount due i.e. Rs.3,67,745/-, will be paid as per the availability of funds. The petitioner in Writ Petition No.7876/2014 is entitled for leave encashment amount of Rs. 2,36,670/-, gratuity amount of Rs.1,99,520/- and the arrears of 6th Pay Commission of Rs. 1,37,918/-. The total amount due towards Municipal Council is Rs.5,74,108/-. Till today, the Municipal Council has paid Rs.1,39,640/-, and the balance amount due i.e. Rs.4,34,468/-, will be paid as per the availability of funds.

10] In the light of discussion hereinabove, the petitioners' prayer to disburse them pension from the office of Accountant General, Nagpur stands rejected. However, if the petitioners have any grievance about the calculation of the afore-mentioned amounts towards Leave Encashment / Gratuity, etc. they can agitate their grievances before the Appropriate Forum. We direct respondent no. 2 to ensure that the petitioners receive the entire amount towards Leave Encashment and Gratuity, in case the said amount is not yet disbursed to the petitioners as mentioned in the affidavit-in-reply by respondent no. 5, as expeditiously as possible, however within 8 weeks from today. In case the funds are not available with respondent no.5 to disburse the aforementioned amount, respondent no.2 shall release funds to the extent of unpaid amount in favour of respondent no.5, and adjust the said amount from the admissible grant-in-aid to respondent no.5 from the State Government.

11] With the above observations, both the Writ Petitions stand rejected.

[SANGITRAO S.PATIL]
JUDGE

[S.S.SHINDE]
JUDGE

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