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IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

WRIT PETITION NO.1049 OF 2010

1. Anil s/o Dnyandeo Sarode,
Age 38 years, Occ. Service,
R/o Kinhi, Taluka Bhusawal,
District Jalgaon.
2. Subhash s/o Kadu Zope,
Age 41 years, Occ. Service,
R/o Zope Wada, Varangaon,
Tq. Bhusawal, District Jalgaon ... PETITIONERS

VERSUS

1. The State of Maharashtra
through Secretary,
Primary Education Department,
Mantralaya, Mumbai – 32
2. The Director of Education,
Maharashtra State,
Central Building, Pune
3. The Deputy Director of Education,
Nashik Region, Nashik
4. The Education Officer (Primary),
Zilla Parishad, Jalgaon.
5. The Secretary,
Leva Samaj Yuwa Seva Mandal,
Varangaon, Tq. Bhusawal,
District Jalgaon.
6. The Head Master,
Navin Prathamik Shala,
Now C.H. Bade Prathamik Vidyamandir,
Varangaon, Tq. Bhusawal,
District Jalgaon. ... RESPONDENTS

((2))

.....
Shri B.R. Warma, Advocate for petitioners
Mrs. M.A. Deshpande, Addl. G.P. for respondents N.1 to 3
Shri M.K. Goyanka, Advocate for respondent No.4
.....

CORAM: RAVINDRA .V. GHUGE AND
 SUNIL K. KOTWAL, JJ.

Date of reserving judgment : 1st November, 2017

Date of pronouncing judgment : 24th November, 2017

JUDGMENT (PER SUNIL K. KOTWAL, J.):

1. By filing this petition under Article 226 of the Constitution of India, the petitioners have sought the following substantial reliefs :

(A) By issuing writ of mandamus for appropriate writ or directions or orders in the like nature the respondent No.3 and 4 be directed to consider the claim of approval to the appointment of petitioners with effect from July 1999 or on the date of completion of strength of students at 500 or from the date of first proposal seeking approval and modify the existing order granting approval dated 24/12/2004 and 4/7/2007.

(B) By issuing writ of mandamus for appropriate writ or directions or orders in the like nature the respondent No.3 and 4 be directed to make applicable Pension Scheme on the basis of appointment of the petitioners made and approved

before 2005 by quashing the letter dated 29/3/2008 issued by respondent No.4.

- (C) By issuing writ of mandamus for appropriate writ or directions or orders in the like nature the respondent No.3 and 4 be directed to pay salary differences from July 1999 to 31/5/2004 and award all consequential service benefits.

2. The Government of Maharashtra under various Government Resolutions has made applicable the provisions contained in the Maharashtra Civil Services (Pension) Rules to the full time teachers and non-teaching staff in the non-Government/ private aided schools. The last of such Pension Scheme was framed under the Maharashtra Civil Services (Pension) Rules, 1982. The Union of India vide Notification issued by its Finance Department dated 22.12.2003 has made applicable the Defined Contributory Pension Scheme (for short, the "DCP Scheme") to the employees who are appointed on or after 1.1.2005. The Union of India has also appointed a Committee for the said purpose. The Government of Maharashtra vide Resolution dated 31st October 2005, had resolved to make similar DCP Scheme applicable to the employees appointed in the services of the State of Maharashtra on or after 1st November 2005. Vide

Government Resolution dated 29th November 2010, the Government of Maharashtra, through its School Education and Sports Department, has resolved that teachers and non-teaching staff appointed in the recognized non-Government (private) aided primary, secondary and higher secondary schools as also Junior College of Education on or after 1st November 2005, shall be governed by the new DCP Scheme.

3. The question that arises for consideration in the present petition is as to whether non-teaching staff like Clerks and Peons, who were appointed in private recognized Government-aided schools prior to 1.11.2005 on honourarium, and who were brought in regular scale after the cut-off date 1.11.2005, would be governed by the 1982 Pension Rules or the new D.C.P. Scheme.

4. After hearing Shri B.R. Warma, learned counsel for the petitioners and learned A.G.P. for the State, following undisputed facts emerge before this Court.

5. That, on 2.7.1993, petitioners were appointed as Clerk and Peon respectively in respondent No.6 school, on contract basis, when there was ban on recruitment of the staff, under Government Resolution dated 16.6.1987. This ban on recruitment was lifted under Government Resolution dated 1.8.1995. 100% grant-in-aid is approved to the

respondent No.6 school since the year 1998. In the year 1999, the strength of the students in respondent No.6 school was beyond 500. Therefore, since June 1999, the respondent No.6 school became eligible to get approval for appointment of one Clerk and one Peon in the school. However, till 2001, respondent Nos.5 and 6 did not submit the proposal to the respondent No.4 for grant of approval though on 24.5.1999 respondent No.5 issued fresh appointment orders in favour of petitioners on permanent basis. For the first time, on 21.6.2001, respondent No.6 sought approval from the Government to the appointment of the petitioners as Clerk and Peon respectively on the ground that strength of the school reached beyond 500. By that time, on 30.5.2000, again ban was imposed on recruitment and creation of any staff by the Government Departments (Government Resolution dated 30.5.2000). Therefore, approval was not granted to the appointment of petitioners.

6. Thereafter, Shikshan Sevak Scheme came into effect. Separate scheme was introduced by State Government under Government Resolution dated 12.7.2004 for recruitment of Clerks and Peon on honourarium basis. Under this Government Resolution, the Director of Education (Primary) was instructed to create and sanction 333 posts of Junior

Clerks and 336 posts of Peons in 336 schools in the State of Maharashtra. This newly introduced Government Resolution, for appointment of Clerks and Peons in eligible schools on honourarium basis, specifically provides that, after appointment for the first three years, honourarium of Rs.2000/- per month and Rs.1700/- per month would be payable to the Clerk and Peon respectively. Thereafter, if the performance of the Clerk and Peon is satisfactory, then only the respective Clerk and Peon would be brought in regular pay scale applicable to Clerks and Peon.

7. On 2.11.2004, a fresh proposal was submitted by respondent No.5 Educational Institution for approval of appointment of petitioners as Clerk and Peon respectively. On 24.12.2004, the respondent No.4 granted a "temporary approval" to the appointment of the petitioners as Clerk and Peon respectively, but on honourarium basis for the period of next three years only. Petitioners satisfactorily completed this period of three years. Therefore, on 14/7/2007, the respondent No.4 granted "permanent approval" to the appointment of petitioners and they were brought in regular pay-scales applicable to them.

8. Learned counsel for the petitioners also submits that, because the strength of the students in respondent No.6

school reached above 500 in the year 1999 and because the school was eligible to get sanction for one Clerk and one Peon in the year 1999, the approval for the appointment of petitioners as Clerk and Peon respectively ought to have been granted with effect from July 1999 and not from 24.12.2004 and 4.7.2007, as granted by the State Government.

9. The learned counsel for petitioners submits that, under Government Resolution dated 19.7.2011, the Maharashtra Civil Services (Pension) Rules, 1982 (Old Pension Rules) are made applicable to the Shikshan Sevak/ Gramsevak/ Krushi Sevak who were appointed prior to 1.11.2005 on honourarium basis, only after completing their service for the period of three years satisfactorily. He further submits that, though under Government letter dated 24.12.2004, approval has been granted to the appointment of petitioners since 1.6.2004, on honourarium basis for the period of next three years, and though this temporary approval was made permanent on 4.7.2007, w.e.f. 1.6.2007 to bring the petitioners on regular pay-scale, old pension scheme would be applicable to the petitioners in view of Government Resolution dated 19.7.2011 referred above. According to learned counsel for the petitioners, the Government Resolution dated 19.7.2011 is also applicable to

the non-teaching staff like Clerk and Peon as they fall in the category of "Shikshan Sevak".

10. Learned counsel for the petitioners placed reliance on judgment of this Court, passed on 10.7.2014 in Writ Petition No.6689/2013 (Anil V. Wasekar & ors. Vs. State of Maharashtra & ors.), Kaushalya Shivaji Kekan & ors. Vs. State of Maharashtra & ors., dated 11.10.2013 in Writ Petition No.2455/2012, Shantaram Madhukar Patil & anr. Vs. State of Maharashtra & ors., dated 30.7.2014 in Writ Petition No.6093/2011, Sandip Vasantrao Patil & ors. Vs. State of Maharashtra & ors., dated 15.2.2017 in Writ Petition No.5321/2011.

11. Learned A.G.P. for the State points out that, though the strength of the students in respondent No.6 school was above 500 after June 1999 and though that time respondent No.6 school was eligible to obtain a sanction for the appointment of one Clerk and one Peon, the said proposal was submitted by respondent No.6 school on 21.6.2001, when there was ban on recruitment and grant of approval. According to the learned A.G.P., therefore, the appointment of the petitioners as Clerk and Peon cannot be approved with effect from July 1999. She points out that, the ban on recruitment and approval was lifted under Government

Resolution dated 12.7.2004, which introduced the appointment of Clerk and Peon on honourarium basis in the schools which are eligible for such appointments.

12. The learned A.G.P. for the State countered the argument of the learned counsel for the petitioners that the petitioners fall in the category of "Shikshan Sevak" and submits that, Shikshan Sevak is a different cadre, who are appointed under a different scheme than the non-teaching staff like Clerk and Peon. According to learned A.G.P., under the Government Resolution dated 19.7.2011, the Government has carved out an exception only for the Shikshan Sevak/ Krushi Sevak/ Gramsevak. She has pointed out that, this Government Resolution dated 19.7.2011 nowhere reflects that the Clerks and Peons are also included and covered under this Government Resolution. Learned A.G.P. submits that, as the case of petitioners is not covered under Government Resolution dated 19.7.2011, the old pension scheme would not be applicable to the petitioners, in view of the specific directions given by the Government under Government Resolution dated 24.2.2008 and Government Resolution for clarification, dated 30.6.2009.

13. Undisputedly, in the year 1999, the respondent No.6 school was eligible to get sanction for one post of Clerk

and one Peon because, in that year, the strength of the students in respondent No.6 school grew beyond 500 students. However, on 21.6.2001, for the first time the respondent No.6 school submitted its proposal to the Education Department to grant sanction and approval to the appointment of petitioners as Clerk and Peon respectively. When the proposal for appointment of Clerk and Peon was submitted by respondent No.6 school to the Education Department, at that time, there was absolute ban on new recruitment and approval under the Government Resolution dated 30.5.2000. Thus, obviously, the respondent No.1 to 4 were not empowered to grant approval to the appointment of petitioners on 21.6.2001.

14. The ban on recruitment was lifted only on introduction of Government Resolution dated 12.7.2004, under which the scheme for recruitment of Clerk and Peon on honourarium basis was introduced in the Government aided private primary schools where the strength of the students reached beyond 500 students. In the circumstances, the respondent No.4 Education Officer is justified in granting temporary approval to the appointment of petitioners as Clerk and Peon respectively w.e.f. 1.6.2004 for the period of next three years on honourarium basis. The appointment order

issued by respondent No.5 dated 24.5.1999 in favour of petitioners, as Clerk and Peon respectively on permanent basis is illegal, as on that date post of one Clerk and one Peon were not sanctioned by respondent No.4 because in the year 1999 no proposal for approval of these appointments was submitted by respondent No.6. Thus, obviously, the appointment of petitioners as Clerk and Peon cannot be approved w.e.f. July 1999 as prayed by the petitioners. In the circumstances, the prayer clause (A) of the petition cannot be allowed.

15. In support of his submissions that the posts of Clerk and Peon fall in the category of "Shikshan Sevak", learned counsel for the petitioners has drawn our attention to Section 2(7) of the Maharashtra Employees of private Schools (Conditions of Service) Regulation Act, 1977 (hereinafter referred to as the M.E.P.S. Act), wherein the term "employee" is defined as under :

"Employee" means any member of the teaching and non-teaching staff of a recognized school + [and includes *Assistant Teacher (Probationary)]

+Inserted by Section 10(a) of the Mah. Act 14 of 2007.

*substituted for Shikshan Sevak by Maharashtra Act 9 of 2012, Sec. 10(a)

16. A bare glance at Section 2(7) of the M.E.P.S. Act makes it absolutely clear that, teaching staff and non-teaching

staff are separate cadres, and the words "Shikshan Sevak" are substituted by the words "Assistant Teacher" under Maharashtra Act No.9 of 2012. It means that, "Shikshan Sevak" is synonymous term for "Assistant Teacher" and the posts 'Clerk' and 'Peon' do not fall in the category of "Shikshan Sevak". Thus, the contention of learned counsel for the petitioners is not acceptable that the petitioners fall in the category of Shikshan Sevak and, therefore, the Government Resolution dated 19.7.2011 is applicable to the petitioners.

17. After going through the Government Resolution dated 19.7.2011, it becomes clear that, in the entire Government Resolution there is no reference that it is made applicable to non-teaching staff like Clerk and Peon in the educational institutions. On the other hand, from this Government Resolution, it can be gathered that, exception has been carved out by Government only for "Shikshan Sevak/ Krushi Sevak/ Gramsevak", to make applicable old pension scheme to these specified cadres if their appointments are made prior to 1.11.2005 i.e. the cut-off date for applicability of new pension scheme. In the case of "Kaushalya Shivaji Kekan & ors Vs. State of Maharashtra" (supra), this Court has interpreted the Government Resolution dated 19.7.2011, which is held applicable only to Shikshan

Sevak/ Gramsevak and Krushi Sevak. Therefore, the ratio of this case is of no help to the petitioners.

18. We have carefully considered the Government Resolution dated 19.7.2011 in the light of the contention of the petitioners that they derive benefit from the said Government Resolution. We find that, firstly, the said Government Resolution is specifically restricted to the Shikshan Sevak, Krushi Sevak and Gramsevak. The very title of the Government Resolution and the first paragraph below the introduction in the Government Resolution, it is specifically mentioned that, the Government Resolution is with regard to Shikshan Sevak, Gramsevak and Krushi Sevak, working in 100% grant-in-aid primary, secondary and higher secondary schools, Junior Colleges, Colleges of Education, Sainik Schools, Vidya Niketan, Zilla Parishad and Agricultural Department. Those Shikshan Sevak, Gramsevak and Krushi Sevak who were working on honourarium basis prior to 1.11.2005, are benefited by the said Government Resolution since it provides for reckoning their service on honourarium basis for the purposes of their retiral pensionary benefits. We have not been shown any Government Resolution, which indicates that the three years period of honourarium service put in by employees like the petitioners before us, would

enable the service on honourarium to be reckoned as regular service by such employees.

19. Similarly, the case of "Anil V. Wasekar & ors Vs. State of Maharashtra & ors." (supra) is distinguishable, wherein this Court held that, merely because grants are disbursed to the school from 1.12.2005, the petitioners cannot be deprived of the benefit of the old pension scheme of the year 1982, when the school in which the petitioners are working was brought on 100% grant-in-aid w.e.f. April 2005. Thus, the ratio decidendi in this case is altogether distinct. This case is not applicable to the case at hand.

20. On the other hand, learned A.G.P. has rightly drawn our attention to the Government Resolution dated 26.2.2008 and the clarificatory Government Resolution dated 30.6.2009, which provides that, the old pension scheme would be applicable only to those non-teaching staff, who complete the initial period of three years on honourarium scale before 1.11.2005. This Government Resolution specifically provides that, the new pension scheme will be applicable to those staff members who become regular on 1.11.2005 or thereafter.

21. In the case at hand, the approval order of petitioners, dated 24.12.2004, shows that, approval was granted w.e.f. 1.6.2004 for the period of three years on

honourarium basis and the order dated 4.7.2007 further makes it clear that the petitioners were brought in regular pay-scale only on 1.6.2007 i.e. after the cut-off date 1.11.2005. As the petitioners became regular on 1.6.2007 i.e. after the cut-off date 1.11.2005, when the new pension scheme is made applicable to the non-teaching staff in the school, by no stretch of imagination it can be held that the old pension scheme would be made applicable to the petitioners. It follows that, prayer clause (B) of the petition cannot be allowed to make the old pension scheme applicable to the petitioners. It follows that, a writ of mandamus cannot be issued to direct respondent No.3 and 4 to pay salary differences from July 1999 to 31.5.2004 to the petitioners. In other words, none of the prayers of the petition can be allowed.

22. The case of "Shantaram Madhukar Patil & anr. Vs. State of Maharashtra & ors." (supra) and "Sandip Vasantrao Patil & ors. Vs. State of Maharashtra" (supra) are distinguishable for the reason that in these both cases the Government Resolutions dated 26.2.2008 and 30.6.2009 were not brought to the notice of this Court. Even the ratio of **Homraj Bisen & ors. V/s State of Maharashtra & ors.** reported in **[2013 (2) Mh.L.J. 401]** is not applicable to the

case at hand for the reason that in that case, legality and validity of Government Resolution dated 29/11/2010 was challenged, under which Government of Maharashtra, through its School Education & Sports Department has resolved that Teachers and non-teaching staff appointed in recognized non-Government (private)-aided primary, secondary and higher secondary schools as also Junior College of Education, on or after 1.11.2005, shall be governed by the new defined contributory pension scheme. The question for consideration before this Court was, "Whether the employees who were appointed in private recognized school prior to 1.11.2005 and whose services were approved by competent authority but the schools were not admissible to 100% grant-in-aid, would be governed by 1982 Pension Rules or new D.C.P. Scheme". In this case, this Court held that, Government Resolution dated 29.11.2010 is valid and the petitioners, who were appointed in private recognized schools prior to 1.11.2005 and whose services were approved by the competent authority, but the schools were not admissible to 100% grant-in-aid would be governed by new D.C.P. Scheme. In the result, the petition was dismissed. Thus, obviously, in the case of "Homraj Vs. State of Maharashtra", this Court has nowhere interpreted the Government Resolution dated 19.7.2011, and this Court

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nowhere held that Clerks and Peons appointed prior to 1.11.2005 on honourarium basis, would be governed by the 1982 Pension Rules. Thus, the ratio of this case is of no help to the petitioners in any manner.

23. In the result, we have come to the conclusion that this petition being devoid of merit, deserves to be dismissed. Accordingly, we pass the following order :

O R D E R

Writ Petition is dismissed. Rule is discharged.

(SUNIL K. KOTWAL)
JUDGE

(RAVINDRA V. GHUGE)
JUDGE

After pronouncing the judgment, learned Advocate for the petitioners prays for continuance of the interim relief granted earlier for a period of six weeks, since the petitioners intend to assail this judgment before the Hon'ble Apex Court.

The request is accepted. The interim relief granted earlier would continue for a further period of six weeks.

(SUNIL K. KOTWAL)
JUDGE

(RAVINDRA V. GHUGE)
JUDGE

fmp/