

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 13220 OF 2016

Sou. Mone Rashmi Shriram

.... Petitioner

vs

1 State of Maharashtra
2 The Accountant General,
State of Maharashtra, Mumbai-1
3 The Deputy Director of Education
(Secondary & Higher Secondary)
Mumbai Region, Kolhapur
4 Educational Officer (Secondary),
Zilla Parishad, Thane
5 Through Chairman,
Chatrapati Shiksan Mandal, Kalyan.\
6 The Headmaster,
Nutan Vidyalaya, Kalyan (West)

.... Respondents

Mr. Satyajeet A. Rajeshirke with Mr. Rahul B. Vijaymane
for the petitioner.

Ms. Nisha Mehra, AGP for respondents/State.

**CORAM: ANOOP V. MOHTA AND
RAVINDRA V. GHUGE, JJ.**

DATE : May 04, 2017

ORAL JUDGMENT (Per Ravindra V. Ghuge, J.):

1 Rule. Rule is made returnable forthwith. Heard finally by

consent of the parties.

2 By this Petition, the Petitioner has put forthwith the following prayers (a), (b) and (c) below paragraph 16:

“a) This Hon. Court may be pleased to issue Writ of Certiorari or any other appropriate writ or direction thereby quash and set aside Letter/order bearing outward no/Audit/Thane Region/Pension-objections/6 dated 29/6/2016 issued by Office of Respondent No. 3 (Exhibit C).

b) This Hon. Court may be pleased to issue Writ of Mandamus or any other appropriate writ or direction thereby directs Respondents no 5 and 6 to submit Pension proposal afresh and further direct Respondents no 1 to 4 to sanction & grant the same by considering service of the Petitioner on the Post of Part Time Teacher along with service rendered as Full Time Teacher.

c) This Hon. Court may be pleased to direct Respondents to grant Petitioner arrears of Pension retirement benefits and/or other financial benefits along with interest.”

3 We have considered the submissions of the learned counsel for the Petitioner and the learned AGP on behalf of the Respondents.

4 Issue is as regards eligibility of the Petitioner for pension under the Maharashtra Civil Services (Pension) Rules, 1982 . The

Petitioner is said to have rendered total service of 20 years out of which 15 years and 5 months were as a part time teacher and 4 years and 7 months as a full time assistant teacher under the Maharashtra Employees of Private Schools (Conditions of Service) Regulations Act, 1977. There is no dispute that the MCS Pension Rules are applicable.

5 The learned AGP strenuously submits that the only reason for rejecting the proposal of the Petitioner for pension under the Pension Rules is that he has not put in 10 years qualifying service for being eligible for pension. In support of her contention, it is stated that since 10 years as a regular employee have not been put in by the Petitioner, he is held to have not put in 10 years of qualifying service.

6 We find that the above stated issue is no longer res integra. This Court (Coram: S.C.Dharmadhikari and K. R. Shriram,JJ.) by its judgment dated 7.1.2014 in Writ Petition No.2354/2012 in the matter of *Jyoti Prakash Chougule v. State of Maharashtra and 6 ors*, has concluded that as the Petitioner in the said case had put in 14 years of service as a part time teacher and 8 years and 7 months as a full time assistant teacher, she would be held qualified for pension under the Rules applicable. The observations of

this Court in paragraph Nos. 8 to 13 read as under:

“8] The petitioner claims that she has rendered total service of 14 years and 15 days out of which five years, five months and 15 days as part time and eight years seven months as full time assistant teacher. The petitioner submits that as per the provisions of the MEPS Rules the petitioner is entitled to one half of service rendered as a part time assistant teacher to be considered for calculating qualifying service. If two year eight months and 22 days (half of part time service) is considered along with full time service of 8 years seven months, total qualifying service of the petitioner comes to 11 years three months and 22 days which would make the petitioner entitled to and qualified for pension. The petitioner submits that the petitioner from time to time made a request to respondents to send the proposal for pension after considering the service rendered as part time service. The petitioner submits that the petitioner is ready and willing to return the benefits received towards Gratuity and retirement.

9] In doing so, the petitioner places reliance upon a judgment of this Court in the case of Shivappa S/o.Bhujangappa Bembale Vs. State of Maharashtra and Anr. reported in 2005 (3) Mh.L.J.709. The petitioner once again made a representation to the concerned respondents but by Annexure H dated 1st August 2011 what has been communicated to her is that she has not rendered the qualifying service at the Balwantrao Zhele High School, Jaysingpur. The head of the institution, therefore, informed her that in terms of Maharashtra Civil Services (Pension) Rules, 1982, which are applicable to teachers, she would not be entitled to the benefit that she is claiming on account of the duration of service rendered. The petitioner is aggrieved by this communication and that is how this petition is filed. The petitioner has submitted that the very post of part time assistant teacher was converted

into a full time one on account of consolidated workload. Therefore, she was given appointment as full time assistant Teacher.

10] On this petition, notice was issued on 24th January 2013 to respondent Nos. 5 to 7. The learned AGP waived service for respondent Nos. 1 to 4. From that date till we have heard and concluded the arguments, no reply has been filed. There was sufficient opportunity given and in fact time was also extended but no affidavit in reply has been filed. None of the averments have been denied or controverted.

11] Petitioner's advocate has placed reliance upon the judgment of Shivappa (supra) in which identical controversy was considered by the Division bench of this court. The Division Bench has held as under:-

“5. Relying on the above three provisions of Rule 30, Rule 57 Note 1 and Rule 110 of the Maharashtra Civil Services (Pension) Rules, Mr. Vivek Dhage, Advocate for petitioner, submits that present petitioner is entitled for pension as his part time service as Peon is approximately 20 years as he was appointed in the year 1970 and continued on the same post till 1990 and, thereafter, the Chief Executive Officer has taken him in regular cadre by giving appointment in the said cadre and he worked for three years. So, considering the Note 1 of Rule 57, his previous service is to be counted to the extent of 10 years as this period worked as part time Peon is about 20 years and in regular post he worked for three years. Thus, the total period of service of present petitioner comes to near about 13 years, however, the Zilla Parishad has completely ignored this aspect.

6. The only crux in the present matter as the Zilla Parishad authorities has rejected the claim of

present petitioner relying on Note 2, however, considering the factual aspect from the present case as it is seen that the initial appointment order of the present petitioner as part time Peon is 24-7-1970; he continued as part time Peon till 10-7-1990 and thereafter by order dated 6-7-1990 the petitioner was taken on regular cadre in the pay scale of Rs. 750-12-870-DR-14-940 by the Chief Executive Officer, Zilla Parishad. The order passed by the Chief Executive Officer, Zilla Parishad is also on record and the very wording of the said order safely makes it clear that the persons who are working as part time and salary being paid from contingency, those persons are being taken on regular cadre in class-4 and being fixed in the pay scale of Rs. 750-12-870-DR-14-940. After going through the order dated 7-7-1990 it can be said that it is the fresh order giving regular employment to the petitioner, however, as he was already worked as part time Peon and being paid from contingency the services being regularised in the pay scale in class-4 servant. We have gone through the Note 1 and Note 2 of Rule 57 and we find that the Zilla Parishad has wrongly applied Note 2 in the present matter while rejecting the claim of the petitioner to grant pension, as in fact in the present case, Note 1 of Rule 57 is applicable. Therefore, we find that the claim as set up by the present petitioner that he is entitled for pensionary benefits, is definitely justified.

7. Mr. Dhage, Advocate, has made reference in respect of order passed in Writ Petition No. 3472/1996 and in a same situation this Court in the said writ petition, has given direction to the respondents to consider the case of petitioner for pensionary benefits within a period of three months and also directed for payment of arrears. We have gone through the said order wherein a reliance is placed on Note 1 of Rule 57 of the

Maharashtra Civil Services (Pension) Rules, 1982. Considering the factual aspects in the present case we also find that in the present case Note 1 of Rule 57 is applicable.”

12] We are, therefore of the opinion that the point and issue raised in this petition is squarely covered by this judgement. The teacher could not have been deprived of the services rendered under the same management but may be in different schools or institutions. The services could have been clubbed or added to as desired. The reliance placed on Rule 30 and 31 of the MCS(Pension) Rules 1982 was also noticed in the case of Shivappa (supra) and the Division Bench invited attention of the authority to Rule 57 which deals with non pensionable service. That is how the observations and findings in paras 5 and 6 reproduced above have been rendered by the Division bench, to confer the benefit of pension on the petitioner. The post is fully aided and the Rules noted above are thus applicable.

13] Once the very State Pension Rules are applicable to teachers in terms of the Rule 19 of the MEPS Rules, then, we are of the view that the above principle will apply in the present case. Hence, we direct the respondent No.2 Accountant General to consider the case of present petitioner for giving pensionary benefits in view of the above rule and to decide the entitlement within four months from the date of receipt of copy of this order. The necessary arrears which the petitioner is entitled to should be accordingly paid. If any monetary benefits have to be refunded, the said Respondent No.2 to make an appropriate order in that behalf and the Petitioner to abide by the same.”

V. Ghuge, J.) has considered an identical issue in the matter of *Mahatma Phule Krishi Vidyapeeth v. Ganpat Kisan Karle*¹. As like the judgment of this Court in the matter of *Jyoti Prakash Chougule (supra)*, the learned Single Judge has considered the various provisions of the pension Rules and has concluded that the service as a part time employee also needs to be reckoned with while calculating qualifying service of 10 years. The observations of the Court in paragraph Nos. 23 to 38 read as under:

"23] A similar situation fell for the consideration of the learned Division Bench of this Court in the case of *Parshuram Vithoba Bhandare (supra)*. The facts of the case are narrated in paragraph nos.2,3,4 and 5, which read as under:

"2. The facts which are not disputed are in a very narrow compass, that the petitioner was recruited as a daily wager in 1964. In 1980 a post of labour supervisor on the establishment of respondent No. 2 was sanctioned. On 13/9/1983 the petitioner was appointed permanently on that post. It is not in dispute, as will be seen from the averments made in para 2 of the affidavit in reply, that the petitioner was made permanent in the cadre of supervisor on 13/9/1980. Thus the petitioner was undisputedly working as a labour supervisor from 13/9/1980 though he was working as a daily wager since 1964.

3. The petitioner was denied the pensionary benefits. Relying on the provisions of Rule 57 of the Maharashtra Civil Service (Pension) Rules, 1982,

1 2016(4) Bom. C.R. 790

according to which the petitioner has not completed 10 years of qualifying service as labour supervisor and therefore according to the Government as required by Rule 57 he is not entitled to any terminal benefits.

4. The petitioner's original application for this relief before the Maharashtra Administrative Tribunal was also rejected by the Tribunal agreeing with the contention of the State that Rule 57 did not permit the grant of any such benefit of pension to the petitioner. Unfortunately the factual position that the petitioner served for more than 10 years continuously as a labour supervisor which was a permanent sanctioned post with the Government, was not taken into consideration. The provision of Rule 30 of the Pension Rules and those of Rule 57 were also considered in the proper perspective by the Tribunal and which resulted the Tribunal rejecting the application of the petitioner requiring the petitioner to move before this Court for exercising its jurisdiction under Articles 226 and 227 of the Constitution of India.

5. The denial of pensionary benefits by the State to its employees on flimsy ground is not a phenomena any more for various reasons, most of which are flimsy, and the pensionary benefits are denied by the State to its employees. It would therefore be necessary in the circumstances, to examine the provisions of the Pension Rules in proper perspective. Rule 30 of the Pension Rules is a basic Rule on entitlement, which spells out who are entitled to the pensionary benefits like family pension in the service of Government of Maharashtra, which reads as under:

24] The petitioner – Parshuram was recruited as a daily wager in 1964 and upon creation of a permanent post in 1980, was appointed permanently to the said post. The learned Division Bench considered the fact that Parshuram was not paid his wages from the contingency fund and there was no evidence to suggest

that his salary was being paid out of the contingency fund of India. Considering this background, the learned Division Bench concluded that his case would fall under Rule 30 and not under Rule 57.

25] Therefore, the conclusions of the learned Division Bench in paragraph no.7 of the Parshuram judgment (supra) are vital for deciding this case and which read as under:

“7. Relying on the first note to Rule 57 above, that the petitioner was denied pensionary benefit by the State and the denial was approved by the Maharashtra Administrative Tribunal, in our opinion, both are wrong. A reading of Rule 30 clearly shows that the petitioner is entitled to the pensionary benefits. A reading of Rule 57 proves that the petitioner's case is not covered by the exceptions mentioned in that Rule 57. It is nowhere the case of Government of Maharashtra that the salary of the petitioner paid to him as daily wages from 1964 to 1980 was drawn from the contingency fund of the State and it is only when the salary or wages paid to the employees are drawn from contingency fund that the exception is made in relation to the case of grant of terminal benefits. This factual and legal aspect was not taken into consideration either by the State or Tribunal resulting in miscarriage of justice and denial of valuable right to the petitioner. The petitioner having completed more than 10 years of continuous service as labour supervisor and as his salary at any point of time was not drawn from the contingency fund, was always entitled to the pension. The petitioner is therefore liable to succeed. In the result the petition succeeds and is allowed. Rule is made absolute.” (emphasis supplied)

26] The learned Division Bench, therefore, concluded

that his case would fall under Rule 30 by concluding that “A reading of Rule 30 clearly shows that the petitioner is entitled to the pensionary benefits.” No doubt, Parshuram had completed 10 years of continuous service, but the issue before the learned Division Bench was as to what would be the fate of his service as a daily wager prior to becoming permanent. An identical case is before this Court with regard to what would be the fate of the respondent's past tenure as a daily wager prior to his becoming permanent. The learned Division Bench in Parshuram's case concluded that the earlier portion of daily wage service will have to be computed under Rule 30 as it held that since he was not paid daily wages from the contingency fund, his case would fall under Rule 30.

27] The learned Division Bench of this Court in the case of Shivaji Jyotiba Pawar (supra) (unreported judgment dated 21.9.2010), considered the submission of the State with regard to a Government circular dated 6.8.2009, issued for intimating this very petitioner – University that the pensionary benefits would not be applicable to the employees, who were working on work charge basis and who were subsequently appointed on newly sanctioned posts. The facts of the case, which were undisputed, are reproduced in paragraph no.4 of the judgment, which read as under:“

4. Petitioners were working on Work Charge basis w.e.f. 30 April 1971 to 29th Oct., 1983. Vide order dt. 29th Oct., 1983, respondent no.4 appointed the petitioners on regular establishment in the newly sanctioned post. The petitioners retired on superannuation on 31.5.1992 and 31st Dec., 1996, respectively. Since the petitioners were not given pensionary benefits, they made various representations. When the petitioners representations were not considered, petitioners filed writ petition nos.5321/2006 and 5322/2006 before this Court. The said petitions were disposed of by this Court vide order dt.3rd Feb., 2009. The respondent University had made

a statement before this Court that the University had sought a clarification from the Government as to whether the petitioners could be given advantage of the pensions or not. In the light of this statement, the petitions were disposed of with a direction to the State Government to decide the issue within four months from the date of the order. The State Government, vide order dt. 6th August, 2009, informed the University that the pensionary benefits could not be made applicable to the petitioners. Hence, the present petition.“

28] In the above backdrop, the contention of this very Agricultural University that the concerned employees were given fresh appointments after creation of posts and were not the posts that were converted, was dealt with by this Court. It was concluded by this Court that the petitioners therein were working as Mistries and when posts were created, purportedly by conversion for the benefits of the Mistries, the said petitioners were held to be in continued service on the newly created posts.

29] The learned Single Judge of this Court in the matter of Ahmednagar Municipal Council v. Sukhdeo Dhondiba Pacharne (supra), an unreported judgment dated 3.10.2008, specifically dealt with a communication dated 15.1.2005 issued by the State of Maharashtra concluding that those employees, who have worked for less than 10 years, would not be entitled for pensionary benefits. This Court concluded that as long as the letter dated 15.1.2015 is not in conflict with law or the Rules, the same could be sustained. However, if the same is in conflict as against the Rules, the findings of the Industrial Tribunal will have an overriding effect on the administrative letter.

30] The learned Division Bench of this Court in the matter of Waliuddin Pashasaheb (supra) had once again dealt with the effect of Rule 30 and Rule 57 read

with Note 1. In the said case, the payment of the daily wages of the concerned employee was made through the contingency funds and hence it was concluded that for the purposes of counting his pensionable service, half of his earlier service period will have to be added to his period of permanent service. He was, therefore, entitled for pension under Rule 57.

31] The petitioner has placed heavy reliance on the letter dated 27.12.1993, which is restricted to Rule 57 Note 1, contending that daily wagers who are workers onwork charge basis, shall not be entitled for pensionary benefits under the 1982 Rules. Considering the law laid down by this Court in the matters of Jayshree Narayan Mhaske (supra), Shivappa Bhujangappa Bembale (supra) and Ahmednagar Municipal Council (supra), the said communication by the Desk Officer being in conflict with the 1982 Rules, deserves to be disregarded and the same will, therefore, have no effect on the rights of employees under the 1982 Rules.

32] Shri Shahane has placed reliance upon the judgment of Supreme Court in the case of State of U.P. v.Narendra Bahadur Singh (supra) to support his contention that the benefits of past service cannot be made

available to an employee for the purpose of pension and gratuity. It is undisputed that the case before the Hon'ble Supreme Court in the above case was with regard to the Rules applicable to the Krishi Utpadan Mandi Parishad. The said judgment does not indicate as to which Rule was considered by the High Court while delivering the judgment of grant of pension, validity of which was considered by the Hon'ble Supreme Court. No documentary evidence was placed on record to indicate that the past services of the Munsiff was protected. I

do not find that the said judgment is applicable to the case in hand.

33] The petitioner has then relied upon the judgment of the learned Division Bench of this Court in the case of Narayan Balkrishna Deshpande (supra). The said case was under Rule 254(1) of the Bombay Civil Service Rules, 1959. The petitioner had sought voluntary retirement and was allowed to retire. He was not granted pension as he had not completed pensionable service. The learned Division Bench concluded that a plea for relaxation of minimum pensionable period was put forth and Rule 254(1) did not prescribe any relaxation of the minimum pensionable period. The said issue is totally different from the facts of this case, which renders the said ratio inapplicable.

34] The petitioner has relied upon the Division Bench judgment of the Allahabad High Court in the case of Motilal Gupta (supra) to support its contention that a break in service cannot be added to the permanent service put in by the employee. In the instant case, no documentary evidence has been placed on record before the Industrial Court that the respondent was out of employment prior to permanency being granted to him on the very first day of his appointment to a permanent vacant post. The ratio laid down in the Motilal Gupta case (supra), therefore, will not be applicable in this case.

35] The other judgments cited by Shri Shahane have been gone into by this Court. Since the issue of Rules 30, 57 and 110 of the 1982 Pension Rules of this State are not the subject matter under the said cases, the ratio laid down therein would not be applicable to the instant case.

36] The learned Division Bench of this Court in the case of Prabhakar Marotirao Dalal (supra) while considering the effect of a Government resolution dated 23.6.1986 in relation to the 1982 Rules concluded that

such Government resolutions and instructions would be applicable if the Rules are silent and such instructions are not in conflict with the Rules. It was concluded that the Courts normally would not strike down a Rule or notification if it is possible to save the Rule or the notification whether it be by legislation or a notification in the exercise of executive power.

37] In addition to the above, in my view, the second proviso to Rule 30 has been lost sight of by the litigating sides. I also do not find from any of the judgments cited by both the sides that the second proviso to Rule 30 has been brought to the notice of this Court or the Hon'ble Apex Court in any of the said matters. It is, in this backdrop that I am considering the said proviso.

38] A careful perusal of the second proviso to Rule 30 will indicate that it is with regard to the case of a temporary Government servant who retires on superannuation. So also, an employee being declared permanently incapacitated by the appropriate medical authority or an employee who has voluntarily retired from service is also held eligible for grant of superannuation, invalid or as the case may be, retiring pension, retirement gratuity and family pension at the same scale, as is admissible to a permanent Government servant. It is, therefore, provided by the said proviso that a temporary Government servant, who retired on superannuation and who has completed not less than ten years of service, obviously as a temporary employee, is also held entitled for retiring pension, retirement gratuity and family pension at the same scale as is admissible to a permanent Government servant. As such, in my view, Rule 30 is aimed at covering the cases of all such employees, who have been working temporarily for a period of at least ten years, are held to have satisfied the definition of "Qualifying Service" under Rule 30 and who are not covered by Rule 57."

8 The Petitioner, in the instant case, has superannuated on 30.09.2015. His proposal for pension was forwarded on 20.06.2015 mentioning his service as being for 12 years, 3 months and 17 days after considering half of his part time service. The said proposal has been rejected by the impugned order dated 29.06.2016. In the light of the law as is settled by this Court in the matter of *Jyoti Prakash Chougule (supra)* and *Mahatma Phule Krishi Vidyapeeth (supra)*, the impugned order is rendered unsustainable.

9 Insofar as the payment of interest on the delayed payment of pension is concerned, the learned AGP has vehemently opposed the said request made by the Petitioner in her prayer clause. It is stated that the delay is neither inordinate nor deliberate. We are, however, not convinced by the said submission for the reason that the Petitioner has retired on 30.09.2015 and it is likely to take three more months until her pension papers are cleared and the pension is actually paid to her. It is practically for two years that the Petitioner has survived without pension post retirement. The said hardships and manifest inconvenience suffered by the Petitioner could be softened by granting

interest. We are convinced that interest at the rate of 6% per annum needs to be granted on the outstanding pension dues from 1.10.2015 till the amount is actually paid.

10 Considering the above, this Writ Petition is allowed. The impugned order dated 29.06.2016 issued by Respondent No.3 is quashed and set aside. Respondent No.3 is, therefore, directed to clear the pension proposal of the Petitioner as expeditiously as possible and preferably within a period of six weeks from today and ensure that the payment of pension commences within six weeks thereafter. The outstanding/unpaid pension amount shall attract interest at the rate of 6% per annum from 1.10.2015 till the amount is actually paid.

11 Rule is made absolute in the above terms accordingly.

12 No costs.

(RAVINDRA V. GHUGE J.)

(ANOOP V. MOHTA, J.)