

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

WRIT PETITION NO. 5164 OF 2014

**BABARAO CHANDRABHAN RAJEGORE
VERSUS
THE STATE OF MAHARASHTRA AND OTHERS**

Mr.S.K.Kadam, Advocate for the petitioner
Mr.S.B.Joshi, AGP for the respondents/State
Mr.U.S.Malte, Advocate for respondent No.4

**CORAM : S.V.GANGAPURWALA &
S.M.GAVHANE, JJ.**

**RESERVED ON : 11.10.2018
PRONOUNCED ON : 22.11.2018**

P.C. :-

. On 19.09.2018 we were considering to pass the final order but due to some clarification, we have again placed the matter on 11.10.2018 for rehearing. We have heard the learned counsels for the respective parties.

2 The petitioner assails the order passed by respondent No.2 rejecting the claim of the petitioner for pensionary benefits.

3. Mr. Kadam, learned counsel for the petitioner submits that the petitioner was working on daily wages w.e.f. 17.11.1979 as a Junior

Assistant under the then Marathwada University, Aurangabad at University Sub-Centre Nanded. After bifurcation of the erstwhile Marathwada University the services of the petitioner were transferred to Swami Ramanand Teerth University, Nanded. The petitioner filed complaint ULP before the Industrial Court. The Industrial Court allowed the complaint ULP filed by the petitioner and directed the respondents to grant permanency to the petitioner from October, 1986 after completing necessary formalities. Pursuant thereto the petitioner was made permanent under the order dated 05.02.1997 as a Junior Assistant and the petitioner was given payscale from 1986. Learned counsel submits that the petitioner stood retired on attaining the age of superannuation on 31.12.2005 and submitted proposal for pension. The proposal for pension is rejected.

4. Mr.Kadam, learned counsel further submits that the petitioner has completed the qualifying services as is required under the provision of Maharashtra Civil Services (Pension) Rules, 1982. Learned counsel submits that the petitioner is granted permanency w.e.f. 1986 by the Industrial Court. The order of the Industrial Court has become

final. Alongwith the petitioner four other employees similarly situated had also filed the complaints, similar order were passed in their complaint also. In respect of three employees the permanent post were created, however, the petitioner was discriminated. The ground raised by the respondent was that the petitioner at the time of initial entry into the service was over age. Learned counsel submits that after the permanency is accorded by the Industrial Court the respondent cannot now turn around and take plea that the appointment was irregular. The petitioner would be entitled to the pensionary benefits. The petitioner was holding permanent post substantively. He was made permanent. In view of Rule 30 of the M.C.S. (Pension) Rules, the petitioner is entitled for the pensionary benefits. The petitioner has put in more than 10 years of services on permanent basis. It was the responsibility of the State to create a permanent post pursuant to the order of the Industrial Court. Learned counsel submits that in the year 1986 the petitioner was terminated. The Labour Court granted reinstatement with continuity and back wages as such the petitioner's services has to be counted as continuous. The petitioner was also given time bound

promotional payscale and regular salary with increments and was treated as regular employee for all the purposes. The payscale was also revised from time to time. According to the learned counsel the pensionary benefits are made applicable by the Government of Maharashtra pursuant to the Government Resolution dated 21.07.1983. The same was made applicable to the teaching and non-teaching staff of the Non-agricultural Universities and affiliated non-Government Colleges.

5. Learned counsel submits that the University had also applied to the Director of Higher Education for sanction of the permanent post. The Government sanctioned three posts in respect of similarly situated employees and in respect of the petitioner different stand was taken only on the ground that at the time of entry into the service, the petitioner was over age. In view of the order passed by the Industrial Court it was not open for the respondent to contend that the appointment of the petitioner was not regular.

6. Mr. Malte, learned Advocate for the University submits that the University complied the

order of the Industrial Court and issued order dated 05.02.1997 granting the payscale to the petitioner from 1986 and was paid from University funds. There is no scheme for pension at the establishment of the University. The University had applied to the Government for giving grant for the payment of the salary to the petitioner, the same was negatived on the ground that the appointment of the petitioner is irregular and the petitioner was over age at the time of entry in the service. Learned counsel submits that Section 8 of the Maharashtra University Act provides for the control of the State and University without prior approval of the State Government cannot create new post of employees. As the Government had not sanctioned the post, the substantive post could not have been created for the petitioner. Learned counsel submits that the petitioner has accepted the order and terms and conditions mentioned in the order dated 05.02.1997 pursuant to which the permanency was given to the petitioner by the University. The petitioner had not challenged the terms and condition of the order granting permanency and now after retirement cannot assail the same. Learned counsel submits that Section 102 of University Act provides for

University fund and the University fund is not provided for pensionary benefits. The University fund can be utilized for the purpose as provided in Section 102 of the said Act.

7. Mr. Joshi, learned AGP submits that the State was not party before the Industrial Court. The appointment of the petitioner was irregular and he was over age and as such no substantive post has been created for the petitioner. Learned AGP relies on Rule 31 of the MCS (Pension) Rules, 1982. The petitioner was not paid by the Government from consolidated fund of the State or the local fund administered by the Government. The Government never treated the service of the petitioner as qualifying service. In view of that the petitioner is not entitled for pensionary benefits. The Government cannot be saddled with liability to pay the pensionary benefits to the petitioner.

8. We have considered the submissions canvassed by the learned counsels for the respective parties.

9. The petitioner assails the communication

dated 05.09.2013 rejecting the claim of the petitioner for pensionary benefits.

10. Initially under order dated April 09, 2015 this Court (Coram:S.S.Shinde & P.R.Bora, JJ) had dismissed the writ petition by observing thus:

“We do not see any reason to interfere in the impugned communication. It appears that, the appointment of the petitioner was not in accordance with the Government Resolution dated 28.12.2005 and the appointment of the petitioner was not on approved post.”

11. The petitioner approached the Apex Court by filing Civil Appeal No.8929/2017. The Apex Court under order dated 10.07.2017 set aside the order of this Court dismissing the writ petition and remitted the matter to this Court for fresh consideration.

12. It is a matter of record that the petitioner was working on daily wages w.e.f. 17.11.1979 as a Junior Assistant under the erstwhile Marathwada University, Aurangabad, Sub-centre Nanded and after bifurcation of the University he was transferred to Swami Ramanand Teerth University,

Nanded. The petitioner filed a complaint alongwith other four similarly situated employees bearing ULP No.59/1986 challenging the order of termination. The Labour Court by setting aside the order of termination, directed to give benefits of service and back wages from 25.12.1985. The petitioner alongwith four others thereafter filed complaint ULP No.155/1986 before the Industrial Court seeking benefits of permanency. The complaint is allowed under order dated 29.07.1994. The Industrial Court passed the following order:

“The Complainants be given permanency from October 1986, doing the necessary formalities, justifying the vacancies and giving permanency to the complainants. This should be done within six months from the order of this date 06.10.1993. On failure to comply within the given time, the difference be paid to the complainants, in respect of wages as if they are made permanent from the above referred date”

13. Pursuant to the aforesaid order of the Industrial Court, the University granted benefits of permanency to the petitioner and other four candidates. However, in the order granting

permanency, the University observed that the petitioner at the time of initial appointment was over-age and as such he is paid from establishment funds. Three candidates similarly situated who were also awarded permanency as per the order of the Industrial Court, were absorbed on the newly created posts and are treated as regular employees. On attaining the age of superannuation the petitioner stood retired on 30.12.2005. The proposal for payment of pension was forwarded. However, the said proposal is turned down on the ground that the petitioner was over-age at the time of initial appointment and the post was not created. He was paid from the University funds. There is no scheme of pension if the payment is made from the University fund.

14. The aspect of the petitioner being over-age could have been raised before the Industrial Court when the petitioner claimed permanency so also before the Labour Court when the petitioner moved for setting aside the order of dismissal. The same was never raised. The petitioner was given the benefit of permanency. He was paid salary in the prescribed pay scale. It also appears that the

petitioner was given benefit of time bound promotional pay scale treating the petitioner as a regular and permanent employee. In fact, after the order was passed by the Industrial Court directing the University to grant permanency to the petitioner alongwith other four persons, the petitioner is granted the benefit of permanency. However, he is not granted the pensionary benefit only on the ground that at the time of initial appointment the petitioner was over-age and that when the petitioner was given the order by the University pursuant to the order of the Industrial Court, it was specified in the order of the University dated 05.02.1997 that the post was not created. However, he would be paid from the University funds and not from the Government funds and will not be entitled for the benefit of the Government policy. The respondents were duty bound to implement and obey the order passed by the Industrial Court in its true letter and spirit.

15. The order of the Industrial Court directing the respondent to grant permanency to the petitioner had become final. Once permanency has been granted to the petitioner alongwith other similarly situated

employees under the order of the Industrial Court and pensionary benefits are granted to other three employees. Denying the pensionary benefits to the petitioner on the ground that at the time of initial appointment the petitioner was over-age would be discriminative and against the principle of justice, equity, fair play and good conscious. The petitioner has rendered about 19 years service from the date when the petitioner was absorbed and made permanent and if his prior service is counted as half, the same would be more than 22 years.

16. It would be too late in the day for the respondent to contend that as the petitioner was over-age at the time of initial appointment he would not be entitled for pensionary benefits though he was granted the benefit of permanency under the order of the Industrial Court. Other similarly situated employees who alongwith the petitioner had approached the Industrial Court and are beneficiaries of the same order of the Industrial Court are given retiral and pensionary benefit. It would not be open for the respondent to raise the ground that the appointment of the petitioner is irregular as he was over-age and as such he would

not be entitled for the pensionary benefits. Terming the appointment of the petitioner as irregular on the ground he was over-age the same would be contrary to the order of the Industrial Court granting permanency to the petitioner. It was open for the University to raise this ground before the Industrial Court. Once judicial order has been passed directing the University to grant permanency to the petitioner alongwith other four employees and has become final, it would not be open for the respondents now to contend that the petitioner's appointment was irregular being over-age and as such would not be entitled for retiral benefits. Reliance on Rule 31 of the MCS (Pension) Rules by the respondent/State would be of no avail to the respondents/State as the permanency was directed to be given by the Industrial Court. The respondent had no option but to consider the service of the petitioner as regular and permanent. In view of that as though the Government had not paid the salary of the petitioner during service but was directed to be continued and considered as permanent, all the respondents herein are bound to comply the order of the Industrial Court and treat the petitioner as regular for all purposes.

17. In view of the aforesaid facts and circumstances the impugned communication is quashed and set aside. The respondents shall consider the claim of the petitioner for pensionary benefits considering his service as permanent from 01.10.1986. So also, may give effect to his service rendered from 02.04.1979 to 01.10.1986 on daily wages/temporary as may be permissible in law. The pension proposal shall be forwarded expeditiously preferably, within a period of two months from today. Same shall be processed by the competent authority preferably, within a period of three months after receipt of the said proposal.

18. The writ petition is allowed in above terms. No costs.

[S.M.GAVHANE, J.]

[S.V. GANGAPURWALA, J.]