

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 6928 OF 2016

Dr. Shailejkumar Kanku Mane	...Petitioner
Versus	
The State of Maharashtra & Ors.	...Respondents

Mr. Gajanan Savagave for Petitioners
Mr. N. C. Walimbe – AGP for State – Respondents.

**CORAM: SMT. V. K. TAHILRAMANI, Acting C. J. &
M. S. SONAK, J.**

DATE : 25 APRIL 2018

ORAL JUDGMENT :

1] Heard the learned counsel for the parties.

2] Rule. With the consent of and at the request of the learned counsel for the parties, Rule is made returnable forthwith.

3] The challenge in this petition is to the impugned order dated 20th January 2016 made by the Maharashtra Administrative Tribunal (MAT) in Original Application No. 1079 of 2015 instituted by the petitioner seeking directions

to the respondents to accept the petitioner's notice dated 24th January 2013 for voluntary retirement and to award to the petitioner pension and other retiral benefits on such basis.

4] Mr. Savagave, the learned counsel for the petitioner submits that the petitioner's notice dated 24th January 2013 to proceed on voluntary retirement was rejected on the sole ground that the petitioner, on the date of service of such notice, had not attained the age of 50 years. Mr. Savagave submits that in fact, in terms of Rule 66 of the Maharashtra Civil Service (Pension) Rules 1982 (said Rules), the government servant who has completed 20 years of qualifying service is entitled to voluntary retirement from service and this aspect, has not at all been considered either by the respondents or the MAT.

5] Mr. Savagave submits that the petitioner, was appointed as medical officer on 2nd August 1991 and therefore, by the time, the petitioner served notice dated 24th January 2013 seeking to proceed on voluntary retirement, the petitioner, had completed 20 years of

qualifying service. Mr. Savagave submits that the qualifying service is to be computed in terms of Rule 30 of the said Rules. Again, Mr. Savagave submits that the provisions of Rules 30 and 66 have not at all been considered by the respondents or by the MAT. For these reasons, Mr. Savagave submits that the impugned order made by the MAT is liable to be set aside and the reliefs as prayed for by the petitioner in the original application are liable to be granted along with consequential benefits as well as interest.

6] Mr. Walimbe, the learned AGP submits that since the petitioner's date of birth is 2nd June 1966, as on the date the petitioner gave notice dated 24th January 2013 for voluntary retirement, he had not attained the age of 50 years. He submits that this is a good ground to reject the notice for voluntary retirement. Mr. Walimbe submits that in any case, the petitioner was nominated for appointment as a medical officer only on 21st November 1995 and therefore, his qualifying service, can be computed only from 21st November 1995 and not from 2nd August 1991. Mr. Walimbe submits that on 2nd August 1991 the petitioner was appointed purely on temporary basis and his temporary

service cannot be considered for purposes of any service benefits. For these reasons, Mr. Walimbe submits that there is absolutely no infirmity in the action of the respondents in not accepting the petitioner's notice dated 24th January 2013 for voluntary retirement from service.

7] Mr. Walimbe also placed on record the order dated 21st April 2018, in which it is recorded that one Dr. Shivaji Ishwarrao Nelge, Medical Officer, was permitted to voluntarily retire from service after taking into consideration the date on which he was nominated by the MPSC for appointment to the post of medical officer. On this basis, Mr. Walimbe submits that qualifying service has to be computed from the date of regular appointment and there is no question of taking into consideration temporary service rendered by a government servant for such purposes.

8] For all these reasons, Mr. Walimbe submits that this petition is liable to be dismissed.

9] The rival contentions now fall for our determination.

10] The undisputed facts in the present case are as follows:

- (A) The petitioner's date of birth is 2nd June, 1966;
- (B) The petitioner was appointed as a medical officer on 2nd August 1991 on temporary basis;
- (C) On the basis of nomination by MPSC, the petitioner was made a permanent medical officer on 21st November, 1995;
- (D) The petitioner, in the prescribed form, served a notice proposing to proceed on voluntary retirement on 24th January 2013;
- (E) By communication dated 30th May 2014, the respondents rejected the notice / proposal for voluntary retirement on the ground that the petitioner had not attained the age of 50 years on the date of the notice i.e. on 24th January 2013;
- (F) The petitioner instituted OA No. 1079 of 2015 before the MAT, which came to be dismissed by the impugned order dated 20th January 2016;
- (G) Hence, the present petition.

11] The only reason stated in the communication dated 30th May 2014 for rejecting the petitioner's proposal to proceed on voluntary retirement is that the petitioner had not attained the age of 50 years on the date when he served the notice i.e. on 24th January 2013. In this communication, reference was made to Rule 85 of the said Rules. The reference to Rule 85 of the said Rules is obviously incorrect because Rule 85 of the said Rules is concerned with procedure for wound or injury pension, which was not at all the issue involved in the present case. However, from the context as also the affidavit in reply filed by the respondents, it appears that the reference was to Rule 10(5) of the said Rules.

12] The impugned order dated 20th January 2016 made by the MAT comprises in all of 5 paragraphs. The first paragraph states the names of the counsel who appeared in the matter. The second paragraph states that the counsel were heard at length. The third paragraph prescribes the reasons set out in communication dated 30th May 2014, by which the respondents rejected the petitioner's proposal for

voluntary retirement and the fourth and fifth paragraphs, read as follows:

“4. The reason assigned by the State in the impugned rejection is thus within the parameters prescribed by law. The order is not shown to be contrary to law or otherwise erroneous.

5. The O.A. Has no merit and dismissed.”

13] From the aforesaid, it is very obvious that neither the respondents nor the MAT have even adverted to the correct and relevant provisions in the said Rules, on the basis of which, the petitioner's proposal for voluntary retirement was required to be considered. As noted earlier, Rule 85 of the said Rules is totally irrelevant for the purposes of deciding the issues which arise in the present matter. Rule 85 of the said Rules, deals with '*wound or injury pension*'. Perhaps what was meant was Rule 10(5) of said Rules. This sub rule, no doubt, provides that a government servant referred to in sub rule 4(a)(i), by giving notice of three months in writing to the appropriate authority, may retire after he has attained the age of 50 years. However, it is not as if only the government servants who are referred to in sub rule (4)(a)(ii) of rule 10 of the said rules are entitled to seek voluntary retirement. In terms of rule 66 of the said

Rules, which is, in fact, the correct rule which could have engaged the attention of the MAT, at any time after government servant has completed 20 years of qualifying service, he may, by giving notice of three months in writing to the appointing authority, retire from service.

14] From the return of the respondents, it is apparent that even the respondents conceded that it is this rule 66 which is really applicable to the case of the petitioner. However, the respondents contend that the qualifying service of the petitioner is to be computed prima facie from the date 21st November 1995 and not from the date of the petitioner's initial appointment on temporary basis with effect from 2nd August 1991. This contention, cannot be accepted. This contention cannot be accepted for at least two reasons. Firstly, this is not the contention reflected in the communication dated 30th May 2014 by which the petitioner's proposal to proceed on voluntary retirement came to be accepted. Ordinarily, the respondents, have to stand or fall on the basis of the reason stated by them in the communication rejecting the proposal. The respondents cannot, by filing affidavits introduce fresh reasons or seek

to justify the challenged communication on the basis of different or additional reasons. Secondly, such contention, ignores the clear provisions of Rule 30 of the said Rules which provides the principles for determination of qualifying service.

15] Rule 30 of the said Rules which deals specifically with the issue of commencement of qualifying service provides that subject to the provisions of these rules, *qualifying service of a government servant shall commence from the date he takes charge of the post to which he is first appointed either substantively or in officiating or **temporary capacity.***

16] Rule 66 of the said Rules which deals with the specific issue of retirement on completion of 20 years of qualifying service, reads as follows :

“66. Retirement on completion of 20 years qualifying service

(1) At any time after a Government servant has completed twenty years qualifying service, he may, by giving notice of three months in writing to the appointing authority, retire from service.

(2) The notice of voluntary retirement given under sub-rule (1) shall require acceptance by the

appointing authority :

Provided that where the appointing authority does not refuse to grant the permission for retirement before the expiry of the period specified in the said notice, the retirement shall become effective from the date of expiry of the said period.

(3) [Deleted]

Provided that the total qualifying service after allowing the increase under this sub-rule shall not exceed the qualifying service which the Government servant would have had, if he had retired voluntarily at the lowest age limit for voluntary retirement prescribed under sub-rule (5) of rule 10.

(4) (a) A Government servant referred to in sub-rule (1) may make a request in writing the appointing authority to accept notice of voluntary retirement of less than three months giving reasons therefor;

(b) On receipt of a request under clause (a), the appointing authority subject to the provisions of sub-rule (2), may consider such request for the curtailment of the period of notice of three months on merits and if it is satisfied that the curtailment of the period of notice will not cause any administrative inconvenience, the appointing authority, with the concurrence of the Finance Department, may relax the requirement of notice of three months on the condition that the Government servant shall not apply for commutation of a part of his pension before the expiry of the period of notice of three months.

(5) A Government servant, who has elected to retire under this rule and has given the necessary notice to that effect to the appointing authority, shall be precluded from withdrawing his notice except with the specific approval of such authority :

Provided that the request for withdrawal shall

be made before the intended date of his retirement.

(6) The pension and retirement gratuity of the Government servant retiring under this rule shall be based on the pay as defined under rules 60 and 61 and the increase not exceeding five years in his qualifying service shall not entitle him to any notional fixation of pay for purposes of calculating pension and gratuity.

(7) This rule shall not apply to a Government servant who -

(a) retires when he is declared surplus,

(b) retires from Government service for being absorbed permanently in an Autonomous Body or a Public Sector Undertaking to which he is on deputation at the time of seeking voluntary retirement.

Explanation - For the purpose of this rule the expression "appointing authority" shall mean the authority which is competent to make appointments to the service or post from which the Government servant seeks voluntary retirement"

17] Rule 66 of the said Rules, in clear terms provides that at any time after a government servant has completed 20 years of qualifying service, he may, by giving notice of three months in writing to the appointing authority retire from service. The use of expression '*at any time after government servant has completed 20 years qualifying service*' clearly militates against construction that a government servant who has entered into government

servant before attaining the age of 35 years, must have attained the age of 50 years on the date on which he gives notice as contemplated by rule 66(1) of the said Rules. The expression '*at any time*', is qualified by the expression which follows i.e. '*after the government servant has completed 20 years of qualifying service.*' This means that after government service has completed 20 years of qualifying service, he / she is entitled to give notice of three months in writing to the appointing authority proposing to retire from service and there is no requirement that such government servant, if he / she have entered into government service before attaining the age of 35 years must wait until he / she attains the age of 50 years.

18] The second proviso to rule 66(2) merely provides that the total qualifying service after allowing the increase under this sub rule shall not exceed the qualifying service which the government servant would have had, if he had retired voluntarily at the lowest age limit for voluntary retirement prescribed under sub rule (5) of rule 10. This proviso merely puts a cap on the computation of total qualifying service. However, this proviso does not impose any embargo upon

a government servant seeking to retire after completion of 20 years of qualifying service but before attaining the age of 50 years.

19] Therefore, the only reason stated by the respondents in the communication dated 30th May 2014 for rejecting the petitioner's proposal for voluntary retirement, is quite unsustainable. We therefore are unable to agree with the view taken by the MAT in the impugned order that the reason assigned is within the parameters prescribed by law. In fact, the reason assigned, is clearly not within the parameters prescribed by law.

20] The next issue is whether the qualifying service of the petitioner is to be computed from 21st November 1995 when he was made permanent as a medical officer or whether, the qualifying service is to be computed from 2nd August 1991, which is the date of his first appointment in a temporary capacity to the post of medical officer.

21] Here again, taking into consideration the clear provisions of rule 30 of the said Rules, we agree with the

contention of Mr. Savagave that the qualifying service of the petitioner will have to be computed from the date of his first appointment in temporary capacity i.e. 2nd August 1991 and not the date on which the petitioner was made permanent i.e. 21st November 1995.

22] As noted earlier, rule 30 of the said rules is found in Chapter V of the said rules, which deals with the aspect of '*qualifying service*'. Rule 30 in particular, deals with the aspect of *commencement of qualifying service*. This rule provides that subject to the provisions of the rules, qualifying service of a government servant shall commence from the date he takes charge of the post to which he is first appointed either substantially or in an officiating or *temporary* capacity provided that at the time of retirement he shall hold substantially a permanent post in the government service or holds a suspended lien or certificate of permanency.

23] Rule 30 of the said Rules makes it clear that qualifying service is to be computed from the date a government servant takes charge of the post to which he is first

appointed even in a temporary capacity. In the present case, there is no dispute whatsoever that the petitioner has taken charge of the post of medical officer to which he was first appointed in a temporary capacity on 2nd August 1991. There is also no dispute that as on the date on which the petitioner proposed to proceed on voluntary retirement, the petitioner was holding substantially a permanent post in government service. Thus, as on 24th January 2013, i.e. the date of which, the petitioner gave notice for voluntary retirement, the petitioner, had completed 20 years of qualifying service. Therefore, contention of Mr. Walimbe to the contrary cannot be accepted.

24] The order dated 21st April 2018 tendered by Mr. Walimbe, relates to the voluntary retirement of Dr. Shjivaji Nelge. The respondents, it appears, have taken into consideration his service after he was nominated *prima facie* by the MPSC. On basis of such an order, the respondents, cannot seek to interpret the provisions of rule 66(1) of the said Rules or for that matter the respondents cannot choose to ignore the provisions of rule 30 of the said rules. Besides, the order dated 21st April 2018 does not

negatively state that the qualifying service of Dr. Nelge, if any, prior to the order of permanence, is excluded from consideration. In any case, when it comes to interpretation of statutory rules, orders in the individual cases like orders dated 21st April 2018 are no aid whatsoever to interpretation by a court of law. However, the order dated 21st April 2018 is slightly relevant because it states that in terms of rule 66(2) of the said Rules, Dr. Nelge is deemed to have retired from service since, within the prescribed period of three months, the appointing authority has not refused to grant the permission for retirement.

25] From the undisputed facts in the present case, it is quite clear that the petitioner's notice dated 24th January 2013 proposing to proceed on voluntary retirement in terms of rule 66(1) of the said Rules was a legal and valid notice and the reasons stated by the respondents in their communication dated 30th May 2014, for rejecting such notice were not at all legal or valid. In fact, in terms of the proviso to rule 66(2), where the appointing authority does not refuse to grant permission for retirement before the expiry of the period specified in the said notice, the

retirement shall become effective from the date of expiry of the said period.

26] In the present case, admittedly, for a period of three months from 24th January 2013, the appointing authority, had not refused to grant permission for retirement. Therefore, at least *prima facie*, based upon the proviso to rule 66(2) of the said Rules, the petitioner's notice dated 24th January 2013, took effect and the petitioner stood voluntarily retired on 24th April 2013 i.e. three months after 24th January 2013. Such legal effect could not have been erased on the basis of communication dated 30th May 2014, which in any case, relies upon an entirely untenable reason.

27] For all the aforesaid reasons, we allow the present petition; set aside the MAT's impugned order dated 20th January 2016; set aside the respondent's communication dated 30th May 2014 and direct that the petitioner be treated as deemed to have voluntarily retired as medical officer with effect from 24th April 2013 for all legal and practical purposes.

28] As it is, it is the case of the respondents that the petitioner has not reported for duties from 24th April 2013. Therefore, there is no question of the petitioner claiming for any salary etc. for the period post 24th April 2013. However, since the petitioner, is deemed to have voluntary retired from 24th April 2013, the petitioner will be entitled to all benefits of any voluntary retirement like pension etc. as admissible under the rules commencing from 24th April 2013.

29] We therefore, dispose of this petition with the following order / directions :

(A) The impugned judgment and order dated 20th January 2016 made by the MAT is hereby set aside;

(B) The respondents communication dated 30th May 2014 rejecting the petitioner's proposal to proceed on voluntary retirement with effect from 24th April 2013 is hereby set aside;

(C) We direct the respondents to treat the petitioner

as voluntarily retired with effect from 24th April 2013 for all legal and practical purposes;

(D) Since it is stated that the petitioner has not drawn any salary or emoluments with effect from 24th April 2013, there is no question of the petitioner claiming the same or the respondents claiming for any refund of the same. If however, the petitioner has received any salary or emoluments beyond 24th April 2013, the petitioner to refund the same to the respondents within three months from today, failing which, such amount, shall carry interest at the rate of 7% per annum commencing from date of receipt till date of refund;

(E) The respondents are directed to pay to the petitioner all retiral benefits like pension etc. within three months from today on the basis that the petitioner stands voluntarily retired from service with effect from 24th April 2013. If the arrears are not cleared within three months from today, the respondents shall be liable to pay interest at the rate

of 7% per annum effective from 24th April 2013 till the date of actual payment;

(F) Rule is made absolute to the aforesaid extent. However, there shall be no order as to costs.

30] All concerned to act on basis of authenticated copy of this order.

(M.S. SONAK, J.)

(ACTING CHIEF JUSTICE)

CHANDKA