

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

WRIT PETITION NO. 5757 OF 2018

Balasaheb Laxmanrao Deshmukh .. Petitioner

Versus

The State of Maharashtra Through
Its Principal Secretary .. Respondent

Shri Avinash S. Deshmukh, Advocate for the Petitioner.
Shri Sujit G. Karlekar, A.G.P. for the Respondent.

**CORAM : S. V. GANGAPURWALA AND
R. G. AVACHAT, JJ.**

Closed for orders on : 29.11.2018

Order pronounced on : 11.01.2019

FINAL ORDER (Per S. V. Gangapurwala, J.) :

. The focal point of the present matter is, “Whether the service rendered by the petitioner as a subordinate government pleader since 21st December, 1995 till his appointment as Assistant Legal Advisor-cum-under Secretary on 21.03.2009 can be counted for the purpose of pensionary benefits ?”

2. The petitioner on or about 21st December, 1995 was appointed as A subordinate Government Pleader, Shrirampur in

Ahmednagar district for a period of one year with effect from the date he takes over the charge of the said post. The appointment was subject to the conditions of service laid down in the Maharashtra Law Officers (Appointment, Conditions of Service and Remuneration) Rules, 1984 (for short "Rules of 1984"). Though the appointment was for a period of one year, the petitioner was continued in service from time to time and was lastly appointed on 04th December, 2007 as A Assistant Government Pleader and Assistant Public Prosecutor for a period of two years. Again same was subject to conditions of service laid down in the Rules of 1984. While the petitioner was officiating on the said post, pursuant to the advertisement issued by the Maharashtra Public Service Commission, the petitioner applied for the post of Assistant Legal Advisor-cum-Under Secretary. The petitioner was selected and under appointment order dated 21.03.2009 was appointed as Assistant Legal Advisor-cum-Under Secretary. In March 2013 the petitioner was issued with an order of Deputy Legal Advisor-cum-Deputy Secretary on temporary promotion and he worked as such till the date of his retirement on attaining age of superannuation that is on 31.08.2013. The petitioner applied for pension on the basis of the service rendered by him on various posts with effect from 01.01.1996. The request of the petitioner was rejected. Aggrieved thereby, the petitioner filed Original Application No. 204 of 2017 before the Maharashtra Administrative Tribunal, Aurangabad. The Tribunal negated the contention of the

petitioner and dismissed the original application. The petitioner has assailed the said judgment of the Tribunal in the present writ petition.

3. Mr. Avinash S. Deshmukh, the learned advocate for the petitioner submits that, the respondent State and the Tribunal have failed to give the benefit of Rule 30 of the Maharashtra Civil Services (Pension) Rules, 1982 (for short "Pension Rules") read with Rule 53 of Pension Rules. The petitioner fulfills all the requisite conditions prescribed thereunder viz the condition regarding recruitment from the bar, rendering of pensionable service in one or more than one post on (Assistant Government Pleader and Additional Public Prosecutor, Assistant Legal Advisor-cum-under Secretary and Deputy Legal Advisor-cum-Deputy Secretary) for almost 17 years. The temporary service rendered by the petitioner from 1996 onwards as a Assistant Government Pleader and Additional Public Prosecutor followed by his appointment on regular and substantive post as a Assistant Legal Advisor-cum-under Secretary qualifies the petitioner for pension. It was obligatory on the part of the respondent to add the service rendered by the petitioner from 1996 till his appointment on the substantive post as Assistant Legal Advisor-cum-under Secretary in the year 2009 as a qualifying service under Rule 53 of the Pension Rules. The case of the petitioner is clearly covered under Sub Rule (b) clauses (xvi) & (xvii) of Rule 53 of the Pension Rules. The learned

counsel further submits that, Rule 30 of the Pension Rules very specifically provides that 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 an officiating or temporary capacity. The only requirement is at the time of retirement he shall hold substantively a permanent post in Government service or holds a suspended lien or certificate of permanency. The petitioner was holding substantively a permanent post on the date of his retirement and he was a permanent employee in view of that the service rendered from 1996 till his appointment substantively in a permanent post has to be counted for pensionable purpose. The Tribunal has committed an error in not accepting the same.

4. Mr. Karlekar, the learned Assistant Government Pleader for the respondent submits that, the petitioner was holding a tenure post since 01.01.1996. The petitioner worked as a Assistant Government Pleader and Additional Public Prosecutor at the pleasure of the Government. The said post was a tenure post and was not entitled for a fixed pay, but was entitled to the fees as per the Rule 24 of the Rules of 1984 and the Government Resolutions issued from time to time regarding fees structure. The learned A. G. P. further submits that, the provisions of the Pension Rules, the Maharashtra Civil Services (Commutation of Pension) Rules, 1984 as well as scheme of General Provident Fund were not applicable to the petitioner as he was appointed

after 2005 that is after introduction of new Defined Contributory Pension Scheme. The service rendered by the petitioner as a Assistant Government Pleader and Additional Public Prosecutor cannot be considered as a Government service. It is further submitted that, the corrigendum issued to the appointment order very specifically refers that the petitioner would be governed by the Defined Contributory Pension Scheme. The petitioner had not challenged the said condition of his appointment. The Tribunal has considered all these aspects and has rightly dismissed the original application.

5. Before we advert to the contentions canvassed by the learned counsel for respective parties, it would be necessary to peruse the relevant rules.

6. The appointment of the petitioner as a Assistant Government Pleader and Additional Public Prosecutor was subject to the conditions of Rules of 1984. Rule 30 of the Rules of 1984 specifically provides that a law officer except the Advocate General shall hold office during the pleasure of Government in the Law and Judiciary Department. Those appointed under the said Rules of 1984 are paid retainer per month and/or fees as is decided from time to time as provided under Rule 16 and 17 of the Rules of 1984. They are not paid fixed pay per month. The post held by them is a tenure post. Rule 30 of the Pension Rules prescribes that qualifying service of Government servant shall

commence from the date he takes charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity. "Officiate" is defined under Sub Rule (35) of Rule 9 of the Pension Rules. As per the said definition Government servant officiates in a post when he performs the duties of a post on which another person holds a lien. The temporary post is defined under Sub Rule (53) of Rule 9 of the Pension Rules, as a post carrying a definite rate of pay sanctioned for a limited time. A permanent post is defined under Sub Rule (40) of Rule 9 of the Pension Rules. It means a post carrying definite rate of pay sanctioned without limit of time. Sub Rule 51 of Rule 9 of the Pension Rules defines substantive pay, which means the pay other than special pay, personal pay or emoluments classified as pay by Government under Sub rule (36) (iii) to which a Government servant is entitled on account of post to which he has been appointed substantively or by reason of his substantive position in a cadre. For the petitioner to bring his case within the ambit and purview of Rule 30 of the Pension Rules, it would be necessary for the petitioner to demonstrate that the post on which he was appointed initially on and from 01.01.1996 as a Assistant Government Pleader and Additional Public Prosecutor was held by him substantively or in an officiating or temporary capacity. A person would be said to be substantively appointed, if he receives substantive pay as provided under Sub Rule (51) of Rule 9 of the Pension Rules. The petitioner was not on paid fixed pay. The petitioner also cannot

be said to be officiating on the post as provided under Sub Rule (35) of Rule 9 of the Pension Rules, nor it was in a temporary capacity. The petitioner was appointed for a particular tenure i. e. for one year and subsequently the tenure was extended from time to time as per Rule 30 of Rules of 1984. The appointment of the petitioner was at the pleasure of the Government. The petitioner was not holding the post of Assistant Government Pleader substantively or cannot be said that the appointment of the petitioner was on temporary post as it was not carrying a definite pay sanctioned for a limited time. The petitioner was paid the fees as per the rate fixed from time to time as provided under Rule 16 and 17 of the Rules of 1984.

7. In the light of the aforesaid, the case of the petitioner cannot be brought within the ambit and purview of Rule 30 of the Pension Rules *inter alia* the service rendered by the petitioner from 01.01.1996 till his appointment to the post of Assistant Legal Adviser-cum-under Secretary on 21.03.2009 cannot be counted for the purpose of pensionary benefits.

8. The another contention of the petitioner required to be dealt with, is the benefit sought to be undertaken of Rule 53 Sub Rule (b) clauses (xvi)& (xvii) of the Pension Rules. Rule 53 of the Pension Rules provides that the Government servants who are directly recruited from the Bar and whose pensionable service has been rendered in one or the other of the posts or

service mentioned in any of the clauses therein and whose qualifying service for superannuation pension is not less than ten years, may add to their service qualifying for superannuation pension, the years of service in the manner, provided under the said rules.

9. It needs to be considered that, the petitioner was appointed as a Assistant Legal Advisor-cum-under Secretary on 21.03.2009 and temporarily promoted as Deputy Legal Advisor-cum-Deputy Secretary on 26.03.2013 till he attained the age of superannuation on 31.08.2013. The petitioner rendered service on substantive post only for a period of four years and same is muchless than ten years as provided under Rule 53 of the Pension Rules. Moreover, the appointment of the petitioner on the said post is on 21.03.2009. Those Government servants recruited on or after 01.11.2005 are not accorded the benefit of Pension Rules. Sec. 2(2) of the Pension Rules provides that, these rules shall not apply to the Government servants who are recruited on or after 01.11.2005. As the recruitment of the petitioner is after 01st November, 2005, Rule 53 of the Pension Rules would not inure to the benefit of the petitioner. The appointment order of the petitioner also specifically provides that the petitioner would be governed by the Defined Contributory Pension Scheme, so also the petitioner will not be eligible for the benefit of Pension Rules, Maharashtra Civil Services (Commutation of Pension) Rules, 1984 and the scheme of

General Provident Fund. The corrigendum was issued to that effect on 21.05.2009. The petitioner has not challenged the said corrigendum to his appointment order and has accepted it. It will not be open for the petitioner now to turn around after his retirement on attaining age of superannuation and contend otherwise. The petitioner has accepted the appointment order without any demur and acted upon the said appointment order. The petitioner would be governed by the same. Taking case of the petitioner either way, the petitioner would not be entitled for pension. The Tribunal has not committed any error while dismissing the original application.

10. In the light of the above, the writ petition is dismissed. No costs.

[R. G. AVACHAT, J.]

[S. V. GANGAPURWALA, J.]

bsb/Jan. 19