

Pradnya Bhogale

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.966 OF 2003**

Sheshmani K. Dubey,
Residing at D-14, University
Staff Quarters, Vidyanagari
Campus, Mumbai – 400 098 ..Petitioner

Versus

1. University of Mumbai,
through its Registrar,
D.N. Road, Fort, Mumbai – 400 032
2. The Joint Director of Higher
& Technical Education,
Dhobi Talao, Mumbai – 400 001.
3. State of Maharashtra,
through its Department of
Higher & Technical Education,
Mantralaya Annexe,
Mumbai – 400 032.
4. Mrs. Rita Garde,
Department of Physics
University of Mumbai,
D.N. Road, Fort, Mumbai – 400 032. ..Respondents

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Mr. Mihir Desai, Senior Counsel I/b. Mr. Chetan mali for the
petitioner.

Mr. Rui Rodrigues for respondent No.1.

Mr. A.A. Kumbhakoni, Advocate General a/w Mr. Himanshu
Takke, AGP for respondent Nos.2 and 3.

**CORAM : S.C. DHARMADHIKARI &
M.S. KARNIK,JJ.**

**RESERVED ON : 21st FEBRUARY, 2019
PRONOUNCED ON : 8th NOVEMBER, 2019**

JUDGMENT (PER SHRI M.S. KARNIK,J.)

By this petition filed under Article 226 of the Constitution of India the petitioner challenges the order dated 19.03.2003 terminating the services of the petitioner and with a further direction to reinstate him as a Full Time Lecturer, continuity of service and backwages. The petitioner prays for grant of pensionary benefits in terms of Maharashtra Civil Services (Pension) Rules.

2. The Petition had come up for admission and grant of interim reliefs on 04.12.2003 when this Court was pleased to grant an ad-interim relief in terms of prayer clause (b) which reads thus :-

“(b) pending hearing and final disposal of this petition the Respondents be directed to continue to employ the Petitioner as lecturer in Physics and pay him regularly his wages.”

3. Brief facts of the case are as under :-

The petitioner was appointed as Technical Assistant with the respondent-University of Mumbai on 13.03.1986. After selection by properly constituted Selection Committee, the petitioner was appointed as Lecturer in Physics (against the reserved post) with the respondent-University on 13.08.1996. The petitioner did his Ph.D. before 1993 and therefore he was exempted from doing NET/SET. From 1996 to 2000 the petitioner continued in service year to year without any breaks.

4. The respondent-University issued advertisements on 06.09.2002 and 07.09.2002 for three reserved posts of Lecturer in Physics alongwith three posts for Readers, out of which one was shown in the open category. As the petitioner was qualified for the post of Reader and hence he applied for the same and he was interviewed on 07.03.2003. The petitioner was given an impression that another candidate was selected though no rejection was communicated to the petitioner.

5. Smt. Rita Garde, a reserved category candidate was appointed on the petitioner's post on 19.03.2003. The petitioner's services were terminated. As indicated earlier, this Court by an interim order dated 21.04.2003 directed the respondent-University to continue the petitioner on another post which had become vacant and could not be filled despite repeated advertisements. The petitioner continued in service as a temporary employee.

6. In the year 2008 the respondent-University recruited another candidate on the reserved post in which the petitioner was working despite the ad-interim order dated 21.04.2003 passed by this Court. The petitioner was nevertheless continued. In 2009 the respondent-University transferred the petitioner to an approved open post of Lecturer (Physics). The petitioner continued to work in the said post. Thus of the three open category vacant posts of Lecturer in Physics one post is occupied by the petitioner since 2009.

7. Learned Senior Counsel for the petitioner would rely upon the Pension/CPF/Gratuity scheme dated 21.07.1983.

The question of application of pension, gratuity and other retirement benefits to the teaching and the non-teaching staff in the non-Government Colleges and the non-Agricultural Universities was under the consideration of Government for some time past. By this Resolution the Government directed that the pension, gratuity and other retirement benefits admissible to the Maharashtra State Government servants under the Maharashtra Civil Services Rules (Pension) Rules, 1982 including the Family Pension, 1964 contained therein should be made applicable to the full time approved teaching and the non-teaching staff in recognized aided non-Government Arts, Science, Commerce and Education Colleges and the non-Agricultural Universities in the State who retired or retire on or after 1st October, 1982. Clause 2 (i)(b) provides that for the purpose of this scheme "An employee means a full-time Professor, Reader, Lecturer, Demonstrator, Tutor, Method Master, Registrar, Deputy Registrar, Superintendent, Head Clerk, Sr. Clerk, Jr. Clerk, Peons and other categories as are working in the non-Government Colleges, as well as Universities in the

pattern approved by the State Government and included in the Salary Payment Scheme operated through the State Government”.

8. It is the contention of learned Senior Counsel for the petitioner that after selection by properly constituted Selection Committee, the petitioner was appointed as Lecturer in Physics (against the reserved post) with effect from 13.08.1996. The petitioner was continued in the said post year after year without any break. Pursuant to the advertisements issued on 06.09.2002 and 07.09.2002 for three reserved posts of lecturers in Physics alongwith three posts for Readers, out of which one was shown in the open category, the petitioner being qualified for the post of Reader applied for the same and he was interviewed. The petitioner however pursuant to the ad-interim order passed by this Court continued to work in the post of Lecturer (Physics) in one of the three open category vacant post of Lecturer in Physics in view of the ad-interim order passed by this Court. Learned Senior Counsel would submit that since 1996 the petitioner occupied the post of Lecturer in Physics till he retired on

attaining the age of superannuation. Learned Senior Counsel would submit that the petitioner being an employee within the meaning of Clause 2(i) (b) of the Government Resolution dated 21.07.1983 is entitled to pensionary benefits as per the provisions of the Maharashtra Civil Services (Pension) Rules, 1982 (hereinafter referred to as 'the said Rules' for short). He would also rely upon the decision of this Court in the case of **Pratima Dave Vs. State of Maharashtra and others in Writ Petition No.1317 of 2017** where this Court considered Rule 30 of the Maharashtra Civil Services Rules in the context of commencement of qualifying service. Learned Senior Counsel would submit that in terms of this decision the petitioner's service in the post of Lecturer have commenced from 1996 and therefore he has put in more than 10 years which is the period required for qualifying service for pension.

9. Learned Senior Counsel would further submit that in any case as for a period from 1996 to 2000 almost for 4 years, the petitioner having continuously worked in the said post, the said post meant for reserved category needs to be dereserved as

no candidate from the reserved category was available for long number of years.

10. On the other hand learned Advocate General submitted that the petitioner was appointed against the post of Lecturer (Physics) which was meant for reserved category candidate and he was never regularly appointed in the post, therefore he is not entitled to claim pensionary benefits. According to him, the petitioner cannot claim any benefits as the petitioner was never substantively appointed in the vacant post. In his submission merely officiating in the said post will not confer any right on the petitioner to claim pensionary benefits. Shri Kumbhakoni, learned Advocate General stated that the State Government is however not averse to examining the issue afresh as to whether the petitioner is eligible for pensionary benefits under the old scheme of 1983 or under the new scheme of 2015 and also the aspect whether the post should be dereserved.

11. Heard learned counsel. We have perused the memo of the petition and the relevant annexures. There is no dispute that after selection by properly constituted Selection Committee the petitioner was appointed as Lecturer in Physics as against the reserved post with the respondent-University. The petitioner was continued in service without any break. Pursuant to the advertisement issued in the year 2002 the services of the petitioner were terminated with effect from 19.03.2003. However by an ad-interim order passed by this Court the petitioner was directed to be continued on another post which had become vacant and could not be filled despite repeated advertisements. Thereafter, in the year 2008 the petitioner continued to work in the open category vacant post of Lecturer in Physics. Having worked in the reserved post for so long number of years which post could not be filled up as a result of non availability of suitable candidate, the respondents need to address the issue whether the post in question should be dereserved and whether the petitioner having been appointed through duly constituted Selection Committee and duly qualified

be held eligible to be appointed in the said post.

12. We have also perused the pension scheme dated 21.07.1983 which applies even to a lecturer working in the University in view of Clause 2(i)(b). Rule 48 of the Maharashtra Civil Services (Pension) Rules, 1982 provides for condonation of interruption in service. Rule 48 reads thus :-

“ 48 : Condonation of interruption in service

(1) The appointing authority may, by order, condone interruptions in the service of a Government servant :

Provided that -

(a) the interruptions have been caused by reasons beyond the control of the Government servant;

(b) the total service pensionary benefit in respect of which will be lost, is not less than five years duration, excluding one or two interruptions, if any; and

(c) the interruption including two or more interruptions, if any, does not exceed one year.

(2) The period of interruption condoned under sub-rule (1) shall not count as qualifying service.

(3) In the absence of a specific indication to the contrary in the service record, an interruption between two spells of civil service rendered by a Government servant under Government, shall be treated as automatically condoned and the pre-interruption service treated as qualifying service.

(4) Nothing in sub-rule (3) shall apply to interruption caused by resignation, dismissal or removal from service or for participation in a strike.

(5) The period of interruption referred to in sub-rule (3) shall not count as qualifying service.”

13. A reading of Rule 48 would go to show that the appointing authority has a power to condone interruptions in the service of a Government servant in certain circumstances. Thus there are ample powers conferred on the appointing authority to condone interruptions in the services of a Government servant when such interruptions have been caused by reasons beyond the control of the Government servant. Even this Court in **Pratima Dave's** case (*supra*) has held in the context of Rule 30 of the Maharashtra Civil Services Rules that if a person holds permanent post substantially, even if his initial appointment is in an officiating or temporary capacity, the qualifying service would commence from the date from which he has first been appointed in the Government service.

14. In the present facts we find that in the year 1996 the petitioner was appointed after selection by properly constituted

Selection Committee as Lecturer in Physics. This appointment however was against the reserved post. The appointment continued for years together. In view of the interim order passed by this Court, the petitioner was accommodated as against the vacant post of Lecturer in open category. Factually however during the period 1996 to 2002 when fresh advertisements were issued, the petitioner worked in the post meant for reserved category candidate. In these circumstances the issue whether the post should have been dereserved as the reserved category candidates were not available for long number of years needs to be considered. Even the learned Advocate General is not averse to the Government examining the issue also in the context whether the petitioner is eligible for grant of pension under the old pension scheme of 1983 or under the new pension scheme of 2015 and also regarding dereservation of the post.

15. Without expressing any opinion it would be in the interest of justice that the State Government examines the following questions :

(a) Whether the post of Lecturer in Physics meant for a reserved category should be dereserved as no candidate from the reserved category was available for long number of years ?

(b) Whether the services rendered by the petitioner as a Lecturer in Physics from the year 1996 till the date of superannuation should be considered as qualifying service for the purpose of pensionary benefits in terms of the provisions of the Maharashtra Civil Services Rules, 1982 ?

16. The decision whether the petitioner is entitled for pensionary benefits has to be taken considering that the petitioner has worked continuously in the substantive post of Lecturer in Physics till superannuation. The issue of grant of pensionary benefits also needs to be examined in the light of decision of this Court in **Pratima Dave's** case (*supra*) considering that the petitioner has held permanent post of Lecturer substantively though in a temporary capacity as per the contention of the respondents. This Court has clearly held that the qualifying service would commence from the date on which

he was first appointed in Government service. We may further observe that Rule 48 of the Maharashtra Civil Services (Pension) Rules, 1982 clearly empowers the appointing authority to condone interruptions in the service of a Government servant if the said interruptions have been caused by reasons beyond the control of the Government servant.

17. We may also observe that the issue regarding dereservation of the post needs to be examined in the context of the various Government Resolutions holding the field in this regard. As the entire records in respect of the appointment and selection etc. of the said post of Lecturer (Physics) are with the University, we direct the University to forward all the records to the Secretary, Higher and Technical Education, Mantralaya within a period of six weeks from the date of uploading of this order. Even additional records if are called for, the same be forwarded within 2 weeks from the date of requisition made by the Secretary, Higher and Technical Education. The decision on the issue of dereservation of the post and grant of pensionary

benefits be taken within a period of 12 weeks from the date of uploading of this order.

18. The claim of the petitioner for monthly pension be examined in the context of Rule 48 of the Maharashtra Civil Services (Pension) Rules, 1982.

19. The petition is therefore allowed in the above terms.

20. The rule is made absolute in the above terms with no order as to costs.

(M.S. KARNIK, J.)

(S.C. DHARMADHIKARI, J.)