

Urmila Ingale

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 1576 OF 2014

Kulkarni Shashikant Bhavani
Adult Indian Inhabitant
Formerly Lecturer in Physical Education
at B.P.C.A's College of Physical Education
Wadala, Mumbai residing at
9/1 Janhavi CHS, Lene No.2
Lokmanya Colony, Paud Road
Kothrud, Pune – 411 029

.. Petitioner

Vs.

1. Bombay Physical Culture Association
registered Society having office at
B.P.C.A's College of Physical Education
Bharatiya Kreedha Mandir
Wadala Road, Mumbai – 400 031
(through its Secretary)

2. The Principal
B.P.C.A's College of Physical Education
Bharatiya Kreedha Mandir
Wadala Road, Mumbai 400 031

3. The State of Maharashtra
through the Principal Secretary
Government of Maharashtra
in the Department of Sports and
Youth Service, Mantralaya,
Mumbai 400 032.

4. The Assistant Director of
Sports and Youth Service

Maharashtra State

Central Building, Pune 411 001

.. Respondents

Mr.C.R. Sadasivan, for the Petitioner.

Mr.A.L.Gore, for Respondents No. 1 and 2.

Ms.Jyoti Chavan, AGP for Respondent – State.

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

**RESERVED ON : 23rd JANUARY, 2019
PRONOUNCED ON : 13th FEBRUARY, 2019**

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

Heard.

Rule. The respondents waive service. By consent, Rule made returnable forthwith.

. By this Petition filed under Article 226 of the Constitution of India, the petitioner seeks a declaration that the petitioner is entitled to provident fund, gratuity and pension benefits under the Maharashtra Civil Services (Pension) Rules, 1982; and the General Provident Fund Scheme (GPF). He also prays for arrears of salary arising out of the implementation of the fifth pay commission scales of pay during the period from 01/01/1996 till the date of his removal from service.

The brief facts of the case are thus :

2. The petitioner was appointed as a lecturer in Physical Education with the respondent No.2 – College with effect from 12/06/1989. The petitioner was earlier working as a lecturer in Physical Education since 1985 for 4 years till 11/06/1989. The appointment with the respondent No.2 - College was in continuation of the previous service without any break. The petitioner was granted the placement benefit in Senior Scale on completion of 8 years of service in 1993 after taking into consideration his service rendered with the earlier Colleges.

3. The respondent – Management alleged that the petitioner molested a girl student. The petitioner was taken in custody on 18/02/1995 and released on bail on 19/02/1995. The petitioner was placed under suspension with effect from 22/02/1995 by the respondent No.1 – Management. By judgment and order dated 24/01/2000, the petitioner was acquitted.

4. The petitioner wrote a letter to the respondent No.1 pointing out that since he stands acquitted from the criminal charges levelled against him, he should be permitted to join duty at the College. Even the challenge to the order of acquittal of the petitioner before this Court failed. In the meantime, a charge-sheet dated 28/02/2000 came to be issued to the petitioner by the Management. The petitioner avers that without examining any witnesses, the Inquiry Officer conducted the Inquiry in just one sitting on a single date. On the basis of the report submitted by the Inquiry Officer, the petitioner was issued a show cause notice for termination of his service. The said notice was challenged before this Court. By an order dated 11/07/2000, this Court disposed of the Writ Petition by holding thus :

“ In the criminal case the Magistrate has recorded a finding that the ingredients of offence under Section 354 of the Indian Penal Code were not established. However that does not mean that the inquiry cannot be conducted on the same set of facts because if the allegations are proved to be correct it may amount to serious misconduct. Mr. More for the Respondent Nos.3 and 4 stated that the institution will hold a proper inquiry and no orders will be passed without

giving opportunity to hearing to the petitioner. Mr. More also states that the show cause notice dated 24th June, 2000 will not be acted upon and stand withdrawn.”

5. In view of the above order, an Inquiry was conducted which resulted in the petitioner's removal from service. The removal from service was challenged by the petitioner before the College Tribunal. The College Tribunal by its order dated 02/09/2002 quashed the Inquiry proceedings. It ordered reinstatement at the same stage where he was before removal from service. He was continued under suspension. The Management unsuccessfully challenged the order of College Tribunal in this Court.

6. The Inquiry thereafter once again proceeded. The Inquiry Officer returned the findings holding the petitioner guilty of misconduct. By order dated 01/09/2004, the petitioner was removed from service. The petitioner's challenge to the order of removal before the College Tribunal resulted in dismissal of his Appeal by judgment and order dated

03/05/2005 of College Tribunal. Writ Petition No. 2011 of 2006 filed by petitioner challenging the order of College Tribunal came to be rejected by this Court vide order dated 05/05/2008.

7. Thereafter the petitioner requested respondents No. 1 to 4 to determine his monthly pension and all dues arising from service of 19 years including the arrears arising out of fifth pay commission scales of pay, PF accumulations, gratuity and arrears of pension. The petitioner by letter dated 23/09/2011 addressed to the respondents submitted a detailed calculation of his arrears of salary and retirement dues. By a communication dated 03/01/2012, respondent No.2 informed the petitioner that no employee is entitled for any financial benefits particularly when he/she is dismissed from service, when such dismissal is pursuant to the departmental Inquiry.

8. Learned Counsel for the petitioner submitted that the criminal case lodged against the petitioner resulted in his

acquittal and therefore the stand of the respondents- College denying him pension and other retiral dues is arbitrary and unconstitutional. Learned Counsel relying on the decision of the Hon'ble Supreme Court in the case of **State of Jharkhand and ors. Vs. Jitendra Kumar Srivastava and anr. in Civil Appeal No. 6770 of 2013** submits that right to receive pension is in the nature of 'property' and this right to property cannot be taken away without due process of law as per provisions of Article 300A of Constitution of India.

9. Learned Counsel for the petitioner would urge that the order of removal cannot have an effect of wiping away the benefit of past services rendered by him thereby depriving him of his rightful claim to pension and retiral dues. Learned Counsel submits that the only effect of removal is that the petitioner ceases to be in the employment of respondent No.2 and in no case, his terminal dues can be forfeited in such an arbitrary manner.

10. Per contra, it is submitted by the learned Counsel for

the respondents No. 1 and 2 – College that the petitioner had 5 years and 8 months of actual service to his credit and therefore he does not even have the service of 20 years to qualify for pension. It is his further stand that even if the period under suspension is taken into consideration as on duty, still then, the petitioner would have 19 years of service to his credit which cannot be considered for the purpose of pension for want of service of 20 years. The respondent – College has denied the factum of the petitioner's previous service with two Colleges between 1985 to 1989 prior to joining services with the respondent No.2 – College. Insofar as arrears of salaries as per scale on implementation of fifth pay commission from 1996 till his dismissal is concerned, respondent No.2 – College has taken a stand that as the petitioner was suspended during that period, the question of paying him arrears does not arise.

11. According to respondent No.2, the petitioner was removed from service after full-fledged departmental Inquiry was held against him for serious misconduct. The removal

order dated 01/09/2004 was challenged before the College Tribunal which Appeal came to be dismissed on 03/05/2005. It is submitted that even this Court dismissed the Writ Petition No.2011 of 2006 filed by the petitioner against the order of removal. The learned Counsel for respondent No.2 submits that insofar as gratuity payable to the petitioner is concerned, as there was a shortfall in the minimum qualifying service for the said purpose, question of payment of gratuity does not arise.

12. Heard learned Counsel for the parties. Perused the Petition and its annexures. We have also gone through the affidavit-in-reply filed on behalf respondent No.2.

13. The question that falls for our consideration is whether the petitioner is entitled to the pensionary benefits claimed by him even though he has been removed from service for a proved misconduct of serious nature. It is not in dispute that the petitioner joined the services of the respondent No.2 – College as a lecturer in Physical Education with effect from

12/06/1989. For serious allegations of sexual harassment of girl students, duly proved in the departmental Inquiry, the petitioner was removed from service on 01/09/2004. The petitioner has been under suspension from 22/02/1995 right till his removal.

14. We find the charges levelled against the petitioner for which he was proceeded with departmentally are very serious. The order of removal from service dated 01/09/2004 was challenged before the Tribunal. By a detailed judgment and order dated 03/05/2005, the Tribunal dismissed the Appeal. The petitioner is held guilty of grave misconduct. Apart from the other charges proved against the petitioner, the College Tribunal observed that the charge of moral turpitude was proved with reference to the incidents in relation to two girl students and also in relation to other lady students in general. The Tribunal further observed that mischiefs committed by the petitioner fall within the purview of the definition of sexual harassment as stated in **Vishaka and ors. Vs. State of**

Rajasthan and ors. (1997) 6 SCC 241 by the Supreme Court.

15. Not only this, but, in Writ Petition No. 2011 of 2006 filed by the petitioner in this Court challenging the order passed by the College Tribunal, this Court by a detailed judgment and order dated 05/05/2008 dismissed the Petition. Even the contention of the petitioner, by placing reliance on the decision of the Apex Court in the case of **Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. AIR 1999 SC 1416**, that the case of the petitioner falls in the category of “little exception” carved out by the Supreme Court was rejected by this Court. This Court in paragraph 39 upon observing that as the conduct of the petitioner has been clearly found to be one which amounts to 'Misconduct' as defined by the statute of the University of Mumbai and as appropriate disciplinary action has not only been initiated but also completed strictly in conformity with its statutes by the Management, rejected the contentions raised on behalf of the petitioner by placing reliance on the judgment of the Apex Court in **Vishaka's** case (*supra*). Further in paragraph

44, this Court observed that the allegations proved against the petitioner, to say the least, are of such a nature that they are unbecoming of a teacher. It is further observed that behaviour of the petitioner as proved in the context of expected conduct and character of the teacher amounts to misbehaviour, derogatory to the status and dignity of a teacher. Thus, the petitioner was held guilty, in addition to moral turpitude, also of misconduct. The petitioner was removed from service for a grave misconduct.

16. Let us now examine the submissions of the learned Counsel for the petitioner with reference to the decision of the Apex Court in the case of **State of Jharkhand and others** (*supra*). The question for consideration before the Apex Court was as to whether, in the absence of any provision in the Pension Rules, the State Government can withhold a part of pension and/or gratuity during the pendency of departmental/criminal proceedings. The decision in the case of **State of Jharkhand and others** (*supra*) will be of no assistance

to the petitioner.

17. However, to decide the present controversy, it would be necessary to refer to paragraph 7 of the said decision which reads thus:

“7. It is an accepted position that gratuity and pension are not the bounties. An employee earns these benefits by dint of his long, continuous, faithful and un-blemished service. Conceptually it is so lucidly described in D.S. Nakara and Ors. Vs. Union of India; (1983) 1 SCC 305 by Justice D.A.Desai, who spoke for the Bench, in his inimitable style, in the following words :

“The approach of the respondents raises a vital and none too easy of answer, question as to why pension is paid and why was it required to be liberalized ? Is the employer, which expression will include even the State, bound to pay pension? Is there any obligation on the employer to provide for the erstwhile employee even after the contract of employment has come to an end and the employee has ceased to render service ? What is a pension ? What are the goals of pension? What public interest or purpose, if any, it seeks to serve ? If it does seek to serve some public purpose, is it thwarted by such artificial division of retirement pre and post a certain date ? We need seek answer to these and incidental

question so as to render just justice between parties to this petition. The antiquated notion of pension being a bounty a gratuitous payment depending upon the sweet will or grace of the employer not claimable as a right and, therefore, no right to pension can be enforced through Court has been swept under the carpet by the decision of the Constitution Bench in Deoki Nandan Prasad V. State of Bihar and Ors. (1971) Su. S.C.R.634 wherein this Court authoritatively ruled that pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a Government servant coming within those rules is entitled to claim pension. It was further held that the grant of pension does not depend upon any one's discretion. It is only for the purpose of quantifying the amount having regard to service and other allied matters that it may be necessary for the authority to pass an order to that effect but the right to receive pension flows to the officer not because of any such order but by virtue of the rules. This view was reaffirmed in State of Punjab and Anr. V. Iqbal Sing (1976) IILLJ 377 SC.”

18. As observed by the Apex Court, it is now a settled position of law that the pension is a right and the payment of it does not depend upon the discretion of the government but is governed by the rules. A government servant coming within

those rules is entitled to claim pension.

19. Having noticed the legal position, we now discuss the rules relating to release of pension applicable in the case of the petitioner. The present case is admittedly governed by the provisions of the Maharashtra Civil Services (Pension) Rules, 1982 (hereinafter referred to 'the said Rules'). Rule 26 of the said Rules provides thus :

“26. Pension subject to good conduct.

(1) Future good conduct shall be an implied condition of every grant of (pension or family pension). Government may, by order in writing, withhold or withdraw a (pension or family pension) or part thereof, whether permanently or for a specified period, if the (pensioner or family pensioner) is convicted of a serious crime or is found guilty of grave misconduct:

Provided that where a part of (pension or family pension) is withheld or withdrawn the amount of remaining (pension or family pension) shall not be reduced below the minimum (pension or family pension) as fixed by Government.

(2) Where a (pensioner or family pensioner) is convicted of a serious crime by a court of law, action under sub-rule (1) shall be taken in the light of the judgment of the court relating to such conviction.

(3) In a case not falling under sub-rule (2), if Government considers that the pensioner is *prima facie* guilty of grave misconduct, it shall, before passing an order under sub-rule (1), follow the procedure as laid down in rules 8 and 9 of the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979 for imposing a major penalty....”

20. Rule 26 will have to be construed in the light of observations of the Apex Court that pension is a right and the payment of it does not depend upon the discretion of the government, but is governed by the rules and a government servant coming within those rules is entitled to claim pension.

21. We may also refer to Rule 27 of the said Rules which gives a right to the government to withhold or withdraw the pension. Rule 27 reads thus:

“27. Right of Government to withhold or withdraw pension.

(1) (Appointing Authority may), by order in writing, withhold or withdraw a pension or any part of it, whether permanently or for a specified period, and also order the recovery from such pension, the whole or part of any pecuniary loss caused to Government, if, in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of his service including service rendered upon re-employment after retirement:

Provided that the Maharashtra Public Service Commission shall be consulted before any final orders are passed in respect of officers holding posts within their purview:

Provided further that where a part of pension is withheld or withdrawn, the amount of remaining pension shall not be reduced below the minimum fixed by Government.

(2) (a) The departmental proceedings referred to in sub-rule (1), if instituted while the Government servant was in service whether before his retirement or during his re-employment, shall, after the final retirement of the Government Servant, be deemed to be proceedings under this rule and shall be continued and concluded by the authority by which they were commenced in the same manner as if the Government servant had continued in service.

(b) The departmental proceedings, if not instituted while the Government servant was in service, whether before his retirement or during his re-employment,-

(i) shall not be instituted save with the sanction of (Appointing Authority),

(ii) shall not be in respect of any event which took place more than four years before such institution, and

(iii) shall be conducted by such authority and at such place as the Government may direct and in accordance with the procedure applicable to the departmental proceedings in which an order of dismissal from service could be made in relation to the Government servant during his service.

(3) No judicial proceedings, if not instituted while the Government servant was in service, whether before his

retirement or during his re-employment, shall be instituted in respect of a cause of action which arose or in respect of and event which took place, more than four years before such institution.

(4) In the case of a Government servant who has retired on attaining the age of Superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where departmental proceedings are continued under sub-rule (2), a provisional pension as provided in rule 130 shall be sanctioned.

(5) Where Government decides not to withhold or withdraw pension but orders recovery of pecuniary loss from pension, the recovery shall not, subject to the provision of sub-rule (1) of this rule, ordinarily be made at a rate exceeding one-third of the pension admissible on the date of retirement of a Government servant.

(6) For the purpose of this rule-

(a) departmental proceedings shall be deemed to be instituted on the date on which the statement of charges is issued to the Government servant or pensioner, or if the Government servant has been placed under suspension from an earlier date, on such date: and

(b) judicial proceedings shall be deemed to be instituted-

(i) in the case of criminal proceedings, on the date on which the complaint or report of a police officer of which the Magistrate takes cognizance in made, and

(ii) in the case of civil proceedings, on the date of presenting the plaint in the Court.

22. A reading of Rules 26 and 27 of the said Rules clearly demonstrates that not only the government has power to withhold or withdraw pension if pensioner is found guilty of grave misconduct, but even has a power to order recovery of pecuniary loss from the pension. Clause 1 of Rule 26 provides that Government may, by order in writing, withhold or withdraw a (pension or family pension) or part thereof, whether permanently or for a specified period, if the (pensioner or family pensioner) is convicted of a serious crime or is found guilty of grave misconduct. (emphasis supplied by us)

23. It is thus clear that in the present case petitioner's right to receive a pension is not absolute, but is subjected to Rules 26 and 27 of the said Rules.

24. In the present case, the petitioner is removed from service on a proved charge of grave misconduct involving moral

turpitude. This being the position, if respondent No.2 has rejected the claim of the petitioner for pension on the ground that the petitioner is removed from service on account of proved charge of grave misconduct, we do not find the action of the respondents is contrary to the rules or in any manner arbitrary. No doubt, pension is a right of the petitioner, but the same is governed by the said Rules. A plain reading of Rules 26 and 27 makes it amply clear that the government has a power to withhold permanently a pension, if the pensioner is found guilty of grave misconduct. The petitioner was removed from the service before he attained the age of superannuation. The removal from the service before he reaches the age of superannuation will hardly be of any consequence, for when claim for pension is made upon cessation of service, the same would be governed by the provisions of the Rules 26 and 27 of the said Rules. The conduct of the petitioner and grave nature of the proved misconduct involving moral turpitude for which the petitioner is removed from service would dis-entitle the petitioner to claim pensionary benefits. It is not possible to

fathom a situation where an employee is held eligible for pension though he is removed from service upon a proved misconduct of a serious nature before attaining the age of superannuation or on completion of pensionable service ; whereas in respect of an employee who has retired, his right to receive pension is made subject to good conduct in future. Subject to the provisions of Rules 26 and 27, departmental proceedings can be held even against a retired employee and if held guilty of grave misconduct, his pension can be forfeited.

25. The petitioner has hardly rendered 5 years and 8 months of actual service and all along was under suspension till his removal. In these circumstances, the respondent – Management has taken a stand with regard to gratuity that the question of payment of gratuity did not arise as there was a shortfall in the minimum qualifying service for the said purpose. We see no reason to interfere with the stand of the Management in the facts of the present case. Insofar as the settlement of the provident fund which is deducted from his salary, the petitioner

may approach the College authority for settlement of claims, if not already done.

26. We therefore, do not find any merits in the present Petition, the same is accordingly dismissed with no order as to costs. Rule is discharged.

(M.S.KARNIK, J.)

(S.C.DHARMADHIKARI, J.)