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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2538 OF 2021

1. Shri Purushottam Harishchandra
Shirsekar
Aged 42 yrs, Occ. Service, R/o. Nate, Tal
Rajapur, Dist. Ratnagiri.

2. Nate Gram Panchayat's Nate Nagar
Vidyamandir,
Nate Arts Commerce Junior College,
Nate, Tal. Rajapur, Dist. Ratnagiri,
Through its Principal

... Petitioners

V/s.

1. The State of Maharashtra
Through the Secretary, School
Education Department, Mantralaya,
Mumbai - 40032.

2. The Education Officer (Secondary),
Zilla Parishad, Ratnagiri.

3. Superintendent,
Pay and Provident Fund Unit (Sec. Edn.)
Ratnagiri.

... Respondents

Mr. Narendra V. Bandiwadekar with Mr. Vinayak R.
Kumbhar and Mr. Ajinkya S. Navale i/b. Mrs. Ashwini
Navjyot Bandiwadekar for the Petitioners.
Mr. N.C. Walimbe, AGP for State - Respondent Nos.1 to 3.

CORAM: R.D. DHANUKA AND
R.I. CHAGLA, JJ.

ORDER RESERVED ON 11TH AUGUST, 2021

ORDER PRONOUNCED ON 25TH AUGUST, 2021

ORAL ORDER (Per R.I. Chagla, J.)

1. The Petitioners have filed this Writ Petition under Article 226 of the Constitution of India. The Petitioner No.1 seeks to quash and set aside the impugned order dated 13th May, 2020 issued by the Respondent No.3 on the proposal dated 6th November, 2019 submitted by the Petitioner No.2. Further direction has been sought against Respondent No.2 to apply pension scheme to the Petitioner No.1 which was prevailing prior to 1st November, 2005 in accordance with the provisions of the Maharashtra Civil Services (Pension) Rules, 1982 (“the said Rules”) and grant consequential service benefits to the Petitioner No.1.

2. The Petitioner No.1 came to be appointed as Part Time Shikshan Sevak on 11th September, 2001 which post was sanctioned on aided basis in the school of the previous management. The Petitioner No.1’s services continued in the said post for three years and the Respondent No.2 granted approval to the said appointment.

3. The Petitioner No.1 after completing three years as Part Time Shikshan Sevak came to be appointed as part time teacher on 1st September, 2010. The Respondent No.2 granted approval to the said appointment, which was made on aided post.

4. Thereafter, the Petitioner No.1 came to be upgraded to the post of full time teacher in the same school on 15th June, 2015. The said post was sanctioned on aided basis. The proposal of the Petitioner was accordingly submitted to the Respondent No.2 for approval on 30th December, 2015.

5. The Respondent No.2 issued order dated 25th January, 2016 rejecting the said proposal of the Petitioner No.1 on the ground that as per Government Resolution dated 2nd May, 2012, there was a ban on recruitment of teachers in aided school.

6. Being aggrieved thereof, the Petitioner No.1 and the management of the previous school filed Writ Petition No.4120 of 2016 in this Court to challenge the order dated 25th January, 2016 passed by the Respondent No.2. The

Division Bench of this Court by an order dated 28th February, 2016 allowed the said Writ Petition and set aside the impugned order and directed Respondent No.2 to grant approval to the Petitioner No.1 as full time teacher and make payment of salary. On 1st September, 2018, the Respondent No.2 issued order of approval to the appointment of the Petitioner on full time post. Since, the Petitioner No.1 was declared surplus in the previous school, the Respondent No.2 issued order on 28th November, 2018 and absorbed the Petitioner No.1 in the Petitioner No.2 school as full time teacher. Accordingly, the Petitioner No.1 made application dated 19th July, 2019 to the Petitioner No.2 and requested that since the Petitioner No.1 was appointed prior to 1st November, 2005, the old pension scheme shall be made applicable to the Petitioner No.1. A proposal was submitted to the concerned office for applying the old pension scheme.

7. The Petitioner No.2 submitted proposal dated 6th November, 2019 to the Respondent No.3 along with decisions of this Court which were relied upon by the Petitioner No.1. The Respondent No.2 was requested to grant the said proposal and apply the old pension scheme to Petitioner No.1.

8. The Respondent No.3 passed the impugned order dated 13th May, 2020 which is on the reverse of the said proposal letter submitted by the Petitioner No.2, thereby rejecting the said proposal. Being aggrieved by the impugned order the Petitioner has filed this Writ Petition.

9. The learned Counsel appearing for the Petitioner has submitted that the impugned order is bad in law as it proceeds on the premise that the appointment of the concerned teaching and non teaching employees has to be on full time post and not on part time post and which appointment has to be prior to 1st November, 2005 and for which the grant-in-aid should also have been sanctioned for full time post prior to 1st November, 2005. It is only then that the provisions of the old pension scheme will apply.

10. The learned Counsel for the Petitioner has submitted that the Petitioner No.1 in the present case was appointed as a part time shikshan sevak on 11th September, 2001 i.e. prior to 1st November, 2005 and the said post was receiving 100% grant-in-aid from the State Government. He has submitted that since the Petitioner No.1 has been appointed prior to 1st

November, 2005 albeit on a part time post on receiving 100% grant-in-aid, Respondent No.3 could not have rejected the proposal submitted by the Petitioner No.2 to apply the old pension scheme to Petitioner No.1. He has placed reliance upon the judgments of this Court in Writ Petition No.8289 of 2013, Writ Petition No.10221 of 2015 and Writ Petition No.5421 of 2017. He has submitted that in these decisions this Court had taken a consistent view that the 50% of the part time services is to be counted for the purpose of pension along with the full time services rendered by the Petitioner either for teaching or non teaching employees for the purpose of payment of pension.

11. Learned Counsel has also placed reliance upon the decision of this Court in ***Smt. Prema Narsinha Herkal Vs. State of Maharashtra & Ors.***¹. The Division Bench has in the said decision held that the Petitioner therein is entitled to claim 50% of the part time service rendered by the employee for the purpose of pension and the date of appointment as part time librarian in that case had to be taken in to consideration for the purpose of pension. The Division Bench

1 Writ Petition No.3719 of 2019 decided on 11th March, 2020.

further held that the appointment as full time librarian is not a fresh appointment. The services of the Petitioner has to be counted from the first date of appointment i.e. as part time librarian and therefore, the pension scheme prevailing prior to 1st November, 2005 would be applicable to the Petitioner.

12. The learned Counsel for the Petitioner has submitted that the impugned order has referred to a Government Order without giving particulars of the Government Order and which it claims provided a teaching or non teaching employee is appointed prior to 1st November, 2005, it should be to a full time post sanctioned 100% grant, for the old pension scheme to apply, otherwise the D.C.P.S. (new pension scheme) will apply. He has submitted that merely referring to a Government Order without providing its particulars is not sufficient as it is the basis for the passing of the impugned order. He has submitted that as far as the Government Resolution dated 31st October, 2005 which applies the new pension scheme is concerned, it has to be interpreted in line with the decisions of this Court. He has submitted that under clause 4 of the said Government Resolution which is titled applicability of the scheme, the following is provided:

APPLICABILITY OF THE SCHEME

4. (a) As mentioned above, new defined contribution pension scheme will be applicable to Government servants who are recruited on or after 1st November, 2005 in State Government service.

(b) Government is also pleased to direct that the above decision should, mutatis-mutandis, apply to the employees, who are recruited on or after 1st November, 2005, in the services of the Recognized and Aided Educational Institutions, Non- Agricultural Universities and affiliated Non Government College and Agricultural Universities etc., to whom the existing pension scheme and General Provident Fund Scheme is applicable.

(c) In exercise of the powers conferred by the proviso to Section 248 of the Maharashtra Zilla Parishadas and Panchayat Samiti's Act, 1961 (Mah.V of 1962) and of all the other powers enabling it in that behalf, Government is further pleased to decide that the above decision shall apply to the employees, who are recruited on or after 1st November, 2005 in the services of Zilla Parishad.

13. It is submitted that it is clear from the above clause that the new pension scheme is made applicable to Government employees who are recruited on or after 1st November, 2005 in the services of recognized and aided educational institutions. He has submitted that there is no

distinction made between full time employees and part time employees in the services of such recognized and aided educational institutions. He has referred to the decision of the Division Bench of this Court in *Deshmukh Dilipkumar Bhagwan & Ors. Vs. State of Maharashtra, through Chief Secretary, General Administration Department & Ors.*², wherein this Court had referred the issue as to whether employees who were appointed prior to 1st November, 2005 in the aided recognized, primary and secondary and higher secondary schools as well as colleges of the education who were receiving less than 100% grant-in-aid as on 1st November, 2005 are entitled to the benefit of old pension scheme under the pension rules and commutation of pension Rules or whether they will be governed by the new pension scheme under the Government Resolution of 2005 to a Larger Bench. Apart from this issue, two more issues have also been referred to the Larger Bench He has then referred to the Full Bench decision of this Court in *Deshmukh Dilipkumar Bhagwan Vs. State of Maharashtra*³ in which the Full Bench has answered these issues. The Full Bench has

2 Writ Petition No.8387 of 2013 decided on 26th August, 2019.

3 2019(3) Mh.L.J. 903

answered these issues at paragraph 37, which reads as under:

37. Under these circumstances, we answer the Reference as under:-

Question No.1.

In the context of the right of an employee of private school or college of education to receive pensionary benefits and the corresponding liability of the Government to pay the same, only those schools and colleges of education which are receiving 100% grant-in-aid can be termed as aided institutions.

Question No.2.

The employees who were appointed prior to 1-11-2005 in aided recognized primary, secondary schools as well as colleges of education which were receiving less than 100% grant-in-aid as on 1-11-2005 would be governed by the DCP Scheme.

Question No.3.

Similar will be the situation of the employees who were appointed prior to 1-11-2005 in aided primary, secondary and higher secondary schools as well as the colleges of education which were receiving less than 100% grant-in-aid as on 1-11-2005 but which became 100% aided before 29-11-2010 would also be governed by the DCP Scheme.

14. It has thus been held by the Full Bench that only those schools and colleges of education which are receiving 100% grant in aid can be termed as aided institutions. Further, in answer to question No.2, this Court has held that the employees who were appointed on 1st November, 2005 in aided recognized primary, secondary schools as well as colleges of education, which were receiving less than 100% grant in aid as on 1st November, 2005 would be governed by the DCP Scheme. He has submitted that from the decision of the Full Bench which has answered the three questions referred to the Bench. It is clear that distinction has been made between part time and full time employees appointed prior to 1st November, 2005 in aided educational institutions. The only requirement for application of the old pension scheme is that the employee should be receiving the 100% grant-in-aid as on 1st November, 2005 otherwise the employees would be governed by the DCP scheme. He has submitted that it is an accepted position in the present case that, the Petitioner No.1 was receiving 100% grant-in-aid on 1st November, 2005 and that the Petitioner No.1 was appointed part time shikshan sevak prior thereto i.e. on 11th

September, 2001 on fully aided basis in the school of the previous management. He has accordingly submitted that the old pension scheme is applicable to the Petitioner No.1 i.e. the scheme prevailing to 1st November, 2005 in accordance with the provisions of the said Rules, 1982 and the Petitioner No.1 is entitled for consequential service benefits.

15. The learned AGP appearing for Respondent Nos.1 to 3 has vehemently opposed the Petition. He has placed reliance upon the Affidavit in Reply of Respondent No.2 dated 13th July, 2021. He has referred to the averments in the said Affidavit and in particular the averments in paragraph 5 and 6 thereof, wherein it is stated that the judgments relied upon by the Petitioner in Writ Petition No.8289 of 2013, Writ Petition No.5422 of 2017 and Writ Petition No.10221 of 2015 are limited to the facts in those Petitions. It is stated that the said judgments are not squarely applicable to the case of the Petitioner No.1. It has further been stated in paragraph 6 of the Affidavit that there is a Government Order directing that if any employee is appointed prior to 1st November, 2005 but the post is sanctioned 100% grant for full time post after 1st

November, 2005, then for such teaching and non teaching employees (new pension scheme) DCPS applies.

16. The learned AGP has relied upon the decision of the Division Bench of this Court dated 26th August, 2019 in Writ Petition No.8387 of 2013 and companion matters, which referred to in paragraph 13 of the said Affidavit and wherein it is contended that the issue involved in this Petition is no longer *res integra*. He has submitted that the said decision of the Division Bench reference is made to the decision of the full bench of this Court which has held that employees of educational institutions working against fully aided i.e. 100% aided post prior to 1st November, 2005 irrespective of the nature of the initial appointment would be governed by the old pension scheme. He has submitted that this would necessarily to be read as employees working on fully aided post prior to 1st November, 2005. He has submitted that as the appointment of the Petitioner No.1 as full time teacher a fully aided post, was after 1st November, 2005, the new pension scheme i.e. DCPS would be applicable. He has accordingly submitted that there is no merit in this Petition and it should be rejected.

17. Having considered the submissions, it is to be noted that the Petitioner No.1 was appointed on a part time fully aided post in the school of the previous management on 11th September, 2001. It has been consistently observed by this Court in various decisions including the decisions relied upon by the learned Counsel for the Petitioners and referred to in the Petition i.e. the decisions of this Court in Writ Petition No.8289 of 2013, the decision dated 29th April, 2014; decision in Writ Petition No.5421 of 2017, decision dated 9th July, 2018 and decision in Writ Petition No.10221 of 2015, decision dated 11th February, 2016 that teaching as well as non teaching employees who have been appointed initially in part time services and thereafter in full time services are entitled to claim pension and pensionary benefits on 50% of the part time services rendered by the employee along with the full time services in the educational institutions. The services of the employee has to be counted from the first date of appointment on either part time or full time post for purpose of pension and pensionary benefit. It is also been held in a subsequent decision of the Division Bench of this Court in ***Smt. Prema Narsinha Herkal*** (Supra) that the services in

that case of the Petitioner as full time librarian cannot be considered as a fresh appointment as the Petitioner therein had been appointed as part time librarian prior to 1st November, 2005 i.e. on 21st September, 1990 and thereafter as full time librarian from 6th November, 2006. The services of the Petitioner has to be counted from the first date of appointment and it was accordingly held by the Division Bench that, the old pension scheme prevailing prior to 1st November, 2005 would be applicable to the Petitioner.

18. It has thus been a consistent view of this Court that the services of the employee of the Educational Institution is to be counted from the first date of appointment irrespective of whether it is on a part time or full time post. Further, if such appointment is prior to 1st November, 2005, then the old pension scheme would be made applicable to the employee. This requirement is further made clear from the Government Resolution dated 31st October, 2005 which provides in Clause 4 that the employees who are to be recruited on or after 1st November, 2005 in the services of the recognized and aided educational institutions for the new pension scheme (DCPS) is made applicable.

19. The decision of this Court in *Deshmukh Dilipkumar Bhagwan (Supra)* had referred certain questions to the full bench and one of the questions is material herein which is whether the employees appointed prior to 1st November, 2005 in aided recognized primary, secondary and higher secondary schools as well as colleges of education which were receiving less than 100% grant-in-aid as on 1st November, 2005 are entitled to the old pension scheme under the pension rules and the commutation of pension rules or whether they will be governed by the new pension scheme under the Government Resolution dated 31st October, 2005? This question along with two other questions have now been answered in the full bench decision in *Deshmukh Dilipkumar Bhagwan (Supra)*. The Full Bench has made it clear that only those education institutions receiving 100% grant-in-aid can be termed as aided institutions. The employees appointed prior to 1st November, 2005 in aided educational institutions but receiving less than 100% grant-in-aid as on 1st November, 2005 would be governed by the new pension scheme (DCPS).

20. Thus it is clear that employees such as Petitioner No.1 who were appointed prior to 1st November, 2005 in aided educational institution receiving 100% grant-in-aid as on 1st November, 2005 would be governed by the old pension scheme. This has further been made clear by the Division bench in *Deshmukh Dilipkumar Bhagwan (Supra)* along with companion matters, decision dated 26th August, 2019 (Coram Pradeep Nandrajog, CJ and Smt. Bharati Dangre, J.). It has been held therein that employees of schools, including colleges of education working against fully aided, i.e. 100% aided post prior to 1st November, 2005, irrespective of the nature of the initial appointment would be governed by the old pension scheme. We do not find any merit in submission of the learned AGP that the employee must not only be appointed prior to 1st November, 2005 but the post against which the employee is appointed must also be a fully aided post for making the old pension scheme applicable to such employee. The impugned order has only referred to a Government Order which it alleges provides for such requirement. However, the said Government Order has neither been produced nor any particulars of the same has

been given. Further the Government Order relied upon in the impugned order cannot be contrary to what has to be laid down in the decisions of this Court including the decision of the Full Bench in ***Deshmukh Dilipkumar Bhagwan (Supra)***.

21. We are of the view that since the Petitioner No.1 had been appointed prior to 1st November, 2005 and occupied a part time fully aided post i.e. receiving 100% grant-in-aid from the State Government, the old pension scheme would be made applicable to the Petitioner No.1. Hence, we pass the following order:-

- (a) The Respondent No.2 Education Officer shall apply the pension scheme to the Petitioner No.1 prevailing prior to 1st November, 2005 (old pension scheme) in accordance with the provisions Maharashtra Civil Services (Pension) Rules, 1982 and the Petitioner No.1 is eligible to be granted all consequential service benefits under the old pension scheme.

- (b) The Respondent Nos.2 and 3 shall allot the Provident Fund Account to the Petitioner No.1 and thereafter permit the Petitioner No.2 to deduct the amount of monthly compensation from monthly salary of Petitioner No.1 and deposit the same in the said Provident Fund Account which shall be done within a period of six weeks from the date of this order.
- (c) Rule made absolute in the above terms.
- (d) Writ Petition is disposed of accordingly.
- (e) There shall be no order as to costs.

(R. I. CHAGLA J.)

(R.D. DHANUKA, J.)