IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH : NAGPUR.

WRIT PETITION NO.2960/2019

Mukund S/o Pundalik Pahurkar,
aged 62 Yrs., Occ. Retired Civil Engineering
Asstt., R/o Plot No.S/A-10, Himalaya Vishwa
Colony, Nagpur Road, Wardha (Maharashtra). ..Petitioner.

..Vs..

1. The Zilla Parishad, Nagpur.
Through the Chief Executive Officer,
Zilla Parishad, Nagpur - 440 001.

2. The Executive Engineer Works
Department, Zilla Parishad,
Nagpur - 440 001.

3. The State of Maharashtra,
through the Secretary, Rural
Development Department, 25,
Marzban Path, Fort,
Mumbai - 400 001. ..Respondents.

Mr. D.P. Shouche, Advocate for the petitioner.
Mr. I.S. Charlewar, Advocate for respondent Nos.1 and 2.
Mr. D.P. Thakare, Additional Government Pleader for respondent No.3.

CORAM :- SUNIL B. SHUKRE AND
ANIL S. KILOR, JJ.
DATED :- 5.10.2021.

ORAL JUDGMENT *(Per Sunil B. Shukre, J.)*

Prayer (A) of the petition is not pressed by the learned counsel for the petitioner.

2. Heard. **Rule**. Rule made returnable forthwith. Heard finally by consent.

3. The petitioner was appointed as Muster Clerk on the establishment of respondent No.1 w.e.f. 1.4.1985 and in due course of time, he was promoted to the post of Civil Engineering Assistant. The petitioner while working on the post of Civil Engineering Assistant retired on 31.1.2015 on attaining superannuation. At the time of retirement, the last drawn pay of the petitioner was Rs.16,730/-. This salary of the petitioner was fixed by respondent Nos.1 and 2 by mistakenly considering the petitioner as Junior Engineer. This mistake was realized by respondent Nos.1 and 2 and, therefore, a decision was taken after the retirement of the petitioner that the pension that would be payable to the petitioner would be not on the basis of his last drawn pay applicable to the post of Junior Engineer but, the pay applicable to the post of Civil Engineering Assistant. Accordingly, by placing reliance upon circular dated 28.7.2014, the impugned order fixing the pension of the petitioner at Rs.7,020/- was issued.

4. The contention of the learned counsel for the petitioner is that fixing of the pension of the petitioner at a scale lower than 50% of the

last drawn pay is against the provisions made in rule 110 of the Maharashtra Civil Services (Pension) Rules, 1982 (for short "Rules of 1982") and, therefore, the communication by which this was done, is illegal.

5. Mr. Charlewar, learned counsel for respondent Nos.1 and 2 submits that since pay which was lastly drawn by the petitioner was inadvertently fixed, later a correction was made in respect of the same by following the Government Resolution dated 28th July, 2014 and, therefore, it cannot be said that the impugned action of respondent Nos.1 and 2 is against the law.

6. Rule 110 of Rules of 1982 is relevant for deciding the controversy involved in this petition. Sub-rule (2)(a) of rule 110 of the Rules of 1982 reads thus:-

> *"(2)(a) In case of Government Servant retiring on Superannuation, Retiring, Invalid or Compensation Pension in accordance with the provisions of these rules after completing qualifying service of not less than twenty years, the amount of pension shall be calculated at fifty per cent of the 'Pensionable Pay' subject to maximum of Rs.67,000/- plus admissible grade pay."*

It would be clear from the above referred rule that the amount of pension is required to be calculated at 50% of the pensionable pay subject to maximum of Rs.67,000/- plus admissible grade pay.

7. “Pensionable pay” is the expression which has been defined in rule 9(38) as under:-

> *“Pensionable pay means the average pay earned by a Government servant during the last ten months service [or last month’s pay, whichever is more beneficial to the Government Servant.]”*

In order to understand completely the meaning assigned to the expression ‘pensionable pay’ it would also be necessary to refer to the definition of pay as provided under rule 9(36). It reads as under:-

> *“9(36) Pay means the amount drawn monthly by a Government servant as-*
>
> *(i) the pay (including special dearness pay) which has been sanctioned for a post held by him substantively or in an officiating capacity, or to which he is entitled by reason of his position in a cadre; and*
>
> *(ii) personal pay, and special pay; and*
>
> *(iii) any other emoluments which may be specially classed as pay by Government [including Non-Practicing allowance.]*
>
> *(iv) Any kind of financial incentive, including difference in pay on account of one-step promotion (other than by way of Time bound promotion of Assured career progression) as per any policy of the Government, shall not be admissible for calculating pay.]*
>
> *(v) in the 6th Pay Commission, the pay drawn in the prescribed pay band plus applicable grade pay but does not include any other type of pay like special pay, which the Government Servant was receiving immediately*

before his retirement or on the date of his death.]"

8. It would be clear from the above referred provisions of Rules of 1982 that for the purpose of "pensionable pay", consolidated salary lastly drawn by the employee is required to be taken and then, either the average of consolidated salary earned by the government servant during the last 10 months or the last months pay, whichever is more beneficial to the government servant, would be relevant for considering what would be the pensionable pay of the government servant. In short, it would be the consolidated salary drawn on an average basis during the last 10 months service or the last months consolidated salary, whichever is more beneficial, which would be the one to be counted as pensionable pay.

9. Thus, the pension i.e. required to be calculated would be in accordance with the definitions given in rule 9(38) and rule 9(36) read with rule 110 of Rules of 1982 and that would mean that if the last drawn consolidated salary is more beneficial to an employee of the government, it would be that salary which would have to be taken into account for determination of the amount of pension payable to the employee.

10. In the present case, there is no dispute about the fact that out of

two options, one of last 10 months average salary and last drawn salary, it is the latter which is more beneficial to the petitioner and, therefore, the last drawn salary of the petitioner would be required to be taken into account for calculating the pension payable to the petitioner in terms of rule 110.

11. The impugned communication, however, ignores the above referred provisions of law and fixes the pension amount of the petitioner at Rs.7,020/- which is not consistent with the formula prescribed in rule 110 of Rules of 1982. If we go by this formula and in our considered opinion, respondent Nos.1 and 2 are also bound by the same, the pension amount payable to the petitioner would come to Rs.8,365/-. We find that respondent Nos.1 and 2 have committed a serious error of law in determining the amount of pension payable to the petition by fixing the same at Rs.7,020/-, quite in violation of provisions of rule 110 read with rules 9(36) and 9(38) of Rules of 1982.

12. Of course, respondent Nos.1 and 2 have placed reliance upon the office circular dated 28th July, 2014. As per this circular, the salary that was payable to the petitioner ought to have been one which was applicable to the post of Civil Engineering Assistant and it could not

have been the one applicable to the post of Junior Engineer. According to respondent Nos.1 and 2 there was a mistake in fixing the salary of the petitioner at the scale applicable to the post of Junior Engineer. The mistake may have been committed by respondent Nos.1 and 2 in pay fixation of the petitioner but, the question is as to whether or not, it was rectified by the respondents either during the service tenure of the petitioner or immediately after the retirement of the petitioner. The answer, as we find from the reply filed on record and also the documents placed on record, is in the negative. There was no revision made in the pay-scale applicable to the petitioner when he was in service. In fact, the pay-scale of Junior Engineer was applied to the petitioner and granted to him way back in the year 2008 and it continued till his retirement on 31st January, 2015. Even after his retirement, there was no revision of pay-scale applicable to the petitioner made and no recovery was ordered from the petitioner. It was only at the time of fixation of pension amount that the mistake was realized and it was sought to be corrected not by notionally revising the pay-scale of the petitioner, not by ordering any recovery from the petitioner but only by reducing the pension amount payable to the petitioner and that too not in accordance with law in terms of provisions made in rule 110 of the Rules of 1982. In fact, this issue was already resolved by this Court when it disposed of the Writ

Petition No.240/2018 (Mukunda S/o Pundalik Pahurkar V/s. The Zilla Parishad, Nagpur, through the Chief Executive Officer and Ors.) by its order dated 27.8.2018, which was filed by the petitioner with the same grievance. At that time, this Court had found that there was an appeal filed by the petitioner which was pending decision of the authorities and, therefore, this Court thought it fit to direct the authority to decide the appeal within the time stipulated in the order, while keeping all rival contentions open. It appears that even after the issue was referred back to the appellate authority, it was not properly adjudicated upon by the authority and, therefore, the petitioner was once again required to knock at the doors of this Court, which he has done by filing this petition.

13. We have already found that the fresh order, which is impugned herein, passed by respondent Nos.1 and 2 is against law, for the reasons already recorded.

14. At this stage, learned counsel for the respondent Nos.1 and 2 invites our attention to the interim order passed by the Hon'ble Supreme Court on 1st February, 2018 in petition for special leave to appeal stating that an identical issue is pending before the Apex Court. On our request, learned counsel for respondent Nos.1 and 2 made

available to us the judgment dated 27th February, 2015 delivered in Writ Petition No.5371/2014 (Nizamuddin S/o Badruddin Sheikh V/s. The Zilla Parishad, Nagpur and others) by this Court, which is subject matter of challenge in the aforestated petition for special leave to appeal. We have gone through this judgment which is taken on record and marked "A" for identification. By this judgment, coordinate Bench of this Court has directed the Zilla Parishad to give to the petitioner therein pay-scale of Rs.5500-9000 w.e.f. 1.4.1985 and thereafter the Bench also directed the Zilla Parishad to fix the pay on the basis of the revised pay-scale. This is not the issue involved in this petition and, therefore, in our respectful submission, no assistance could be sought by respondent Nos.1 and 2 from the interim order passed in the aforestated petition for special leave to appeal.

15. In the result, we find that this petition deserves to be allowed and it is **partly allowed** accordingly. The impugned communication dated 16.4.2015 is hereby quashed and set aside. Respondent Nos.1 and 2 are directed to fix the amount of pension and pay it, together with arrears, payable to the petitioner in accordance with the provisions made in rule 110 of the Rules of 1982 by taking into consideration the last drawn pay at Rs.16,730/- as reflected in the last pay certificate (Annexure P1), within four weeks from the date of the

order.

16. The petition as regards prayer clause (A) stands **dismissed**.

17. Rule accordingly. No costs.

JUDGE **JUDGE**