

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,

NAGPUR BENCH, NAGPUR

WRIT PETITION NO.2413 OF 2017

Sheshrao @ Shekhar s/o.
Pusaramji Surjuse, Aged 64 years,
Occ. Retired, r/o. Flat No.102,
Gokul Apartments, 80, Nawab
Lane, Gokulpeth, Nagpur. PETITIONER

// VERSUS //

- 1.State of Maharashtra,
Through Principal Secretary,
Law and Judiciary Department.
Madam Kama Road, Hutatma
Rajguru Square, Mantralaya,
Mumbai-32.
- 2.State of Maharashtra,
Through Principal Secretary,
Food, Civil Supplies and
Consumer Protection Department,
Madam Kama Road, Hutatma
Rajguru Square, Mantralaya,
Mumbai-32.

3.State of Maharashtra,
Through Principal Secretary,
Finance Department,
Madam Kama Road, Hutatma
Rajguru Square, Mantralaya,
Mumbai-32.

4.(The Lokayukta,
State of Maharashtra)
(Deleted vide Court's order
dt.20.4.2017)

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RESPONDENTS

Mr.R.L.Khapre, Senior Advocate assisted by Mr.D.R.Khapre
and Mr.D.M.Surjuse, Counsel for the petitioner.
Mrs.Kalyani Deshpande, A.G.P. for Respondent nos.1 to 3.

Date of reserving the Judgment : 2nd February,
2021.

Date of pronouncement of the Judgment : 5th February,
2021.

CORAM : DIPANKAR DATTA, CJ. and
PUSHPA V. GANEDIWALA, J.

JUDGMENT (Per Dipankar Datta, CJ) :

1. The issue we are tasked to resolve is, whether the
petitioner is entitled to draw pension.

2. Resolving the aforesaid issue would require noticing the basic facts giving rise to this writ petition.

3. The petitioner, born on 12th October, 1952, joined the Maharashtra Judicial Service as a Civil Judge (Junior Division) on 3rd December, 1990. In his fifth year of judicial service, the petitioner was appointed as an Assistant Legal Advisor-cum-Under Secretary to the Government of Maharashtra, Law and Judiciary Department on 12th December, 1994. Having continued on such post for over seven and a half years, the petitioner had applied for and was selected for appointment as President of the Consumer Disputes Redressal Forum (hereafter "***the District Forum***"). Consequent to issuance of Government Resolution dated 13th May, 2002, by which the petitioner was appointed as President of the District Forum, he had by his letter dated 5th June, 2002 requested the Principal Secretary to the Government of Maharashtra, Law and Judiciary Department to relieve him from service retaining his lien on the post of Assistant Legal Advisor. By an order dated 31st July, 2002, the petitioner was relieved from the

post of Assistant Legal Advisor without anything being said in respect of retention/suspension/termination of lien. Consequent to such relieving order, the petitioner joined as President of the District Forum on 1st August, 2002. The Government Resolution dated 13th May, 2002, *inter alia*, stipulated that the petitioner shall be on probation for a year and upon confirmation, shall continue as such President for a further period of four years or until he attains the age of 65 years, whichever is earlier. The petitioner continued successfully as President of the District Forum for the first term, which ended on 31st July, 2007. This is evident from the fact that he was offered appointment for a second term, which he accepted without demur. The appointment order dated 2nd July, 2007 stipulated that the petitioner shall continue on the post of President of the District Forum for a period of five years or until he attains 65 years of age, whichever is earlier, and in furtherance thereof he discharged the duty of President of the District Forum till 31st October, 2012, i.e., the last day of the month in which he attained the age of 60 years. If indeed the petitioner had continued in Judicial Service, he

would have retired on 31st October, 2010, on attaining the age of superannuation of 58 years. A few months prior thereto, 21st June, 2010 to be precise, the petitioner addressed a letter to the Principal Secretary to the Government of Maharashtra, Law and Judiciary Department. While informing that he was due to retire on 31st October, 2010, the petitioner requested for release of retiral benefits in his favour. However, at no point of time prior to 31st October, 2010 did the petitioner express his intention to revert to the Law and Judiciary Department.

4. Keeping in view the aforesaid factual narrative vis-a-vis the law applicable thereto, meaning thereby the Maharashtra Civil Services (General Conditions of Services) Rules, 1981 (hereafter "**the GCS Rules**", for short) read with the Maharashtra Civil Services (Pension) Rules, 1982 (hereafter "**the Pension Rules**", for short), we need to decide the entitlement of the petitioner, if any, to pension. In the process, we would also be guided by the decisions of the Supreme Court cited by the parties which we consider are relevant for such purpose.

5. Before considering the rival contentions, we deem it proper to place on record that previously orders have been passed on this writ petition by co-ordinate Benches expressing anguish as to why the petitioner despite putting in twelve years of service in the Law and Judiciary Department of the Government of Maharashtra is not entitled to pension, when even a temporary employee, having put in ten years of service, is entitled to pension. We have found that based on such orders, the Law and Judiciary Department relented and proposed to the Finance Department of the Government of Maharashtra to extend benefits of pension to the petitioner but the Finance Department stood its ground and declined to extend such benefits for the reason that the petitioner has not put in qualifying service of 20 years; hence, he is not entitled to pension in terms of the Pension Rules.

6. At the outset, we had indicated to Mr. Khapre, learned Senior Advocate for the petitioner that it is not for the Court to re-write the law and that the petitioner's claim for pension would be examined by us without being

influenced by any of the observations contained in the previous orders. We, thus, allowed Mr. Khapre to advance arguments on the merits of the petitioner's claim afresh.

7. Appearing in support of the writ petition, Mr. Khapre submitted that the petitioner had put in nearly twelve years of service, initially as a Civil Judge (Junior Division) and thereafter, as an Assistant Legal Advisor and to such period of service, he was entitled to addition of 8 years in terms of Rule 53 of the Pension Rules (having joined judicial service at the age of 38 years).

8. The fallacy in the argument was immediately pointed out to Mr. Khapre by referring to clause (a) of Rule 53 of the Pension Rules. The petitioner having initially joined as Civil Judge (Junior Division) as a direct recruit from the Bar, he was entitled to addition of a maximum period of five years which the Finance Department was willing to add to twelve years of service under the Law and Judiciary Department. Sensing that we were against him on such

point, Mr. Khapre rightly did not press it and proceeded to advance other arguments before us for our consideration.

9. Drawing our attention to the petitioner's letter dated 5th June, 2002, it was contended by Mr. Khapre that the petitioner had sought for being relieved from the post of Assistant Legal Advisor upon retaining his lien on such post and since the relieving order dated 31st July, 2002, issued in reference to the petitioner's letter dated 5th June, 2002, did not refuse retention of lien, it must be assumed that the petitioner was relieved by allowing him to retain his lien on the post of Assistant Legal Advisor. Mr. Khapre continued to submit that at no point of time prior to 31st October, 2010, there was a termination of lien and the petitioner must be considered to have been in service of the Government till such date, thereby achieving the period of "qualifying service" for drawing pension under the Pension Rules. It was further contended that the petitioner, by his letter dated 21st June, 2010, i.e., more than four months prior to his date of retirement on superannuation (31st October, 2010), sought for pensionary benefits from the Principal

Secretary, which was arbitrarily denied. Our attention was drawn by Mr. Khapre to the decisions of the Supreme Court reported in AIR 1976 SC 367 (T. R. Sharma vs. Prithvi Singh and another) and (2002) 9 SCC 724 (State Bank of India vs. E.K.Andrew and another) and the decision of this Court reported in 2002(2) Bom.C.R. 740 (Parshuram Vithoba Bhandare vs. State of Maharashtra and another), for the proposition that there being no termination of lien, the petitioner cannot be deprived of pension by reason of technicalities to which the Finance Department has taken recourse. It was finally contended that if indeed the Finance Department were disinclined to grant pension to the petitioner, he could have been duly informed prior to his retirement on superannuation on 31st October, 2010 so that he could have made a choice of either reverting to the Law and Judiciary Department or to continue as President of the District Forum. Omission to give such a choice was argued as arbitrary and violative of Article 14 of the Constitution. Based on the above arguments, Mr. Khapre prayed that the respondent no.1 be directed to settle the pension papers of

the petitioner and to start release of pension in his favour as early as possible.

10. Opposing the writ petition, Mrs. K.R. Deshpande, learned Additional Government Pleader referred to the affidavit filed on behalf of the Finance Department as well as the order passed by the Lokayukta on a complaint lodged by the petitioner. According to her, the petitioner had put in twelve years of actual service on a substantive post under the Government of Maharashtra. In view of Rule 53 of the Pension Rules, five years were added to the twelve years of actual service rendered by the petitioner, which fell short of qualifying service by three years. Despite the Lokayukta having opined in the order that legally the petitioner was not entitled to pension and the Finance Department ought to view his case sympathetically, every avenue was explored but, unfortunately, the terms of the GCS Rules as well as the Pension Rules did not permit the Finance Department to act in derogation of the same and to make special provisions for pension for the petitioner to avail of.

11. Our attention was drawn by Mrs. Deshpande to the decision of the Supreme Court reported in (1996) 10 SCC 734 (Dr. S.K. Kacker vs. All India Institute of Medical Sciences and Others) in support of the proposition that, consequent upon the appointment as President of the District Forum, the petitioner's lien on the post of Assistant Legal Advisor stood terminated and that he had no right to revert even before the date of his retirement on superannuation (31st October, 2010). She, however, hastened to add that the Supreme Court in Dr. S.K. Kacker (supra) was considering a case which was covered by the Fundamental Rules, which is *pari materia* with the GCS Rules framed by the State of Maharashtra under Article 309 of the Constitution of India.

12. Referring to Rule 30 of the Pension Rules, Mrs. Deshpande has contended that as on 31st October, 2010, the petitioner was neither holding a substantive post under the Government of Maharashtra nor was his lien on the post of Assistant Legal Advisor retained/suspended; on the

contrary, the petitioner was holding a permanent post under the Consumer Affairs Department and, therefore, entitled to pay and allowances as provided by Rule 3 of the Maharashtra Consumer Protection Rules, 2000 and hence, he is precluded in law from claiming that he is entitled to draw pension in terms of the Pension Rules.

13. Mrs. Deshpande concluded her submission by submitting that interference on this writ petition ought to be declined.

14. We have heard learned Advocates for the parties, perused the pleadings and considered the decisions cited at the bar with meticulous care. Co-ordinate Benches of this Court having previously expressed opinion, albeit *prima facie*, that there was no sound reason to deprive the petitioner of pension, we have taken additional care to render our decision on the issue noted at the beginning of this judgment.

15. A Government servant, in terms of Rule 66 of the Pension Rules, at any time after completing twenty years of qualifying service may retire from service subject to the provisions in the other sub-rules. It has not been disputed at the Bar that without putting in qualifying service of twenty years, a retiring Government servant cannot ordinarily claim pension. Admittedly, the petitioner falls short of qualifying service by three years. Rule 54 of the Pension Rules, though provides for condonation of deficiency or addition in service, even such provision would not clothe the Government with the power to make up for the deficiency either by condonation or by addition. Viewed from this perspective, we unhesitatingly hold that the petitioner has not put in qualifying service for pension and is also not entitled to pension even if any of the clauses of Rule 54 were pressed into service.

16. This takes us to the point of lien argued by Mr. Khapre. In service jurisprudence, "lien" means the right of a public servant to hold the post substantively on which he has been appointed. It admits of no doubt that the existence of lien

and incidents thereof are governed by the Service Rules applicable to a Government servant. Acquisition, retention, suspension and cessation are different aspects of lien.

17. In terms of the GCS Rules, once appointed on a substantive post, an incumbent acquires a lien. He continues to retain the lien until such lien is either suspended on the occurrence of any of the contingencies in the Rules or such lien is terminated as provided therein. The concept of suspension is based on the fundamental principle that a Government servant cannot hold more than one substantive post at the same time. Ordinarily, a Government servant's lien on a post cannot be terminated if such termination would result in leaving him without a lien or a suspended lien on a permanent post; however, such lien will stand terminated on acquisition of a lien on a permanent post outside the cadre on which the Government servant is borne.

18. Apart from the above, we have not been shown any other provision dealing with lien. There is also no concept of

a deemed suspension of lien. If indeed a Government servant holding a substantive post is inclined to accept an offer of appointment on a post beyond his cadre, yet, wishes to have his lien on his substantive post suspended, there ought to be a written order in this regard. We are not impressed by the argument of Mr. Khapre that the relieving order dated 31st July, 2002 having been issued referring to the letter of the petitioner dated 5th June, 2002, suspension of lien must be assumed. We had enquired of Mrs. Deshpande as to whether appointment on the post of Assistant Legal Advisor had been made after the petitioner joined as President of the District Forum. She submitted that an advertisement was published in 2004 but no suitable candidate could be found, but ultimately appointment was made in 2008. Assuming that there has been a substantive appointment on the post of Assistant Legal Advisor prior to the petitioner's retirement date (31st October, 2010), it is inconceivable that two incumbents would hold lien in respect of the same post.

19. In Dr. S.K. Kacker (*supra*), the appellant was working as Professor and Head of the ENT Department in the respondent-AIIMS. Pursuant to an advertisement for appointment to the post of Director of the AIIMS on regular basis, the appellant had applied for and was selected by the Committee for appointment as a Director. He came to be appointed by the Institute Body with the concurrence of the Government of India. He assumed the office on 11th October, 1990 for a period of five years. His tenure came to an end on 15th October, 1995. The question that emerged for consideration before the Supreme Court was, whether on expiry of five years' tenure as Director, the appellant could revert to his parent post, i.e., Professor and Head of the ENT Department. The Court, upon consideration of clause (d) of FR 14-A, held that on appointment to a permanent post, be it under the Central Government or the State Government, outside the cadre on which the Government servant is borne, his lien on the previous permanent post stands terminated on his acquiring a lien in a permanent post. The post of Director being the head of AIIMS and independent of all the departments, the Director

is enjoined to supervise not only the administrative work of AIIMS but also its management for and on behalf of the Institute Body. Therefore, on his substantive appointment to the permanent post as a Director, the appellant lost his lien on the post of Professor and Head of the ENT Department. Resultantly, when the tenure of the appellant had expired by efflux of time or in case any of the eventualities mentioned in Regulation 30-A had happened, he could not revert to the post of Professor and Head of the Department.

20. The facts of the present case are not too dissimilar. The difference is in respect of the applicable Rules and the posts on which the petitioner had the occasion to work. We note that FR 14-A(d) of the Fundamental Rules is *pari materia* with Rule 25(2) of the GCS Rules. Rule 23 of the GCS Rules provides for suspension of a lien. For facility of appreciation, Rule 23 is quoted below:

“23.Suspension of a lien. - (1) A competent authority shall suspend the lien of a Government servant on a permanent post which he holds substantively if he is appointed in a substantive capacity -

(a) to a tenure post, or
(b) provisionally, to a post on which another Government servant would hold lien had his lien not been suspended under this sub-rule.

(2) A competent authority may, at its option, suspend the lien of a Government servant on a permanent post which he holds substantively if he is deputed out of India or transferred to foreign service or in circumstances not covered by sub-rule (1) of this rule is transferred, whether in a substantive or in an officiating capacity, to a post in another cadre, and if in any of these cases there is reason to believe that he will remain absent from the post on which he holds a lien for a period of not less than three years.

Note- When it is known that a Government servant on transfer to a post outside his cadre is due to retire on superannuation within three years of his transfer, his lien on his cadre post cannot be suspended.

(3) Notwithstanding anything contained in sub-rule (1) or (2) of this rule, a Government servant's lien on a tenure post may in no circumstances be suspended. If he is appointed substantively to another permanent post, his lien on the tenure post must be terminated.

(4) If a Government servant's lien on the post is suspended under sub-rule (1) or (2) of this rule, the

post may be filled substantively and the Government servant appointed to hold it substantively shall acquire a lien on it, provided that the arrangements shall be reserved as soon as the suspended lien revives.

Note 1. - This sub-rule also applies if the post concerned is a post in a selection grade of a cadre.

Note 2.-When a post is filled substantively under this sub-rule, the appointment will be termed a provisional appointment, the Government servant appointed will hold a provisional lien on the post, and that lien will be liable to suspension under sub-rule (1), but not under sub-rule (2) of this rule.

(5) A Government servant's lien which has been suspended under sub-rule (1) of this rule shall revive as soon as he ceases to hold alien on a post of the nature specified in sub-rule (1)(b).

(6) A Government servant's lien which has been suspended under sub-rule (2) of this rule shall revive as soon as he ceases to be on deputation out of India or on foreign service or to hold a post in another cadre, provided that a suspended lien shall not revise because the Government servant takes leave if there is reason to believe that he will, on return from leave, continue to be on deputation out of India or on foreign

service or to hold a post in another cadre and the total period of absence on duty will not fall short of three years or that he will hold substantively a post of the nature specified in clause (a) or (b), of sub-rule (1).

Instruction.- Under the existing provisions of this rule, it is possible for more than one person to be appointed in a provisional substantive capacity against a single post. The operation of this rule should, however, be restricted so as to permit only one provisional substantive appointment against one post. Accordingly, the lien acquired by a Government servant on his appointment in a provisionally substantive capacity under sub-rule (4) of this rule, should not be suspended if he is deputed out of India or is transferred to a post of the nature specified in sub-rule (2) of this rule. “

[emphasis supplied]

21. The substantive appointment of the petitioner as President of the District Forum for five years is covered by sub-rule (3) of Rule 23 and, therefore, there could be no question of the competent authority suspending the petitioner's lien on the post of Assistant Legal Advisor. The circumstance that the post of President of the District Forum is a tenure post does not make much of a difference.

After all, it is another permanent post beyond the cadre in which the petitioner was borne and on which the petitioner was appointed substantively with little or no likelihood of he reverting to his permanent post of Assistant Legal Advisor anytime before expiry of the term of five years. The lien of the petitioner on the post of Assistant Legal Advisor not having been suspended and on the contrary, there being a termination of lien by operation of sub-rule (2) of Rule 25 of the GCS Rules, coupled with non-fulfilment of the requirement of the first proviso to Rule 30 of the Pension Rules, leads us to the irresistible conclusion that the petitioner is not entitled to pension in terms of the Pension Rules.

22. We may, in this context, also refer to the decision of the Supreme Court reported in (1989) 4 SCC 99 [Ramlal Khurana (Dead) by LRS. vs. State of Punjab and Others]. Paragraph 8 of the said decision is relevant and accordingly, is quoted below :

“8.The other contention urged for the appellant that he was not confirmed in the Excise Department and unless confirmed, he acquired no lien cannot also be accepted. Lien is not a word of art. It just connotes the right of a civil servant to hold the post substantively to which he is appointed. Generally when a person with a lien against a post is appointed substantively to another post, he acquires a lien against the latter post. Then the lien against his previous post automatically disappears. The principle being that no government servant can have simultaneously two liens against two posts in two different cadres. It is a well accepted principle of service jurisprudence.”

[emphasis supplied]

23. In this regard, the conduct of the petitioner cannot also be overlooked. It has not been disputed at the Bar that, as an Assistant Legal Advisor, he was receiving lessor pay than the pay received by him consequent upon his appointment as President of the District Forum. We cannot despise the petitioner pursuing a better career option but the corresponding loss of benefits of pension, if he were to continue as President of the District Forum till attaining 60 years of age, ought to have been comprehended by him.

With his eyes open, the petitioner accepted the post of President of the District Forum for two consecutive terms with the result that he could serve for two additional years, which might not have been possible had he continued to serve the judiciary. In view of the benefits that the petitioner received as President of the District Forum, he cannot now claim benefits of pension, which he would have otherwise been entitled to, if he were part of the Judicial Service.

24. The decisions relied on by Mr. Khapre have been perused. Law was declared having regard to the facts obtaining in the cases before the Courts. Because of the factual dissimilarities with the case at hand, we are unable to apply the ratio of such decisions here.

25. In the case of T.R.Sharma (*supra*), the Court held that since the Governor had de-confirmed the appellant from the post of Block Development and Panchayat Officer, the suspended lien of the appellant on the post of Agricultural Inspector would stand revived w.e.f. February 26, 1969.

There is no order of de-confirmation in the present case and therefore, the decision is distinguishable.

26. E.K.Andrew and another (supra) was a case relating to termination of service of a permanent employee pursuant to proceedings initiated by the Reserve Bank of India on the basis of certain charges. We have failed to comprehend the materiality of the said decision to the facts at hand. It is not the case of any party that the petitioner had been removed from service on disciplinary grounds.

27. The decision in the case of Parshuram Vithoba Bhandare (supra) also does not advance the case of the petitioner. There, the petitioner was working on daily wages for years together and thereafter, promoted as a Supervisor on daily wages, though declared as permanent. It was held that the case of petitioner was wrongly dealt with under Rule 57 of the Pension Rules, dealing with exceptions to Rule 30 thereof, and also that the petitioner's case was liable to be dealt with under Rule 30. That is not the case here.

28. For the reasons assigned above, we cannot persuade ourselves to agree with Mr. Khapre that the petitioner is entitled to pension under the Pension Rules. The writ petition is dismissed, without costs.

29. If the petitioner is entitled to any other benefit which remains unpaid, he shall be at liberty to claim it in accordance with law. Upon such a claim being received, the competent authority shall proceed to deal with and decide the same, also in accordance with law.

JUDGE

CHIEF JUSTICE

[ssjaiswal]

