

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

WRIT PETITION NO. 1138 OF 2020

- 1) The Deputy Director of Health
Services, Akola Circle, Akola,
Tq. and District Akola.
- 2) The District Malaria Officer,
District Malaria Office, Amravati,
Tq. and District Amravati.
- 3) The Office Superintendent,
District Malaria Office, Amravati,
Tq. and District Amravati.

.... **PETITIONERS**

VERSUS

Ek Nath Sitaramji Gawande,
Aged 50 years, Occupation – Service,
R/o Kamal Colony, Amravati,
Tq. and District Amravati.

.... **RESPONDENT**

Mr. S.M. Ukey, Addl.G.P for the petitioners,
Mr. N.R. Saboo, Counsel for the respondent.

CORAM : ROHIT B. DEO, J.

DATED : 9th FEBRUARY, 2022

ORAL JUDGMENT :

Petitioners, who are representing the Government of Maharashtra, are assailing the judgment dated 12-2-2018 rendered by the Industrial Court, Amravati in Complaint (ULP) 76/2014 whereby,

allowing the complaint the Industrial Court declared that the petitioners have engaged in unfair labour practice under Item 9 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (Act) and directed the petitioners to fix the pay scale of the complainant-respondent herein in accordance with the directions issued in paragraphs 3 and 4 of the operative part of the judgment, which read thus :

“3. The respondents are directed to make proper pay fixation of this complainant by taking into account his date of appointment as 31-3-1986 and pay scale of Rs.950/- and pay scale revised from time to time as per 5th Pay and 6th Pay Commission and adding the yearly increments on it and to pay up to date salary.

4. The respondents are further directed to extend the benefits of time bound promotion and the benefits of “आश्वासीत प्रगती योजना” with all consequential benefits.”

2. The controversy lies in an extremely narrow compass and turns on the applicability of the Maharashtra Civil Services (Pay) Rules, 1981 (Pay Rules). While the Industrial Court has held that the relevant Rule is Rule 39, the petitioners would argue that it is Rule 44, which is applicable.

3. Facts are brief, and are broadly admitted or are irrefutable.

4. The complainant was appointed in the year 1986 at Maregaon,

District-Yavatmal and was terminated on 01-9-1987. The termination was assailed in Complaint (ULP) 573/1994 and the Labour Court, Yavatmal allowed the complaint vide judgment dated 13-10-1997 holding the complainant entitled to reinstatement, with continuity in service and back-wages. The complainant was reinstated on 23-6-1998. The petitioners challenged the judgment of the Labour Court in revision, which the Industrial Court dismissed.

5. It is the case of the complainant that although he was reinstated, he was not paid back-wages. The complainant instituted recovery proceedings vide Case 9/2007 which the Labour Court, Yavatmal decided vide judgment dated 14-11-2011 and the petitioners herein were directed to pay the back-wages with interest.

6. The contention of the complainant before the Industrial Court was that though in continuous service, he was denied the benefits of annual increments. The complainant contended that only three increments for the service tenure 01-9-1987 to 24-6-1998 were granted, while he was entitled for increments with effect from 31-3-1987. The complainant pointed out to the Industrial Court that petitioner-Deputy Director of Health Services directed petitioner 2-District Malaria Officer to fix the pay of the complainant in accordance with Rule 39 of the Pay

Rules, and disobeying the said direction, the District Malaria Officer fixed the pay wrongly. The complainant further contended that he was not granted the benefit of the 5th Pay Commission nor was he granted the benefit of the Time Bound Promotion or Assured Progressive Scheme.

7. The petitioners responded with the case that the complainant was appointed as a daily wager. The substratum of the case of the petitioners is discernible from paragraph 5 of the written statement, which reads thus :

“5. The service conditions of regular employees with the Government are registered as per M.C.S.R. That as per rule 39 of M.C.S.(Pay) Rules, 1981 prescribes service which counts for increments. Then as per rule 44 of the above rules, then it extends to which passed non continuous officiating or temporary service counts for increments. It is alleged that the complainant is terminated from 01-9-1987 and he has been reinstated on 23-6-1998, a period of 10 years, 9 months and 26 days. As per the said rules a period of 10 years an employees entitled to three increments so accordingly the benefits have been extended to the complainant. The increments cannot be extended to an employee automatically, he has to be in actually in employment and present on work for getting increments. Time scale increments and its dates to be decided according to the actual working when the employee was on work has to be noted. As per rule 44, if a person who has not permanently appointed to a post then his time scale working or past non continuous officiating service on temporary post cannot be computed directly but a period which such an employee has actually worked and there is a gap in his services then there is a limitation to extend increments so taking into consideration the ten years period, three increments have been extended to the complainant.

The temporary service in toto cannot be taken into consideration for increments. That the content of the complainant that he has not been extended the entitled increments is denied. The contention of the extension of 12 increments by the complainant, the same is not entitled by the complainant hence denied. Hence, the said extension of increments is not illegal or bad in law.”

8. Perusal of the written statement reveals that the petitioners failed to appreciate that the complainant was reinstated with continuity in service and, therefore, the complainant was deemed to be in employment from the date of the appointment notwithstanding the break in service due to the illegal termination and obviously notwithstanding the fact that the complainant did not actually discharge duties.

9. Rules 39 and 44 of the Pay Rules read thus :

“39. Service which counts for increment

The following provisions prescribe the conditions on which service counts for increments in a time-scale :-

(1) Subject to the provisions of rules 11, 14, 20 and 44, all duty in a post on a time-scale counts for increments in that time-scale.

For the purpose of arriving at the date of next increment in that time-scale, the total of all such periods as do not count for increment in that time-scale shall be added to the normal date of increment :

Provided that the increment shall be admissible from the 1st of the month in which it accrues,

Note – The above proviso shall not apply to the persons on probation.

Exception 1.- (a) The increment(s) of a Government

servant appointed directly to a post on probation during the period of probation should be regulated as follows :-

- (i) The first increment should be released on completion of one year of his probationary period and the subsequent increment should be released on his completing the probationary period satisfactorily.*
- (ii) A probationer whose probationary period is extended on account of failure to pass a departmental examination within the prescribed time limit or on account of leave taken by him during the probationary period, should be allowed to draw, on his appointment to that post on long term basis after completion of the probationary period satisfactorily, such pay as he would have drawn had he not been on probation and consequential arrears.*
- (iii) A probationer whose probationary period is extended on account of unsatisfactory performance, should be allowed to draw second increment only with effect from the date of satisfactory completion of the probationary period and shall not be eligible for arrears.*
- (b) The expression "A Government servant appointed directly to a post" appearing in sub-clause (a) above, includes -*
 - (i) a Government servant who, while holding substantively, a permanent post in the cadre, is appointed by selection in open competition to another post on probation; and*
 - (ii) a Government servant who is so appointed but is granted higher starting pay in the time-scale attached to the post.*

Exception 2-In the case of eight monthly peons employed in the Land Records Department, the period during which the establishment is not employed shall be treated as duty counting for increments in the time-scale of pay sanctioned for such establishment only if the peon is actually on duty immediately prior to and immediately subsequent to such period, viz -

- (i) on the date on which the establishment is discharged and*
- (ii) on the date on which it is re-employed.*

(2)(a) Service in another post other than a post carrying less pay referred to in sub-rule (1) of rule 27 of the Maharashtra Civil Services (General Conditions of Services) Rules, 1981, whether in a substantive or officiating capacity, service on deputation in or out of India whether for training or otherwise and leave except extraordinary leave taken otherwise than on medical

certificate, count for increments in the time-scale applicable to the post on which the Government servant holds a lien as well as in the time-scale applicable to the post or posts, if any, on which he would hold a lien had his lien not been suspended.

(b)

Subject to the restriction mentioned herein, the following periods shall count for increment in the time-scale applicable to a post in which a Government servant was officiating :-

- (i) all leave, except extraordinary leave;*
- (ii) extraordinary leave on medical grounds;*
- (iii) deputation within or outside India, or temporary transfer to another department;*
- (iv) period spent on training.*

The period to be counted is restricted to that during which he would have continued to officiate in that or in a higher post in the parent Department but for such interruption.

Provided that Government may, in any case in which they are satisfied that the extraordinary leave was taken for any cause beyond the Government servant's control or for prosecuting higher scientific and/or technical studies, direct that the extraordinary leave shall be counted for increments under clause (a) or (b).

Note 1.- In the case of a Government servant who, while officiating in a post proceeds to attend a course of training or instructions and who is treated as on duty while undergoing such course, the period of such duty will count for increment in the post in which he was officiating prior to his being sent for training or instructions, if he is allowed the pay of the officiating post during such period.

Note 2- The period of leave allowed to count for increment should be restricted to the period during which the Government servant would have officiated in the post if he had not proceeded on leave. For this purpose, the authority competent to make appointment to the post should furnish the following certificate while preferring the claim for increment :-

Certified that Shri/Smt./Kum. ----- would have continued to officiate in the post of -----if he/she had not proceeded on leave for the period from ----- to -----

Instruction 1 – Note 2 does not apply to staff paid from contingencies and work charged staff.

Instruction 2 – A certificate referred to in Note 2 above will not be necessary in respect of probationers.

Instruction 3 – In the case of a Government servant proceeding on leave, where no officiating arrangement is made in the leave vacancy and the Government servant concerned returns to the same post after the expiry of leave, the above certificate may be issued by the authority sanctioning the leave.

Instruction 4 – For the purpose of the above certificate the Heads of Departments should be considered as competent authority in respect of Class II Officers under their control irrespective of whether the vacancy is filled or not.

Exception – In the case of an Assistant or District Judge proceeding on leave where officiating arrangement is made in a leave vacancy; the Registrar, High Court of Judicature of Bombay, may issue such certificate provided that, at least one officer junior to the officer so proceeding on leave, should be officiating as an Assistant or District Judge, as the case may be, during such leave period in respect of which the certificate is granted.

(3) If a Government servant, while officiating in a post or holding a temporary post on a time-scale of pay, is appointed to officiate in a higher post or to hold a higher temporary post, his officiating or temporary service in the higher post shall, if he is re-appointed to the lower post or is appointed or re-appointed to a post on the same time-scale of pay, count for increments in the time-scale applicable to such lower post. The period of officiating service in the higher post which counts for increments in the lower post is, however, restricted to the period during which the Government servant would have officiated in the lower post but for his appointment to the higher post.

This sub-rule, applies also to a Government servant, who is not actually officiating in the lower post at the time of his appointment to the higher post, but who would have so officiated in such lower post or in a post on the same time-scale of pay had he not, been appointed to the higher post.

Note – The intention of this sub-rule is to allow the concession, irrespective of whether the higher post is within or outside the Department to which the Government servant belongs.

(4) *If a Government servant on reversion from an ex-cadre post to the parent cadre is a appointe post on a scale lower than that of the ex-cadre post but not on the same time-scale as the post held at the time of his transfer to the ex-cadre post, the service rendered on the higher scale in the ex-cadre post shall count for increments in the time scale applicable to the cadre post.*

(5) *Foreign service counts for increments in the time-scale applicable to -*

- (a) *the post in Government service on which the Government servant concerned holds a lien as well as the post or posts, if any, on which he would hold a lien had his lien not been suspended, and*
- (b) *any post in which he is officiating when transferred to foreign service for so long as he would have continued to officiate in that post or a post in the same time-scale but for his going on foreign service or to which he may be so promoted subsequently under rule 62 of the Maharashtra Civil Services (Joining time, Foreign Service and Payments during Suspension ; dismissal and Removal) Rules, 1981 for duration of such officiating promotion while on foreign service,*
- (c) *any post in the parent cadre on a lower scale of pay to which the Government servant is appointed on reversion from the ex-cadre post.*

(6) *Joining time counts for increment -*

- (i) *if it is under sub-rule (1) of rule 10 of the Maharashtra Civil Services (Joining Time, Foreign Service and Payments during Suspension, Dismissal and Removal) Rules, 1981 in the time-scale applicable to the post on which a Government servant holds a lien or would hold a lien had his lien not been suspended as well as in the time-scale applicable to the post, the pay of which is drawn by a Government servant during the period ; and*
- (ii) *if it is under sub-rule (2) of rule 10 referred to in (i) above in the time-scale applicable to the post/posts held on the last day of leave before commencement of the joining time.*

44. Extent to which past non-continuous officiating or

temporary service counts for increments.

If a person holding no substantive appointment under Government is appointed to officiate in a permanent post or to hold a temporary post on a time-scale of pay, he shall not be allowed to count for purposes of increment in the time-scale, past non-continuous officiating service in such permanent post or non-continuous service in such temporary post except to the extent indicated below :-

<i>Period of past continuous service</i>	<i>Number of increments which should be allowed in the time-scale of the post to which he is appointed.</i>
<i>Less than 5 years</i>	<i>: Nil.</i>
<i>5 years and more but less than 7 ½ years.</i>	<i>: 1 increments</i>
<i>7 ½ years and more but less than 10 years.</i>	<i>: 2 increments</i>
<i>10 years and more</i>	<i>: 3 increments.</i>

Note 1.- Service shall be deemed non-continuous only if it is interrupted by actual loss of employment.

Note 2.- The principle enunciated in sub-rule (3) of rule 39 should apply when such a person is appointed to officiate in a higher post, permanent or temporary.

Exception. - For selected posts or cadres notified with the approval of Government as posts where the special skill of a recruit is of importance, half the past non-continuous service should be allowed to be counted towards increments subject to the conditions mentioned below :-

(a) the grant of increment should not be allowed unless the employee is actually on duty on the date on which the establishment is discharged and on the date on which it is restarted ;

(b) the grant of increment should not be automatic. Its grant should be at the discretion of the appointing authority, which should award such number of increments not exceeding the prescribed limits as may be justified, having regard to the recruit's efficiency in work;

(c) where the interval between the discharge of an employee and his re-appointment exceeds three years he will not be entitled to count his previous service for purposes of increment.

The following list contains the posts notified by Government as eligible for the concession of this Exception :-

<i>Name of the Administrative Department</i>	<i>Designation of the post to which the above rules are applicable</i>	<i>Remarks</i>
<i>Urban Department and Public Health Dept.</i>	<i>Malarial Havildar and Mazdoors.</i>	<i>Employed for 4 ½ to 6 months year.</i>
<i>Public Works Department and Irrigation Department.</i>	<i>(i) Steam Road Roller Drivers (ii) Diesel or Oil Road Roller Drivers. (iii) Boring Mechanics. (iv) Fitters. (v) Engine Drivers.</i>	
<i>Agriculture and Co-operation Department</i>	<i>(i) Tractor Drivers. (ii) Bulldozer Operators.</i>	<i>Sanction in the Mechanical Cultivation Section for seven months in a year during the ploughing season (November to June). ”</i>

10. The Industrial Court has held that it is Rule 39 of the Pay Rules which is applicable. This finding is unexceptionable. As noted supra, the Deputy Director of Health Services rightly directed his subordinate officer to take recourse to Rule 39 of the Pay Rules, and for reasons inexplicable the subordinate officer ignored the instructions and fixed the pay scale of the complainant in accordance with Rule 44 of the Pay Rules, and in the process failed to appreciate the implication of the judgment which conferred the benefit of continuity of service.

11. I see no reason to interfere in writ jurisdiction. The petition is dismissed with no order as to costs.