

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.5207 OF 2021

Ramkisan s/o Rohidasrao Yadav
Age :60 years, Occu: Retired Govt.
Servant R/o. Nutan Vasahat,
Ambad, Tq. Ambad, Dist. Jalna

... **PETITIONER**

VERSUS

1. The State of Maharashtra
through its Chief Secretary,
Maharashtra State, Mantralaya
Mumbai – 32.
2. The Secretary (E.G.S.)
Maharashtra State,
Mantralaya, Mumbai-32.
3. The Secretary,
General Administration Department,
Maharashtra State, Mantralaya,
Mumbai-32.
4. The Secretary,
Department of Planning,
Maharashtra State, Mantralaya,
Mumbai-32.
5. The Divisional Commissioner,
Aurangabad Division, Aurangabad.
6. The Collector,
Collectorate, Jalna,
Dist. Jalna.
7. The Sub-Divisional Officer,
Public Works Department,
Sub-Division, Ambad,
Tq. Ambad, Dist. Jalna.
8. The Zilla Parishad, Jalna,
Through its Chief Executive Officer.
9. The Block Development Officer
Grade-1, Panchayat Samiti,
Ghansavangi, Tq. Ghansavangi,
Dist. Jalna.

... **RESPONDENTS**

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Advocate for Petitioner : Mr. V.P. Golewar
Addl. G.P. for respondent Nos.1 to 7 : Mrs. M.A. Deshpande
Advocate for respondent Nos.8 and 9: Mr. S.M. Ganachari

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**CORAM : MANGESH S. PATIL AND
SHAILESH P BRAHME, JJ.**

DATE : 24.07.2023

JUDGMENT (MANGESH S. PATIL, J.) :

Heard. Rule. Rule is made returnable forthwith. Learned AGP waives service for respondent Nos.1 to 7, learned advocate Mr. Ganachari waives service for respondent Nos.8 and 9. At the joint request of the parties, the matter is being heard finally at the stage of admission.

2. By invoking the powers of this Court under Article 226 of the Constitution of India, the petitioner is seeking direction to extend the pensionary benefits by virtue of Government Resolutions dated 01.12.1995, 21.04.1999 and Government order dated 25.06.2004.

3. The petitioner was appointed as a mustering assistant with the respondent No.7 on 30.05.1986. By Resolution dated 01.12.1995 the Government of Maharashtra framed the scheme for absorption of mustering assistant in regular Government/Zilla Parishad services in respect of persons who were in service as mustering assistant as on 31.05.1993. By another decision dated 25.06.2004 the State Government also decided to create supernumerary posts for absorption of such mustering assistants who were eligible for absorption pursuant to the Government Resolution dated 01.12.1995. It was also laid down that these mustering assistants would be deemed to have been absorbed and the provision of the Maharashtra Civil Services Pension Rules would be applicable with effect from 25.06.2004.

4. It appears that the petitioner was subsequently absorbed in the

respondent Nos.8 and 9 – Zilla Parishad as Civil Engineering Assistant with effect from 03.03.2006 and stood superannuated on 31.01.2018. In this backdrop the petitioner is coming with following prayers :

- “A. The Hon'ble High Court may be pleased to issue order, writ or directions in the nature writ of mandamus, directing the respondents to complete the formalities of pension papers and forward the same to the competent authorities for sanction of payment of pension and pensionary benefits to the petitioner within stipulated time and further be pleased to pass necessary orders for the said purpose.*
- B. The Hon'ble High Court may be pleased to direct the respondents to decide the representation dated 16.08.2018 in view of the provisions of Government Resolution dated 01.12.1995 and 25.06.2004 and grant pension and pensionary benefits to the petitioner.*
- C. The Hon'ble High Court may be pleased to issue order, writ or direction in the nature writ of mandamus, holding that the petitioner is eligible and entitled for the pension and pensionary benefits and accordingly issue necessary directions to the respondents for payment of pension and pensionary benefits to the petitioner.”*

5. The learned advocate for the petitioner would submit that the issue of mustering assistants' absorption and their entitlement to receive pension has been a matter of consideration of this Court in several matters. Though different aspects were under consideration before several benches, the petition can be decided in the light of the observations of this Court in the matter of **Writ Petition No.2589/2022; Sheshrao Patloba Waybase Vs. State of Maharashtra and connected matters** decided on 13.08.2015 which order was challenged by some of the petitioners in **Civil Appeal No.6531 - 6533 of 2022 Shaikh Miyan s/o Shaikh Chand etc. ect. Vs. State of Maharashtra and connected appeals** decided on 07.09.2022 by the Supreme

Court.

6. The learned AGP referring to the affidavit-in-reply would submit that the petitioner since absorption has been serving with the respondent Nos.8 and 9 and the issue can be addressed by them.

7. Learned advocate Mr. Ganachari for respondent Nos.8 and 9 would refer to the affidavit-in-reply and submit that the petitioner was absorbed as Civil Engineering Assistant on a vacant post at Panchayat Samiti Ghansavangi by the order dated 09.01.2006. During employment he was suspended by the order dated 10.09.2014 subsequently by another order dated 04.06.2015 he was reinstated and resumed duty on 11.06.2015. Subsequently the disciplinary proceeding was taken to its logical end and he was imposed with a punishment under the Maharashtra Zilla Parishad District Services (Discipline and Appeal) Rules, 1964. His two increments were stopped and subsequently he stood superannuated on 31.01.2018.

8. He would then point out from paragraph No.9 to 12 of the affidavit-in-reply that taking into consideration the petitioner's date of appointment as 03.03.2006 as Civil Engineer Assistant, necessary retiral benefits have been extended in the form of Leave Encashment, Group Insurance Scheme benefit and since as on the date of his appointment he was governed by the Defined Contributory Pension Scheme (D.C.PS) which had come into existence with effect from 01.11.2005 and the petitioner having received all these benefits cannot be now heard to say any thing regarding pension.

9. By referring to the rejoinder of the petitioner his learned advocate would submit that the petitioner is entitled to get absorbed in accordance with the scheme framed by the government on 01.12.1995 and subsequent resolution of 1999 and order of the year 2004. By virtue of Government order dated 25.06.2004 the petitioner will have to be deemed to have been absorbed in the regular service and the provisions of the Maharashtra Civil Services Rules including the Pension Rules would be applicable. Even the respondent - Divisional Commissioner by his communication dated 30.07.2004 addressed to all the District Collectors expressly clarified that by virtue of the Government Resolution dated 01.12.1995 the mustering assistant should be deemed to have been absorbed on supernumerary post and would be governed by the Maharashtra Civil Services Rules by treating them as Government Servants. Pursuant to such communication the respondent Collector, Jalna informed the respondent No.7 that for want of posts the mustering assistants working could not be absorbed and issued directions for their absorption on supernumerary posts. The petitioner's name finds place in that list at serial No.9. Along with him one Mr. S.B. Raut was also absorbed who stood superannuated on 30.04.2021 but his pension papers have been finalized by issuing a pension pay order dated 16.06.2021.

10. The learned advocate would then submit that since the petitioner is entitled to be declared as deemed to have been absorbed in the regular Government service with effect from 25.06.2004 i.e. even before

coming into force of the D.C.P.S. which was brought in force with effect from 01.11.2005, his service would be governed by old pension scheme. Even Mr. S.B. Raut is getting pension having been treated as governed by the old pension scheme.

11. We have carefully considered the rival submission and perused the papers.

12. Except the fact that the petitioner has not approached the Industrial Court which was the fact situation in the matter of **Sheshrao Patloba Waybase** (supra) decided by the division bench of this Court or even was the case in the **Shaikh Miya Shaikh Chand** (supra) before the Supreme Court, the factual scenario in the matter about petitioner's entitlement to absorption and the pension revolve around the Government Resolution dated 01.12.1995, 21.04.1999 and Government order dated 25.06.2004. It would be apt to refer to the following observations of this Court to understand the history from the decision in the matter of **Sheshrao Patloba Waybase** (supra):

"9. It is not a matter of debate that, the petitioners were working as mustering assistants and their names appear in the seniority list as on 31.05.1993. These petitioners are covered by the scheme as framed by the Government vide Resolution dated 01st December, 1995. It is also matter of record that, the said scheme framed by the Government vide Government Resolution dated 01st December, 1995 is approved by the Apex Court in Special Leave to Appeal (Civil) No.15654 of 1991. Clause 5.2 of the said scheme lays down that the mustering assistants would not be entitled for the benefits of the Government service, nor

would be deemed to be Government employees. The said scheme also further lays down vide clause 4.7 that the process of absorption shall be completed by 31.03.1997. The Apex Court on December 02, 1996 passed the following order in Special Leave to Appeal (Civil) No. 15654 of 1991.

"Special Leave Granted.

The impugned order of the High Court dated 22nd March 1991 is set aside and we direct that the question of absorption into regular services shall be governed by the scheme prepared by the State government contained in the Government Resolution dated 01st December, 1995. We approved the scheme and direct that all the employees who fall within the parameters of the scheme should be similarly treated as that the possibility of individuals coming for redress under the scheme may not arise as that would only create avoidable litigation.

The appeal will stands disposed of accordingly with no order as to costs."

10. On 25.06.2004 the Government issued order saying that, there are still mustering assistants who have not been absorbed and additional posts would be created and all would be deemed to have been absorbed from the date of the said resolution i.e. from 25.06.2004. Some of the mustering assistants, who could not be absorbed earlier filed Writ Petition No.619 of 2006 with Writ Petition No.1029 of 2006 seeking pensionary benefits. The Division Bench of this Court vide judgment and order dated 16.07.2007 held as under :

"10) We have considered the submissions advanced by the learned counsel appearing for the respective parties. Perused the material placed on record, the Scheme and the Government Resolution by which the Muster Assistants were absorbed in regular service. The clear intention while absorbing the Muster Assistants in regular service is reflected from clauses 3.1 to 5.2 of the Government Resolution dated 1st December 1995. Such persons working as Muster Assistants were not to be considered as State employees as per the scheme. In view of the Government

Resolution dated 21st April 1999 the State Government adopted a stand that the service conditions applicable to the Government employees would not be applicable to the Muster Assistants who are absorbed in regular service.

- 11) The Apex Court in its order passed on 2nd December 1996 had approved the scheme reflected in the Government Resolution dated 1st December 1995. Therefore, prima facie we find that in view of the scheme which was approved by the Apex Court the petitioners would not be entitled to seek continuation of the period of their service during which they worked as Muster Assistants for computation of pension.*
- 12) The learned AGP points out that the Muster Assistants whose services were regularized from a particular date would get pension from the date of regularisation of service. The State Government has taken a clear stand that past period of such Muster Assistants prior to the date of regularization would not be counted for the purpose of calculation of pension. We find that the stand adopted by the State was in tune with the scheme framed by the State Government. Therefore, rule 33 of the Pension Rules would not be applicable to the facts of this case and the scheme framed by the State Government.*
- 13) In the light of the above position no interference is called for in these petitions."*

11. The Division Bench of this Court in Writ Petition No.954 of 1990 passed an interim order dated 20.12.2001 directing the State to issue orders of absorption to the mustering assistants with retrospective effect from 31.03.1997 and the said orders of absorption shall be issued within four weeks. The State assailed the said order before the Apex Court. The Apex Court vide order dated 22.04.2002 in Special Leave to Appeal (Civil) No.7592 of 2002 stayed the said order of this Court dated 20.12.2001. The Apex Court passed the following order.

"Issue notice on the special leave petition as well as on prayer for interim relief. Meanwhile, the operation of the order under challenge shall remain stayed. However, it is clarified

that the petitioner shall take steps to gradually absorb the Mustering Assistants in accordance with seniority."

12. Thereafter this Court vide final order dated 06.02.2002 disposed of the said writ petitions and directed to issue orders of regularization to remaining mustering assistants within a period of two weeks. The State assailed the same before the Apex Court. The Apex Court passed following order in Special Leave to Appeal (Civil) No.5171 of 2002 and 7592 of 2002.

"We have heard learned senior counsel for the petitioners. Despite service, none appears for the respondent. We, therefore, dispose of these special leave petitions in terms of the interim order dated 15.03.2002 by directing that the petitioners would take steps to gradually absorb the Mustering Assistants in accordance with seniority and the roster"

13. It would be seen that, the order of this Court directing to give retrospective effect was stayed by the Apex Court and eventually the matter was disposed of by the Apex Court by directing that the petitioners i. e. the State would take steps to gradually absorb the mustering assistants in accordance with seniority and roster. As such, the order of this Court directing the absorption with retrospective effect i.e. from 31.03.1997 and to give all consequential benefits from the said date was stayed by the Apex Court and the Apex Court disposed of the special leave petitions in terms of interim orders passed by the Apex Court. In view of the said order of the Apex Court, it would not be open for this Court to again dwell on the said aspect and direct considering the service of petitioners prior to the absorption as a Government service for the purpose of pensionary benefits. Even the Division Bench of this Court subsequently in Writ Petition No.619 of 2006 and Writ Petition No.1029 of 2006 has held that, the service prior to

regularization cannot be considered as Government service and the service prior to the regularization cannot be counted for the purpose of pension. The judgment dated 19.07.2012 of the Division Bench of this Court at Principal seat at Bombay in Writ Petition No.2946 of 2007 would not be relevant as in the said case the Industrial Court in the year 1996 had directed the State to give regularization to the services of the said employee.

14. In the light of the above, it will not be possible for this Court to accept the contention of the petitioners, more particularly in view of the order of the Apex Court referred supra, whereby the directions given by this Court in Writ Petition No.954 of 1990 directing regularization with retrospective effect from 31.03.1997 and for all consequential benefits were stayed by the Apex Court and the special leave petition was disposed of in terms of interim orders and further it was observed by the Apex Court that the State shall gradually absorb the mustering assistants as per their seniority.

15. This Court is bound by the said orders. In the light of the above, the contentions raised by petitioners cannot be considered and no relief can be granted to petitioners. The writ petitions as such stand disposed of. No costs.”

13. Though the petition was ultimately dismissed, in our considered view the observations and the conclusions of the Supreme Court in the matter of **Shaikh Miyan Shaikh Chand** (supra) take care of all the issues being raised in the present petition, even if the petitioner had not approached the Industrial Courts. The following observations according to us would seal the fate of the present matter :

“ We have heard learned counsel for the parties in the aforesaid context.

Learned counsel for the appellants seeks to contend that since the appellants were absorbed at different times and in view of the orders of the Industrial Courts treating the present case pari materia, benefits should be extended to all the appellants from their original date of joining. Before the Industrial Court a similar factual matrix of individual cases was examined and relief granted. That route has not been followed by the appellants before us but they seek parity.

It is the say of learned counsel for the State that benefits have been extended only from the date of absorption.

It is trite to say that the question of payment of pension would arise only if the pensionary service is completed. Thus the question would be as to what is the period of service which will have to be counted for such pensionable service.

In our view, what the Bench considered appropriate to issue notice was really the aspect that since the absorption occurred over a period of time, and that may have deprived some persons to their service as permanent employees, it should be the notional date of absorption of 31.03.1997 which should be taken into account for determining the pensionable service.

In our view, this is also what the Industrial Courts have done where relief has been granted and it has been accepted by the State.

We are thus of the view that the only direction which can be issued is that persons who has been absorbed over a period of time post 31.03.1997, for pensionable service, the reckoning date would be 31.03.1997 and such of the persons who have rendered a pensionable service on that basis would be entitled to that benefits.”

14. In view of such emphatic decision covering the muster assistants who had not approached the Industrial Court and irrespective of the fact that the petitioner was actually absorbed in the year 2006, he would be entitled to the pension from the notional date of absorption i.e. 31.03.1997.

15. Needless to state that since the D.C.P.S. was brought with effect from 01.11.2005, once the petitioner is found entitled to reckon the date for calculation of pension notionally from 1997, when the old pension scheme

was applicable, the decision of the respondent Nos.8 and 9 of holding the petitioner's employment to be governed by the D.C.P.S. will not be sustainable.

16. Obviously, the respondent Nos.8 and 9 will have to now workout the retiral benefits of the petitioner afresh and revise his pension by taking the notional date of absorption as 31.03.1997. The benefits already derived by the petitioner can certainly be set off against the dues, if any, recoverable by him pursuant to such revision of pension.

17. We allow the writ petition and direct the respondent Nos.8 and 9 to revise the pension by treating the petitioner's notional date of absorption as 31.03.1997 as expeditiously as possible and in any case within 12 (twelve weeks) and disburse the pension regularly and shall pay the arrears if any, after deducting the benefits derived by him already, as expeditiously as possible and in any case within twelve weeks of passing the pension order.

18. Rule is made absolute in above terms.

(SHAILESH P. BRAHME, J.)

(MANGESH S. PATIL, J.)