

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION

WRIT PETITION NO.12848 OF 2022

The Chief Executive Officer,
Vita Nagar Parishad, Vita ...Petitioner

vs.

Tanaji Ramchandra Kadam ...Respondent

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**WITH
WRIT PETITION NO.13157 OF 2022**

The Chief Executive Officer,
Vita Nagar Parishad, Vita ...Petitioner

vs.

Jaysing Jyoti Kadam ...Respondent

Mr. Nikhil Wadikar a/w. Mr. Pradip Zende, Ms. Sejal Jain, Mr. Malhar Pawar i/b. Mr. Nandu Pawar, for the Petitioner.
Mr. Abhishek Nandimath i/b. Mr. Umesh Mankapure, for the Respondents.

CORAM : N. J. JAMADAR, J.
RESERVED ON : MAY 02, 2023
PRONOUNCED ON : JULY 18, 2023

JUDGMENT :

1. Since a common question of law: whether the services rendered on daily wage basis qualify for the pensionable service, after the employee is made permanent, arises for determination in these petitions, in an identical factual backdrop, both the petitions are heard and decided by this judgment.

2. Rule. Rule made returnable forthwith. With the consent of the learned counsel for the parties, heard finally.

3. Mr. Tanaji Kadam, the respondent in Writ Petition No. 12848 of 2022 and Mr. Jaysingh Kadam, the respondent in Writ Petition No.13157 of 2022 were appointed as sweepers with Vita Nagar Parishad, the petitioner, a local authority, on 20th May, 1985. The respondents filed complaint before the Industrial Court at Kolhapur alleging unfair labour practices in not giving the benefit of permanency. During the pendency of those complaints, the petitioner and respondents arrived at a settlement. In accordance with the terms of settlement, the parties agreed that the respondents would be absorbed in the services of the petitioner and made permanent.

4. Pursuant to the settlement arrived at between the parties, the Director of Municipal Administration passed an order giving approval to the proposal to absorb the respondents on the permanent roll of the petitioner subject to certain terms and conditions with effect from the date of the said order. It was, inter alia, stipulated that the past services rendered on daily wage basis will not be reckoned for financial or service benefit. The Standing

Committee of the petitioner Nagar Parishad, in its meeting dated 5th February, 2001, passed a resolution to give appointment to the respondents on the regular establishment of the petitioner subject to the condition that the respondents would withdraw the complaints filed before the Industrial Court.

5. On 13th February, 2021, the Chief Officer of the petitioner accordingly passed an order to absorb the respondents on the permanent post of sweeper with effect from 18th January, 2001 subject to the condition that the respondents would withdraw the complaints filed before the Industrial Court, Kolhapur and the past services rendered by the respondents on daily wage basis would not be counted for any financial or service benefit. Both the respondents retired upon attaining the age of superannuation, on 31st May, 2010.

6. Initially the respondents raised a dispute about the incorrect calculation of gratuity only from the date of their appointment on the permanent post i.e. 13th January, 2001. The Controlling Authority under the Payment of Gratuity Act passed an order to pay gratuity by taking into account the services rendered by the respondents as daily wagers. The petitioner's challenge to the said order was not entertained. Thereafter the respondents sought

grant of pension in accordance with the provisions contained in Maharashtra Civil Services (Pension) Rules, 1982 (Pension Rules, 1982).

7. The respondents claimed that they were entitled to pension as the services rendered by them on daily wage basis since the year 1985 would qualify for the pensionable service under Rule 30 of the Pension Rules 1982. As the request and representation of the respondents were not favourably considered by the petitioner, Mr. Tanaji Kadam filed Complaint (ULP) No. 96 of 2017 and Mr. Jaysingh Kadam, Complaint (ULP) No. 95 of 2017 before the Industrial Court at Sangli alleging unfair labour practices under Item 9 and 10 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (MRTU & PULP Act, 1971). It was, inter alia, alleged that the refusal to grant pension despite the claim of the respondents being covered by Rule 30 of the Pension Rules amounted to unfair labour practices under Items No. 9 and 10.

8. The petitioner resisted the complaints on the premise that the respondents were absorbed in the service of the petitioner, pursuant to the settlement arrived at between the parties. It was

expressly agreed that the past service rendered on daily wage basis would not be reckoned for financial or other benefits. Since the respondents had not rendered the requisite qualifying service to be entitled to get pension, there was no unfair labour practice indulged in by the petitioner. In substance, the petitioner contended the services rendered by the respondents as daily wagers did not deserve to be reckoned for computing the qualifying service.

9. By the impugned judgment, the learned Member, Industrial Court was persuaded to hold that the respondents case was covered by the first proviso to Rule 30 and Rule 57, which incorporated the exceptions in which an employee was not entitled to pension, was not at all attracted. The petitioner, thus, committed unfair labour practice in declining to grant pension, under Item 9 of the Schedule IV. However, no case of unfair labour practice under Item 10 of the Schedule IV was made out. The learned Member further held that since there was delay on the part of the respondents in invoking the remedy, the respondents were not entitled to arrears of pension from the date of retirement till the date of application. The Industrial Court, thus, directed the petitioner to pay the arrears of pension from the date of filing of the complaint i.e. 13th November, 2017.

10. Being aggrieved the petitioner has invoked the writ jurisdiction.

11. I have heard Mr. Nikhil Wadikar, the learned counsel for the petitioner, and Mr. Abhishek Nandimath, the learned counsel for the respondents at some length. With the assistance of the learned counsel for the parties, I have perused the material on record including the impugned judgment.

12. Evidently, the controversy lies in a narrow compass. Whether the services rendered by the respondents on daily wage basis qualify for the pensionable service, is the core question in controversy. On facts, however, there is not much controversy. Indisputably, the respondents started rendering services as sweeper to the petitioner on daily wage basis with effect from 20th May, 1985. It is incontestible that the respondents approached the Industrial Court seeking relief of permanency and, during the pendency of those complaints, settlement was arrived at between the parties and the petitioner agreed to absorb the respondents on the establishment of the petitioner. The respondents were, accordingly, appointed as sweeper on the permanent post with effect from 18th January, 2001 subject to conditions that they would

withdraw the complaints filed before the Industrial Court and they would not be entitled to any financial or service benefits on the basis of past service rendered on daily wages.

13. In the backdrop of the aforesaid rather uncontested facts, it is the case of the petitioner that the respondents were not entitled to pension as they were made permanent with effect from 18th January, 2001 on an express condition that past services would not be counted for any purpose. The respondents countered by asserting that their case was governed by Rule 30 of the Pension Rules and not by Rule 57 of the Pension Rules.

14. As the controversy revolves around the entitlement to pension on the basis of applicability of particular pension rule, it may be expedient to extract Rule 30 and 57 of the Pension Rules.

Rule 30 and 57 read as under:-

30. Commencement of qualifying service -

Subject to the provisions of these rules, qualifying service of a Government servant shall commence from the date he takes charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity:

Provided that at the time of retirement he shall hold substantively a permanent post in Government service or holds a suspended lien or certificate of permanency:

[Provided further that, in cases where a temporary Government servant retires, on Superannuation or on being declared permanently incapacitated for further

Government service by the appropriate medical authority after having rendered temporary service of not less than ten years, or voluntarily after completion of twenty years of qualifying service, shall be eligible for grant of Superannuation, Invalid or, as the case may be, Retiring Pension; Retirement Gratuity; and Family Pension at the same scales as admissible to a permanent Government servant.]

57. Non-pensionable service -

As exceptions to Rule 30, the following are not in pensionable service:-

- (a) Government servants who are paid for work done for Government but whose whole time is not retained for the public service,
- (b) Government servants who are not in receipt of pay but are remunerated by Honoraria,
- (c) Government servants who are paid from contingencies,
- (d) Government servants holding posts which have been declared by the authority which created them to be non-pensionable.
- (e) Holders of all tenure posts in the Medical Department, whether private practice is allowed to them or not, when they do not have an active or suspended lien on any other permanent posts under Government.

Note 1- In case of employees paid from contingencies who are subsequently brought on a regular pensionable establishment by conversion of their posts, one-half of their previous continuous service shall be allowed to count for pension.

Note 2- In the case of persons who were holding the posts of Attendants prior to 1 st April 1966, one-half of their previous continuous service as Attendants, shall be allowed to count for pension.

15. A conjoint reading of Rule 30 and 57 would indicate that under Rule 30, subject to the provisions of the Pension Rules, 1982 (including Rule 57), qualifying service of a Government servant shall commence from the date he takes the charge of the post to which he is first appointed, either substantively or in an officiating or temporary capacity. The first proviso to Rule 30, however, ordains

that at the time of retirement the Government Servant shall hold a substantive permanent post in Government service or a suspended lien or certificate of permanency. Rule 57, which incorporates exceptions to Rule 30, specifies the non-pensionable services.

16. A cumulative reading of the aforesaid provisions would show that if a case is covered by any of the exceptions incorporated in Rule 57, the concerned Government servant would not be entitled to pension notwithstanding having rendered the qualifying service recognized under Rule 30. To determine whether the service rendered by the government servant qualifies for permanent service, the test is not whether the Government servant is first appointed in permanent or temporary capacity but whether at the time of retirement he holds a permanent post substantively. If at the time of retirement a Government servant holds a permanent post substantively, to which he might have been made permanent at a later point of time, the past service rendered by the Government servant on a temporary post also qualifies for the pensionable service. Thus, under Rule 30 the determinant is not the nature of the initial appointment but the nature of the post held by the Government servant at the time of retirement.

17. Mr. Wadikar, learned counsel for the petitioner, would submit that the learned Member, Industrial Court misdirected himself in returning a finding that the refusal to grant pension on the part of the petitioner constituted a failure to implement settlement or agreement under Item No. 9 to Schedule IV. A multi-fold submission was canvassed. Firstly, the respondents were absorbed on the establishment of the petitioner pursuant express terms of settlement, which clearly provided that the past services rendered on daily wage basis would not be reckoned for any financial or service benefits. The petitioner had scrupulously adhered to the said terms of settlement. Secondly, the pensionary benefits which the respondents claimed squarely fall within the ambit of the term “financial benefits” which the respondents had agreed not to claim. Thirdly, according to Mr. Wadikar, the services of the respondents for entitlement to pension can only be said to have commenced from the date on which they were absorbed on the establishment of the petitioner. Lastly, the recourse to the provisions contained in Rule 30 of the Pension Rules, was erroneous.

18. In opposition to this, Mr. Abhishek Nandimath, the learned counsel for the respondents submitted that the learned Member, Industrial Court, correctly applied the provisions contained in Rule

30 of the Pension Rules, 1982. In fact, the order passed by the Controlling Authority under the Payment of Gratuity Act directing the petitioner to compute the gratuity by taking into account the services rendered on daily wage basis dismantled the edifice of resistance sought to be put forth on behalf of the petitioner. It was urged that there is no such error in the impugned judgments which warrants interference in exercise of writ jurisdiction.

19. To begin with, it has to be seen whether the case of the respondents is covered by any of the exceptions incorporated in Rule 57 of the Pension Rules, 1982. In fact, it was not the case of the petitioner before the Industrial Court that the respondents' services were covered by any of the exceptions enumerated in Rule 57. Neither it was alleged that the respondents were remunerated by honoraria or paid from contingencies. Nor that the posts were declared to be non-pensionable. The only contention of the petitioner was that the respondents worked on daily wage basis and had agreed under the terms of settlement not to claim any financial or service benefits, on that count.

20. As noted above, the nature of the initial appointment is not of decisive significance. Even if a Government servant was appointed

in a temporary capacity the services rendered by him in that capacity qualify for pension, if on the date of retirement he holds a substantive post. Whether the services rendered on daily wages fall within the ambit of services rendered in a temporary capacity ? By a catena of decisions this Court has enunciated that if a daily wager is subsequently appointed on a permanent post, his services, rendered as a daily wager, are required to be reckoned for pensionary benefits.

21. In the case of **Parshuram Vithoba Bhandare vs. State of Maharashtra and Anr.**¹ wherein an identical question arose, as the petitioner therein worked as a daily wager since 1964 and came to be appointed permanently on a sanctioned post in the year 1983, a Division Bench of this Court after adverting to the provisions of Rule 30 and 57 (extracted above), held that the petitioner therein would be entitled to pension after reckoning the services rendered as a daily wager as qualifying service for pension. The Division Bench observed, inter alia, as under:-

5] The denial of pensionary benefits by the State to its employees on flimsy ground is not a phenomena any more for various reasons, most of which are flimsy, and the pensionary benefits are denied by the State to its employees. It would therefore be necessary in the circumstances, to examine the provisions of the Pension Rules in proper perspective. Rule 30 of the

1 2001 (4) Mh. L.J. 587.

Pension Rules is a basic Rule on entitlement, which spells out who are entitled to the pensionary benefits like family pension in the service of Government of Maharashtra, which reads as under.

6] Rule 57 spells out the exception of the general Rule that every employee who has a particular length of service to his credit is entitled to the pensionary benefits. Rule 57 reads as under.

7] Relying on the first note to Rule 57 above, that the petitioner was denied pensionary benefit by the State and the denial was approved by the Maharashtra Administrative Tribunal, in our opinion, both are wrong. A reading of Rule 30 clearly shows that the petitioner is entitled to the pensionary benefits. A reading of Rule 57 proves that the petitioner's case is not covered by the exceptions mentioned in that Rule 57. It is nowhere the case of Government of Maharashtra that the salary of the petitioner paid to him as daily wages from 1964 to 1980 was drawn from the contingency fund of the State and it is only when the salary or wages paid to the employees are drawn from contingency fund that the exception is made in relation to the case of grant of terminal benefits. This factual and legal aspect was not taken into consideration either by the State or Tribunal resulting in miscarriage of justice and denial of valuable right to the petitioner. The petitioner having completed more than 10 years of continuous service as labour supervisor and as his salary at any point of time was not drawn from the contingency fund, was always entitled to the pension. The petitioner is therefore liable to succeed. In the result the petition succeeds and is allowed. Rule is made absolute.

22. The non-applicability of Rule 57 where there was no material to show that the Government servant was paid out of contingency fund was again highlighted by the another Division Bench in the case of **Jayshree w/o. Narayan Mhaske vs. State of Maharashtra and Others²**.

2 2005 (3) Mh.L.J. 492.

23. A learned single Judge of this Court considered the question in controversy in a greater detail in the case of **Mahatma Phule Krishi Vidyapeeth, Rahuri vs. Ganpat Kisan Karle, Ahmednagar**³ and after an analysis of the provisions of the Pension Rules, 1982 and the previous pronouncements, enunciated in clear and explicit terms that if a daily wager is given work on daily basis without there being a post available and upon creation of said post is granted regularization and permanency from the first day, his past service tenure will have to be reckoned for the purpose of calculating his qualifying service.

24. In the said case, in addition, the learned Judge had adverted to the import of the second proviso to Rule 30 and held that the second proviso to Rule 30 deals with the services of temporary employees including those employees who have retired or have been permanently incapacitated and who have completed not less than 10 years of service as temporary employees and they would also be entitled for retiring pension, retirement gratuity and family pension at the same scale as is admissible to the permanent government servant. Rule 30 is aimed at covering the cases of all such employees who have been working temporarily for a period of at least 10 years to satisfy the definition of qualifying service under

3 2016 II CLR 860.

Rule 30 and are not covered by Rule 57.

25. In the light of aforesaid exposition of law, reverting to the facts of the case, the respondents indubitably, held a substantive post on the date of their retirement, upon attaining the age of superannuation: the respondents were permanently absorbed on the establishment of the petitioner with effect from 18th January, 2001 and the respondents, again indisputably, rendered services as daily wagers since the year 1985 and the case of the respondents is not covered by any of the exclusionary clauses of Rule 57. All the conditions necessary for reckoning the services rendered as daily wager for pensionary benefits were squarely satisfied. In that view of the matter, refusal to grant pension clearly constituted an unfair labour practice under Item 9 of Schedule IV.

26. The endeavour on the part of the petitioner to wriggle out of the liability to pay the pension, banking upon the settlement arrived at between the parties, in an earlier proceeding whereunder it was stipulated that the respondents' past service rendered on daily wage basis would not be counted for any financial or benefits, does not merit acceptance. If a case is clearly covered by the prescription in the pension rules, there can be no waiver of the

right to receive pension. It is trite pension is not a bounty. Secondly, even if the conditions, subject to which the respondents were appointed to the permanent post are taken at par, yet they cannot be construed to hold that the respondents had agreed to forgo the services rendered as daily wager even for pensionary benefits.

27. The learned Member, Industrial Court correctly applied the governing provisions of the Pension Rules, 1982 to the facts of the case and, thus, no interference is warranted in exercise of extraordinary writ jurisdiction. Resultantly, the petitions deserve to be dismissed.

Hence, the following order.

ORDER

- 1] The petitions stand dismissed.
- 2] The petitioner shall pay the pension to the respondent in the respective petition, within a period of four months along with arrears with effect from 13th November, 2017.
- 3] In default, the entire amount shall carry interest @ 9% p.a. from the said date till payment and/or realization.
- 4] Subject to aforesaid direction, the rule stands discharged.
- 5] In the circumstances of the case, there shall be no order as to costs.

(N. J. JAMADAR, J.)