

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

WRIT PETITION NO. 12080 OF 2012

Kamlesh Raghunath Chaudhari and Ors. ... Petitioners

V/s.

The State of Maharashtra,
Ministry of Finance and Ors. ... Respondents

Mr. Suresh S. Pakale, Senior Advocate with Ms. Padmaja Malgaonkar
i/b. Avinash R. Belge for the Petitioners

Mr. Abhijit P. Kulkarni with Ms. Sweta Shah for Respondent Nos. 4
to 9

Mr. R.P. Kadam, AGP for the Respondent - State

***CORAM : NITIN JAMDAR &
SANDEEP V. MARNE, JJ.***

DATE : 11 AUGUST 2023

P.C. :-

Heard the learned Counsel for the parties.

2. This Petition is filed by 19 employees of Pune Municipal Corporation working on the post of firemen. They are aggrieved by the application of new Defined Contributory Pension Scheme (DCPS). They seek application of the Old Pension Scheme under the provisions of the Maharashtra Civil Services (Pension) Rules, 1982 and General Provident Fund Scheme. There is no dispute to

the position that the employees who are appointed prior to 1 November 2005 are governed by the provisions of Old Pension Scheme and those who are appointed after 1 November 2005 are being governed by the provisions of DCPS.

3. The Petitioners contend that their recruitment process was initiated by the Pune Municipal Corporation prior to 1 November 2005. They further contend that they were selected and appointment orders were also issued to them before 1 November 2005. However, their actual joining has taken place after 1 November 2005. It is also the case of the Petitioners that they were initially governed by the provisions of the Old Pension Scheme but subsequently, they were brought over on to the DCPS on account of their actual joining in service after 1 November 2005.

4. A question arose before this Court as to what is the position if the recruitment process is initiated prior to 1 November 2005 and the appointments are given subsequently, which is the fact situation in the present Petitions. The Division Bench of this Court in the case of *Khillari Rajendra Eknath and Ors. vs. The State of Maharashtra and Ors. in Writ Petition No. 2270 of 2021* decided on 28 April 2023, took note of provisions of Office Memorandum dated 3 March 2023 issued by the Central Government which directed application of Old Pension Scheme to all Central Government Servants in whose case recruitment process was

initiated before coming into force of DCPS, though the actual appointments took place after DCPS came into force. This Court held in paragraphs 22 and 23 as under :-

“22. The Central Government took note of various judicial pronouncements as well as representations received from the affected employees whose appointments were made against posts/vacancies advertised/notified for recruitment prior to notification of the DCPS. The GOI, Ministry of Personnel, Public Grievances and Pensions issued Office Memorandum dated 03.03.2023 directing as under :

“4. The matter has been examined in consultation with the Department of Financial Services, Department of Personnel & Training, Department of Expenditure and Department of Legal Affairs in the light of the various representations/references and decisions of the Courts in this regard. It has now been decided that, in all cases where the Central Government civil employee has been appointed against a post or vacancy which was advertised/notified for recruitment/appointment, prior to the date of notification for National Pension System i.e. 22.12.2003 and is covered under the National Pension System on joining service on or after 01.01.2004, may be given a one-time option to be covered under the CCS (Pension) Rules, 1972 (now 2021). This option may be exercised by the concerned Government servants latest by 31.08.2023.

5. Those Government servants who are eligible to exercise option in accordance with para-4 above, but who do not exercise this option by the stipulated date, shall continue to be covered by the National Pension System.

6. The option once exercised shall be final.

7. The matter regarding coverage under the CCS (Pension) Rules, 1972 (now 2021), based on the option exercised by the Government servant, shall be placed before the Appointing Authority of the posts for which such option is being exercised for consideration, in accordance with these instructions. In case the Government servant fulfills the conditions for coverage under the CCS (Pension) Rules, 1972 (now 2021), in accordance with these instructions, necessary order in this regard shall be issued latest by 31 st October, 2021. The NPS account of such Government servants, shall, consequently, be closed w.e.f. 31 st December, 2023.

8. The Government servants who exercise option to switch over to the pension scheme under CCS (Pension) Rules, 1972 (now 2021), shall be required to subscribe to the General Provident Fund (GPF). Regarding accountal of the corpus in the NPS account of the Government servant, Controller General of Accounts (CGA) has furnished the following clarification vide letter No.1(7)(2)/2010/cla./TA III/390 dated 14.11.2019 & I.D. Note No.TA-3-6/3/2020-TA-III/cs-4308/450 dated 23.12.2022;

i. Adjustment of Employees' contribution in Accounts : Amount may be credited to individual's GPF account and the account may be recasted permitted up-to-date interest (Authority-FR-16 & Rule 11 of GPF Rules).

ii. Adjustment of Government contribution under NPS in Accounts : To be accounted for as (-)Dr. to object head 70-Deduct Recoveries under Major Head 2071- Pension and other Retirement benefit-Minor Head 911-Deduct Recoveries of over

payment (GAR 35 and para 3.10 of List of Major and Minor Heads of Accounts).

iii. Adjustment of increased value of subscription on account of appreciation of investments – May be accounted for by crediting the amount to Govt. account under M.H. 0071 – Contribution towards Pension and Other Retirement Benefits 800-Other Receipts (Note under the above Head in LMMHA).”

23. Thus, so far as employees of the Central Government are concerned, they have been given an option to opt for Old Pension Scheme in case they have been appointed against a post or vacancy advertised for recruitment prior to the date of Notification of DCPS. We have already observed above that, the State Government has adopted the DCPS formulated by the Central Government vide Notifications dated 22.12.2003 and 30.12.2003 by way of issuance of the G.R. dated 31.10.2005. The recitals to the G.R. make it amply clear that the State Government has essentially followed the Scheme formulated by the Government of India. Therefore, we see no reason why the State Government should not follow the provisions of Office Memorandum dated 03.03.2023 as well. If the State Government adopts the provisions of the Office Memorandum dated 03.03.2023, petitioners who are appointed against the posts advertised before 01.11.2005 would be governed by the provisions of the Old Pension Scheme. We are therefore of the considered view that since the State Government has adopted the Scheme formulated by the Central Government for Defined Contributory Pension Scheme, the changes effected to the Scheme by the Central Government (based on judicial pronouncements) should also be made applicable to the Officers and employees of the State Government inter alia would

consequently apply to the Officers and members of the staff of the High Court as well.”

5. This Court further clarified the position of law making a distinction between the phrases “appointment” and “recruitment” and observed thus :-

“27. Sub-Rule (2) of Rule 2 of the M.C.S. (Pension) Rules, 1982 states that these rules would not apply to the Government Servants who are recruited on or after 01.11.2005. Rules 1982 are the beneficial piece of legislation governing the post retiral benefits to a government employee. It has been held time and again that pension is not a bounty. Rules 1982 are not made applicable to the government servants who are recruited on or after 01.11.2005. Though the amendment to the Rules 1982 by the State Government are based upon the amendment carried out in the Central Civil Services (Pension) Rules, 1972 there is a subtle difference between the two. The Central Civil Services (Pension) Rules, 1972 apply to the Government Servants appointed on or before 31.12.2003, meaning thereby that it would not apply to the government servants appointed on or after 1st day of January, 2004. Whereas under the said M.C.S. (Pension) Rules, 1982, the wordings are ‘the Rules shall not apply to government servants who are recruited on or after 01.11.2005’. The phraseology “Recruitment” and “Appointment” are not synonymous. There is a marked distinction between “Recruitment” and “Appointment”. Recruitment is a stage prior to appointment. Recruitment is the process which entails selection of candidates. Selection is a process of picking the candidates from the short listed candidates. An

appointment means an actual act of posting a person to a particular office.”

6. This Court thereafter, proceeded to allow the Writ Petitions observing thus :-

“30. Resultantly, the Writ Petition succeeds. It is declared that Petitioners shall be governed by the provisions of the Old Pension Scheme in vogue prior to 1.11.2005, as well as General Provident Fund Scheme. Petitioners shall not be governed by the provisions of the Defined Contributory Pension Scheme introduced vide G.R. dated 31.10.2005. The Petitioners’ contribution to DCPS be credited to their GPF Accounts. The modalities as suggested in para-8 of the Office Memorandum dated 03.03.2023 issued by the Government of India be adopted while switching over Petitioners from DCPS to Old Pension Scheme.”

7. On the legal position as laid down by the Division Bench of this Court, there is no debate before us. The State Government has not challenged the decision rendered by the Division Bench in the case of *Khillari Rajendra Eknath*.

8. Another Division Bench of this Court, Bench at Nagpur in the case of *Rahul Laxmikant Kontamwar and Ors. vs. The State of Maharashtra and Ors.* in Writ Petition No. 3715 of 2022, following the judgment in *Khillari Rajendra Eknath* has issued the following directions :-

“10. The petitioners’ contribution to DCPS be credited in their GPF Accounts. The Modality adopted by the Government of India while switching over the petitioners from DCPS to Old Pension Rules shall also be adopted by the respondents.”

9. Therefore, we proceed to follow the same course of action as adopted by the Division Benches in these Petitions.

10. Today, by a separate order passed in the case of *Palghar Zilla Gramsevak Sanghatana v/s. The State of Maharashtra and Ors.* in Writ Petition No. 1893 of 2020, we have followed the law laid down by this Court in *Khillari Rajendra Eknath and Rahul Laxmikant Kontamwar* and have directed the Chief Executive Officers of the concerned Zilla Parishads to examine the cases of each of the Gramsevaks for verifying whether the recruitment process had commenced before 1 November 2005 and whether benefits of the judgment in *Khillari Rajendra Eknath and Rahul Laxmikant Kontamwar* could be extended to them.

11. We accordingly dispose of the present Petition by directing the Municipal Commissioner of Pune Municipal Corporation to examine the cases of each of the Petitioners for verifying whether their recruitment processes were initiated prior to 1 November 2005.

12. In the event, the Municipal Commissioner comes to a conclusion that the cases of the Petitioners herein are similar to the Petitioners in *Khillari Rajendra Eknath* and *Rahul Laxmikant Kontamwar*, the Municipal Commissioner shall proceed to extend the benefit of application of Old Pension Scheme and General Provident Fund Scheme to the Petitioners herein within a period of four weeks from today. The modalities directed for application of Old Pension Scheme in *Khillari Rajendra Eknath* and *Rahul Laxmikant Kontamwar* be adopted in cases of the Petitioners as well.

13. With the above directions, the Writ Petition is disposed of.

SANDEEP V. MARNE, J.

NITIN JAMDAR, J.

JYOTI
PRAKASH
PAWAR

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by JYOTI
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