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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO. 2270 OF 2021

Khilari Rajendra Eknath and OthersPetitioners

V/s.

The State of Maharashtra and OthersRespondents

Mr. Vishal Kanade i/by. Mr. Sagar A. Rane, Advocate for the petitioners.

Mr. Himanshu Takke, AGP for State-respondent no.1.

Dr. Milind Sathe, Senior Advocate a/w. Mr. Rahul Nerlekar, Advocate for respondent no.2-BHC.

**CORAM : S.V.GANGAPURWALA, ACTING CJ &
SANDEEP V. MARNE, J.**

RESERVED ON : 24th APRIL, 2023.

PRONOUNCED ON : 28th APRIL, 2023

JUDGMENT: (Per - ACTING CHIEF JUSTICE)

1. **Rule.** Rule made returnable forthwith and with the consent of counsels for parties, the petition is called out for final hearing.

2. Petition is filed by 56 Clerks working on the establishment of the High Court of Bombay, Appellate Side seeking a declaration that they are governed by the provisions of the Old Pension Scheme in vogue prior to 01.11.2005 and the General Provident Fund Scheme. Petitioners seek directions not to apply the Defined Contributory Pension Scheme (DCPS)/National Pension Scheme

(NPS) introduced vide Government Resolution (G.R.) dated 31.10.2005. To that extent, a declaration is sought that the Notification issued by the High Court on 21.04.2008 making applicable provisions of G.R. dated 01.11.2005 to the staff of the High Court and the Courts subordinate to it would apply prospectively from 21.04.2008 and that the same would not apply to petitioners.

3. On 20.6.2005 an advertisement was issued by the Registrar General of the High Court for filling up 48 posts of Clerks on the establishment of the Bombay High Court, Appellate Side in the pay scale of 3050-4590. The last date for submission of applications was 11.07.2005. Petitioners applied in pursuance of the advertisement. A Written Test was conducted on 09.08.2005 which was cleared by petitioners. They were then subjected to Typing Test on 29.10.2005 and interviews on 26.11.2005. A Select list/Wait List of the candidates was published on 07.12.2005. Appointment orders were issued to the Petitioners on 28.12.2005. This is how the Petitioners came to be appointed on the post of Clerk on the establishment of the High Court of Bombay, Appellate Side.

4. The High Court, by its Notification dated 20.02.1995 directed that various Rules formulated by the Government of Maharashtra relating to conditions of service of its employees would apply to the officers and members of the staff attached to the High Court. Thus, the provisions of Maharashtra Civil Services (Pension) Rules, 1982 came to be adopted by the High Court for its officers and members of staff. By another Notification dated 29.03.1999, the High Court directed that the provisions of the Maharashtra General Provident Fund Rules would apply to the officers and members of the

staff of High Court. By those Notifications, it was also directed that any amendments effected to the Rules by the State Government from time to time shall automatically apply to the officers and members of the staff attached to the High Court, unless otherwise directed by the Chief Justice.

5. The employees and officers of the Central Government are governed by the provisions of Central Civil Services (Pension) Rules, 1972, under which the employees and officers were being paid pension, gratuity and other benefits as provided under the Rules. The Government of India introduced the New Defined Contributory Pension Scheme by issuing Notifications dated 22.12.2003 and 30.12.2003 and made the provisions of DCPS applicable to Government Servants appointed to the Government of India service after 31.12.2003. Under the DCPS, both employees as well as Government are required to contribute specified amount every month to the Provident Fund. The pension is to be paid to the employees out of the corpus so generated from the contributions.

6. The Government of Maharashtra adopted the provisions of DCPS introduced by the Government of India by issuing G.R. dated 31.10.2005. By that G.R., a New Defined Contributory Pension Scheme on lines of Government of India was introduced by replacing the then existing pension scheme. The Scheme came into effect w.e.f. 1.11.2005 and became mandatorily applicable to all government servants recruited on/or before 1.11.2005 in State Government service. The provisions of the DCPS of the State Government are on par with those introduced by the Government of India.

7. On account of issuance of the G.R. dated 31.10.2005, the

provisions of Maharashtra Civil Services (Pension) Rules, 1982 were amended providing that the Rules shall not apply to government servants recruited on/or after 1.11.2005.

8. The High Court issued Notification dated 21.04.2008 under the provisions of Article 229 of the Constitution of India directing that the G.R. dated 31.10.2005 regarding introduction of New Contributory Pension Scheme shall apply to the staff of the High Court and the Courts Subordinate to it. It was further directed that, any amendment to the Pension Scheme would automatically apply to the High Court staff and the Courts Subordinate to it, unless otherwise directed by the Chief Justice.

9. As Petitioners were actually appointed in service of the High Court after 1.11.2005, the provisions of the DCPS have been applied to them. A representation came to be addressed by the Petitioners on 24.10.2017 for application of provisions of Old Pension Scheme on the ground that their selection process was initiated before 1.11.2005. Another representation dated 23.08.2018 was made by the High Court Non-Gazetted Ministerial Staff Association to the Chief Minister for application of Old Pension Scheme. Few representations came to be addressed on 10.08.2021 and 9.09.2021 for application of the provisions of Old Pension Scheme. Having not received any response to their representations, Petitioners have knocked the doors of this Court by filing the present petition seeking application of the provisions of Old Pension Scheme.

10. Appearing for Petitioners, Mr. Kanade learned Counsel would submit that the vacancies against which Petitioners are recruited pertain to the period prior to 01.11.2005. He would submit

that the selection process was also initiated before 01.11.2005. That most of the process of selection was completed before 01.11.2005 as Written Test and Typing Test were conducted prior to the said date. Merely because there was some delay in conducting the interviews and issuing the appointment orders, petitioners cannot be made to suffer. Mr. Kanade would rely upon the judgment of the Delhi High Court in **Pawan Kumar and Others V/s. Union of India and others**¹, in support of his contention that the provisions of Old Pension Scheme are required to be applied in cases where selection process is initiated in respect of vacancies which arose prior to 01.11.2005. He would also place reliance on the Office Memorandum issued by the Government of India on 03.03.2023 giving one-time option to employees of the Central Government appointed against a post or vacancy which was advertised/notified for recruitment/appointment prior to the date of notification of National Pension Scheme. He would submit that similar benefit is required to be extended to the Petitioners as well.

11. The petition is resisted by the High Court. Dr. Sathe the learned senior advocate appearing for the High Court, would raise the preliminary issue of delay and laches on the part of Petitioners in filing the present petition. He would submit that Petitioners became the members of the New Pension Scheme in December 2005 and their contributions to the pension fund have been deducted since then. That Petitioners therefore cannot now be permitted to raise the stale issue of application of Old Pension Scheme. Dr. Sathe would further submit that the service conditions of High Court staff are determined by the Chief Justice in exercise of the powers under Article 229 of the Constitution of India. Under various Notifications

1 (2023) SCC Online DEL 112

issued from time to time, the provisions of the Rules made applicable to the government servants in State Government service have been made applicable to the Officers and members of the staff of the High Court. That therefore the provisions of the G.R. dated 31.10.2005 have rightly been made applicable to the officers and members of the staff of the High Court by issuance of the Notification dated 21.04.2008.

12. Dr. Sathe would contend that mere initiation of recruitment process or participation by Petitioners therein does not create any vested right in favour of an employee. That rights in respect of the Government Servant, if any, get crystallized only upon his actual appointment. That therefore various stages in selection process prior to appointment are wholly irrelevant for the purpose of determining entitlement of a Government Servant to service benefits which accrue only upon his actual appointment. That it is settled law that, mere selection for appointment does not create any right in favour of a selected candidate. That there is distinction between legitimate expectation and vested/accrued rights. That application of Old Pension Scheme is a not a vested/accrued right of petitioners. In support of his contention, Dr. Sathe would rely upon the following judgments:

(i) **Chairman, Railway Board and Others Vs. C.R. Rangadhamaiah and Others**²

(ii) **Punjab State Co-operative Agricultural Development Bank Limited V/s. Registrar, Co-operative Societies**³

(iii) **Shivaji Nagnath Lokare and Others V/s. State of**

² (1997) 6 SCC 623

³ (2002) 4 SCC 363

Maharashtra and Others⁴

13. The petition is also opposed by the State Government. Mr. Himanshu Takke, the learned AGP would submit that the DCPS has been made applicable by the State of Maharashtra on lines with the similar scheme introduced by the Government of India. That provisions of Rule 2 of the Maharashtra Civil Services (Pension) Rules, 1982 have been amended providing that the Rules shall not apply to government servants who are recruited on/or after 1.11.2005. That the date of actual appointment in government service is the crucial factor for applying the provisions of a particular pension scheme and that therefore the date of commencement of the selection process is wholly inconsequential. The petition is also opposed by the State Government on the grounds of delay and latches.

14. Rival contentions of the parties now fall for our consideration.

15. Before advertng to the merits of the petition, we first deal with the issue of delay and latches in filing the present petition. No doubt, the Petitioners are appointed in the service of the High Court in December 2005 and raised the issue about applicability of DCPS for the first time by making representation dated 24.10.2017. The present petition has been filed on 30.09.2021. Both High Court, as well as, the State Government have raised the issue on delay and latches contending that the petition has been filed sixteen years after applicability of provisions of DCPS to Petitioners. Petitioners continue to be in service on the date of filing of the petition. Pension

⁴ (2017) 5 Mh.L.J.854

would accrue to them only after they retire from service, either on attaining the age of superannuation or after opting for voluntary retirement. The Petitioners' entitlement draw pension is not under dispute. What Petitioners seek is applicability of a particular pension scheme. The manner of payment of pension under the two schemes differ. It is not that the Petitioners have started drawing pension under DCPS. In that view of the matter, cause of action for Petitioners would be continuous one. There is yet another reason why the petition would not suffer from delay or latches. The DCPS of the Central Government (which is adopted by the State Government) has recently undergone changes on 17-02-2020 and 03-03-2023, details of which have been discussed in later portion the judgment. The petition therefore cannot be defeated on the grounds of delay and latches. We therefore repel the objection raised by the High Court administration and the State Government in this regard.

16. Now turning to the merits of the petition, the issue involved in the present petition is about applicability of provisions of Old Pension Scheme to employees whose selection process was initiated prior to introduction of the DCPS, which came into effect on 01.11.2005. The High Court has adopted the provisions of Maharashtra Civil Services (Pension) Rules, 1982 to its officers and members of staff. Until 31.10.2005 pension payable to the government servants was governed by the provisions of the Maharashtra Civil Services (Pension) Rules 1982. The Pension Scheme under the Rules did not involve making of any contributions by the government servants for earning pension upon their retirement. The quantum of pension under the Rules is to be determined by taking into consideration pensionable pay (ten

months' average pay prior to retirement) coupled with the number of years of service put in by them.

17. There was a similar pension scheme for the Central Government Servants under the provisions of Central Civil Services (Pension) Rules, 1972. The Government of India introduced the DCPS by issuing Office Memorandum dated 22.12.2003 and 30.12.2003 and made the provisions of DCPS applicable to the Central Government servants recruited on/or after 01.01.2004. The State Government has adopted the DCPS introduced by the Central Government and has made the same applicable to its employees by issuing the GR dated 31.10.2005. Thus, what is done by the State Government is essentially to adopt the provisions of DCPS introduced by the Government of India. This is clear from para Nos.1 and 2 of the GR dated 31.10.2005 which reads thus:-

INTRODUCTION

Government of India vide Notification, Ministry of Finance, Department of Economic Affairs dated 22nd December 2003 introduced a new Contribution Pension Scheme i.e. "Defined Contribution Pension System" for the employees who are recruited on or after 1st January, 2004 in Central Government Service. Government of India has also declared that the option of joining the aforesaid new Contribution Pension Scheme would also be available to the State Governments. Besides, under this scheme Government of India have Constituted an independent "Pension Fund Regulatory and Development Authority (PFRDA)" for the management and regulation of the pension fund.

The question of introduction of New Contribution Pension Scheme, on the lines of Government of India, for new recruits in State Government Service was under consideration of this Government.

RESOLUTIONS

(a) Government has now decided that a new “Defined Contribution Pension Scheme” **on the lines of Government of India**, replacing the existing pension scheme, as detailed below, would be made applicable to the Government servants who are recruited on or after 1st November 2005 in State Government Service.

(b) Government is also pleased to decide that for the purpose of implementation of the above new Defined Contribution Pension Scheme, **this State Government would join the aforesaid new defined contribution pension system introduced by Government of India.**

(c) The Government is also pleased to decide that the provisions of,

(i) the existing pension scheme (i.e. Maharashtra Civil Services (Pension) Rules, 1982 and Maharashtra Civil Services (Commutation of Pension) Rules, 1984 and

(ii) the existing General Provident Fund Scheme (GPF) would not be applicable to the Government servants who are recruited on or after 1st November 2005 in State Government service.

There can thus be no matter of doubt that the State Government has adopted the DCPS of the Central Government, *albeit* from a different date (01-01-2004 for Central Government and 01-11-2005 for State Government).

18. Application of Old Pension Scheme to Government Servants appointed on or after 01.01.2004 in the Central Government gave rise to numerous litigation across the country. The challenge to the validity of the provisions of DCPS came to be rejected in various judicial pronouncements. Later, litigation were initiated by employees whose selection process was completed prior to

introduction of DCPS but appointment orders were delayed and effected after 1.11.2004. Various High Courts/Tribunals directed that such employees, whose selection process was completed prior to 1.01.2004, would be governed by the provisions of the Old Pension Scheme. To give benefit of such judicial pronouncements to all similarly placed government employees, the Government of India, Ministry of Personnel, Public Grievances and Pension issued Office Memorandum dated 17.02.2020 providing one-time option to Central Government employees who were declared successful for recruitment in the results declared on 31.12.2003 against vacancies which occurred before 01.01.2004. The relevant portion of the Office Memorandum dated 17.02.2020 reads thus :

No. 57/04/2019-P&PW(B)
Government of India
Department of Pension and PW

Lok Nayak Bhawan, Khan Market,
New Delhi, the 17th February, 2020.

OFFICE MEMORANDUM

Subject : Coverage under Central Civil Services (Pension) Rules, 1972, in place of National Pension System, of those Central Government employees whose selection for appointment was finalized before 01.01.2004 but who joined Government service on or after 01.01.2004.

4. The matter has been examined in consultation with the 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 been decided that in all cases where the results for recruitment were declared

before 01.01.2004 against vacancies occurring on or before 31.12.2003, the candidates declared successful for recruitment shall be eligible for coverage under the CCS (Pension) Rules, 1972. Accordingly, such Government servants who were declared successful for recruitment in the results declared on or before 31.12.2003 against vacancies occurring before 01.01.2004 and are 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. This option may be exercised by the concerned Government servants latest by 31.05.2020.”

(Ruchir Mittal)
Deputy Secretary to the
Government of India.

19. Thus, the Office Memorandum dated 17.02.2020 provided a solace to those Central Government Servants whose selections were finalized in all respects prior to introduction of the DCPS. This Court, by its judgments in (i) **Chitralekha Ratnakarrao Vaidya vs. State of Maharashtra and Others** delivered in Writ Petition No.9199 of 2021 dated 13.12.2021 (ii) **Balasaheb Subrao Kale and Others vs. State of Maharashtra and Others** delivered in Writ Petition No.4115 of 2016 dated 30.11.2018 (iii) **Nandkishor Vinayak Garje and Others vs. The State of Maharashtra and Others** delivered in Writ Petition No.242 of 2019 along with connected Writ Petitions dated 03.03.2020 (to which one of us Acting Chief Justice was a party) and (iv) **Gangu Murlidhar Zade Vs. State of Maharashtra and Ors.** delivered in Writ Petition No. 13702 of 2021 dated 6.09.2022 (v) **Sonali Sanjay Patil & Ors. V/s. State of Maharashtra and Ors.** delivered in Writ Petition No.12009 of 2021 dated 6.10.2022; and (vi) **Bharat s/o. Manchakrao Gurle & Ors. V/s. State of Maharashtra and Ors.**

delivered in Writ Petition No. 14731/2021 dated 06.10.2022(to which one of us Sandeep V. Marne J. was a party) directed that the provisions of Old Pension Scheme would be applicable to the Petitioners therein whose results were declared on or before coming into force of the DCPS.

20. This is how employees whose selection process was over before introduction of DCPS came to be governed by the Old Pension Scheme. However there were several employees of the Central Government, whose selection process was pending as on the date of introduction of DCPS. They formed another category where the advertisement/recruitment notification was issued prior to introduction of DCPS but some stages of selection process remained pending when the DCPS was introduced in the Central Government w.e.f. 01-01-2004. They were actually appointed in the government service after 01-01-2004. Amongst decision by the tribunals, the Delhi High Court in **Pawan Kumar** (supra) dealt with the case of recruits in Central Armed Police Force, who had applied in pursuance of advertisement issued prior to 01.01.2004 but were appointed after 01.01.2004. In the petition before the Delhi High Court, advertisement was issued in June 2002 by the Special Selection Board for filling up Group-A posts of Assistant Commandants in the Border Security Force, Central Reserve Police Force, Indo-Tibetian Border Police force and special Security Bureau (now "Sashtra Seema Bal"). The last date of filing up the application was 30.06.2002. The written examination was conducted on 2.3.2003 and the successful candidates were subjected to physical test, interview and medical examination between October 2003 to February, 2004. The final results were declared in July, 2004. In the meantime, DCPS was implemented w.e.f. 01.01.2004. Though in

Naveen Kumar Jha v. Union of India⁵, **Avinash Singh vs. Union of India**⁶ and **Parmanand Yadvav V/s. Union of India**⁷, the Delhi High Court had directed extension of Old Pension Scheme, the respondents therein issued Office Order dated 11.12.2018 extending the benefit of Old Pension Scheme only to those personnel whose recruitment process was completed by 31.12.2003 and who joined the Force after 1.1.2004. Thus, petitioners in **Pawan Kumar** (supra) were not granted the benefit of Old Pension Scheme. The Delhi High Court dealt with the case of the Petitioners and held in paras-46 and 47 as under :

“46. On this aspect we find that the appointment letters have been issued to the petitioners in the year 2004-2005 after conclusion of the selection process, which took extra inordinate long time as the advertisement / notification for appointment was released in the year 2002 & 2003 for different posts in the Forces. It is not misplaced to mention here that the advertisement [in W.P.(C) No. 12712/2021 i.e. the lead matter] inviting applications for recruitment of Assistant Commandant in BSF/CRPF/ITBP/SSB noted that *"on joining an organization a candidate shall be governed by the Act and Rules as applicable to that organization and as amended from time to time"*.

47. It is the settled position that appointments have to be strictly made in terms stipulated in the advertisement and any breach would tantamount to vitiation of the selection process.”

21. The Delhi High Court thus held that the Rules as applicable as on the date of issuance of the advertisement would apply. After holding as above, the Delhi High Court thereafter went into slightly different issue of applicability of Old Pension Scheme to Central Armed Police Forces and held that the provisions of Old Pension Scheme would apply to them.

5 (2012) SCC Online Del 5606

6 (2011) SCC Online Del 2432

7 (2015) SCC Online Del 7274

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 31st October, 2021. The NPS account of such Government servants, shall, consequently, be closed w.e.f. 31st 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 account 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/cia./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 Heard 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.

24. It appears that the Delhi High Court has adopted the provisions of OM dated 03.03.2023 to officers and staff on its establishment by issuing the following Circular:

**HIGH COURT OF DELHI:NEW DELHI, (Establishment-I
Branch)**

CIRCULAR

No.523/Estt.I/DHC Date: 28.03.2023

It is circulated for information of all concerned that pursuant to Office Memorandum No.57/05/2021-P&PW(B) dated 03.03.2023 issued by Department of Pension and Pensioners Welfare, Ministry of Personnel, Public Grievances and Pensions, Government of India, New Delhi, eligible officers/officials of this Court, who were initially appointed against the posts/ vacancies which were advertised/notified for recruitment/appointment, prior to the date of notification for National Pension' System i.e. 22.12.2003 and are presently covered under the National Pension System on joining service on or after 01.01.2004, may exercise one-time option for coverage under Central Civil Services (Pension) Rules, 1972 (now 2021), in place of National Pension System, latest by 31.08.2023. The Government Servants who exercise the option to switch over to pension scheme under CCS (Pension) rules 1972 shall be required to subscribe to the General Provident Fund (GPF).

The aforesaid OM for coverage under CCS (Pension) Rules, 1972, is also applicable to those officials, who were initially appointed in this Court on various posts viz. Junior Judicial Assistant, Restorer, Personal Assistant, Judicial Translator, Court Attendants etc., on or after 01.01.2004, 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 subsequently technically resigned from the service of this Court to join other Government departments through proper channel. Ex-officials of this Court may also exercise their one-time option to switch over from National Pension System to Central Civil Services (Pension) Rules, 1972 (now 2021), latest by 31.08.2023.

It is clarified that the option once exercised shall be final and those Officers/officials who are eligible to exercise option in accordance with the conditions mentioned in the aforesaid O.M. and have not exercised this option by the stipulated date, shall continue to be covered by the Na-

tional Pension System and option exercised after 31.08.2023 shall not be entertained in any case. A copy of the said Notification dated 03.03.2023 is attached to this circular for ready reference.

Sd/

(J.Tripathi) Registrar(Estt.-I)

Thus it appears that the Delhi High Court has already adopted the provisions of OM dated 03-03-2023 to its officers and members of staff.

25. The State Government has placed strong reliance on sub-rule (2) of rule 2 of the Maharashtra Civil Services (Pension) Rules, 1982 which reads thus :

“2. These Rules shall not apply to the Government Servants, who are recruited on or after 1st November 2005.”

However, it must be noted that similar amendment came to be effected in Rule 2 of the Central Civil Services (Pension) Rules, 1972. The amended provision reads thus:

“Application.- Save as otherwise provided in these rules, **these rules shall apply to Government servant appointed on or before the 31st day of December, 2003** including civilian Government servants in the Defence Services, appointed substantively to civil services and posts in connection with the affairs of the Union which are borne on pensionable establishments, but shall not apply to,-

- a) Railways servants;
- b) Person in casual and daily rated employment;
- c) Persons paid from contingencies;
- d) Persons entitled to the benefit of a Contributory Provident Fund;
- e) Members of the All India Services;
- f) Persons locally recruited for service in diplomatic,

- Consular or other Indian establishments in foreign countries;
- g) Persons employed on contract except when the contract provides otherwise; and
- h) Persons whose terms and conditions of service are regulated by or under the provisions of the Constitution or any other law for the time being in force.”

Despite similar provision in the CCS (Pension) Rules 1972 (now 2021), the Central Government has made departure at least on two occasions by issuing OM dated 17-02-2020 and 03-03-2023 by making applicable the Pension Scheme under the Rules to employees actually appointed after 01-01-2004. Therefore, on this count alone, the provisions of sub-Rule (2) of Rule (2) of the M.C.S. (Pension) Rules, 1982 would not come in the way of Petitioners being granted the relief of application of Old Pension Scheme.

26. The matter can be viewed from other facet even by considering the amended rules.

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.

28. The Apex Court in the case of **Shivaji Nagnath Lokare and Others** (Supra) has observed that the appointment cannot be read to include the word ‘selection, recruitment or recruitment process’. The Apex Court in case of **Prafulla Kumar Swain Etc. vs. Prakash Chandra Misra And Ors.**⁸ observed that recruitment cannot tantamount to appointment.

29. In the present case, the advertisement was issued on 20.06.2005 and the last date for submission of Application was 11.07.2005. The written test was also conducted on 09.08.2005 which was cleared by the Petitioner. They also cleared typing test prior to 01.11.2005. The appointment order is issued subsequently. The legislature in its wisdom has not used the term “appointment on or after 01.11.2005” in Sub-Rule (2) of Rule 2 of the M.C.S. (Pension) Rules, 1982. The M.C.S. (Pension) Rules, 1982 would not apply to the persons who are recruited on or after 01.11.2005 meaning thereby that the said Rule would not apply to the persons

8 1993 SCC Supl. (3) 181

whose recruitment process had commenced after 01.11.2005. The M.C.S. (Pension) Rules, 1982 shall apply to persons recruited in government services prior to 01.11.2005 though appointment orders are issued subsequent to 01.11.2005.

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.

31. We hope and trust that the State of Maharashtra would issue Office Memorandum similar to Office Memorandum dated 03.03.2023 issued by the Central Government clarifying that in all cases where State Government employee has been appointed against a post or vacancy which was advertised/notified for recruitment/appointment prior to the date of notification for Defined Contributory Pension Scheme i.e. 31.10.2005 and is covered under the Defined Contributory Pension Scheme on joining service on after 01.11.2005, may be given one time option to be covered under the The M.C.S. (Pension) Rules, 1982. Such an office memorandum would avoid further litigation.

32. Writ Petition is accordingly allowed.

33. Rule is made absolute in the above terms.

(SANDEEP V. MARNE, J)

(ACTING CHIEF JUSTICE)