

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

WRIT PETITION NO. 2758 OF 2008

Mr. Anjali w/o Anil Tanksale,
Aged about 43 years,
Occupation – Service,
R/o 30-C, Tapowan Complex,
Somalwada, Nagpur.

.... **PETITIONER**

VERSUS

- 1) State of Maharashtra,
through its Secretary, Education
Department, Mantralaya,
Mumbai – 400 032.
- 2) Deputy Director of Vocational
Education and Training,
Regional Office, Link Road, Sadar,
Nagpur.
- 3) Somalwar Academy Education Society,
through its Secretary, Ramdaspath,
Nagpur.
- 4) Somalwar Junior College,
through its Principal, Ramdaspath,
Nagpur.

.... **RESPONDENTS**

Mr. D.A. Mohgaonkar, Counsel for the petitioner,
Mrs. Kalyani Deshpande, AGP for respondents 1 and 2,
Mr. Uday Changle, Counsel h/f. Mr. Anand Parchure, Counsel
respondents 3 & 4.

CORAM : ROHIT B. DEO & MR. M.W. CHANDWANI, JJ.
DATED : 30th JUNE, 2023

ORAL JUDGMENT : (PER : R.B. DEO, J.)

Widely worded as the prayer clause is, the grievance which is agitated during the course of hearing is that the petitioner is denied the benefit of the Old Pension Scheme.

2. The State Government issued Government Resolution dated 31-10-2005 which applied the Defined Contributory Pension Scheme (DCPS) replacing the existing Pension Scheme, to Government servants who are recruited on or after 01-11-2005 in State Government service. Clause 4(b) of the Government Resolution dated 31-10-2005 made applicable the DCPS to the employees, who are recruited on or after 01-11-2005, in the services of the Recognized and Aided Educational Institutions, Non-Agricultural Universities and affiliated Non-Government Colleges and Agricultural Universities etc., to whom the existing pension scheme and General Provident Fund Scheme is applicable.

3. The Full Bench of this High Court has held that the Old Pension Scheme shall apply only to employees who were appointed prior to 01-11-2005 in recognized primary, secondary schools or colleges of education which were receiving 100% grant-in-aid as on 01-11-2005 (*Deshmukh Dilipkumar Bhagwan and others v. State of Maharashtra and others, 2019(3) Mh.L.J. 903.*

4. The grounds on which the benefit of Old Pension Scheme is denied are discernible from communication dated 07-8-2006 addressed by the Deputy Director, Vocational Education and Training, Regional Office, Nagpur to the petitioner and her employer school. We may extract the relevant portion of the said communication -

“With reference to the above, approval is hereby accorded to the appointment of Smt. A.A. Tanksale, as full time teacher (Electronics) in the pay scale of 7225 – 11050 with effect from 01-3-2006 (in words First March Two Thousand Six), in General Category (Open) as per proposal submitted by you and as per Bindu Namavali as submitted by you, subject to the condition that the remaining backlog will be filled in on priority basis and also subject to the following conditions.

Since, the above approval is accorded with effect from the date after 01-11-2005 and as per the provisions of letter at Sr.No.8 under reference, the provisions of Terminology of contributory Pension Scheme has been made applicable, the provisions of Maharashtra Civil Services (Pension) Rules 1982 will not be applicable.”

5. It would be necessary to note broad facts in order to address the grievance raised in the petition.

a) The petitioner was initially appointed as Lecturer in Electronics on the establishment of Somalwar Junior College, Khamla Branch, Nagpur which is administered by respondent 3-institution, with effect from 01-10-1988. The said college was then unaided.

b) Somalwar Junior College, Ramdaspath, Nagpur is also administered by respondent 3-institution. In the said college, one vacancy of Lecturer in Electronics occurred in 1997 due to the resignation of Mrs. M.D. Keskar who was working as Lecturer in Electronic, which post was receiving 100% grant-in-aid. The petitioner was transferred to the aided post which felt vacant due to the resignation of Mrs. M.D. Keskar.

c) The management sought approval from the appropriate authority to transfer an appointment of the petitioner to the 100% aided post which felt vacant due to the resignation of Mrs. M.D. Keskar. Contemporaneously, the management intimated the occurrence of the vacancy to the Employment Exchange and the Social Welfare Officer. Respondent 2-Deputy Director of Vocational Education and Training was also requested to forward the name of any surplus teacher who may be eligible and interested in applying for the vacant post.

d) While respondent 2 did communicate the name of Mr. Pravin Padalwar who belonged to the Scheduled Tribe Category, and the management did invite Mr. Pravin Padalwar to attend the interview, he did not turn up.

e) The management addressed communication dated 26-9-1997 to respondent 2 that Mr. Pravin Padalwar did not report and sought permission to transfer the petitioner to the vacant aided post.

f) The management issued order dated 16-9-1997

appointing the petitioner as full-time Lecturer in Electronics Department, Somalwar Junior College, Ramdaspath, Nagpur. The petitioner contends that while she was, as a fact, transferred, she was issued an appointment order and not transfer order.

g) The management then forwarded proposal seeking approval to the appointment of the petitioner as Lecturer in Electronics Department, Somalwar Junior College, Ramdaspath, Nagpur.

h) Respondent 2 issued communication-cum-order dated 12-2-1999 which approves the appointment of the petitioner for the academic year 1997-98 subject to the condition that the backlog in reservation is cleared.

i) Presumably, in view of the limited tenure of the approval, the management issued fresh appointment order dated 25-6-1998 and sought approval to the said appointment. Respondent 2 again approved the appointment of the petitioner for the academic year 1998-99 on the condition of filling in the backlog.

j) The management then issued appointment order dated 25-6-1999 and sought approval to the appointment from respondent 2.

k) Vide communication dated 08-9-1999 respondent 2 informed the management that since appointment of the petitioner is made for two years on probation, the proposal be submitted along with the roster.

l) In response, the management addressed communication dated 03-11-1999 to respondent 2, along with which communication was enclosed the roster.

m) Although the management complied with the direction that the roster be enclosed, the order of approval dated 09-3-2000 is again restricted to the academic year 1999-2000.

n) The management submitted representation dated 10-7-2000 inviting the attention of respondent 2 to the fact that the roster was already submitted and requesting respondent 2 to approve the appointment of the petitioner on probation.

o) In response, respondent 2 communicated to the management on 04-9-2000 that since the roster is not certified, approval to the appointment of the petitioner on probation cannot be granted.

p) It appears that on 20-6-2001 again appointment order was issued to the petitioner and approval sought from respondent 2. In response, respondent 2 addressed communication dated 25-10-2002 seeking explanation from the management as to the efforts made to fulfill the backlog.

q) The management addressed communication dated 09-9-2002 to respondent 2 clarifying that Bifocal course has four sanctioned post (i) Full-time Teacher/Lecturer, (ii) Instructor, (iii) Laboratory Assistant, and (iv) Helper. It was further clarified that out of the four sanctioned posts, three are filled in from the reserved category and it is only the post of Full-time Lecturer/Teacher which is occupying by the petitioner is from the Open Category. The management elaborately spelt out the efforts made to fulfill the backlog in the school concerned.

r) Respondent 2 then addressed communication dated 21-1-2003 purporting to return the proposal seeking approval to the appointment of the petitioner.

s) An exchange of communications between the management and respondent 2 followed. One relevant communication is communication dated 27-9-2005 addressed by the management to respondent 2 along with which was enclosed the certified roster.

t) Ultimately, by communication dated 07-8-2006 impugned, the relevant portion of which is extracted *supra*, the appointment of the petitioner was approved with effect from 01-3-2006 subject to the condition that the petitioner shall not be entitled to the benefit of the Old Pension Scheme.

6. **SUBMISSIONS** -

a) Mr. D.A. Mohgaonkar would submit that it is not controverted that the transfer of the petitioner to the aided post on 18-9-1997, which the management unfortunately treated as fresh appointment, was in clear, permanent and sanctioned

vacancy which occurred due to the resignation of Mrs. M.D. Keskar, who belonged to the Open Category. The management was forced to issue fresh appointment order in view of the action of the authority to approve the appointment only for the academic session. Ultimately, considering the certified roster and the explanation of the management, the authority did approve the appointment of the petitioner vide communication-cum-order impugned. Mr. D.A. Mohgaonkar would submit that respondent 2 fell in serious error in approving the appointment of the petitioner with effect from 01-3-2006 and the rationale underlying the date of effect of the approval is not discernible from the communication impugned.

b) The alternate submission which is canvassed by Mr. D.A. Mohgaonkar is that assuming *arguendo* that the date of effect of the approval is justified, the denial of the benefit of the Old Pension Scheme is arbitrary and irrational. Mr. D.A. Mohgaonkar would emphasize on the distinction between in connotation of the word “recruited” and “approved” and submit that the fact that the appointment is approved with effect from 01-3-2006 does not detract from the irrefutable position that the

petitioner was appointed after following due process of law on 18-9-1997 and in any event, prior to 01-11-2005.

c) Mr. D.A. Mohgaonkar would invite our attention to the decision of the Full Bench in *St. Ulai High School and another v. Devendraprasad Jagannath Singh, 2007(1) Mh.L.J. 597* to buttress the submission that grant of approval is not a condition precedent to a valid order of appointment. Mr. D.A. Mohgaonkar would then press in service the decisions of the Coordinate Bench in *Writ Petition 4241/2012 (Kum. Sandhya K. Pandharpure v. State of Maharashtra and others), and connected matters; Purushottam Harishchandra Shirsekar and another v. State of Maharashtra and others, 2022(2) Mh.L.J. 390; Nilesh and others v. State of Maharashtra and others (2021) 6 AIR Bom. R. 680 and connected matters*; and the decision rendered by the Division Bench of the Madras High Court in *Writ Appeal (MD) 307/2019 (V. Vasanthi v. The State of Tamil Nadu and others)*.

d) The learned Assistant Government Pleader Mrs. Kalyani Deshpande would take us through the affidavit-in-response dated 11-9-2008 which is filed on behalf of respondent

2. The broad stand of respondent 2 as is discernible from the affidavit-in-response is that limited tenure approvals were granted to the appointment of the petitioner in view of the existence of backlog. The management submitted the certified roster position as on 31-12-2003 and 31-12-2004 and requested grant of regular approval to the appointment of the petitioner. However, as per the roster position as on 31-12-2003, seven employees were appointed in excess in Open Category, and in the roster position as on 31-12-2004 one employee was appointed in excess beyond the required percentage. The management then submitted certified roster as on 31-7-2005 which again shows that in the Open Category one employee was appointed in excess. The management informed respondent 2 that one Teacher Mrs. P.P. Mehta is due to superannuate on 28-2-2006 and she hails from the Open Category. The affidavit-in-response asserts that since Mrs. P.P. Mehta was to superannuate on 28-2-2006, the appointment of the petitioner was approved with effect from 01-3-2006.

7. **CONSIDERATION** -

a) We may now consider the decisions cited by Mr. D.A. Mohgaonkar. In *St. Ulai High School*, the Full Bench clarified that while emphasizing that the appointment is not rendered illegal for want of approval, the approval of the appointment is a condition for disbursal of grant-in-aid. The Full Bench further clarified that in an appropriate case where the non approval of the services of a Teacher by the Education Department affects the right of the Teacher to pensionary benefits or declaration that he or she is not surplus, the Teacher shall be entitled to challenge the refusal of approval in appropriate proceedings.

b) In *Kum. Sandhya K. Pandharpure*, the challenge was to the order of refusal of approval. The petitioners were granted approval on year to year basis subject to the employer fulfilling the backlog in recruitment. The approval was refused since the employer of the petitioners did not fill in the backlog. It was only due to the intervention of the High Court in separate petition that the roster was prepared and certified by the Backward Class Cell on 16-8-2007 and again approval was rejected on the premise that the petitioner was appointed in Open Category and the

backlog was not filled in.

c) The High Court noted that employees from the Open Category who were appointed subsequently, were granted approval. The High Court found that despite the knowledge of the existence of the backlog, initially appointments were approved on academic year to year basis. The High Court reasoned that the petitioners cannot be blamed if the employer took no step to fill in the backlog. It is in these broad facts that the High Court directed that the approval be granted to the petitioners from the dates on which the immediate junior is given approval.

d) *Purushottam Harishchandra Shirsekar* is rendered in the context of the refusal of the authority to consider the part-time employment of the petitioner made prior to 01-11-2005. The Coordinate Bench held that irrespective of the nature of the initial appointment, employee working against fully aided post prior to 01-11-2005 would be governed by the Old Pension Scheme. Significantly, the Coordinate Bench found no merit in the submission canvassed on behalf of the State Government that the employee must not only be appointed prior to 01-11-2005,

but further the post against which the employee is appointed must also be a fully aided post for making the Old Pension Scheme applicable to such employee. We may extract the relevant passage in *Purushottam Harishchandra Shirsekar* thus -

*“20. Thus it is clear that employees such as Petitioner No.1 who were appointed prior to 1st November, 2005 in aided educational institution receiving 100% grant-in-aid as on 1st November, 2005 would be governed by the old pension scheme. This has further been made clear by the Division Bench in *Deshmukh Dilipkumar Bhagwan (Supra)* along with companion matters, decision dated 26th August, 2019 (Coram Pradeep Nandrajog, CJ and Smt. Bharati Dangre, J.). It has been held therein that employees of schools, including colleges of education working against fully aided, i.e. 100% aided post prior to 1st November, 2005, irrespective of the nature of the initial appointment would be governed by the old pension scheme. We do not find any merit in submission of the learned AGP that the employee must not only be appointed prior to 1st November, 2005 but the post against which the employee is appointed must also be a fully aided post for making the old pension scheme applicable to such employee. The impugned order has only referred to a Government Order which it alleges provides for such requirement. However, said*

Government Order has neither been produced nor any particulars of the same has been given. Further the Government Order relied upon in the impugned order cannot be contrary to what has been laid down in the decisions of this Court including the decision of the Full Bench in Deshmukh Dilipkumar Bhagwan (Supra)."

e) It appears that the expression, "fully aided post" which is employed in the passage extracted *supra*, refers to "full time post". The observation is made in the context of the submission that an employee who is appointed on part-time post receiving grant-in-aid prior to 01-11-2005, and the post is upgraded as full-time post receiving 100% grant after 01-11-2005, the Old Pension Scheme shall not apply.

f) We may now analyze the decision of the Full Bench in *Deshmukh Dilipkumar Bhagwan*. In *Homraj Hansaram Bisen and ors. v. State of Maharashtra and ors. 2013(2) Mh.L.J. 401*, the Nagpur Bench held that the Pension Rules 1982 and as a sequitur the Old Pension Scheme would apply only to the employees who were working in 100% grant-in-aid schools prior to 01-11-2005. After the decision in *Homraj Hansaram Bisen*, bunch of petitions came up for consideration before the Coordinate Bench at the

Principal Seat which was of the opinion that the issues were required to be decided by a Larger Bench. The questions for consideration by the Larger Bench were formulated thus -

“1. Whether only those schools and colleges of education which are receiving 100% aid can be termed as the aided institutions or whether schools and colleges of education receiving less than 100% aid can also be termed as aided institution?

2. Whether the employees who were appointed prior to 1st November, 2005 in the aided recognized primary, secondary and higher secondary schools as well as colleges of education which were receiving less than 100% grant-in-aid as on 1st November, 2005 are entitled to the benefit of Old Pension Scheme under the Pension Rules and the Commutation of Pension Rules or whether they will be governed by the New Pension Scheme under the GR of 2005?

3. Whether the employees who were appointed prior to 1st November, 2005 in the aided recognized primary, secondary and higher secondary schools as well as the colleges of education which were receiving less than 100% grant-in-aid as on 1st November, 2005 but which became 100% aided before the date on which the GR of 2010 came into force, are entitled to the benefit of Old

Pension Scheme under the Pension Rules and the Commutation of Pension Rules or whether they will be governed by the New Pension Scheme under the GR of 2005?”

g) The Full Bench held that only those employees of private recognized aided schools who were recruited prior to 01-11-2005 in schools receiving 100% grant-in-aid would continue to be governed by the Old Pension Scheme. It would be apposite to extract the relevant passages in the decision of the Full Bench.

“33. It is true that the relevant rules under grant-in-aid code refer to an aided school and does not make a distinction between a partially or fully aided school. Nevertheless, the liability of the Government to pay pensionary benefits to a retired employee of a private school can arise only if the Government has undertaken to pay 100% grant to the school. As noted, very concept of expecting the Government to pay such pension even in a case where the Government has so far not undertaken the liability to pay 100% grant is abhorrent to the basic principle of service law.

34. It is true that the service put in by an employee of a recognized private school during the time when such

school was not receiving grant, would also count towards the qualifying service for pension when such employee retires from a school which receives grant. This was also the context of G.R. dated 8.4.2018 noted earlier. This, however, would not mean that the employee appointed in a school can claim to be governed by the pension scheme till the school starts receiving 100% grant.”

h) The Full Bench answered the reference thus -

“37. Under these circumstances, we answer the Reference as under :-

Question No. 1:

In the context of the right of an employee of private school or college of education to receive pensionary benefits and the corresponding liability of the Government to pay the same, only those schools and colleges of education which are receiving 100% grant-in-aid can be termed as aided institutions.

Question No. 2 :

The employees who were appointed prior to 1.11.2005 in aided recognized primary, secondary schools as well as colleges of education which were receiving less than 100% grant-in-aid as on 1.11.2005 would be governed by the DCP scheme.

Question No. 3:

Similar will be the situation of the employees who were appointed prior to 1.11.2005 in aided primary, secondary and higher secondary schools as well as the colleges of education which were receiving less than 100% grant-in-aid as on 1.11.2005 but which became 100% aided before 29.11.2010 would also be governed by the DCP scheme.”

i) Reverting to the factual matrix, we may note that it is not even the case of the State Government or respondent 2 that the private recognized school to which the petitioner was transferred or appointed on 18-9-1997 was not receiving 100% aid. The transfer of the petitioner which is treated as fresh appointment by the management was in vacancy which was clear, permanent and sanctioned, and which occurred due to the resignation of Mrs. P.P. Mehta who was from the Open Category. While it is faintly suggested in the counter-affidavit that in view of the existence of the backlog, the appointment of the petitioner was not lawful, it is admitted position on record that the appointment was approved, albeit on academic year to year basis. Neither the qualifications nor the eligibility nor the mode of

appointment was questioned by the authority on ground other than the need to fill in the backlog. Ultimately, considering the certified roster and on the premise that one Teacher Mrs. P.P. Mehta who hails from the Open Category shall stand superannuated on 28-2-2006, the appointment is approved with effect from 01-3-2006.

j) We are inclined to hold, on the basis of facts which are either admitted or incontrovertible, that the petitioner was appointed in private recognized school which was receiving 100% aid prior to 01-11-2005. As is observed by the Coordinate Bench in *Kum. Sandhya K. Pandharpure*, assuming that there existed backlog which the management could not clear in entirety, the fault does not lie at the door step of the petitioner. We are not impressed by the half-hearted attempt of respondent 2 to brand the initial appointment of the petitioner “unlawful”.

k) Assuming that respondent 2 was justified in approving the appointment of the petitioner with effect from 01-3-2006 on the premise that Mrs. P.P. Mehta was superannuated from the Open Category, the only implication perhaps may be that the State

may be justified in not releasing the salary grant for the post to which the petitioner is appointed for the period preceding the approval. However, the fact that the appointment is approved with effect from 01-3-2006 does not mean or imply that the petitioner was not recruited in school receiving 100% grant-in-aid prior to 01-11-2005.

l) The decision of the Division Bench of the Madras High Court in *V. Vasanthi* is closure to the factual matrix. The petitioner-teacher was appointed on 29-7-2002 and after undergoing the one month Child Psychology Training, her services were regularized on 20-12-2004. In the State of Tamil Nadu the New Contributory Pension Scheme came into force on 01-4-2003. By the order impugned, the petitioner-teacher was held not eligible to the benefit of the Old Pension Scheme on the premise that she was regularised in service on 20-12-2004 after commencement of the New Contributory Pension Scheme, which came into force on 01-4-2003.

m) The Division Bench of the Madras High Court held that the date of approval cannot be construed as the date of

appointment for the purpose of considering the applicability of the relevant pension scheme. The Division Bench of the Madras High Court considers the issue thus -

“10. Now, the question arises for consideration is as to whether the date of approval of appointment is the relevant date for considering the claim of the writ petitioner under the Old Pension Scheme or the date of approval of her original appointment to the said post. Appointment to the post by the School/Management and approval of the same by the Education Department are two different events and thus, relevant dates of those two events are certainly different and distinguishable. Approval of appointment is granted by the department for the purpose of extending the monetary benefits. Therefore, it does not mean that date of approval itself has to be construed as the date of appointment for the purpose of considering the applicability of the relevant pension scheme. Approval of such appointment may be granted either from the date of such appointment or from any other subsequent date depending upon the facts and circumstances of each case like want of vacancy or sanction etc. At any event, the date of appointment remain to be the same. The dispute herein is not with regard to the claim for salary from the date of the appointment of the writ petitioner. On the other hand, it

is in respect of the applicability of relevant pension scheme, under which, the writ petitioner has to be placed. For this purpose, the date of approval of appointment is not relevant factor and on the other hand, it is only the date of appointment that matters. In other words, if the writ petitioner is entitled to count her service period from the date of her appointment for the purpose of pension, she must be placed only under the Old Pension Scheme, since her appointment was admittedly earlier to the introduction of the New Pension Scheme.

11. *At this juncture, the observation made by the Division Bench in **2004-2-L.W. 591** (cited supra) at paragraph 8, is relevant to be quoted.*

“8. Their right to be regarded as persons eligible for confirmation / approval can be said to arise only after they acquired, after their training, a minimum prescribed qualification. The Government here has shown great concession to them by allowing them to retain their position even without obtaining the requisite diploma or certificate in child psychology by giving to them training in child psychology. We see nothing wrong in the Government directing that their approval / confirmation can only be on and after the date they complete the training. Their past service however shall count for pension.”

12. A careful perusal of the above observation made in the said **Pallivasal Primary School** case would show that even though approval of the appointment of the teacher, who has undergone Child Psychology Training, will take effect only on completion of such training, the past service rendered by such teacher i.e., service rendered before the completion of such training, is bound to be counted for pension. In other words, the service period of such teacher commences from the date of the appointment and not from the date of approval, even though the monetary benefits start to accrue only from the date of completion of the training. Therefore, for all practical purposes, the date of appointment is not altered and remain to be the same. Therefore, the date of approval of appointment of the writ petitioner cannot be construed as the date relevant for considering the applicability of the pension scheme and on the other hand, it is the original date, on which the writ petitioner got appointed that matters for considering as to whether the writ petitioner is governed under the Old Pension Scheme or not. At this juncture, it is relevant to note that in G.O.Ms.No.259, Finance (Pension) Department, dated 06.08.2003, a proviso to Rule 2 of the Tamil Nadu Pension Rule 1978, was introduced by way of amendment, wherein and whereby, it is contemplated that the Tamil Nadu Pension Rules 1978 shall not apply to Government Servants “appointed” on or after 1st April

2003 to services and posts. The word “appointed” referred in the said proviso cannot be construed to mean approval of such appointment.”

n) We are inclined to agree with the observations of the Division Bench of the Madras High Court extracted *supra*.

8. In the result, we quash the impugned communication dated 07-8-2006 to the extent the petitioner is not held entitled to the benefit of the Old Pension Scheme.

9. We declare that the petitioner is entitled to the benefit of the Old Pension Scheme.

10. The petitioner is superannuated on 30-11-2022. Any monetary benefit under the DCPS received shall be refunded and/or adjusted against the benefits receivable under the Old Pension Scheme.

(Mr. M.W. Chandwani, J.)

(Rohit B. Deo, J.)

Digitally signed by PRAFULLA
MANOHARRAO ADGOKAR
Signing Date: 20.07.2023 15:29

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