

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION 2368 OF 2022

Pramod s/o. Prabhakar Rao Deshmukh,
Aged about 63 yrs, Occ. Retired,
r/o. Yashomangal Colony,
VMV Road, Amravati 444 604

Petitioner

...Versus.....

1. State of Maharashtra,
through Secretary, Department of Social
Justice and Special Assistance,
Mantralaya, Mumbai 32

2. Commissioner, Social Welfare (MS) 3,
Church Road, Pune 1

3. Regional Deputy Commissioner of
Social Welfare, Samajik Nyay Bhawan,
Maltekdi, Road, Amravati

4. Assistant Commissioner of Social
Welfare, Samajik Nyay Bhawan,
Maltekdi Road, Amravati

5. Vidarbha Youth Welfare Societi's,
College of Social Welfare, through
Principal, Anjangaon Bari Road,
Badnera, Amravati

.....Respondents

Mr. P.D. Meghe, counsel for petitioner.
Mr. M.K. Pathan, AGP for Respondent 1 to 4/State.
Mr.R.D. Bhuibhar, counsel for Respondent 5.

CORAM: ROHIT B. DEO AND MRS. VRUSHALI V. JOSHI, JJ.
DATE: 28.04.2023

JUDGMENT : (PER ROHIT B. DEO, J.)

Heard.

2. Rule. Rule made returnable forthwith. With consent, heard finally.

3. The petitioner is assailing the order dated 17.3.2022, issued by respondent 4 – Assistant Commissioner of Social Welfare (Annexure -1), whereby amount of Rs. 5,20,140/- paid to the petitioner towards leave encashment, is directed to be recovered on the premise that the petitioner was not entitled to the benefit of leave encashment.

4. Petitioner was appointed as Assistant Librarian at respondent 5 - institution on 1.10.1982, and he superannuated on 31.12.2016.

5. Respondent 5 is an aided institution which is affiliated to the Sant Gadge Baba Amravti University.

6. The service conditions of the non-teaching employees of respondent 5 are governed by the provisions of the Maharashtra Non-Agricultural Universities and Affiliated Colleges Standard

Codes (Terms and Conditions of Service of Non-Teaching Employees) Rules, 1984 (hereinafter referred to as the “Rules of 1984”).

7. The Pension Scheme was made applicable to teaching and non-teaching employees of colleges which are receiving grant-in-aid from the Department of Higher and Technical Education and are affiliated to Non-agricultural Universities in the State of Maharashtra. At a later stage, the Pension Scheme was made applicable also to the teaching and non-teaching employees of colleges which receive grant-in-aid from the Department of Sports.

8. Respondent 5, which was receiving grant-in-aid from the Department of Social Justice and Special Assistance, and similarly situated colleges, were not covered by the Pension Scheme. The teaching and non-teaching employees of Social Work Colleges approached the High Court seeking implementation of the Pension Scheme, in Writ Petition 5771/2011, Writ Petition 682/2012 and Writ Petition 3277/2012.

9. The writ petitions supra, were decided by common judgment dated 10.6.2013 and Rule was made absolute in terms of direction contained in paragraphs 37 and 40, which we extract below:

“37. In the result, it follows that the Government decision dated 27.6.2001 refusing to extend the pension-cum-gratuity scheme to Ayurvedic and Unani Colleges impugned in Writ Petition No.5771 of 2011 and similar decision dated 12.7.2010 about Social Work Colleges impugned in other two writ petitions are, therefore, unsustainable. Submission that communication dated 12.7.2010 is only reiteration of basic decision of the State dated 11.7.2001 not to extend said benefit to Social Work staff and has been questioned after huge delay, also does not hold any water. There is nothing on record to show that this cabinet decision was communicated to any of the concerned parties. These decisions dated 27.6.2001, 11.7.2001 and 12.7.2010 are quashed and set aside.

40. In this situation, we feel that pension and gratuity from State exchequer for the past needs to be denied to all and said benefits can be directed to be extended to the respective petitioners/staff members only from the date of filing of these three petitions before this High Court. Thus we hold that Staff of Petitioner Colleges and Hospital staff in Writ Petition No.5571 of 2011 is entitled to pension and gratuity in terms of GR dated 21.7.1983 from 21.11.2011 ie the date of filing of Writ Petition No.5771 of 2011. Similarly, the staff of Social Work Colleges is entitled to it from 27.1.2012 being the date on which first of writ-petitions ie Writ Petition No.682 of 2012 has been filed. This direction is applicable only to those who are not subject to new defined CPF scheme dated 31.10.2005. Those who are covered under later GR dated 31.10.2005 shall be extended its benefit in terms thereof also from the respective dates of filing already indicated above. Payments towards gratuity and of monthly pension as per these directions should be worked out as per law after requisite compliances by 31.12.2013 and shall be paid to the respective employees within next 6 months thereafter. The monthly pension due to them from

1.1.2014 shall be released regularly along with others. Any default or delay in payment after stipulated period shall attract interest as per prevailing policy of the State Government”.

In view of the directions issued by the High Court, the State Government issued Government Resolution dated 29.10.2014 extending the benefit of pension and gratuity to the teaching and non-teaching employees of the Aided Social Work Colleges, in accordance with the provisions of the Maharashtra Civil Services (Pension) Rules, 1982 and Maharashtra Civil Services (Commutation of Pension) Rules, 1984.

10. The petitioner submits that the State Government appears to be labouring under an erroneous and untenable impression and assumption that since the judgment of the High Court supra, in view of which the Government Resolution dated 29.10.2014 is issued, does not deal with leave encashment benefits, the petitioner and similarly situated employees are not entitled to the benefit of leave encashment.

11. The petitioner would submit, that there was no reason or occasion for the petitioners in the writ petition supra to claim

leave encashment benefits inasmuch as the non-teaching employees of aided colleges are entitled to leave encashment in view of the provisions of Rule 39 of the Rules of 1984, which reads thus,

“39. (1) Cash equivalent of leave salary in respect of earned leave at the credit at the time of retirement on superannuation -

(i) The Authority Competent to grant leave shall suo-motu sanction to an employee who retires on attaining the age of superannuation the cash equivalent of leave salary in respect of the period of external leave at his credit on the date of his superannuation, subject to a maximum of 240 days.

(ii) The cash equivalent of leave salary payable under sub-rule(1) shall also include dearness allowance admissible on the leave salary at the rates in force on the date of retirement and it shall be paid in one lumpsum as a one time settlement.

(iii) The compensatory local allowance and house rent allowance shall not be included in calculating the cash equivalent of the leave salary under this rule.

(iv) From the cash equivalent so worked out, no deduction shall be made on account of pension and pensionary equivalent of other retirement benefits.

(v) A non-teaching employee who retires from service attaining the age of compulsory retirement while under suspension shall be paid cash equivalent of leave salary under sub-rule(i) in respect of the period of earned leave at his credit on the date of his superannuation, provided that in the option of the authority competent to order reinstatement a non-teaching employee has been fully exonerated and the suspension was wholly unjustified.

Explanation 1. An employee can also avail of leave preparatory to retirement of a part of earned leave at his credit. In that case, he shall be allowed payment of cash equivalent of leave salary for the retirement in accordance with sub-rule(i).

Explanation 2. with a view to enabling the retiring employee to receive cash equivalent of leave salary in respect of the unutilized earned leave without delay, the following procedure shall be following namely;-

(a) An employee nearing the retirement date on superannuation should inform in writing to the Authority competent to sanction leave, three months, in advance of the date of retirement, if he desires to avail of cash equivalent of leave salary in respect of the unutilized earned leave at his credit on the date of his superannuation.

(b) The Competent Authority shall after satisfying himself that earned leave, if any, availed of by the concerned employee after receipt of his written intimation as in clause (a) is actually deducted from the earned leave due and admissible as on the date of superannuation as reported by his office, arrange to issue necessary orders sanctioning cash equivalent of leave salary in respect of the unutilized earned leave within a week of the date of retirement of the concerned non-teaching employee.

(c) Thereafter the Competent Authority shall within 15 days after the date of retirement, prefer a bill claiming the cash equivalent of leave salary in respect of the unutilized earned leave to the Administrative Officer, Higher Education Grants of the region concerned.

(d) Payment of cash equivalent of leave salary in respect of the unutilized earned leave at the credit of the non-teaching employee retiring on superannuation, shall be made irrespective of whether or not "No Demand Certificate" from the Registrar or the Principal concerned is received.

Explanation : The cash payment for unutilized earned leave shall be made in the following manner -

*pay+dearness allowance
admissible on date of retirement*

cash payment =-----X *No. of utilized
days of earned
leave at credit
subject to a max.
of + [240]*

*+ substituted for “180 days”, and *explanation renumbered as Explanation 3 by Notification No. USG.1490/(8577) uni-3 Cell dated 25.6.1990.*

(2) Cash equivalent of leave salary in case of death while in service, in case of a non-teaching employees dies while in service the cash equivalent of his leave salary admissible on the date immediately following the death and in case, not exceeding leave salary for 180 days, shall be paid to his family without any reduction account of pension and pension equivalent to death cum retirement gratuity. In addition to the cash equivalent of leave salary admissible his family shall also be entitled to payment of dearness allowance only.

+ substituted for “180 days”, by Notification No.USG.1490/(8577) uni-3 Cell dated 25.6.1990.

12. Petitioner submits that entitlement to leave encashment is by virtue of Rule 39 supra, and employees who superannuated prior to the issuance of Government Resolution dated 29.10.2014 did receive the benefit of leave encashment. It is emphasized, that rules are framed in exercise of power conferred under the Amravati University Act, 1983(“University Act”) and the benefits flowing from the statutory provisions, cannot be diluted much less obliterated on the specious assumption that the

Government Resolution dated 29.10.2014 makes no reference to leave encashment. Petitioner would further submit that the limited significance of the Government Resolution dated 29.10.2014 is that in view of the judgment of the High Court, the employees of the concerned colleges are extended the benefit of pension, and to that extent the Pension Rules are made applicable.

13. Petitioner submits that the Office of the Principal Accountant General (A&E)-II Maharashtra addressed communication dated 29.10.2021 to respondent 4, sanctioning the difference of gratuity amount in view of the implementation of the revised pay scales recommended by the 7th Pay Commission. Since the petitioner did not receive the gratuity amount, he approached the Office of the Accountant General which issued communication dated 8.3.2022 asking respondent 3 to take necessary steps for releasing the amount of gratuity. Petitioner also addressed letter dated 17.3.2022 to respondent 4 demanding that the difference of leave encashment amount also be released.

14. Petitioner was informed by the office of respondent 4

that recovery of Rs. 5,20,140/- from the difference of gratuity amount sanctioned by the office of the Accountant General is ordered. The petitioner represented, but in vain. An amount of Rs. 80,460/- was only remitted to the Treasury for depositing in the account of the petitioner.

15. It is on these broad facts that the petitioner is assailing the order of recovery.

16. Learned counsel Mr. P.D. Meghe has canvassed twin submissions. The first submission is that the petitioner is indeed entitled to leave encashment, which right flows from the provisions of Rule 39 of the Rules of 1984 and the other submission is, that in any event, no amount could have been recovered from the retiral benefits, in view of the enunciation of the Hon'ble Apex Court in *State of Punjab and Others Vs. Rafiq Masih (White Washer) and Others, (2015) 4SCC 334 (Rafiq Masih)*.

17. Respondent 5 - institution has filed affidavit in response dated 20.6.2022 which does not rebut the contentions of the

petitioner. The said affidavit in response need not detain us any further.

18. Respondents 1 to 4 have filed affidavit in response dated 5.7.2022 which is affirmed by the Assistant Commissioner of Social Welfare, Amravati.

It is submitted on behalf of respondents 1 to 4 in the affidavit in response supra, that the Government Resolution dated 29.10.2014 does not envisage leave encashment benefit to the non-teaching employees of Social Work Colleges. It is suggested that the Department of Social Justice is not bound to adopt the policy of another department of the State Government. The affidavit in response dated 5.7.2022 makes no attempt to deal with the submission of the petitioner that the right to leave encashment flows from statutory provisions of the Rules of 1984, particularly, Rule 39.

19. Additional affidavit in response dated 18.1.2023 is filed on behalf of the respondents 1 to 4.

In the additional affidavit dated 18.1.2023, it is submitted that the retiral benefits receivable by employees of the

Social Work Colleges flow from Government Resolution dated 29.10.2014 which was issued in view of the directions issued by the High Court in writ petitions, *supra*. It is submitted that since the High Court restricted the relief only to pension and gratuity, the State Government is not obligated to pay leave encashment to the employees of the Social Work Colleges.

It is submitted that the then officer incorrectly sanctioned the leave encashment to the petitioner, and after an enquiry, the Commissioner of Social Welfare issued direction that the amount incorrectly paid be recovered.

20. An ingenious plea is taken in paragraph 6 of the additional affidavit dated 18.1.2023, which is that the statutory provisions of the Rules of 1984 would not apply to the employees of Social Work Colleges, “**unless so provided by the Government by way of the directions issued from time to time**”.(*emphasis supplied*). It is reiterated that since the High Court restricted the consideration and relief to pension and gratuity, employees of the Social Work Colleges are not entitled to leave encashment. Referring to the order of the Assistant commissioner dated

28.11.2017, it is submitted that the then officer committed an error in assuming that leave encashment is due and payable in view of Rule 39 of Rules of 1984. It is emphasized that the order dated 28.11.2017 refers to Government Resolution dated 29.10.2014 and not to Rule 39. It is further submitted that since the petitioner has not challenged the Government Resolution dated 29.10.2014, nor is a declaration sought that the judgment of the High Court also covers leave encashment, the petitioner may not be entitled to the relief prayed.

21. We have heard the learned counsel for the petitioner Mr. P.D. Meghe, the learned AGP Mr. M.K. Pathan for respondents 1 to 4 and learned counsel Mr.R.D. Bhuihar, for respondent 5, at length.

22. In fairness to Mr. M.K. Pathan, the submission that the recovery could not have been directed after the superannuation of the petitioner, and which submission is premised on the decision of the Hon'ble Apex Court in *Rafiq Masih*, is not seriously opposed. The thrust and focus of the submissions canvassed by

Mr. M.K. Pathan is that while recovery may be impermissible, the petitioner is not entitled to any further relief, and the stand of the State Government that the petitioner and similarly situated non-teaching employees of Social Work Colleges receiving aid, are not entitled to leave encashment benefit be considered on principle, and accepted.

23. We have extracted Rule 39 of the Rules of 1984. It is not even argued, as indeed could not have been, that the non-teaching employees of Aided Social Work Colleges are not governed by the Rules of 1984. The stand of the State Government as is discernible from the additional affidavit supra, is that no benefit under the Rules of 1984 can be claimed, unless the rules are implemented or made applicable by the State Government by issuing directions.

24. We are surprised that the State Government is labouring under an impression that a non-teaching employee whose service conditions are governed by the Rules of 1984 shall not be entitled to claim the benefit of Rule 39 of the said Rules

unless the State Government extends the benefit by issuing direction. The benefit conferred by the statutory provision is not dependent on the issuance of any direction by the State Government. Nothing is brought to our notice, as would impel us to consider the stand of the State Government seriously. Indeed, while we have noted the stand of the State Government and the submission canvased consistent therewith, we have no hesitation in rejecting the ingenious submission without any reservation.

25. The benefit of leave encashment is conferred by the Rules of 1984. The emphasize of the State Government that the judgment of the High Court is restricted to relief of pension and gratuity and excludes leave encashment, is clearly misconceived. The High Court considered the grievance raised, which was that the employees of the Aided Social Work Colleges were not extended the benefit of pension and gratuity. The High Court had no occasion to consider a grievance which was not raised, and which indeed did not exist. The right to receive the leave encashment benefit flows from Rule 39 of the Rules of 1984, and the petitioners before the High Court had no reason or occasion to

invite the High Court to make any observation as regards leave encashment, which right stood crystallized by the statutory service conditions.

26. The submission canvased on behalf of the State Government that in view of the exclusion of leave encashment from the Government Resolution dated 29.10.2014, the petitioner is not entitled to relief is founded on a pathetic misconception of law. The Government Resolution dated 29.10.2014 is issued in view of the directions of the High Court. The fact that the said Government Resolution makes no reference to leave encashment benefit is irrelevant. The Government Resolution was issued to ensure the implementation of the directions of the High Court which are restricted to the grievance of pension and gratuity, and the exclusion of the reference to leave encashment in the Government Resolution must be understood in that context.

27. We are constrained to suggest to the State Government that pleas, even argumentative pleas, in the affidavit in response submitted in the High Court or any other Court, may be vetted

and approved by competent legal minds. Such suggestion, unpleasant as the task is, is necessary in view of the stand of the State Government that the employees are not entitled to the benefit of Rule 39 of the Rules of 1984 unless such benefit is extended by the State Government by issuing directions. It is slightly disconcerting that such contention is raised by the State Government which is expected to be conscious of the fundamental principle of law that the benefit conferred by statutory provisions cannot be diluted much less obliterated by issuing administrative directions or even in exercise of executive power under Article 162 of the Constitution of India. We note that there is nothing in the Parent Act or in the Rules of 1984 which make the effect and implementation of Rule 39 conditional upon or subject to the exercise of administrative power by the State Government.

28. Mr. M.K. Pathan has invited our attention to the reference in the communications or orders issued by the officers concerned to emphasize that the reference is to Government Resolution dated 29.10.2014. We find that any reference by an officer in the communication or order to the said Government

Resolution or Pension Rules is of no significance. Nothing turns on the reference of an officer to the Government Resolution or the Pension Rules. In our considered view, while the reference to irrelevant Government Resolution or Pension Rules may perhaps reflect adversely on the author of the communication, such reference is of no significance in the context of the issue involved.

29. We have no hesitation in holding, that the petitioner and similarly situated employees are entitled to the benefit of leave encashment in view of Rule 39 of the Rules of 1984.

30. While Mr. P.D. Meghe is justified in placing reliance on ***Rafiq Masih*** to buttress the submission that recovery is impermissible, if not illegal, we have already held that the petitioner is entitled to the benefit of leave encashment, and therefore, *de hors* the principles enunciated in ***Rafiq Masih*** this petition will have to be allowed.

31. The petition is allowed in terms of the prayer clauses (i to iii), which reads thus:

(i) Quash and set aside the impugned order dated 17.3.2022 (10.2.2022) issued by the respondent number 4 – Assistant Commissioner, Social Welfare, Amravati at Annexure-I.

(ii) Direct the respondents to determine the amount of leave encashment based upon fixation of pay of petitioner on the basis of 7th Pay Commission recommendations and to release entire amount of gratuity and leave encashment, the same to the petitioner.

(iii) Further direct the respondents to release all other benefits to petitioner based upon fixation of pay of petitioner as per 7th Pay Commission.

(Mrs. Vrushali V. Joshi, J.) (Rohit B. Deo, J.)

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