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

WRIT PETITION NO. 3447 OF 2020

Ashok s/o. Chintaman Raut,
Aged about 61 Years,
Occupation – Nil,
R/o. 45 Mahakali Nagar No.2,
Manewada Ring Road, Nagpur – 34. **....PETITIONER**

...VERSUS...

1. State of Maharashtra,
Through its Principal Secretary,
Department of Social Justice &
Special Assistance, Mantralaya,
Mumbai 32.

2. Commissioner of Persons with Disabilities
Maharashtra State, 3 Church Road,
Pune, Pin code – 411001.

3. District Social Welfare Officer,
Zilla Parishad, Nagpur,
New Administrative Building,
Ground Floor, Near Ravi Bhavan,
Civil Lines, Nagpur.

4. District Collector Nagpur,
As an Administrator Deaf and Dumb
Industrial Institute, Shankar Nagar, Nagpur.

5. Deaf and Dumb Industrial Institute
Through its Principal,
North Ambazari Road, Shankar Nagar Square
Nagpur, 440010.

6. Accountant General (A & E) – II,
Pension Wing, Old Building,
Post Box No.114, GPO, Civil Lines,
Nagpur – 440001. **...RESPONDENTS**

Mr. Anand Parchure, Advocate for Petitioner.
Ms K. Joshi, Addl.G.P. for Respondent 1 to 4 & 6/State.
Mr. V. A. Dhabe, Advocate 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 orders dated 21.01.2020 and 29.06.2020 passed by respondent 3 - District Social Welfare Officer, Zilla Parishad, Nagpur.

4. The order dated 21.01.2020 directs that the salary paid to the petitioner, for duty discharged at the respondent 5 - Deaf and Dumb School, from 02.06.1994 to 31.12.2003, which comes to Rs.7,08,796/- be recovered from the retiral benefits. The order dated 29.06.2020 informs the Principal of the Deaf and Dumb School, Shankar Nagar, Nagpur that the service rendered by the

petitioner at the Deaf and Dumb School between 01.06.1994 to 23.12.2003 cannot be considered as qualifying service, and that the date of appointment be considered as 24.12.2003 and only the period 24.12.2003 to 30.4.2018 be considered for the purpose of pension.

5. Before we note the broad facts, we may note the submission of the learned Additional Government Pleader Mrs K.S. Joshi that the State Government is not averse to granting pension subject to the condition that the salary which is received by the petitioner for the period 01.06.1994 to 23.12.2003 is recovered.

6. Facts are broadly admitted.

6.1 Petitioner admits that from 5.1.1981, he started working as labour at the then Model Mill, Nagpur and in 1999-2000, he was assigned the work of Clerk. The petitioner states that his appointment was not made through the National Textile Corporation (NTC) which then controlled the Model Mill. The petitioner states that in Model Mill, the employees were of two categories, one belonging to the National Textile Corporation Grade and other/Private Mill Grade and that the petitioner was in the latter category. Model Mill closed down in 2003. Petitioner was asked to tender resignation and the employees who belonged to the NTC grade were absorbed in other establishments.

6.2 Petitioner admits that while he was working as labour on the establishment of the Model Mill, he came to be appointed as Accountant at the Deaf and Dumb Industrial Institute, Nagpur on 1.1.1993. He was terminated since some other employee claimed the post of Accountant. After hearing the concerned, the Office of the Commissioner held that the petitioner is entitled to hold the post of Accountant. The petitioner's appointment was approved by the District Women, Child and Handicapped Person Welfare Officer vide order dated 17.5.1994 and again fresh appointment order was issued on 1.6.1994.

6.3 Petitioner claims that he did disclose to the employer that he was required to work in the night shift at Model Mill, Nagpur. Petitioner asserts that he discharged regular duty on the establishment of respondent 5 as Accountant, and in the night shift, he worked at Model Mill.

6.4 Petitioner submits that in the year 2008, one group in the Management submitted complaint to respondent 3. At the instance of respondent 3, the principal issued letter dated 16.5.2008 asking the petitioner to show cause how and why he worked simultaneously at two establishments till 23.12.2003. The petitioner submitted explanation dated 20.5.2008 which was forwarded to respondent 3. Petitioner states that neither the Management nor respondent 3 initiated any action against the petitioner.

6.5 Petitioner then endeavours to highlight the circumstances which compelled him to work at two establishments. Petitioner emphasizes that while the circumstances made him work at two establishments, he discharged duty at respondent 5 diligently and did not give any occasion to the Management to complain.

6.6 Petitioner submits that in view of the dispute in the Management, in the year 2013, the Commissioner directed respondent 3 to submit report as regards the employees of respondent 5. Accordingly, report was submitted which contained specific reference to the petitioner. Petitioner emphasizes that even in the year 2013, the authorities were well aware that the petitioner worked at two places in the period 1994 to 2003 and chose not to initiate any action.

6.7 On 18.7.2017, the Principal prepared a report as directed by the Administrator who had taken over the institution and highlighted the factum of the dual employment of the petitioner. Petitioner superannuated as Accountant on 30.4.2018.

6.7 The pension papers were forwarded to the appropriate authority on 6.3.2018 and the proposal for release of provident fund amount was forwarded on 26.4.2018.

6.8 Petitioner was served with communication dated 22.5.2018 whereby respondent 3 directed the respondent 5 to constitute Enquiry Committee. The direction to hold enquiry records that the act of drawing salary from two establishments constitutes fraud on the Government. It is the case of the petitioner, that his employment at the Model Mill was not the employment with the Government and the question of playing fraud as such does not arise. Petitioner reiterates that his job on the establishment of the Model Mill was in night shift only.

6.9 Inaction on the pension proposal constrained the petitioner to seek information under the Right to Information Act, and in response, petitioner was informed by the office of the respondent 3 that there was an enquiry pending, and the dues shall be released after its completion.

6.10 It appears that there was some interaction and correspondence between the office of respondent 3 and respondent 2 – Commissioner as regards the entitlement of the petitioner to the retiral dues. One of the assumption of the District Social Welfare Officer was that the petitioner received pension from the Model Mill. According to the petitioner, the assumption is factually incorrect and that the Number MH/3502/10677 is the Provident Fund Case Number and has nothing to do with pension. Petitioner asserts that he did not receive any pension from the Model Mill.

6.11 Petitioner states that the Commissioner advised the respondent 3 that it was the responsibility of respondent 3 to deal with the service matters of the employees of the institution. It appears that the respondent 3 issued communication dated 28.11.2018 addressed to the Administrator informing that Rs. 7,08,796/- is recoverable from the petitioner. Further communication dated 15.1.2019 is addressed by respondent 3 to the Principal stating that provisional pension of Rs. 8,535/- is sanctioned subject to the outcome of the departmental enquiry.

6.12 Petitioner states that a preliminary enquiry was conducted. Statement of one Mr.Kulkarni, who is described as the Manager of Model Mill was recorded. Mr. Kulkarni stated that petitioner received provident fund amount of Rs. 1,34,117/- and gratuity of Rs. 4,70,471/- for the services at Model Mill. The statement of the petitioner was also recorded in the preliminary enquiry. The Enquiry Committee submitted report dated 15.4.2019 pursuant to which the provisional pension was stopped with effect from 1.6.2019. Ultimately, the respondent 3 advised the Office of the Accountant General that Rs. 7,08,796/- is recoverable from the petitioner in addition to amount of Rs. 2,76,357/- paid as provisional pension for the period 1.5.2018 to 31.5.2019.

6.13 The Office of the Accountant General, Nagpur addressed communication dated 22.10.2019 to respondent 3 raising certain queries. Respondent 3 responded by stating that the Enquiry Report is enclosed and that the salary paid to the petitioner for the period 1.4.2019 to 23.12.2003 for the employment of the Deaf and Dumb Institute be deducted from the retiral benefits.

6.14 The Office of the Accountant General asked the respondent 3 to submit the final order of the competent authority on Departmental Enquiry and further sought clarification whether the period from

1.6.1994 to 23.12.2003 be counted as qualifying service.

6.15 Respondent 3 issued order dated 21.1.2020 which was followed by order dated 29.6.2020 directing recovery of Rs. 7,08,796/- from the retiral dues and further directing that the date of appointment be considered as 24.12.2003.

7. Petitioner submits that the orders noted supra, and which are impugned herein, are passed without offering any opportunity of hearing to the petitioner and the principles of natural justice stand violated. Petitioner then refers to the objection preferred to the orders impugned, which did not find favour with the authority.

8. It is on these broad facts, that the petitioner assails the orders impugned and the grounds raised in the memo of petition and the submissions canvased by learned counsel Mr. Anand Parchure are on the lines of the perspective of the petitioner noted

supra.

9. Respondent 5 filed affidavit in response dated 26.3.2021 opposing the claim in the petitioner. Perusal of the said affidavit in response reveals, that it is not in dispute that at least in 2008, respondent 5 institute was aware of the factum of dual employment. The said affidavit however makes no attempt to explain why the Management of respondent 5 did not proceed departmentally against the petitioner immediately or in close proximity of time upon gathering the knowledge of dual employment.

10. Along with the affidavit in response, letter dated 20.5.2008 addressed by the petitioner is enclosed and the submission is that in the said letter, the petitioner admitted his mistake and stated that if the Management is of the view that the petitioner caused financial loss to the State Government or if there is a demand from the Model Mill, the amount received from the Model Mill may be recovered in monthly installment and if any amount remains to be recovered, the same be recovered from

the retiral benefits.

11. Petitioner has filed counter affidavit dated 22.6.2021 which endeavours to demonstrate that it was all the while within the knowledge of the Management that the petitioner was working at Model Mill and the then President Mr. S.W. Dhabe clearly declared that the Management is least interested what the petitioner does after the regular duty hours. It appears that there is some controversy as to the authenticity of the document Annexure R-5-3 which the Management is projecting as the admission of guilt and consent of the petitioner to the recovery of the amount.

12. Respondent 4 – District Collector, Nagpur and the Administrator of respondent 5 institute has filed affidavit in response dated 7.4.2021. Paragraphs 4,5 and 6 of the said affidavit read thus:

> *"4. It is submitted that, this respondent vide communication dated 21.1.2019 directed the respondent No. 5 to fix the charges upon the petitioner and asked to appoint an inquiry committee for inquiring the issue of double employment of the petitioner. The copy of said*

communication dated 21.1.2019 is annexed as Annexure R4-I herewith this reply.

5. It is submitted that, the respondent No. 5 accordingly constituted the inquiry committee vide communication dated 4.2.2019, consisting of Smt. Archana Rathod, Sau. Sadhna Pathradkar, Shri Siddharth Somkumar and Shri Devidas Helode. It is submitted that, the said inquiry committee submitted its preliminary inquiry report on 15.4.2019 which is placed on record by the petitioner at Annexure XV (page 68 to 72) to the petition. It is submitted that, the report of the inquiry committee is self explanatory and shows that the said inquiry committee has granted opportunity to the petitioner and the petitioner also admitted before the inquiry committee about his double employment vide his communication dated 15.3.2019. It is submitted that, the contents of the inquiry report are true and correct which consequently proves that the petitioner has worked at two places and received the salary. It is submitted that, the action taken by the respondent No. 5 is just and proper.

6. It is further submitted that, the pension case of the petitioner was forwarded to the respondent No. 6. But considering the objection and queries raised by the respondent No. 6, the pension of the petitioner seems to have not been released. Hence, the communications issued by the respondent No. 3 to the respondent No. 5 is just and proper and the petition is liable to be dismissed being without any substance and merits.

13. Respondent 2 and 3 have filed affidavit in response dated 25.10.2021 and the relevant portion is extracted by us

below:

> *"3. It is submitted that, the present petitioner is working as Accountant in Deaf and Dumb School, Shankar Nagar, Nagpur from year 1994 and retired on 30.4.2018. The present petitioner is also working in Model Mill (Unit of NTC) from 5.1.1981 to 23.12.2003. Therefore, the present petitioner was working with 2 institutions at the same time. Instead of initiating the Departmental Enquiry against the present petitioner, the Principal of Deaf and Dumb School, Shankar Nagar, Nagpur forwarded the pension proposal to the answering respondent.*
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> *4. It is submitted that, on the basis of complaint made by the member of Institution namely Shri Shankar Nildavar, Dr. Mukund Paithnkar, Shri Dilip Khode, Shri Minakshi Sarvate against the present petitioner, the Deaf and Dumb School, constituted the Enquiry Committee and as per report of Enquiry Committee the present petitioner is working at Model Mill as Junior Clerk when he was working as Accountant at Deaf and Dumb School, Shankar Nagar, Nagpur.*
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> *5. It is further submitted that, the present petitioner was on payroll of 2 institutions at the same time and he was receiving salary from both the institutions at the relevant time. On 23.12.2003 after closer of Model Mill his service was came to an end and the present petitioner has also received amount of Rs. 4,03,223/- vide Cheque No. 103624 dated 23.12.2003 as MVRS and other statutory dues, from Model Mill. The copy of said Cheque dated 23.12.2003 is annexed herewith and marked as Annexure R-1.*
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> *Moreover, the present petitioner has received P.F. amount of Rs. 1,34,117/- the present*

petitioner is also having pension account of Model Mill vide Account No. MH/3502/10677 and present petitioner has also received pension scheme card. The copy of pension account is annexed herewith and marked as Annexure R-2.

The present petitioner was working on night duty in Model Mill said fact was admitted by the petitioner. The copy of the same is already annexed with petition as Annexure -III.

6. It is further submitted that, the present petitioner has received amount of Rs. 7,08,796/- as a salary and other allowances as a Accountant in Deaf and Dumb School for the period from 2.6.1994 to 31.12.2003. It is submitted that, the present petitioner from 2.6.1994 to 31.12.2003 the duration of 9 years and 6 months was working with 2 institutions at the same time and also received payment from both the institutions.

7. It is further submitted that, since the said fact was came to notice by the then Principal of Deaf and Dumb School, Shenkar Nagar, Nagpur. Even though the then Principal have not taken any objection/action against the petitioner. The dispute is going at present in the Management of Deaf and Dumb School and therefore, the Collector is appointed as an administrator.

The said fact was put to notice of the Collector. Thereafter, the Collector has suggested to recover the amount paid to the petitioner during that relevant time. Therefore, the answering respondent is to recover amount of Rs. 7,08,796/-, which is for the period from 2.6.1994 to 21.12.2003 the said amount is due from the petitioner which is yet to recover.

14. Petitioner has filed rejoinder to the affidavit in response

filed on behalf of respondents 2 and 3 and certain paragraphs may be reproduced verbatim.

> *"6. Petitioner submits that the respondent no. 5 institutes where petitioner was working imparting education/training to deaf and dumb students as such the provisions of Special Code of the year 1997 for physically handicapped school are applicable to the petitioner. The said special code is called as a "अपंगंच्या शाळा व कर्मशाळांकरीता विशेष शाळा संहीता Rule No. 78 of the said code classifies the punishments into two categories i.e. Minor Punishment and Major Punishment. Rule 78(d) provides that when the increments are withhold for a period less than one year it should be treated as minor penalty. In the present case when service period from 1.6.1994 to 23.12.2003 was itself treated as non-qualifying period as such the entire salary and increments earned during the said period i.e. about 8 to 9 increments would be affected and it would have effect on increments earned even after 2003 till the date of retirement. As such the effect of the impugned orders dated 21.1.2020 and 29.6.2020 is saddling heavy or major penalty on the petitioner and the respondents cannot be permitted to saddle such a heavy penalty without conducting full fledged enquiry in accordance with law against the petitioner and therefore, on this ground itself the impugned orders dated 21.1.2020 and 29.6.2020 deserves to be quashed and set aside.*
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> *7. It is submitted that even according to the Maharashtra Civil Services (Discipline and Appeal) Rules 1979 Rule No. 10(2) thereof or as per Rule No.31 of Maharashtra Employees of Private Schools (Conditions of Service)Regulations the action of respondents falls within the ambit of saddling major penalty and as stated earlier the respondents*

have not followed the procedure required for saddling major penalty before passing the impugned orders.

8. It is submitted that the respondents are repeatedly harping on the point that the petitioner was working on two establishments and are also asserting the violation of Rule 16(1) of Maharashtra Civil Services Conduct Rules. The petitioner submits that his service conditions are not governed by Maharashtra Civil Services Conduct Rules and hence the Rule 16(1) cannot be made applicable to the petitioner. The petitioner has already made it clear that his job at Model Mill Nagpur was not government job. However, at this juncture it is pertinent to mention here that as per the Special Code of the year 1997 applicable to the schools for handicapped the service conditions of petitioner are governed by Maharashtra Employees of Private School (Conditions of Service) Regulation and there is no such bar for non-teaching employees to undertake private job after regular school hours are over and on the contrary the Rule 22 of the said Regulations provides that a non-teaching employee if so desires could even work in night school throughout the year. It is therefore, most respectfully submitted that the respondents are unnecessarily complicating the situation and without proper scrutiny and also without following due process of law passed the impugned orders against the petitioner.

9. It is further submitted that the respondents no. 2 and 3 in their reply have stated that petitioner is also having pension account of Model Mill Vide Account No. MH/3502/10677 and the petitioner has also received the pension scheme card. Petitioner is denying that he has received any such pension scheme card and so far as Account No. MH/3502/10677 is concerned the same is not the *pension account number of petitioner but it is the Provident Fund Number of petitioner and even the annexure no. R-2 annexed by the respondent no. 2 and 3 states that MH/3502/10677 is the Provident Fund Number of petitioner for his working at Model Mill Nagpur. It is thus submitted that the respondents without proper scrutiny are proceedings against the petitioner.*

10. Petitioner submits that before passing the impugned orders the respondents did not even issue any show cause notice to the petitioner asking him to submit an explanation as to why the action resorted against him vide impugned orders dated 21.1.2020 and 29.6.2020 should not be given effect. Had the said opportunity was given to the petitioner, the petitioner would be able to put his side before the respondents. The petitioner thus submits that the entire action on the part of respondents is violative or principles of natural justice and hence on this ground also the petitioner is seeking interference at the hands of this Hon'ble Court".

15. Respondent 5 then filed additional submissions. Paragraphs 1 to 3 of the said additional affidavit reads thus:

"1. That, the petitioner without any substance and merits and without proving and establishing that the law permits him to employment at once and received the salary alongwith other benefits from the government exchequer including the benefits of provident fund, gratuity from the Govt. of India undertaking i.e. NTPC as can be seen from the Annexure-R2 dated 15.2.2019 filed by the respondent No.2 & 3 alongwith their reply dated 5.1.2022. Bare perusal of the same shows that the petitioner has got his PF Account No. MH3502/10677 (admitted in para 9 of his rejoinder) which was never disclosed this respondent No.5 right from the joining of his service till

his retirement from the respondent No.5 school. Therefore being employee of respondent No.5 school new and separate provident fund number was allotted and was in operation having PF Account No. NGP/F28HH/01/46, which is in contravention of the provisions of Provident Funds Act & Rules. Not only that the petitioner also enjoyed the loan from the school as against his PF Account. Copy of the statement of the said PF Account is annexed herewith as Additional Annexure No. R5-4. Therefore it is very clear that the petitioner has concealed the material facts from this Hon'ble Court and hence the petition is liable to be dismissed with heavy compensatory costs.

2) That, the petitioner wants to justify his duel and illegal employment by blaming the then management saying that he had informed the school and management through its then President Shri S.W.Dhabe but except bare statement nothing has been placed on record. It is submitted that the said President was practicing advocate and was also Member of Parliament for two regimes being a Rajya Sabha Member and was also office bearer of the International Labour Organization being Parliamentary Member of the Govt. of India. He was also the President of Worker's Union i.e. INTUC and therefore it is impossible that he had permitted petitioner to work in the school after his regular office hours. Even the petitioner has not placed on record any material that the service rules and conditions of Model Mill permitted him to work with respondent No.5 school while in their employment. Therefore there is no substance in the say of the petitioner that he was working with respondent No.5 school with the knowledge and permission of the then President as claimed in para 3 of the counter affidavit. Therefore in absence of any disclosure about his post-salary and other benefits receiving from Model Mill till 2003 by the petitioner to the school while joining as Accountant proves the fraud and malafides on his part and therefore the petitioner has not approached with clean hands, consequently the petition is liable to be dismissed with costs.

3) That, the petitioner has not placed any documentary *proof, service conditions justifying his employment at two places and was entitled to receive salary and other benefits from his two employers and that too from the government exchequer. Therefore admitting his guilt of duel employment the petitioner himself and therefore has consented for recovery from his monthly salary and also from his retirement benefits and therefore there is no any illegality and ambiguity in the impugned orders. The petitioner has by his rejoinder dated 16.1.2022 has repeatedly submitted that no full fledged inquiry has been conducted by the respondents, however, considering his own admissions and undertakings now the petitioner is estopped from challenging the said recovery as per the impugned orders. Similarly, the committee report at Annexure-4 of the petition clearly mentioned the then Principal brought the said fact into the knowledge of the then Secretary Mr. Dilip Gode but after her retirement the new Principal Mr. Nare seems to have not taken any steps and both of them have denied about the case file and service file of the petitioner as can be seen from Annexures R5-1 & R5-2 filed by this respondent. However, it is pointed out that the petitioner never challenged the said inquiry report of the inquiry committee, on the contrary he has admitted before the said inquiry committee also contacted petitioner on 14.3.2019 in response to the same the petitioner given his statement on 15.3.2019 admitting the double employment due to the poor financial condition of his family. This clearly proves that even after his retirement he has admitted his guilt before the inquiry committee by way of above mentioned statement and therefore the contention of the petitioner that full fledged inquired was required has no substance and therefore the petition is liable to be dismissed with heavy compensatory costs".*

16. Respondent 6 has also filed affidavit in response, which we need not consider in detail inasmuch as the stand is that respondent 6 is not in a position to proceed further in the matter

in view of the pendency of the petition.

17. The first question which we have to consider is whether the amount of Rs. 7,08,796/- can be recovered from the retiral dues of the petitioner on the premise that the said amount corresponds to the salary for the period 1994 to 2003 during which period the petitioner was also working on the establishment of the Model Mill and our answer is in the negative.

18. It is not even the case of the respondents that the petitioner did not discharge full time duty at respondent 5 institute for the period concerned. It is not as if the petitioner left or abandoned the duty even temporarily in order to work at the Model Mill. The petitioner asserts that he worked at the Model Mill only in the night shift and in the absence of any contrarian material, we find it difficult to disbelieve the said assertion, particularly, since it is not even argued before us that the petitioner neglected his duty on the establishment of respondent 5 – institute. In essence, what is sought to be recovered is the amount of salary received by the petitioner for the work actually

done. We have already noted, that it is incontrovertible that at least in 2008, the Management of respondent 5 was aware of dual employment of the petitioner. The petitioner was permitted to superannuation. No Departmental Enquiry was initiated much less punishment imposed, till the superannuation. While the conduct of the petitioner may not be ideal or even appropriate, it is difficult to accept the submission of the respondents that there is any financial loss caused to the State exchequer. We say so, since what is paid to the petitioner is the salary for the duty discharged.

19. The next question which we will have to address is whether the service rendered from 01.06.1994 to 23.12.2003 can be ignored for the purpose of calculation of qualifying service for pension and again the answer will have to be in the negative.

20. It is not as if the petitioner was working on two establishments of the Government. It does not appear, and we are inclined to accept the submission of the petitioner to that effect, that the petitioner does not receive any pension from the

Model Mill. The power of the State Government to deny pension is statutorily regulated. In the present case, while there is no denial of pension as such, the insistence of the State Government that the period between 01.06.1994 to 23.12.2003 shall not be counted for determining the qualifying service has adverse effect on the quantum of pension and the consequence is reduction of pension. Any reduction of pension again can be only in accordance with the statutory rules. It is not even argued before us, that the denial or reduction of pension is done after complying with the statutory rules holding the field.

21. In this view of the matter, the orders dated 21.1.2020 and 29.6.2020 passed by respondent 3 - District Social Welfare Officer, Zilla Parishad, Nagpur are quashed and set aside.

22. Respondents are directed to forthwith process the pension case of petitioner without effecting any recovery from retiral benefits and to count the entire service rendered at respondent 5 institution w.e.f. 1.6.1994 to 30.4.2018 as qualifying

service for the purpose of pension and accordingly release the pension and all other retiral benefits, within the next three months.

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

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