



Gaikwad RD

REPORTABLE

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 2187 OF 2022

DR PRADEEP RANGRAO NALAWADE,
Age: 60 Years, Occupation: Retired as
Associate Professor in Pharmacy, Residing
at: Survey No.8, Plot No.17, Tapodham
Road, Warje, District Pune 411 058.

... PETITIONER**~ VERSUS ~**

- 1. POONA COLLEGE OF PHARMACY,**
Erandawane, Pune District: Pune 411
038.
- 2. BHARATI VIDYAPEETH**
UNIVERSITY,
Bharati Vidyapeeth Bhawan, LBS
Marg, Pune 411 030.
- 3. THE DIRECTORATE OF**
TECHNICAL EDUCATION, STATE
OF MAHARASHTRA,
3, Mahapalika Marg, Post Box No.
1967, Mumbai 400 001.
- 4. STATE OF MAHARASHTRA,**
Through Department of Technical
Education, Mantralaya, Mumbai 400
020.

... RESPONDENTS

superannuation. The 3rd Respondent is the Directorate of Technical Education of the 4th Respondent State of Maharashtra.

4. The emerging facts in the case are that prior to the Petitioner being employed in the 1st Respondent college, he served as Principal in Maharashtra College of Pharmacy from 19th April 1987 to 18th August 1991. There was approval of the 3rd Respondent to his said employment. Thereafter, he served as Principal at the Institute of Pharmacy run by the Shivajinagar Vidya Prasarak Mandal, for two years on probation period after which his services were confirmed. He served there for as many as 7 years and 11 months followed by an appointment as Principal in the Modern College of Pharmacy, Nigdi, Pune for another period of 1 year, 3 months and 3 days.

5. The Petitioner's stint in the 1st Respondent College as Lecturer in Pharmaceutics was from 4th October 1999 till 15th April 2000 and was approved by the 3rd Respondent. Thereafter the Petitioner was continued in service on the said post *albeit* being given technical intermittent breaks in the service for a certain period. Every time, he was given fresh appointment letters and this procedure of engagement continued till 30th April 2009. The Petitioner served on this post from 4th October 1999 till 30th April 2009 with intermittent breaks. The reason for such breaks was that the post was reserved for candidates from the scheduled tribe community and services of the Petitioner were being used for want of an eligible candidate from the ST community.

6. On 11th July 2009, the Petitioner was finally appointed in an open category vacancy on the post, and he has thereafter rendered unbroken service till the date of his superannuation, i.e., till 30th September 2020. Apparently, there is a gap of 674 days in the Petitioner's service, partly due to technical breaks given earlier and partly on account of vacations. Thus, there is a shortage of only one month and 16 days in computation of the Petitioner's qualifying service. It is on this basis that the 3rd Respondent refused to grant pensionary benefits to the Petitioner. The Petitioner made representations to the authorities in the University requesting to condone the gap in service. Acknowledging the service record of the Petitioner, the Joint Director of the 2nd Respondent University also recommended condoning the gaps in service to the 3rd Respondent. All the relevant documents are placed on record.

7. The 3rd Respondent, however, taking cover of several provisions of the Maharashtra Civil Service (Pension) Rules, 1982 ("**MCSP Rules**"), refused to condone the gap in service, and, consequently, the Petitioner retired without pension. The Petitioner thus filed the present Petition impugning the act of the Respondent in refusing to condone the gap in service and rendering him ineligible for pension. During the pendency of the petition, his representation to the 3rd Respondent was rejected by its order of 4th January 2022 and by way of an amendment, the Petitioner also impugns the said order.

8. Mr Bandiwadekar, learned Senior Counsel for the Petitioner, draws our attention to various provisions of the Rules and contends

that the Petitioner is entitled to condonation of the gap in service as provided in Rule 48 of the MCSP Rules. He further asserts that the Petitioner has actually served even during the so-called technical breaks given to him and has also been paid for the said periods and hence there is in fact no gap in service at all. In the alternative, he submits that the Petitioner has in any case completed service of four years and seven months as Principal in Maharashtra College of Pharmacy in Nilanga, which earlier service if added to his service with the 3rd Respondent college, will run much beyond the required qualifying service and thus, he is even otherwise entitled to pension benefits. Lastly, Mr Bandiwadekar says that if the service gap remains uncondoned, the Petitioner would be deprived of his legitimate right to receive pension which is a serious prejudice to him.

9. On the other hand, Mr Mali, learned AGP for the State, contests the Petition relying upon proviso (c) to Rule 48(1) of the MCSP Rules and goes on to reinforce its refusal to condone the service gap saying that the service should be without interruption by confirmation in the same or another post and if there is a break in service, then the interruptions (including two or more interruptions if any), cannot exceed one year. He points out that since the break in service is 674 days, i.e., beyond one year, the conditions of proviso (c) to Rule 48(1) of the MCSP Rules are not met thus making him ineligible for condonation. Nonetheless, Mr Mali admits that the Petitioner has worked during the technical breaks and in fact has also been paid salary for that period. There is also no denial of the approval of the services of the Petitioner and no other impediment is cited to refuse pensionary benefits to the Petitioner.

10. Heard all the parties and perused the record. It is apposite to refer to the relevant provisions of the MCSP Rules, 1981.

“33. Service rendered under Government followed without interruption by confirmation counts in full as service qualifying for pension-A Government servant who holds a permanent post substantively or holds a lien or a suspended lien or a certificate or permanency on the date of his retirement, the entire temporary or officiating service rendered under Government followed without interruption by confirmation in the same or another post, shall count in full as service qualifying for pension except the service rendered against one of the posts mentioned in rule 57.

48. Condonation of interruption in service- (1) The appointing authority may, by order, condone interruptions in the service of a Government servant:

Provided that-

(a) the interruptions have been caused by reasons beyond the control of the Government servant;

(b) the total service pensionary benefit in respect of which will be lost, is not less than five years duration, excluding one or two interruptions, if any; and

(c) the interruption including two or more interruptions if any, does not exceed one year.

Provided further that, such service of the Government servant shall be counted as qualified service for the purposes of Rule 33.

(2) the period of interruption condoned under sub-rule (1) shall not count as qualifying service.

(3) In the absence of a specific indication to the contrary in the service record, an interruption between two spells of civil service rendered by a Government servant under Government, shall be treated as automatically condoned and the pre-interruption service treated as qualifying service.

(4) Nothing in sub-rule (3) shall apply to interruption caused by resignation, dismissal or removal from service or for participation in a strike.

(5) The period of interruption referred to in sub-rule (3) shall not count as qualifying service.”

11. A bare reading of Rule 33 confirms that even if the service of the Petitioner from 1999 till 2009 was labelled ‘temporary’, the entire temporary service followed without interruption by confirmation in the same post must count as service qualifying for pension. The Petitioner’s service after 2009 till superannuation is undoubtedly confirmed and without interruption, and hence, there is no impediment of Rule 33 to deprive pension to the Petitioner.

12. Rule 48 provides three grounds on which gap in service may be condoned. Obviously, sub-clauses (a) and (b) of the proviso to Rule 48(1) are primarily satisfied. The Petitioner really had no say in the technical breaks imposed upon him on account of the post being reserved for candidates of the ST community. Further it is nobody’s case that clause (b) is not satisfied. Now coming to clause (c) of the proviso to Rule 48(1), the 3rd Respondent seems to overlook the

fact that even after Petitioner made a representation dated 16th October 2017, he continued to serve continuously and regularly till his superannuation on 30th September 2020. Thus the 3rd Respondent, itself deciding the Petitioner's representation of 16th October 2017 after a substantial delay, failed to take into account his further service till 30th September 2020. The service from 16th October 2017 counted up to 30th September 2020 makes the gap in service less than four months, i.e., less than one year and thus deserves the benefit of clause (c) of the proviso to Rule 48(1). The 3rd Respondent neglected to consider the days of service *after* the date of representation. Thus the 3rd Respondent has clearly erred in computing the qualifying service of the Petitioner thereby wrongly rendering him ineligible for receiving pension.

13. Another aspect totally overlooked by the 3rd Respondent is the admitted fact that the Petitioner continued to serve even during the technical breaks and for which he was even paid salary for that period. This assumes some significance in relation to the Contract Act, 1972. Section 9 of the Indian Contract Act deals with promises, express and implied. It provides that in so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied. As long as other essential conditions of a contract are fulfilled, the promise, whether express or implied, is enforceable by law. In the present case, there is acceptance of the proposal in terms of accepting appointment and payment of lawful consideration as salary supported by performance of contract. Hence, we can safely hold the act of the Petitioner's continued service in consideration of

payment of salary as an implied contract. Once existence of the contract is established, whether it is reduced into writing or not is inconsequential to the consequences that follow.

14. Moreover, continued 'contracts' like this for years and even decades are unlawful and impermissible.

15. Thus, there is no gap in service at all, considering that the contract of service continued to run. The 3rd Respondent, in its enthusiasm to deny an employee his rightful dues, seems to have confused a 'gap in appointment letters' to mean 'a gap in service'. We thus have no hesitation in holding that there was no gap in service to justify refusal of pension benefits to the Petitioner.

16. Further, the 3rd Respondent has no explanation as to why the post reserved for a candidate of ST community was not being advertised and filled. No steps are shown to have been taken to commence a selection process except to create paperwork of the appointment of the Petitioner as a 'stop gap' arrangement till a candidate from ST community eligible to fill up the post, was finally selected. It is quite unfortunate that the Respondents collectively have failed the system so completely, firstly in not commencing the selection process for filling up the reserved post promptly and secondly, in continuing the service of the Petitioner as a stop-gap arrangement for as many as 10 years, with short spurts of what is referred to as 'technical breaks' to ensure that the employee does not complete the qualifying period. This is nothing but a wrongful loss being caused to an employee, which is totally unacceptable.

17. The Respondents will do well to remind themselves that pension is a post-retirement succour to an employee. The Apex Court in the matters of *DS Nakara & Ors v Union of India*,¹ *Deokinandan Prasad v State of Bihar & Ors*,² *UP Raghavendra Acharya & Ors v State of Karnataka & Ors*,³ *V Sukumaran v State of Kerala & Anr*⁴ and *Punjab State Cooperative Agricultural Development Bank Ltd v. Registrar, Cooperative Societies*⁵ have unequivocally and unambiguously held that pension is not to be treated as a bounty payable at the sweet will and pleasure of the government. The right of pension is a valuable right vested in a government servant. It is a social welfare measure as a post retirement entitlement to maintain the dignity of an employee. Pensionary provisions must be given a liberal construction as a social welfare measure. This does not imply that something can be given contrary to the Rules, but the very basis for grant of pension must be kept in mind, i.e., to facilitate a retired government employee to live with dignity in the winter of his life and thus such benefit should not be unreasonably denied to an employee, more so on technicalities.

18. In our view, the genuine claim of the Petitioner was rejected purely on an incorrect interpretation of law, relying on a provision which is wholly inapplicable. The Petition thus succeeds. The Respondents are directed to disburse the amount of pension to the Petitioner, computed as per Rules, as having completed the period

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- 1 (1983) 1 SCC 305.
 - 2 (1971) 2 SCC 330.
 - 3 (2006) 9 SCC 630.
 - 4 (2020) 8 SCC 106.
 - 5 2022 SCC OnLine SC 28.

of qualifying service, without any gap in service. The impugned order of 4th January 2022 passed by the 3rd Respondent is thus set aside.

19. Rule is thus made absolute in terms of prayer clause (a) and (aa). There will be no order as to costs.

(Neela Gokhale, J)

(G. S. Patel, J)