

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI**

**ORIGINAL APPLICATION NO.905 OF 2017
WITH
MISC. APPLICATION NO.698 OF 2019**

DISTRICT : PUNE

Dr. Dhason Simon.)
Age : 64 Yrs., Retired as Curator in)
Anatomy and residing at D-103, Gagan)
Emerrald, Kondhwa Khurd,)
Pune – 411 048.)...**Applicant**

Versus

1. The State of Maharashtra.)
Through Chief Secretary,)
Mantralaya, Mumbai – 400 032.)
2. The Addl. Chief Secretary.)
Medical Education and Drugs Dept.,)
Mantralaya, Mumbai – 400 032.)
3. The Principal Secretary.)
General Administration Dept.,)
Mantralaya, Mumbai – 400 032.)
4. The Principal Secretary.)
Finance Department, Mantralaya,)
Mumbai – 400 032.)
5. The Director.)
Medical Education and Research,)
Government Dental College Building,)
4th Floor, St. George Hospital Campus)
Mumbai – 400 001.)...**Respondents**

Mrs. Punam Mahajan, Advocate for Applicant.

Mrs. K.S. Gaikwad, Presenting Officer for Respondents.

CORAM : SHRI A.P. KURHEKAR, MEMBER-J

DATE : 03.11.2020

JUDGMENT

1. The Applicant has filed present O.A. for grant of pensionary benefits and to set aside the order dated 14.03.2016 whereby the request for regularization of leave was rejected on the ground that his service was purely temporary invoking the jurisdiction of this Tribunal under Section 19 of the Administrative Tribunal Act, 1985.

2. Undisputed facts for the decision of the present O.A. can be summarized as follows:-

(a) Initially the Applicant was appointed by order dated 02.08.1978 issued by Dean, B.J. Medical College, Pune to officiate as full time Curator in Anatomy for the period of four months in pay scale of Rs.325-25-550-30-610-eb-30-880+DA & other allowances as per rules. (Page 29 of PB).

(b) The Applicant was again reappointed on the post of Curator by order dated 03.02.1979 stating that it is temporary appointment in pay scale of Rs.700-40-1100-50-1600+other allowances as per rules (Page 31).

(c) The Applicant's service was discontinued from 05.02.1981 (Page 32).

(d) Again by order dated 08.02.1979, the Dean, Medical College, Pune re-appointed the Applicant temporarily in revised pay scale for the period of four months or till availability of regular candidate whichever is earlier (Page 33).

(e) Dean, Medical College, Pune again issued the order dated 10.05.1979 stating that the Applicant's appointment has been through the Divisional Selection Board and he is appointed on a clear vacancy. (Page 34)

(f) After appointment, the police verification report and medical certificate from the Medical Board was called and the Applicant was found fit for appointment (Page 35).

(g) The Deputy Director, Medical Education and Research, State of Maharashtra issued a letter dated 11.06.1979 stating that Applicant's appointment was through the Divisional Selection Board and he fulfills the then Recruitment Rules as Curator in Anatomy. The request was also made to AG (Accountant General), Mumbai-1 to issue provisional pay slip (Page 36).

(h) The Government of Maharashtra by letter dated 16.10.1980 asked A.G., Mumbai -1 to authorize the payment of Pay & Allowances to the Applicant (Page 37).

(i) The Government by letters dated 26.03.1981, 07.10.1981, 17.02.1982, 21.03.1986, 09.02.1987, 17.09.1988, 21.02.1989 and 15.03.1990 authorized Pay & Allowances to the Applicant as seen from page no.39 to 50 of PB.

(j) As per Recruitment Rule for the post of Curator in Anatomy at B.J. Medical College, Pune requisite qualification was MBBS or MSC in physical anthropology and admittedly the Applicant is MSC in Anthropology (Page 52 of PB).

(k) The Applicant's service book was maintained on par with regular appointee giving benefit of yearly increments, earned leave,

commuted leave, pay fixation from time to time in regular cadre, LTC & Home loan.

(l) The Applicant was allowed to cross EB bar and lastly he was in pay scale of Rs.9300-34800/-.

(m) The Applicant was also subjected to transfer to Mumbai and again he was reposted in Pune.

(n) By G.R. dated 05.02.1990, instructions were issued by the Government by Maharashtra that even if initial appointment is not through regular selection board, if the candidate fulfills one of the requirement (in terms of the decision given by the Hon'ble High Court in W.P.No.3685 of 1984) such candidate who is in service on 18.06.1983 would be treated as regular appointee.

(o) The Applicant has made various representations in the period from 05.02.1993 to 20.10.2008 to the Government as well as Director Medical Education and Research for absorption on the post of Curator as seen from Page Nos.65,67, 78, 89, 91, 98, 99, 100, 103, 104, 106, 107, 114, 115, 128, 146, 147 and 151 of P.B.

(p) In the meantime, the Government had sought certain information about the mode of appointment of the Applicant and correspondence was made between B.J. Medical College, Pune and the Government.

(q) B.J. Medical College, Pune by letter dated 08.07.1997 recommended the Government to regularize the services of the Applicant (Page 77).

(r) Director, Medical Education Research by letter dated 08.12.2001 recommended the Government for issuance of

permanency certificate to the Applicant stating that the Applicant had already completed service of more than 22 years (Page 101).

(s) Professor and Head of the Department of Anatomy, B.J. Medical College, Pune issued certificate dated 19.06.2007 about performance of the Applicant stating that the Applicant has research publication at his credit and obtained PhD on the topic “Age estimation of human fetus – A study on somatometric and osteometric analysis’ under the University of Pune in July 2003. (Page 124).

(t) Dean, B. J. Medical College, Pune by letter dated 11.12.2007 requested the Director, Medical Education and Research, Mumbai to accept the request of the Applicant for appointment on the post of Lecturer in view of his completion of PhD in 2003 (Page 129) and by letter dated 16.05.2008 (Page 145).

(u) The Applicant has made various representations to the Government to appoint him as Lecturer in Anatomy and to regularize his services by various representations from time to time. (Page Nos.146, 147, 148, 151).

(v) The Government, however by order dated 15.01.2009 rejected the proposal forwarded by B.J. Medical College, Pune for regularization of services on the post of Curator and also rejected his proposal for appointment on the post of Lecturer (Page 153).

(w) Even after rejection by the Government, the Applicant again made various representations for regularization on the post of Curator and he continued the services till he attain the age of superannuation on 31.03.2011.

(x) The Director, Medical Education and Research by letter dated 19.05.2011 (Page No.177 of P.B.) informed the Dean, B.J. Medical College, Pune to take necessary steps for grant of pension to the Applicant at his level. (This letter seems to have been issued on the basis of G.R. dated 02.06.2003 whereby the condition for permanency certificate for grant of pension was deleted from Rule 30 of MCS (Pension) Rules, 1982. However, material to note that subsequently by G.R. dated 04.01.2008, the earlier G.R. dated 02.06.2003 was revoked and stipulation under Rule 30 of Maharashtra Civil Services (Pension) Rules 1982 was again brought in force.)

(y) Dean, B. J. Medical College, Pune by order dated 02.04.2016 informed to the Applicant that his appointment was temporary, and therefore, Maharashtra Civil Services (Leave) Rules 1981 are not applicable to him and his leave for 496 days for grant of extraordinary leave cannot be considered (Page No.196-K of P.B.).

It is on the above background, the Applicant has filed the present O.A. along with application for condonation of delay seeking relief of regularization and consequent pensionary benefits. He contends that it is continuous cause of action depriving him from retirement benefits despite 32 years' service causing severe injustice to him and prayed to condone the delay. He has also raised plea of discrimination.

3. Heard Smt. Punam Mahajan, learned Advocate for Applicant and Mrs. K.S. Gaikwad, learned Presenting Officer for the Respondents.

4. When the matter was taken up for final hearing, the directions were given to Respondents to produce service book of the Applicant, and accordingly, the same was produced for the perusal of Tribunal. Significant to note that the Applicant's service book was maintained on par with regular appointee and all service benefits alike regular

appointee including yearly increments, earned leave, commuted leave, pay fixation from time to time as per enhancement in pay, home town leave facility and home loan was extended to the Applicant. It further reveals that the Applicant had completed computer knowledge course and he was also exempted from passing Marathi and Hindi Language Examination. Importantly, it further reveals that there are entries in service book about appointment of nominee (wife) for the purpose of gratuity, GPF, family pension, etc. Besides, there are entries of verification of leave availed by the Applicant from time to time by the Office of A.G. Suffice to note that, all the while, during 32 years' of service, the Applicant was treated as a regular appointee and all service benefits were extended to him. Needless to mention that all these benefits and maintenance of service book on par with regular appointee run counter to the theory of temporary appointment. If it was really temporary appointment, one failed to understand why service book was maintained and all regular service benefits were extended to him. This being the position, the stand taken by the Respondents is totally irreconcilable and unpalatable in law. There is no escape from the conclusion that the Applicant was treated as regular appointee for all purposes.

5. As stated above, the Applicant was qualified for the post of Curator as per the then eligibility criteria and record speaks in volume that his appointment was made after issuance of Advertisement following interview and selection by Divisional Selection Board. He was subjected to medical test and Police verification of his antecedent regarding character was done. Furthermore, undisputedly, he was appointed in clear vacancy on substantive post. Initially, he was appointed in pay scale of Rs.700-4—1100-50-1600 plus other allowances and at the time of retirement, he was in pay scale of Rs.9300-34800. All these aspects again reinforces the conclusion that the Applicant was treated as regular appointee till his retirement, but only after retirement, the pension and other retiral benefits were denied on the ground that his appointment

was purely temporary. Suffice to say, the stand taken by the Respondent is totally inexplicable and run counter to the voluminous material placed on record as well as legal position.

6. The submission advanced by the learned Presenting Officer that in terms of Rules namely "Curator in Anatomy in Government Medical Colleges under the Director of Medical Education and Research (Recruitment) Rules, 1992 (hereinafter referred to as 'Recruitment Rules of 1992' for brevity) (Page No.225 of Paper Book), the minimum qualification was M.B.B.S, and therefore, the Applicant cannot be said eligible for appointment as Curator is totally unacceptable for the simple reason that the Applicant's appointment was made in 1979 as per the then existing Recruitment Rules or eligibility criteria, and therefore, the Rules framed subsequently in 1992 would not take away the rights accrued in favour of the Applicant. Indeed, if there was any such disqualification or ineligibility to continue the post of Curator, then the Respondents ought to have terminated the services of the Applicant after the enforcement of the 'Recruitment Rules of 1992', but it was not so. On the contrary, the Applicant was continued thereafter for almost 20 years in service. Be that as it may, it is admitted position that at the time of initial appointment in 1978-79, the Applicant was holding M.Sc. degree which was the eligibility criteria, and accordingly, after due process of selection, he was appointed on the post of Curator.

7. In view of above, the stand taken by the Respondents that the Applicant was temporary appointee and was not qualified for the post of Curator has to be deprecated and rejected. This is not a case of backdoor entry by any stretch of imagination. On the contrary, the appointment was made after issuance of Advertisement, holding of interview and selection by Divisional Selection Board. The Respondents have exploited the services of the Applicant for 32 years giving all benefits on par with regular appointee but unfortunately, the proposal for the regularization of the services of the Applicant was rejected by

order dated 15.01.2009 without assigning any reasons (Page No.152 of P.B.). All that, it is stated in communication dated 15.01.2009 that the proposal forwarded by D.J. Medical College, Pune has been rejected by General Administration Department. However, not a single reason is forthcoming in communication dated 15.01.2009. It is two-line order sans reasons. Indeed, the Government ought to have seen the circumstances and the manner in which the appointment was made and legal situation governing the issue. However, unfortunately, the proposal was rejected arbitrarily. Even after rejection of the proposal, the Applicant was continued on the post of Curator till his retirement. This again shows inconsistency and hollowness in the stand taken by the Respondents.

8. Now, let us see whether the claim of regularization is legally acceptable on the anvil of legal positions. At this juncture, it would be apposite to refer Rules 30 and 57 of Maharashtra Civil Services (Pension) Rules, 1982 (hereinafter referred to as 'Pension Rules of 1982' for brevity) which are as follows :-

“30. Commencement of qualifying service.- Subject to the provisions of these rules, qualifying service of a Government servant shall commence from the date he takes charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity :

Provided that at the time of retirement he shall hold substantively a permanent post in Government service or holds a suspended lien or certificate of permanency :

(Provided further that, in cases where a temporary Government servant retires on superannuation or on being declared permanently incapacitated for further Government service by the appropriate medical authority after having rendered temporary service of not less than ten years, or voluntarily after completion of twenty years of qualifying service, shall be eligible for grant of superannuation. Invalid or, as the case may be. Retiring Pension : Retirement Gratuity; and Family Pension at the same scales as admissible to a permanent Government servant.).

57. Non-pensionable service.- As exceptions to Rule, the following are not in pensionable service:-

- (a) Government servants who are paid for work done for Government but whose whole-time is not retained for the public service,
- (b) Government servants who are not in receipt of pay but are remunerated by honoraria,
- (c) Government servants who are paid from contingencies,
- (d) Government servants holding posts which have been declared by the authority which created them to be non-pensionable,
- (e) Holders of all tenure posts in the Medical Department, whether private practice is allowed to them or not, when they do not have an active or suspended lien on any other permanent posts under Government.”

9. The ‘permanent post’ is defined in Rule 9(40) of M.C.S.(Pension) Rules, 1982 as follows :

“**9(40)**: “Permanent Post” means a post carrying a definite rate of pay sanction without limit of time.”

10. The ‘Substantive Pay’ is defined in Rule 9(51) of M.C.S.(Pension) Rules, 1982 as follows :

“**9(51)**: “Substantive Pay” means the pay other than special pay, personal pay or emoluments classed as pay by Government under sub-rule (36)(iii) to which a Government servant is entitled on account of post to which he has been appointed substantively or by reasons of his substantive position in a cadre.”

11. Obviously, in the present case, Rule 57 has no application. It is nowhere the case of the Respondents that the Applicant was paid from contingencies or by way of honorarium. On the contrary, as discussed above, he was appointed on regular pay scale which was revised from time to time in view of recommendations of the Pay Commissions.

12. True, no permanency certificate has been issued by the Government in favour of the Applicant as per first proviso of Rule 30 of ‘Pension Rules of 1982’ which is one of the requirement for qualifying service as pointed out by the learned P.O. However, here, second proviso of ‘Pension Rules of 1982’ is important and prevails over the first proviso.

The second proviso clearly states that in case where temporary Government servant retires after having rendered temporary service of not less than 10 years or even in case of voluntary retirement after completion of 20 years of qualifying service shall be eligible for retiring benefits. As such, in view of this second proviso, it is quite clear that even temporary Government servant, if completes qualifying service of not less than 10 years, he is eligible for retiral benefits. Needless to mention the normal function of proviso is to accept something out of the enactment or to qualify something enacted therein, but for the proviso would be within the purview of enactment. In the words of Lord Macmillan "The proper function of a proviso is to accept and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case".

13. As such, the harmonious interpretation of Rule 30 leaves no doubt that even temporary appointee is entitled for retiral benefits, if he completed qualifying service of not less than 10 years. Whereas, in the present case, the Applicant has rendered 32 years' of service and his appointment was done as per the then criteria by following due process.

14. At this juncture, it would be apposite to refer the decision relied by the learned Advocate for the Applicant. She referred to decision rendered by this Tribunal in **O.A.No.308/2012 (Sunil Padave Vs. The Commissioner, State Intelligence Department) decided on 22.06.2015.** In this case, the Applicant Shri Sunil Padave was appointed purely on temporary basis on temporary vacancy of one Mr. M.A. Datar, who was on leave. The Applicant was continued in service for 25 years and his Service Book was maintained on par with regular employee. All service benefits were rendered to him on par with regular employee. However, the dispute arose when he tendered notice of voluntary retirement under Rule 66 of Maharashtra Civil Services (Pension) Rules, 1982. The notice of voluntary retirement was rejected on the ground that he was the temporary employee and his services were

never regularized. He, therefore, approached this Tribunal for retiral benefits in view of resignation on completion of more than 20 years' service. This Tribunal elaborately dealt with the decisions in **Secretary, State of Karnataka Vs. Umadevi & Ors. (Civil Appeal No.3595-3612 of 1999)**, **A. Umarani Vs. Registrar, Cooperative Societies & Ors. (Civil Appeal No.1413 of 2003)** as well as **State of Karnataka & Ors. Vs. M.L. Kesari & Ors. (SLP No.15774 of 2006)**'s case and granted retiral benefits to the Applicant. This judgment was confirmed by Hon'ble High Court in Writ Petition No.163/2016, decided on 2nd March, 2016 and SLP was dismissed by Hon'ble Supreme Court on 17.10.2016. The legal principles discussed in the Judgment are fully attracted in the present situation. Suffice to say, where the appointment is on clear vacant post and the employee is treated on par with regular employee by maintaining his Service Book, giving yearly increments and benefits of successive Pay Commissions he cannot be deprived of retiral benefits, particularly when, the appointment is made through the then recognized mode of appointment.

15. Mrs. Punam Mahajan, learned Advocate for the Applicant further referred to the decision rendered by this Tribunal in **O.A.975/2018 decided on 16.04.2019 (Balasaheb S. Lambhate Vs. The District Collector, Satara & 3 Ors.)**. In that case, the Applicant was appointed on clear vacancy on substantive post and his service book was maintained as a regular appointee extending all benefits, but after retirement, his pension which was earlier granted was revoked on the ground that he was temporary employee and his appointment was not legal. However, the Tribunal rejected the contention raised by the Government and granted retiral benefits. The said Judgment has been maintained by the Hon'ble Bombay High Court in **Writ Petition No.7753/2019 (State of Maharashtra Vs. Balasaheb S. Lambhate) decided on 01.08.2019**. Furthermore, the SLP filed against the said Judgment was summarily dismissed by the Hon'ble Supreme Court.

16. As such, the principles laid down in these two O.As are clearly attracted and the same having attained finality and implemented by the Government, I see no reason to deny the pensionary benefits to the Applicant.

17. Law relating to subject of regularization has been extensively dealt with by Hon'ble Supreme Court. It would be apposite to refer the decision of Hon'ble Supreme Court in **Umadevi, M.L. Kesari & Nihal Singh's case** in this behalf. In **Umadevi's** case, the Constitutional Bench of Hon'ble Supreme Court held that the appointments made without following due process or Rules relating to appointment did not confer any right on the appointees and Court cannot direct their absorption or regularization. However, the Hon'ble Apex Court made exception to this position and in Para No.53 held as follows :

“53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa [1967 (1) SCR 128], R.N. Nanjundappa [1972 (1) SCC 409] and B.N. Nagarajan [1979 (4) SCC 507] and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date.”

18. Again, the issue of absorption and regularization came before Hon'ble Supreme Court in **M.L. Kesari's** case, wherein it was a case of appointment of daily wages worker by Zilla Parishad and they were continued in service for more than 15 years without protection of order of any Court or Tribunal. The Hon'ble Apex Court referred to the decision

in **Umadevi's** case wherein the directions were given to regularize the employees who fulfilled the criteria laid down therein as one-time measure and again gave direction to State of Karnataka to regularize the services of those Z.P. employees who fulfilled the criteria laid down in Para No.53 of **Umadv's** case referred to above.

19. In so far as **Nihal Singh's** case is concerned, it pertains to the appointment of Special Police Officers by State of Punjab in 1980 in view of large scale disturbance in the State of Punjab and inability of the Government to handle law and order situation with the available Police Personnel. It is in that context, the State of Punjab appointed some Special Police Officers resorting to recruitment under Rule 17(1) of Police Act, 1961. Material to note that in **Nihal Singh's** case, the Hon'ble Supreme Court observed that **Umadevi's** judgment cannot become license for exploitation by the State and its instrumentalities. The Hon'ble Apex Court accordingly gave direction to State of Punjab for regularizing the services of the Appellants by creating necessary posts within three months. Para Nos.35 and 36 of the Judgment is important having bearing over the present issue, which are as follows :-

“35. Therefore, it is clear that the existence of the need for creation of the posts is a relevant factor reference to which the executive government is required to take rational decision based on relevant consideration. In our opinion, when the facts such as the ones obtaining in the instant case demonstrate that there is need for the creation of posts, the failure of the executive government to apply its mind and take a decision to create posts or stop extracting work from persons such as the appellants herein for decades together itself would be arbitrary action (inaction) on the part of the State.

36. The other factor which the State is required to keep in mind while creating or abolishing posts is the financial implications involved in such a decision. The creation of posts necessarily means additional financial burden on the exchequer of the State. Depending upon the priorities of the State, the allocation of the finances is no doubt exclusively within the domain of the Legislature. However in the instant case creation of new posts would not create any additional financial burden to the State as the various banks at whose disposal the services of each of the appellants is made available have agreed to bear the burden. If absorbing the appellants into the services of the State and providing benefits at par with the police officers of similar rank employed by the State results in further

financial commitment it is always open for the State to demand the banks to meet such additional burden. Apparently no such demand has ever been made by the State. The result is – the various banks which avail the services of these appellants enjoy the supply of cheap labour over a period of decades. It is also pertinent to notice that these banks are public sector banks. We are of the opinion that neither the Government of Punjab nor these public sector banks can continue such a practice consistent with their obligation to function in accordance with the Constitution. Umadevi's judgment cannot become a licence for exploitation by the State and its instrumentalities.”

The principles expounded in these Judgments are squarely attracted to the matter in hand in the light of factual aspect and ‘Pension Rules of 1982’. This case even cannot be termed as irregular appointment. Indeed, it is the case of legal appointment except nomenclature of Temporary Appointment, which is nothing but exploitation by State.

20. The learned Advocate for the Applicant referred a decision of Hon'ble Supreme Court **(1995) 6 SCC 227 (A.P. Shrivastava Vs. Union of India)** to substantiate that temporary Government servant is also entitled for pension. In that case, the question of interpretation of C.C.S. (Pension) Rules, 1972 and Rule 56-J of fundamental Rules was involved. Para Nos.4, 5 and 6 of the Judgment are material, which are as under :-

“4. *In view of the aforesaid opinion the appellant having been deprived of the pensionary benefits, has approached this Court. The learned counsel for the appellant contended that if a temporary government servant who voluntarily retires after completion of 20 years of service would be entitled to the pension, there is no reason to deny the same when the employer compulsorily retires him after the employee has completed 20 years of service. In other words when Rule 56 (j) of the Fundamental Rules confers power on the employer to retire government servant in public interest after giving 3 months' notice under the circumstances mentioned therein and Rule 56 (k) similarly entitles a government servant to voluntarily retire after giving 3 months' notice, there should not be any different criteria in the matter of award of pension. Learned counsel appearing for the respondents on the other hand contended that in view of the specific provision of the Rules and the Rule being given its literal meaning there is no escape from the conclusion that a temporary government servant will not be entitled to any pension even if he has completed more than 20 years of service when the employer compulsorily retires him in exercise of power under Rule 56 (j) of the Fundamental Rules.*

5. *In view of the rival submissions at the bar, the question for consideration is whether there is any rationale behind the rule disentitling pension to a government servant when an order of compulsory retirement is passed in exercise of power under Rule 56 (j) of the Fundamental Rules? As has been noticed earlier after completion of a particular period of service the employer has a right to compulsorily retire the employee in public interest and similarly the employee has a right to voluntarily retire on giving three months' notice. It has been held by this Court time and again that the pension is not a charity or bounty nor it is conditional payment solely dependant on the sweet will of the employer. It is earned for rendering a long service and is often described as deferred portion of payment for past services. It is in fact in the nature of social security plan provided for a superannuated government servant. If a temporary government servant who has rendered 20 years of service, is entitled to pension, if he voluntarily retires, there, is no justification for denying the right to him when he is required to retire by the employer in the public interest. In other words, the condition precedent for being entitled to pension in case of a temporary government servant is rendering of 20 years of service.*

6. *In view of the legal position that an order of compulsory retirement is not a punishment and pension is a right of the employee for services rendered, we see no justification for denying such right to a temporary government servant merely on the ground that he was required to retire by the employer in exercise of power under Rule 56 (j) of the Fundamental Rules. In our considered opinion a temporary government servant would be entitled to pension after he has completed more than 20 years of service even if he is required to retire by the employer in exercise of power under Rule 56 (j) of the Fundamental Rules.”*

21. Reverting to the 'Pension Rules of 1982', as stated above, as per second proviso even where temporary Government servant retires on superannuation or retired voluntarily after completion of 20 years of qualifying service are eligible for retiral benefits. This being the position, the Respondents cannot deny pensionary benefits to the Applicant, even if he is considered purely temporary Government servant.

22. Apart, in the present case, as discussed above, the Applicant was all the way treated as regular Government employee and all service benefits on par with regular Government employee were extended to him. His appointment was made in clear vacancy on substantive post after found eligible for the post of Curator and due process of selection i.e. Advertisement, interview by Divisional Selection Board was undergone.

23. This Tribunal has also taken similar view in **O.A.NO.864/2015 (Smt. Anjali Lanke Vs. Chief Secretary, State of Maharashtra) decided on 30.08.2016**. The directions were issued to regularize the services of the Applicant and to extend the retiral benefits, this Judgment has admittedly, attained the finality and has been implemented by the Government.

24. In service jurisprudence, it is well settled principle of law that when particular set of employees is given relief by the Court, all other identically situated persons need to be treated alike by extending that benefits and not doing so, would amount to discrimination and would be violative of Article 14 of the Constitution of India. In this behalf, a reference may be made to the Judgment of Hon'ble Supreme Court in **(2015) 1 SCC 347 (State of Uttar Pradesh Vs. Arvind Kumar Srivastava & Ors.)** wherein the Hon'ble Supreme Court emphasized that in service jurisprudence evolved by the Courts from time to time postulates that, all similarly situated persons should be treated similarly. However, this principle is of-course subject to certain well recognized exception in the form of laches, delays as well as acquiescence. In so far as the present matter is concerned, there is no question of laches, delay or acquiescence. This being the well settled legal principle, in my considered opinion, it would be travesty of justice if the relief claimed by the Applicant is denied to him.

25. As such, suffice to say, the Respondents cannot discriminate the Applicant. The issue of discrimination would be incomplete without reference to the instances quoted by the Applicant. In Para No.6.79 of O.A, the Applicant has given instances that Smt. Aparna Upalekar, Shri R.M. Sangham, Shri Vasant Shinde, the retiral benefits were granted though their appointment was not regular. There is no specific denial to these pleadings that the appointment of these employees was not temporary.

26. In view of aforesaid discussion, it would be highly unjust to deny pensionary benefits to the Applicant having served for 32 years. His services ought to have been regularized in view of recommendation made by Dean, V.J. Medical College, Pune. However, it was rejected by cryptic order dated 15.01.2009 without assigning any reason. As such, the rejection is arbitrary and unsustainable in law.

27. Now turning to the aspect of delay, true, the Applicant stands retired in 2011 but filed the O.A. in 2017 along with the application for condonation of delay. He has sought declaration for grant of pensionary benefits and consequential service benefits. During the pendency of O.A, by way of amendment, the order dated 14.03.2016 was also challenged whereby the proposal for grant of extra-ordinary leave was rejected on the sole ground that his appointment being not regular, M.C.S. (Leave) Rules are not applicable. Contrary to this, the service record reveals that all other service benefits including earned leave, commuted leave was availed by the Applicant. By order dated 27.12.2010 (after absence of 314 days for which extra-ordinary leave was sought), the Applicant was allowed to join on the post of Curator by order dated 17.12.2010 passed by Director of Medical Education and Research, Mumbai. The aspect of legality of order dated 14.03.2016 will be dealt with a little later.

28. Insofar as the delay in filing O.A. is concerned, the learned Advocate for the Applicant submits that it is continuous cause of action being denied pensionary benefits, and therefore, the question of delay do not survive. However, by filing M.A.No.698/2019, the Applicant has requested to condone the delay. This M.A. was ordered to be decided along with O.A. in view of issue involved in the matter.

29. The learned Advocate for the Applicant referred to **(2008) 8 SCC 648 (Union of India & Ors. Vs. Tarsem Singh)** where in Para No.5, the Hon'ble Supreme Court observed as under :-

“5. To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the re-opening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or re-fixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. In so far as the consequential relief of recovery of arrears for a past period, the principles relating to recurring/successive wrongs will apply. As a consequence, High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition.”

30. As such, in view of decision of Hon'ble Supreme Court even if there is long delay in approaching the Tribunal, it is certainly a case relating to continuous wrong, which is causing continuous source of injury, and therefore, the delay deserves to be condoned. The Applicant has make out a case for regularization treating him regular employee and entitled to pensionary benefits as discussed above. This being the position, he cannot be deprived of pension. It is well settled that the pension is not charity or bounty and employee earns it after rendering long service. The Hon'ble Supreme Court time and again reiterated that pension is in the nature of property and this right to property cannot be taken away without due process of law as per Article 300-A of the Constitution of India. The pension is right and the payment of it does not depend upon the discretion of Government but is it governed by the Rules and Government servant coming within those Rules is entitled to claim pension which is accrued by dint of his long and continuous service. It needs to highlight that even after retirement issue of regularizzatio of service of Applicant and grant of Extra-ordinary Leave was under consideration. In such situation, it would be travesty of justice to reject

the claim on technical ground of limitation. At the end of the day, what matters is substantial justice. I am, therefore, inclined to condone the delay and it is accordingly condoned.

31. Now turning to the issue of leave, the perusal of record reveals that there were three spells of leave which were required to be treated as 'extra-ordinary leave'. The first spell was of 55 days as earned leave, second spell of 411 days was study leave for Ph.D. and 30 days' leave was on account of illness. Thus, there was issue of regularization of total 496 days leave as seen from the proposal forwarded by Director, Medical Education and Research, Mumbai to the Government dated 31.05.2013 (Page Nos.175 and 176 of P.B.). Importantly, in the letter, it is stated that after regularization of leave, further action for grant of pension will be taken. It was further stated in the proposal that at the time of retirement, 26 days earned leave and 20 das half pay leave was at his credit. It was, therefore, proposed that remaining 450 days' leave be treated as 'extra-ordinary leave. However, this proposal was rejected by order dated 14.03.2016 on the ground that M.C.S. (Leave) Rules, 1981 are not applicable on the ground that the Applicant was temporary appointee. Earlier to it, the Government by order dated 15.01.2009 rejected the proposal of regularization of the Applicant. It appears that because of it, the proposal for regularization of leave was also rejected.

32. True, in O.A, there is no specific prayer for setting aside the order dated 15.01.2009 as pointed out by leaned P.O. which should have been included in relief claimed. In my considered view, this aspect itself will not non-suit the Applicant in view of his claim of declaration in prayer clause that he be declared entitle to pensionary benefits. Once he is found entitled to it in law, the Tribunal has to quash the order dated 15.01.2009 as a consequential relief.

33. In view of aforesaid discussion, both these orders are totally unsustainable in law. The Applicant's service is required to be

regularized for grant of retiral benefits. Therefore, he should have been granted extra-ordinary leave and retiral benefits ought to have been extended. Consequently, the order dated 15.01.2009 as well as order dated 14.03.2016 is required to be quashed and directions need to be issued to regularize the services of the Applicant and to render retiral benefits within stipulated period. The O.A, therefore, deserves to be allowed. Hence, I proceed to pass the following order.

ORDER

- (A) The Original Application as well as Misc. Application for condonation of delay are allowed.
- (B) The impugned orders dated 15.01.2009 and 14.03.2016 are hereby quashed and set aside.
- (C) 26 days leave be granted as Earned Leave, 20 days be granted as Half-Pay Leave and 450 days leave be treated as Extra-Ordinary Leave as proposed by Director, Medical Education and Research, Mumbai in his letter dated 31.05.2013 addressed to the Government as observed in the Judgment.
- (D) The Respondents are directed to regularize the services of the Applicant since the date of his initial appointment and to extend all retiral benefits as per his entitlement in Rules within three months from today.
- (E) No order as to costs.

Sd/-

(A.P. KURHEKAR)
Member-J

Mumbai

Date : 03.11.2020

Dictation taken by :

S.K. Wamanse.

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