

(2019) 04 BOM CK 0131

In the Bombay High Court

Case No : Writ Petition No. 5429, 5439, 5487, 5724, 7066, 7613, 7966, 8408, 8760, 8765, 10029, 10042 Of 2010, 2075, 2076, 2081, 4105, 4220, 4268, 6257, 7974, 7975, 7977, 10465 Of 2011, 531, 546, 1432, 4347, 4358, 4600, 7733, 10623, 10720, 11713 Of 2012, 2393, 7506,

Deshmukh Dilipkumar Bhagwan And Ors

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 30-04-2019

Acts Referred:

Maharashtra Employees Of Private Schools (Conditions Of Service) Regulation Act, 1977 — Section 4, 16(1), 16(2)

Maharashtra Zilla Parishadas And Panchayat Samiti's Act, 1961 — Section 248

Maharashtra Employees Of Private Schools (Conditions Of Service) Regulation Rules, 1981 — Rule 19

Maharashtra Civil Services (Pension) Rules, 1982 — Rule 2, 30

Constitution Of India, 1950 — Article 14, 309

Citation : (2019) 04 BOM CK 0131

Hon'ble Judges : S.C. Dharmadhikari, J; Akil Kureshi, J; Nitin W. Sambre, J

Bench : Full Bench

Advocate : S.S. Pakle, Manisha Devkar, Avinash R. Belge, Shankar Maruti Katkar, Kirankumar J. Phakade, Sachin Punde, S.B. Deshmukh, N.V. Bandiwadkar, Sagar Mane, Vinayak Kumbhar, Ashutosh Patil, Anirudha Joshi, Manisha Devkar, S.M. Katkar, Tejas Dande, Bharat Gadhvi, Vishal Navale, Sumit Kate, Vaishnavi Gujarathi, Siddhesh Pilankar, Uday Warunjikar, Gajanan K. Kshirsagar, Manish Pabale, Vivek Salunkhe, Umesh Kurund, Mohanish Chaudhari, Ashish S. Gaikwad, Bhavana R. Khichi, Mihir Desai, Sariputta P. Sarnath, Chetan Mali, Swaraj Jadhav, Devyani Kulkarni, Mihir Joshi, Pranita Hingmire, R.S. Apte, M.P. Thakur

Judgement

Akil Kureshi, J

1. At the outset, we may record in brief the facts leading to the present Reference.

The petitioners in these petitions are teachers and non-teaching staff regularly appointed in various recognized aided schools in the State of Maharashtra. The

respective schools are presently receiving 100% grant-in-aid from the State Government. All these employees were appointed prior to 1.11.2005. However, at the time of their appointments, the schools were not receiving 100% grant-in-aid. Admitted position is that all the schools started receiving 100% grant-in-aid from the Government only after 1.11.2005. The significance of this cut off date of 1.11.2005 would become clear as we record further facts. At this stage, however, we note that the Government of Maharashtra has introduced a Defined Contributory Pension Scheme ("DCP Scheme" for short) w.e.f. 1.11.2005 for the State Government employees as well as for the staff of private aided schools and colleges replacing the existing pension scheme. Petitioners claim that as they have been recruited prior to 1.11.2005, they would be governed by the old pension scheme irrespective of the fact that the schools in which they were appointed, started receiving 100% government grant after 1.11.2005. On the other hand, Government argues that an employee of a private school recruited prior to 1.11.2005 would be governed by DCP Scheme if the school in which he was appointed, started receiving 100% grant-in-aid only after 1.11.2005.

2. In order to appreciate this controversy, we may take note of the relevant statutory provisions and Government Resolutions ("GR" for short).

Under GR dated 4.11.1968, the Government decided to grant pensionary benefits to the full time teaching staff of recognized aided non-Government secondary schools in the State who retire on or after 1.4.1966 as admissible to Maharashtra State Government servants under the Revised Pension Rules 1950. This GR defines the term "Teacher" as to mean a full time teacher including a Headmaster / Headmistress and a full time special teacher working, in a non-Government Secondary School. The scheme framed under this GR granted an option to the teachers who were in service on 31.3.1966 either to continue under the Contributory Provident Fund Scheme or to switch over to the Pension Scheme. The teachers recruited on or after 1.4.1966 would be automatically governed by the Pension Scheme.

3. In order to regulate recruitment and conditions of service of employees in certain private schools, the State legislature framed the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (hereinafter referred to as "the Act of 1977"). In exercise of powers conferred under sub-sections (1) and (2) of Section 16 read with Section 4 of the Act of 1977, the Government of Maharashtra framed the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Rules, 1981 (hereinafter referred to as "the said Rules of 1981"). These Rules provided the qualifications for appointment to various teaching posts in private schools. It also laid down the pay scales and allowances and other service conditions of such teachers. Rule 19 of the said Rules of 1981 pertains to pension and reads as under:-

"An employee of an aided secondary school and aided Junior College of Education working on full time basis and retiring on or after the 1st April 1966 and an employee of an aided primary school working on full time basis and retiring on or

after the 1st April 1979 but who have opted for pension and the employee appointed on or after the above-mentioned respective dates shall be eligible for pension at the rates and in accordance with the rules as are sanctioned by Government specifically to the employees of private schools."

4. The Government in exercise of powers under proviso to Article 309 of the Constitution of India framed the Maharashtra Civil Services (Pension) Rules, 1982 (hereinafter referred to as "the Pension Rules of 1982"). Rule 2 of the Pension Rules of 1982 pertains to extent of application and provides that unless otherwise expressed or implied, these Rules shall be applicable to all members of services and holders of posts whose conditions of service the Government of Maharashtra are competent to prescribe. They shall also apply to -

(a) any person for whose appointment and conditions of employment special provision is made by or under any law for the time being in force;

(b) any person in respect of whose service, pay and allowances and pension or any of them special provision has been made by an agreement made with him, in respect of any matter not covered by the provisions of such law or agreement, and

(c) Government servants paid from Local Funds administered by Government, except rules relating to the foreign service.

Chapter V of the Rules pertains to qualifying service. Rule 30 pertains to commencement of qualifying service and inter alia provides that subject to the provisions of the 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.

5. The State Government employees were receiving pension as per the Pension Rules, 1982. The State Government issued a GR on 31.10.2005 in which it was noted that the Government of India has introduced a New Contribution Pension Scheme from January 2004 in Central Government Service. The question of introduction of similar new Contribution Pension Scheme on the lines of Government of India for new recruits in the State Government service was under consideration of the Government. Vide the said GR, Government of Maharashtra decided to adopt Defined Contribution Pension Scheme.

Relevant portion of the GR reads as under:-

"RESOLUTIONS:

2. (a) Government has now decided that a new "Defined Contribution Pension Scheme", on the lines of Government of India, replacing the existing pension scheme, as detailed below, would be made applicable to the Government servants who are recruited on or after 1st November 2005 in State Government Service,

(b) Government is also pleased to decide that for the purpose of implementation

of the above new Defined Contribution Pension Scheme, this State Government would join the aforesaid, new defined contribution pension system introduced by Government of India.

(c) The Government is also pleased to decide that the provisions of,

(i) the existing pension scheme (i.e. Maharashtra Civil Services (Pension) Rules, 1982 and Maharashtra Civil Services (Commutation of Pension) Rules, 1984

and

(ii) the existing General Provident Fund Scheme (GPF) would not be applicable to the Government servants who are recruited on or after 1st November 2005 in State Government service."

.....

APPLICABILITY OF THE SCHEME

4. (a) As mentioned above, new defined contribution pension scheme will be applicable to Government servants who are recruited on or after 1st November 2005 in State Government service.

(b) Government is also pleased to direct that the above decision should, mutatis-mutandis, apply to the employees, who are recruited on or after 1st November 2005, in the services of the Recognized and Aided Educational Institutions, Non-Agricultural Universities and affiliated Non-Government Colleges and Agricultural Universities etc., to whom the existing pension scheme and General Provident Fund Scheme is applicable.

(c) In exercise of the powers conferred by the proviso to Section 248 of the Maharashtra Zilla Parishadas and Panchayat Samiti's Act 1961 (Mah.V of 1962) and of all the other powers enabling it in that behalf, Government is further pleased to decide that the above decision shall apply to the employees, who are recruited on or after 1st November 2005 in the services of Zilla Parishadas.

6. Detail instructions regarding the procedure to be adopted by Heads of Department/Offices/Drawing and Disbursing Officers in respect of drawal of bills, recovery of contribution from Government employees, payment of Government contribution, etc., as well as the instructions regarding the accounting procedure, arrangement regarding fund management and record keeping etc., will be issued shortly"

6. The Government issued a GR dated 8.4.2008 in which it was recorded that the full time teachers in recognized aided private secondary schools have been granted pension from 1.4.1966. In the context of teachers who were appointed at the time when school is not receiving grant-in-aid but may become aided school later on, it was clarified as under:-

"2. In spite of above clear orders from the Government, while granting the pension matters of the teachers, who were initially working in Government recognized non government unaided schools but subsequently such schools getting grants, then compulsion is made to deposit in treasury, the subscription of Contributory Provident fund scheme along with interest, for the service rendered in unaided schools. It has been brought to the notice of the Government by Representatives of teachers in Assembly.

3. Taking into consideration the directions issued in Government Resolution, Education, Sports and Social Welfare Department, bearing No. SSN 1971-G, dated 14th February, 1972, it is clear that the recognized government unaided secondary schools in due course of time had come on the grants / become aided. In respect of such schools, during the service period rendered in the unaided schools, for taking into consideration for pension, and during such period contributory Provident fund subscription deducted and credited in the accounts of the teachers, then such amounts of subscription along with interest thereon, in case of such teachers should be credited in the Government treasury, but if the management did not have started deductions on account of contributory provident fund subscriptions as yet, then such amount should not be recovered from those teachers."

7. On 21.5.2010, the Government issued another GR in respect of Government employees, preamble of which reads as under:-

"By Government Resolution, Finance Department No. Aniyo-1005/126-ser-4 dated 31st October, 2005, the government of Maharashtra has implemented "New Defined Contribution Pension Scheme" to officers / employees working under the Government of Maharashtra and those who have been appointed on 1st November, 2005 or thereafter and by above Government Resolution the rules of the said scheme and procedure for implementation of the scheme is mentioned."

Under the said GR, general instructions for operation of the scheme for Zilla Parishad Employees have been issued including the deductions to be made under the scheme. The GR makes detailed procedure to be followed for allotment of Pension Account Number, recovery of contribution from the employees, for equal amount of government contribution to be credited in the Government account by Zilla Parishad etc.

8. The Government issued similar GR dated 29.11.2010 in respect of employees of private aided schools, preamble of which reads as under:-

" The Government of Maharashtra, in pursuance of Government Resolution bearing No. Aniyo-1005/ 126/ Seva -4 dated 31st October, 2005 has implemented the New Defined Contribution Pension Scheme, to the employees who have been appointed in the Government service on or after 1st November, 2005. In the implementation of this Scheme, the Government of Maharashtra, has taken a decision to participate in the New Defined Contributory Pension

Scheme of the Central Government.

2. Based on the said Government Resolution, for implementation of Defined Contributory Pension Scheme, effectively, as per Government Resolution, Finance Department No. Aniy-1007/18Seva-4 dated 7.7.2007, prescribed procedure has been laid down.

3. In the implementation of this scheme, as per the State Government Employees, to the employees of teaching and non teaching working on the 100% aided posts, in private recognized aided Primary, Secondary, Higher Secondary and Diploma in Education, adopting comprehensive procedure was under consideration of the Government. In this behalf Government has taken the following decision :-

GOVERNMENT RESOLUTION:-

Government has now taken a decision to establish Sub State Record Keeping Agency, in respect of the employees those who have been appointed on 1st November, 2005 or thereafter, in the establishment of teaching and non teaching working on the 100% aided posts, in private recognized aided Primary, Secondary, Higher Secondary and Diploma in Education, and to whom the existing Maharashtra Civil Services Pension Rules, 1982 are applicable. For effective implementation of the Defined Contribution in respect of employees of teaching and non teaching working on the 100% aided posts, in private recognized aided Primary, Secondary, Higher Secondary and Diploma in Education, the Director (Primary) and Director, Secondary and Higher Secondary will be the Controlling Officers to look after the work. The Divisional Deputy Director of Education will see the work of Sub State Record Keeping Agency. The Sub State Record Keeping Agency, will maintain the record of accounts in respect of Defined Contribution Pension Scheme, of the employees those who have been appointed on 1.11.2005 or thereafter in the service of aided primary, secondary and Higher Secondary schools. The Government has taken decision to adopt the following prescribed procedure for effective and successful implementation of the scheme."

This GR also makes detailed provisions for allotting account number for the contributory pension, for recovery of contribution etc.

9. The Government of Maharashtra in order to regulate the primary and secondary education and also to formalise State funding of private recognized schools has framed legislation and also formulated Grant-in-Aid Code through various GRs. It is not necessary to trace the entire history of various provisions made by the State Government in this regard. We may only refer to two of the relatively recent GRs in this respect. Under G.R. dated 10.2.1989, the Government made provisions for sanction of grant to eligible recognized schools. It was decided that the schools becoming eligible for grant as per the norms laid down under the said GR should be sanctioned the grant stage wise.

10. These guidelines were replaced under GR dated 11.10.2000 in which Government revised the formula for grant and the norms for assessment for making a school eligible for State grant-in-aid. Relevant portion of which reads as under:-

"[1] Revised formula for grant

The schools which are not yet brought on grant, or the schools which would be given permission in future, shall be entitled for salary and non-salary grant as under:-

- 1] First four years after permission - No Grant
- 2] Fifth year 20% of salary and non-salary expenditure
- 3] Sixth year 40% of salary and non-salary expenditure
- 4] Seventh year 60% of salary and non-salary expenditure
- 5] Eight year 80% of salary and non-salary expenditure
- 6] Ninth year 100% of salary and non-salary expenditure

After ninth year, every year 100% grant of salary and non-salary expenditure shall be admissible."

Similar provisions were made for giving grant-in-aid to Higher Secondary Schools / Junior Colleges of Education.

11. In such backdrop, large number of petitions (Homraj Hansaram Bisen & Ors Vs. State of Maharashtra & Ors 2013(2) Mh.L.J. 401) came to be filed before the Nagpur Bench of the Bombay High Court by teaching and non-teaching staff of private schools who were appointed prior to 1.11.2005. When these petitioners were appointed in the respective schools, the schools were not receiving 100% grant-in-aid from the Government or even till 1.11.2005. The question, therefore, that the Court considered was whether the employees would be governed by the Pension Rules of 1982 or the DCP scheme. On behalf of the petitioners, it was argued that the service rendered by an employee in a private recognized school even when the school was not receiving grant-in-aid, would be taken into consideration for the purpose of pension once the employee retired after the school started receiving 100% grant. It was argued that the prescription of the cut off date of 1.11.2005 for the school receiving 100% grant-in-aid for the employee to be eligible for pension under Pension Rules of 1982 is wholly arbitrary.

12. On the other hand, on behalf of the Government, it was argued that the Pension Rules of 1982 would be applied only to set of employees who were working in 100% grant-in-aid schools prior to 1.11.2005. Such Rules would not be applicable to the employees who were working in non aided school or schools receiving grant-in-aid only in part and therefore, the insistence of the Government that for an employee to be governed by the Pension Rules of 1982,

the school must be receiving 100% grant-in-aid as on 1.11.2005 was perfectly valid.

13. The Division Bench upheld the Government policy. It was observed that if the cut off date was not prescribed by the Government, it would lead to anomalous situation. In the opinion of the Court, the fact that an employee retiring from an aided school would be entitled to the benefit of pension also taking into account the service rendered by him at the time when the school was not receiving grant-in-aid would not in the present case be important.

14. After the said judgment in case of Homraj Hansaram Bhise (supra), large number of petitions came up for consideration before the Bombay High Court in Writ Petition No. 8387 of 2013 (Deshmukh Dilipkumar Bhagwan & Ors Vs. The State of Maharashtra & Ors) and connected petitions filed by the teachers and non-teaching staff of private recognized schools. These employees were appointed in the respective schools prior to 1.11.2005 at the time when the schools were not receiving 100% grant-in-aid from the Government. The schools started receiving 100% grant-in-aid after 1.11.2005. In face of the Government stand that these teachers would be governed by DCP scheme, the petitioners approached the High Court.

15. The Government placed heavy reliance on the decision of the Court in the case of Homraj Hansaram Bisen (supra). On behalf of the petitioners, an attempt was made to suggest that the issues arising in the said case were different. The Court took note of the detailed discussion in case of Homraj Hansaram Bisen (supra) and negatived this contention. The Court was, however, of the opinion that the issues were required to be decided by a larger Bench for following reasons:-

"20. Prima facie, it appears to us that GR of 2010 does not deal with the issue whether the employees of the schools who were employed prior to 1st November 2005 which were aided but were receiving less than 100% aid are entitled to benefit of the Old Pension Scheme under the Pensions Rules and Commutation of Pension Rules. There are various categories of recognized and aided schools. The first category of schools which were receiving 100% aid on or before 31st October 2005 does not pose any problem. Admittedly, those who were employed in such schools prior to 1st November 2005 and were otherwise eligible will continue to be governed by the Old Pension Scheme notwithstanding Government Resolutions of the year 2005 and 2010. The second category is of the schools which were aided on 31st October 2005 but were not receiving 100% grant on the dates on which Government Resolutions of 2005 and 2010 were brought into force. The third category is of schools which were receiving less than 100% grant-in-aid on 1st November 2005 but started receiving 100% grant-in-aid before the GR of 2010 came into force i.e. on or before 29th November 2010. The GR of 2005 does not deal with employees of schools at all. Therefore, the question will be whether the employees who were employed prior to 1st November 2005 in partially aided schools which became fully aided after 1st

November 2005 will be governed by the Old Pension Scheme governed by the Pension Rules or a New Pension Scheme. This issue squarely arises as the State Government has purportedly made the GR of 2005 applicable to the employees of the schools by virtue of the GR of 2010. We find that the Division Bench in the case of Homraj Hansaram Bisen (supra) has not considered the question whether the word "aid" in Rule 19 of MEPS Rules means 100% aid. Moreover, the Government Resolutions of 1968 and 1972 do not provide that the benefit of the pension will be available only to the employees of 100% aided schools. Prima facie, it appears to us that the New Pension Scheme was not made applicable to the employees of the aided recognized primary, secondary and higher secondary schools as well as colleges of education till the date of coming into force of the GR of 2010. All these aspects were not brought to the notice of the Division Bench while deciding the case of Homraj Hansaram Bisen.

21. Prima facie, we find that the Old Pension Scheme appears to be more beneficial to the employees than the New Scheme. Considering what we have discussed above, it will be appropriate if the entire issue is considered by a larger Bench. Being a co-ordinate Bench, we are bound by the view taken by Homraj Hansaram Bisen (supra). It will be inappropriate to take a view which is different than the view taken by Homraj Hansaram Bisen. There is a reference in the said decision to Rule 19 of MEPS Rules and relevant Government Resolutions. Therefore, prima facie, the submission that the said decision is per incuriam or sub silentio cannot be accepted. In any event, considering the importance of the issues, the decision thereon will affect large number of teachers in the State. Hence, We are of the view that it will be more appropriate if the issues are decided by a larger Bench."

16. The Court, therefore, referred the following questions for consideration of the Larger Bench.

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

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

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

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

17. In such background, learned counsel for both the sides have made detail submissions. On behalf of the petitioners, several learned counsel have advanced their arguments. Their arguments can be summarized as under:-

i. All the petitioners were appointed in recognized non-Government schools prior to 1.11.2005 after following the due process. Their appointments were regular and in accordance with Rules. The Pension Rules 1982 are applicable to all teachers of Government aided schools who were appointed prior to 1.11.2005. The DCP scheme, therefore, would not be applicable to the petitioners;

ii. The petitioners' right to receive pension flows from Rule 19 of the Regulations of 1981 read with Pension Rules 1982. These Rules do not make any distinction between an aided or an unaided school. At any rate, they do not make a distinction between the partially aided or fully aided school;

iii. It is well settled that the service rendered by an employee of an unaided school would qualify for computing the post retiral benefits when the employee retires from an aided school;

iv. Without amending Rule 19 of Rules of 1981, the petitioners' pensionary rights cannot be altered;

v. The DCP scheme is made applicable to the teachers of the non-Government schools under GR dated 29.11.2010. All the petitioners were appointed several years before this GR was issued. In most cases, the schools in which they were appointed had also started receiving 100% grant-in-aid from the Government before issuance of the GR. The right of these petitioners to receive pension from the Government under the existing pension scheme had, therefore, crystallized before issuance of the said GR dated 29.11.2010. By virtue of the said GR dated 29.11.2010, the Government is now trying to shift the petitioners' right to receive pension from the existing Pension Scheme to DCP scheme which is contributory in nature and considerably less advantageous as compared to the old pension scheme. The GR dated 29.11.2010 is, thus given retrospective effect which is not within the power of the State Government. It was contended that the employee's right to receive pension arises during his active service. Actual payment of pension is merely deferred till his retirement.

18. Heavy reliance was placed on a decision of Division Bench of this Court in case of Anuradha Jaywant Gangakhedkar Vs. Brihanmumbai Municipal Corporation & Ors. 2012(5) Mh.L.J. 775 in which in the context of eligibility of a retired teacher to claim pension, it was observed that test which must be applied is as to whether an employee was a full time confirmed and approved member of the teaching or non-teaching staff of a private primary aided school on the date of her retirement. It was observed that there is no warrant in the Pension Scheme or the Pension Rules to exclude while computing qualifying service, the

service which is rendered by an employee before a school came to be in receipt of grant-in-aid. So long as the school was in receipt of grant-in-aid on the date on which an employee retired from service upon attaining the age of superannuation, the application of the Pension Scheme would be attracted.

19. Reliance was placed on a decision of the Supreme Court in the case of State of Maharashtra Vs. Manubhai Pragaji Vashi & Ors. AIR 1996 SC 1 in which it was held that not extending the grant-in-aid to non-Government law colleges and at the same time extending such benefit to non-Government colleges with faculties such as Arts, Science, Commerce, Engineering and Medicine (other professional non-Government colleges) is patently discriminatory.

20. Reliance was also placed on the decision of the Supreme Court in the case of State of Himachal Pradesh & Ors. Vs. Rajesh Chander Sood & Ors. (2016) 10 SCC 77 in which facts were that, such of the employees who had exercised their option to be governed by "1999 Pension Scheme", claimed to be regulated by the said scheme immediately on their having submitted the option. In such background, it was held as under:-

"71. We are also of the view, that there is merit in the contention advanced on behalf of the respondent-employees, inasmuch as, the seeds of the right to receive pension, emerge from the very day, an employee enters a pensionable service. From that very date, the employee commences to accumulate qualifying service. His claim for pension would obviously crystallise, when he acquires the minimum prescribed qualifying service, and also, does not suffer a disqualification, disentitling him to a claim for pension.

72. In the above view of the matter, it is not possible for us to accept, that the rights of the concerned employees under 'the 1999 Scheme', can be stated to get vested, only on the date when a concerned employee would attain the age of superannuation, and satisfy all the pre-requisites for a claim towards pension. We are also persuaded to accept the contention advanced on behalf of the respondent-employees, that the cause of action to raise a claim for pension, would arise on the date when a concerned employee actually retires from service. Any employee governed by a pension scheme, enrolls to earn qualifying service, immediately on his enrollment into the pensionable service. Every such employee must be deemed to have commenced to invest in his eventual claim for pension, from the very day he enters service. More so, in the present controversy, by having expressly chosen to forego his rights, under the Employees' Provident Funds Scheme, 1995.

21. Reliance was placed on a decision of the Division Bench of Panjab and Haryana High Court in case of Harbans Lal Vs. The State of Punjab & Ors. 2010 SCC Online P&H 8181 in which in case of daily wage employee who was later on regularized, it was held that entire daily wage service of the employee till the date of his regularization would be counted as qualifying service for the purpose of pension.

22. Inevitable reference was made to the decision of the Constitution Bench of the Supreme Court in case of D.S. Nakara & Ors. Vs. Union of India AIR 1983 SC 130. As is well known, in the said case, the Supreme Court was considering the validity of the cut off date contained in liberalized Pension formula. The Union of India had liberalized the pension formula which contained a cut off date for its applicability only to those employees who retired on or after said date. In other words, the employees retiring prior to the said date would not be governed by this liberalized formula. The Supreme Court held that said cut off date was arbitrary and violative of Article 14 of the Constitution of India.

23. Reliance was placed on the decision of the Supreme Court in the case of Andhra Pradesh Dairy Development Corporation Federation Vs. B. Narasimha Reddy & Ors. (2011) 9 SCC 286 in support of the contention that the DCP Scheme has been introduced with retrospective effect taking away vested rights which was impermissible.

24. Reliance was placed on a decision of the Division Bench of this Court in case of Vivenne Choudhury & Ors. Vs. Dy. Director of Education & Ors. Judgment dated 25.2.2014 passed in O.S. WP No. 2185 of 2000 in which it was held that the period spent by the employee in a junior college prior to it becoming aided would count for the purpose of fixation of senior scale.

25. Reliance was placed on the decision of the Supreme Court in the case of State of Jharkhand & Ors. Vs. Jitendra Kumar Srivastava & Anr. 2013 (12) SCC 210 to contend that pension and other post-retiral benefits cannot be taken away without the authority of law.

26. Reliance was placed on the decision of the Supreme Court in the case of Chandigarh Administration Vs. Rajni Vali 2000 (2) SCC 42 in which it was observed that imparting primary and secondary education is the bounden duty of the State administration. It is the constitutional mandate that the State shall ensure proper education to the students on whom the future of the society depends.

27. On the other hand, learned AGP submitted that the formulation of the DCP scheme and to cover all the employees of the State Government, Zilla Parishad and Private Aided Schools was a policy decision taken by the Government after due consideration. Such policy decision was implemented by issuance of GRs from time to time. As part of the policy, all employees of the private aided schools appointed after 1.11.2005 would be governed by DCP scheme. The Government would be liable to pay pension only in respect of the employees of schools receiving 100% grant-in-aid. It would be wholly incongruent to direct the Government to pay pensionary benefits to a retiring employee from the school which has not been made 100% grantable. The insistence of the Government, therefore, that for an employee to be governed by the old pension scheme, he must have been appointed prior to 1.11.2005 in a private recognized school receiving 100% grant-in-aid from the Government is valid. He submitted that

Rule 19 of the Rules of 1981 merely provides for payment of pension to employees of recognized private aided schools as per the rates that may be prescribed by the Government. By introducing the DCP scheme, the Government has replaced the old pension structure by a new pension structure which would be applicable to the new appointees. This was done within the parameters of the existing statutory frame work.

28. We have traced the origin of the right of the employees of the aided recognized schools to receive pension from the Government. It originated from the GR dated 4.1.1968 under which it was provided that the pension, gratuity and other retiral benefits admissible to the Maharashtra State Government Servants under the Revised Pension Rules 1950 as amended from time to time and the family pension would be applicable to the full time teaching staff in recognized aided non-Government secondary schools in the State who retire on or after 1.4.1966. Over a period of time, such benefits were extended also to the employees of aided primary schools. In order to regulate, recruitment and conditions of service of employees in private schools in the State, the said Act of 1977 was enacted. In exercise of powers conferred under the said Act, the State Government framed the Rules of 1981 in which the pensionary benefits of the employees of the private recognized aided schools were recognized under Rule 19. As per this Rule, an employee of an aided secondary school and aided Junior College of Education working on full time basis and retiring on or after 1.4.1966 and an employee of an aided primary school working on full time basis and retiring on or after 1.4.1979 who have opted for pension and the employee appointed on or after the said dates would be eligible for pension at the rates and in accordance with the rules as are sanctioned by the Government specifically to the employees of private schools. Thus, the Government brought within the fold of the pension scheme all the full time employees of aided secondary school, aided Junior College of education and primary school from respective dates. The existing staff would have an option to be continued to be governed by the contributory provident fund scheme or to switch over to the pension scheme. All employees appointed after the cut off date would automatically and compulsorily be governed by the pension scheme. The right to claim pension from the Government by a full time employee of a school was thus closely linked with the educational institution receiving aid from the Government. Unless and until, the school in question was paid grant-in-aid by the Government, the question of the employee of said school claiming pensionary benefits from the Government would not arise. It is indisputable that even in absence of the present controversy, an employee of a private recognized school could claim pension from the Government only if the school in which he was employed at the time of his retirement was receiving Government grant-in-aid. Even otherwise, the concept of asking the Government to pay pension to an employee of a school which does not receive grant from the Government is entirely unknown. The liability of the Government to pay to a retired employee of a private recognized school the post retirement benefits would arise only if the

school from which the employee retired was receiving Government grant-in-aid.

29. With this background, we may notice the changes in the Government policy which took place post October 2005. We may recall, under GR dated 31.10.2005, the Government promulgated its policy decision to introduce the DCP scheme. This new scheme would apply to the Government servants who were recruited or or after 1.11.2005 in the State Government service. The clause pertaining to applicability of the scheme provided that the DCP scheme will be applicable to the Government servants recruited or or after 1.11.2005 in State Government service, that the said decision should mutatis mutandis apply to the employees who are recruited on or after 1.11.2005 in service of the recognized and aided educational institutions, Non-Agricultural Universities and affiliated Non-Government colleges and Agricultural Universities etc to whom existing pension scheme and General Provident Fund Scheme is applicable. This clause also provides that such scheme would be applicable to all employees in the service of Zilla Parishads recruited on or after 1.11.2005. This, GR, thus comprehensively covered all State Government employees, employees of recognized aided educational institutions and other colleges as also the employees of Zilla Parishads who were recruited on or after 1.11.2005.

30. It is true that the petitioners who are before the Court in this group of petitions were recruited in recognized private schools prior to 1.11.2005. Admittedly, however, on 1.11.2005, the schools, in which they were so recruited, were not receiving 100% grant-in-aid. At the time, when therefore the State Government decided to introduce the DCP scheme w.e.f. 1.11.2005, the right of these employees to claim pensionary benefits had not yet crystallized. The Government had no obligation to cover such employees in the pension scheme. By GR dated 29.11.2010, therefore, when the Government made detailed provisions for implementation of the DCP scheme for teaching and non-teaching staff of aided private recognized schools, the Government merely elaborated the procedure. This GR referred to the employees of 100% aided posts in the private recognized schools and provided that those who have been appointed after 1.11.2005 would be governed by the DCP scheme. This provision in the GR dated 29.11.2010 is merely in the nature of clarification. It made the position explicit which was already implicit in the GR dated 31.10.2005. In our opinion, Government's stand that only those employees of private recognized aided schools who were recruited prior to 1.11.2005 in schools receiving 100% grant-in-aid would continue to be governed by the old pension scheme is a correct and valid interpretation.

31. The GR dated 29.11.2010 merely made detailed provisions for implementation of the Government decision to introduce DCP scheme which decision was already declared under GR dated 31.10.2005. This, therefore, is not a case of introduction of the DCP scheme with retrospective effect. In that view of the matter, it cannot be said that the Government by virtue of said GR dated 29.11.2010 disturbed or took away the vested or existing rights of the

employees to receive pension under the old scheme. As far back as on 31.10.2005, the Government had already taken a decision to implement the DCP scheme in relation to certain class of employees.

32. Rule 19 of the Rules of 1981 only recognizes the right of employees of the aided schools and colleges to receive pension at the rates and in accordance with the rules as sanctioned by the Government to the employees of such schools. Under GR dated 31.10.2005, the Government replaced the existing pension scheme by the DCP scheme which would be applicable to certain class of employees. Rule 19 of the Rules of 1981 does not prescribe any specific pension scheme, it only refers to payment of pension at the rates and in accordance with the rules as sanctioned by the Government. The DCP scheme which replaced the existing pension scheme would also be in consonance with Rule 19 of the Rules of 1981. As per this rule, it was within the powers of the Government to prescribe the rates and the rules in accordance with which the employees would be eligible to receive pension. The contention of the learned counsel for the petitioners, therefore, that the DCP scheme could not have been implemented without amending Rule 19 of the Rules of 1981 cannot be accepted.

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

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

35. The petitioners have also based their case on right to education arguing that the State must undertake the full responsibility to provide quality basic education which would include payment of full pension to the retired teachers of primary and secondary schools. However, in our opinion, the obligation of the State to provide free and compulsory primary and secondary education or free and compulsory education to all children of the age of six to fourteen years cannot be linked with the scale and manner of payment of post-retiral benefits of the employees of such schools. The liability and obligation of the State to weigh the burden of such post-retirement benefits must depend on range of factors such as existing scheme for payment of such death-cum-retirement benefits and the financial and budgetary consideration of the State. In the present case, the DCP

scheme as applicable to the employees of the State Government and private aided schools is not under challenge.

36. The petitioners had also argued that right of retired Government servants to receive pension is a vested right. It is neither bounty nor a largesse to be given by the employer. To this proposition, there can be no quarrel. However, right to receive post-retiral benefits flow from the scheme provided by the employer. In the present case, as discussed earlier, the existing pension scheme is replaced by new pension scheme. No vested right of the employees is being taken away.

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

Question No. 1:

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

Question No. 2 :

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

Question No. 3:

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

38. The Reference is answered accordingly.

39. Writ Petitions be placed before the appropriate Court for disposal in accordance with law.