
(2008) 08 BOM CK 0017
In the Bombay High Court
Case No : Writ Petition No. 3660 of 1999

Dinanath Mahadeo Hadke

APPELLANT

Vs

Zilla Parishad and Others

RESPONDENT

Date of Decision : 28-08-2008

Acts Referred:

Bombay Civil Services Rules, 1959 — Rule 41, 42, 43, 51, 56
Maharashtra Civil Services Rules — Rule 44

Citation : (2008) 6 ALLMR 184 : (2008) 6 MhLj 592

Hon'ble Judges : C.L. Pangarkar, J;Anoop V. Mohta, J

Bench : Division Bench

Advocate : M.J. Khan, for the Appellant; Majid Shaikh, for the Respondent

Final Decision : Allowed

Judgement

C.L. Pangarkar, J.—By this writ petition the petitioner challenges the improper pay fixation done by the respondents.

2. The petitioner was appointed as a male field worker in the pay scale of Rs. 145-5-190 in Public Health Department vide order dated 31-10-1964. The petitioner joined the service with effect from 24-11-1964. He was granted regular increments from time to time. On 9-12-1966 he was drawing the basic salary of Rs. 155/- P.M. The services of the petitioner came to be terminated due to the abolition of the department itself and petitioner was absorbed later as a Store Keeper under the order of the Chief Executive Officer of Zilla Parishad Chandrapur. He was absorbed in the pay scale of Rs. 100-3-130-EB-4-150. The petitioner contends that after absorption in the new post his pay in the post of field worker should have been protected. Instead of doing that the petitioner's salary was fixed at Rs. 100/-P.M. The petitioner made representations to the Zilla Parishad and the Government. Both were in vein.

3. Respondents contend that the pay is properly fixed.

4. We have heard the learned Counsel for the petitioner and the respondents.

5. The petitioner's services were terminated since the department itself was abolished. His pay in the post of male field worker was Rs. 145-5-190. His basic salary at the time of termination was 165/-. Petitioner was absorbed by the respondent as Store Keeper and he joined the new assignment on 13-12-1967. Scale of pay of this new post was Rs. 100-3-130. It is undisputed that the break in service is condoned by the respondents. The petitioner has contended that his basic pay of Rs. 155/- in the scale applicable to first appointment should have been protected. Learned Counsel for the respondents contends that the petitioner's pay at the lowest in scale of Rs. 100-3-130 is rightly fixed.

6. He relied on the Government Resolution dated 8th September, 1982 issued by the Public Health Department of the Government. The Government Resolution reads as follows:

Resolution: In the case of the Family Planning Staff whiz. Dist. Extension Educators, Extension Educators, Social Workers, " Male Workers and District male field workers in the erstwhile state Faunally Planning Organisation who were retrenched in 1967 and subsequently absorbed in other posts orders have been issued vide Government Resolution Urban Development Public Health Housing Department No. SFD/1863/38462/FP cell dated the 24th April, 1971 that they should be held illegible for the benefit of counting their past service rendered by them prior to their retrenchment for purposes of increment in the post in which have been absorbed provided their re-appointment is without physical break in service and in a post carrying identical of pay vide note 4 under B.C.S. Rule 41.

Government is now further pleased to direct that the Staff of these of the District Extension Educators, Extension Educators, Social workers, Male Workers and District male field workers in the erstwhile state Family Planning Organisation whose post were abolished and who were subsequent absorbed in some other equivalent or lower posts should be regulated under B.C.S. Rule 43 and they should be held eligible for the benefit of counting their past services to the extent indicated below for the purpose of increment in the time of the posts in which they have been absorbed, under B.C.S. Rule 6.

Learned Counsel submitted that the Government Resolution says that those who have not completed 5 years service in the past service are not entitled to any increments at all. The Chart given in the Government Resolution however does show that Para 2 of the Government Resolution says that the employees who are absorbed in the lower post should be regulated by Rule 43 of the Bombay Civil Services Rules. There is no doubt that the petitioner's services were terminated and he is re-employed. There is also no doubt that there was break of more than 24 hours in his service, Learned Counsel submits that the pay at the minimum of time scale should be fixed as laid down in Rule 43 for two reasons, first, the services were terminated and there is re-employment and secondly there was break in service. We deem it necessary to reproduce Rule 43 here:

Rule 43. The re-employment of a Government servant after resignation or removal or dismissal or after discharge on reduction of establishment or after invalidation out of service amounts to a fresh appointment for the purpose of Rule 41 and he will, therefore, draw the minimum of the time-scale. If in any case it is considered that a higher rate of pay should be given the case can be dealt with under Rule 51.

6. But we find that the present case cannot fall under Rule 43 because of the fact that break in service of the petitioner is condoned. Learned Counsel for the respondents contents that the condonation of break in service is only for the purpose of pension and not for increment or pay fixation. The fact of condonation of break in service is evident from Annexure 1-Office Order passed by the respondent. Said order reads as follows:

Office Order

As per the above referred Government Decision, the break in service of Shri D.M. Hadke, Senior Assistant (Ex-Field Worker-Male) Zilla Parishad, Sub Division Small Irrigation, Ramtek from 18-11-67 to 12-12-67 is condoned. His services shall be deemed to be continued for the purposes of increase in salary (increments).

7. The fact is that there is a condonation of break in service and order also shows that it was for fixation of salary and increments. It cannot therefore lie in the mouth of the respondents to say that it was only for the purpose of pension. Now that there is a condonation of break it must be assumed that services of the petitioner are continuous and were never terminated. It would be necessary to look into Instruction No. II under Rule 43. Instruction No. II reads thus:

Instruction II- The pay of a permanent Government servant who is discharged on account of the abolition of his post and is appointed to a lower post at his own option should be fixed under Rule 41(a) with reference to the substantive pay in the old post which is to be abolished; where the maximum of the scale of the new post is less than his substantive pay, he shall draw that maximum.

The case of the petitioner falls in Instruction II. Rule 41(a) and (b) read as follows:

Rule 41. Save as provided in Rules 42, 43, 56, 57 and 66 where a Government servant holding a post in a substantive, temporary or officiating capacity is promoted or appointed in a substantive temporary or officiating capacity to another post, including an ex-cadre post, his initial pay shall be regulated as follows:

(a) When the appointment to the new post involves assumption of duties or responsibilities of greater importance than those attaching to the old post and-

(i) if he is holding a post not higher than a Class II post, his initial pay in the time scale of the higher post shall be fixed at the stage next above the pay notionally arrived at by increasing his pay in respect of the lower post by one

increment at the stage at which such pay has accrued and in the case of a Government servant drawing pay at the maximum of the pay scale by an amount equivalent to the last increment; and

(ii) if he is holding a post higher than a Class II post, he will draw as initial pay the stage of the time scale next above his pay in respect of the old (lower) post.

(b) If the appointment to the new post does not involve such assumption, he will draw as initial pay the stage of the time scale which is equal to his pay in respect of the old post, or if there is no such stage, the stage next below that pay, plus personal pay equal to the difference and in either case will continue to draw that pay until such time as he would have received an increment in the time-scale of the old post, or for the period after which an increment is earned in the time-scale of the new post, whichever is less. But if the minimum pay of the time-scale of the new post is higher than his pay in respect of the old post, he will draw that minimum as initial Pay.

8. However, it appears that pay of the petitioner cannot be fixed under Rule 41(a) but it can be fixed under Rule 41(b), reason is admittedly the appointment to new post does not involve higher responsibilities. Since the post to which the petitioner is appointed is lower one and the scale is also lower the case must fall in Sub-rule (b) of Rule 41. The petitioner's pay, therefore, has to be fixed as per Rule 41(b) of the Bombay Civil Services Rules as last pay in the former post must be therefore protected. An Illustration has been given in the Bombay Civil Services Rules by Gangal 1980 Edition at page 78 which reads thus:

A Government servant holding a post in a time scale of Rs. 160-5-185-6-215 and drawing a pay of Rs. 185/- per month from 1st April, 1971 is appointed to a post on a time scale of Rs. 135-5-150-6-180.7-215 from 1st December, 1971 and the new post does not involve higher responsibilities, his pay on 1st April, 1971 being Rs. 185/-, his pay on 1st December, 1971 will be Rs. 180/- plus Rs. 5/- as personal pay, and on 1st April, 1972 will be Rs. 187/-. If the minimum of the new post is greater than his pay in respect of the old post, he will draw that minimum as initial pay. He will draw next increment in the time scale after one year only.

This would be the exact method of fixation of the pay of the petitioner. The pay of the petitioner could not be fixed under Maharashtra Civil Service Rules since the petitioner was appointed to new post in the year 1967 itself when Maharashtra Civil Services Rules had not come into force. Resultantly Rule 44 of the Maharashtra Civil Services Rules could not be applied, therefore the Chart given with Government Resolution dated 8th September, 1982 i.e. part of Rule 44 of Maharashtra Civil Service Rules could not have been applied to the petitioner's case at all.

9. In the result the petition succeeds. It is directed that the petitioner's pay in the new post be fixed according to Rule 41(b) of the Bombay Civil Services Rules and his last pay drawn in the post of male field worker should be protected. Petition is thus allowed. No order as to costs.