

(2001) 09 BOM CK 0006

In the Bombay High Court

Case No : Writ Petition No. 1714 of 1989

Narharrao Deshpande

APPELLANT

Vs

State of Maharashtra and others

RESPONDENT

Date of Decision : 21-09-2001

Acts Referred:

Constitution of India, 1950 — Article 14, 309

Citation : (2002) 1 LLJ 535

Hon'ble Judges : N.V. Dabholkar, J; B.H. Marlapalle, J

Bench : Division Bench

Advocate : Pradeep Shahane, for the Appellant; V.K. Jaju, AGP for respondent Nos. 1 to 3, for the Respondent

Final Decision : Allowed

Judgement

N.V. Dabholkar, J.—By this writ petition, petitioner challenges parts of Government resolutions dated 18-8-1987; 11-10-1998 and 3-10-1988.

By Government resolution dated 18-8-1987, in the Department of Finance, and more particularly by Clause 3.1 of the same, the term "pensionable pay" is restricted to "pay" as defined in Rule 9 (36)(i) of the Maharashtra Civil Services (Pension) Rules, 1982 (henceforth referred to as "Pension Rules" for the sake of brevity), thereby excluding personal pay, special pay and any other emoluments specially classified as "pay", which were till then included in the said term "pay".

By resolution dated 11-10-1988, Government of Maharashtra in the Finance Department fixed 1-9-1988 to be the date for giving effect to the recommendations of Fourth Central Pay Commission regarding enhancing the ceiling for accrual and encashment of unexhausted earned leave at the time of retirement on superannuation to 240 days from the then existing 180 days.

By resolution dated 3-10-1988 issued by Finance Department of the State; similarly 1-9-1988 is the date fixed for giving effect to revised rates of travelling allowance/detention allowance, transfer grants, etc.

2. Petitioner was a member of State judicial service, who had resumed on 12-9-1956 and retired on superannuation on 31-1-1988. While he was serving as Chief Judicial Magistrate at Latur in the year 1984, the High Court, through its Registrar, was pleased to call for willingness for ex-cadre posts of Judge, Labour Court; Member, School Tribunal, etc. While calling such willingness, the details regarding service conditions of those ex-cadre posts including special pay, deputation allowance and such basic information was furnished. Service condition for Judge, Labour Court was "incumbents of the post will draw their grade pay plus special pay of Rs. 150/- per month and all other allowances admissible under the orders of Government issued from time to time." Petitioner communicated his willingness vide letter dated 25-7-1984. Respondent No. 2, secretary to the Government of Maharashtra in the Industries, Energy and Labour Department, vide order dated 21-1-1985, appointed petitioner as a Judge of the Labour Court at Latur. Even this letter of appointment clearly stated that petitioner would be allowed to draw his grade pay plus special pay of Rs. 150/-. The special pay was subsequently raised to Rs. 300/- per month with effect from 1-1-1986 with a view to attract the Judges from regular judiciary to labour judiciary.

Rule 9(36) of Pension Rules, which defines "pay" includes "special pay". Rule 60 of the said Rules defines "pensionable pay" as "pay as defined in Rule 9 (36)". Thus, "special pay" is required to be included as "pay" for the purpose of calculation of pensionable pay."

While deducting 10% house rent, since petitioner was occupying Government quarter during the service, this "special pay" drawn by the petitioner was added to his basic pay and, thus, an amount of Rs. 30/- per month was deducted towards house rent allowance from his special pay of Rs. 300/-, in addition to 10% of basic as per grade pay.

Since petitioner was due to retire on superannuation with effect from 31-1-1988, his pension case was considered by respondent No. 3 as Head of the Department and pension papers were forwarded to Accountant General II, Nagpur, vide letter dated 27-4-1987. "Pensionable pay" was calculated by adding special pay of Rs. 300/- to the basic as per grade pay, while forwarding the pension case.

The office of Accountant General II failed to pay pension, gratuity, etc. till March, 1988. At the insistence of the petitioner, respondent No. 3 granted provisional pension at Rs. 1915/- per month and gratuity of Rs. 62,000/- vide order dated 9-3-1988. The provisional pension so granted was by incorporating special pay of Rs. 300/- as part of pensionable pay.

Accountant General II, Nagpur, issued pension payment order dated 19-4-1988 fixing the pension of petitioner at Rs. 1815/- per month. By communication dated 14-4-1988, petitioner was informed that the special pay could not be taken into account for calculation of pension/DCRG as the same was not to be so considered as per G.R. dated 18-8-1987. The first grievance of the petitioner is

based on above premises.

The Government of Maharashtra accepted the recommendations of Fourth Central Pay Commission with effect from 1-1-1986. However, while raising the ceiling regarding accumulation and encashment of unexhausted earned leave at the time of retirement on superannuation from 180 days to 240 days, the Government by its G. R. dated 11-10-1988 fixed 1-9-1988 as cut off date for giving effect to such enhancement. In fact, the Central Government has also accepted the said recommendation and fixed 1-7-1986 as the cut off date for the purpose. But for this postponed Cut off date, the petitioner would have accumulated 210 days earned leave as on the date of retirement.

The State of Maharashtra has also revised the rates of T. A. D. A., and transfer grants while on tour and transfer. However, the revised rates are made applicable with effect from 1-9-1988 vide G. R. dated 3-10-1988. Consequently, petitioner, who retired on 31-1-1988 could not avail of the benefit of enhanced rates of travelling allowance on transfer to which he was entitled at the time of retirement.

Hence, the writ petition praying to quash Clause 3.1 of G.R. dated 18-8-1987 to the extent it excludes "special pay" from the definition of "Pensionable Pay" and G.Rs. dated 11-10-1988 and 3-10-1988 to the extent those resolutions fix cut off dated 1-9-1988 for enhanced limit of accumulation of earned leave and revised rates of T. A. D. A. on tour and transfer.

3. Rule was issued by order dated 20-9-1989 and no interim relief was granted. Reply dated 19-9-2001 is filed on behalf of first two respondents, by Deputy Secretary in the Industry, Energy and Labour Department of the State.

4. So far as "pensionable pay" is concerned, the learned Government Pleader has relied upon the same contention as communicated to the petitioner by the office of Accountant General II, Nagpur, in its communication dated 14-4-1988, so also reply dated 19-11-1988 issued by Desk Officer, Finance Department in the Government of Maharashtra to the President, Latur District Pensioners Association. It is contended that the orders contained in Government resolution dated 18-8-1987 are issued on the same lines of the orders issued by the Central Government and, therefore, the request of the association and the petitioner to include "special pay" in the calculation of "pensionable pay" can not be considered;-In reply, filed on behalf of respondent Nos. 1 and 2, further reliance is placed on amendment to Rule 60 of the Pension Rules, 1982, effected vide Government notification in the Finance Department dated 5-5-1990 and it is pointed out that "pensionable pay" as defined by Rule 60 vide amendment dated 5-5-1990, which is given retrospective effect from 1-1-1986, did not include "special pay" as on the date of retirement of the petitioner i.e. 31-1-1988 and, therefore, the fixation of pension of the petitioner on the basis of "pensionable pay" calculated by excluding "special pay" cannot be faulted with.

5. Rule 60 defines "pensionable pay" as follows:

"60. Pensionable pay:

(1) "Pensionable pay" means the average pay earned by a Government servant during the last 10 months service;

(2) In the case of a Government servant, who was in service on 1-3-1976.....;

(3) For the purpose of Sub-Rules (1) and (2) above, "pay" means the pay as defined in Rule 9(36)(i).

Admittedly, Clause 3 is substituted with effect from 1-1-1986 by amendment vide notification dated 5-5-1990. Prior to such an amendment, Clause (3) read:

"For the purpose of sub-rules (1) and (2) above, "pay" means the pay as defined in rule 9(36) and also includes "non-practising allowance" and "dearness pay".

Rule 9(36) of the Pension Rules defines "pay" as under:

"Pay" means the amount drawn monthly by a Government servant as :

(i) the pay (including special clearness pay) which has been sanctioned for a post held by him substantively or in officiating capacity or to which he is entitled by reason of his position in a cadre; and

(ii) personal pay, and special pay; and

(iii) any other emoluments which may be specifically classed as "pay" by the Government.

Thus, it is evident that but for amendment vide notification dated 5-5-1990, the "pensionable pay" included "special pay" since prior to amendment "pensionable pay" was synonymous to pay as defined by Rule 9 (36) and it was not confined only to Sub-clause (i).

6. Petitioner in para 12 of the petition has pointed out cases of couple of Labour Judges, who got the pensionary benefits by fixing the "pensionable pay" by taking into consideration the "special pay" drawn by them. According to petitioner, denial of similar benefit to him by virtue of Clause 3.1 of G.R. dated 18-8-1987 amounts to discrimination and is violative of Article 14 of the Constitution. Respondents have come out with a reply that the individuals, pointed out by the petitioner, had retired prior to 1-1-1986 and, therefore, petitioner can not claim similar benefit in view of G.R. dated 18-8-1987 which was issued after retirement of those two Labour Judges.

In this context, a reference to Rule 6, and more particularly Proviso to Sub-rule (1) of Pension Rules, which incorporates within its fold the principle of natural justice and equity is a must. We quote Rule 6(1) and Proviso for ready reference:

"6. Regulation of claims to pension or family pension.- (1) Any claim to pension or family pension shall be regulated by the provisions of these Rules in force at the time when a Government servant retires or is retired or is discharged or dies,

as the case may be:

Provided that if during his service, changes disadvantageous to him are introduced in rules, to which he became subject on entry into the service of Government, his pension shall not be less than that which would have been admissible, but for the introduction of such changes."

The proviso ensures against the employer State unilaterally changing the service conditions of employee to his disadvantage. If this proviso is taken into consideration, the State could not have incorporated Clause 3.1 in the Government resolution dated 18-8-1987, which has effect of fixing the "pensionable pay" and consequently the pension payable to the petitioner, on the lower side, due to exclusion of "special pay" from the "pensionable pay". In fact, if the proviso above is taken into consideration. Clause 3.1 of said resolution is inapplicable to the case of petitioner and similarly placed Government servants.

If the proviso is strictly construed, Clause 3.1 of G.R. dated 18-8-1987, would be applicable only to the cases of those Government servants, who enter Government service on or after 1-1-1986 because, that is the date on which amendment to definition of "pensionable pay" is brought into force. All Government servants, who entered the Government service before restricting the definition of "pensionable pay" to Sub-clause (i) of Rule 9(36) of the Pension Rules, would be protected by proviso to Rule 6(1) which still exists on the statute book, without striking down Clause 3.1 of G.R. dated 18-8-1987. The Pension Rules are rules framed by the Governor of Maharashtra in exercise of the powers conferred upon him by the proviso to Article 309 of the Constitution of India.

7. In fact, the said protection is also embodied within G. R. itself dated 18-8-1987. Clause 2.2 of the said resolution may usefully be reproduced here :

"Where pension has been authorized in cases occurring on or after 1-1-1986, the same shall be revised in terms of these orders. In cases where pension authorized under the pre-revised orders happens to be more beneficial than the pension becoming due under these orders, the pension already authorized shall not be revised to the disadvantage of the pensioner in view of Rule 131 of the Maharashtra Civil Services (Pension) Rules, 1982."

In case of the petitioner, may be provisional, pension was authorized under pre-revised orders at the rate of Rs. 1915/- per month. In view of Clause 2.2 incorporated in the very resolution dated 18-8-1987, which made the definition of "pensionable pay" restrictive, the pension cases occurring on or after 1-1-1986 were protected, against reduction of pension by virtue of revised orders. Apart from proviso to Rule 6(1) of Pension Rules relied upon by us, this Clause 2.2 of the resolution under challenge provides one more source for such a protection i.e. Rule 131 of the Pension Rules. Rule 131 also protects the employees by declaring that pension once authorized after final assessment shall not be revised to the disadvantage of the Government servant, unless such revision becomes necessary on account of detection of a clerical error. The only exception to this is

provided in Rules 26 and 27 wherein the Government is authorized to withhold pension or part of pension as penalty.

8. Clause 3.1 in the resolution dated 18-8-1987 virtually effects an amendment in the service rules by giving different format to the definition of "pensionable pay". It is settled legal position that statutory rules can not be amended by administrative resolutions.

Such an amendment is introduced to Rule 60(3) of the Pension Rules by notification dated 5-5-1990. Eventually, the amendment is given retrospective effect. As already discussed above, amendment adversely affects the computation of pensionable pay in cases of Government employees, who were already drawing special pay, which till the date of amendment was included in the definition of "pay" and consequently also in the definition of "pensionable pay" for the purpose of deriving the amount payable to an employee as pension. Thus it adversely affects the benefit that has been conferred upon Government employees as a result of qualifying service for particular number of years. Amendment in a statute or statutory rules, which affects the substantive rights or benefits of the citizens, can not be given retrospective effect, although procedural amendments can. Viewed from this angle, the impugned clause contained in Government resolution dated 18-8-1987 can not come into play till 5-5-1990. The State Government shall be in a position to apply Rule 60(3) of the Pension Rules only to those employees who enter the Government service on or after 5-5-1990.

9. Learned counsel for the petitioner has also placed reliance on Rules 7(B) and 7(C) of Maharashtra Civil Services (Revised Pay) Rules, 1988. Rule 7 of these Rules is pertaining to fixation of initial pay in the revised scale. From Rule 7(A), it is evident that all employees for getting the pay fixed in the revised scale are entitled to an amount representing 20% of the basic pay in the existing scale, subject to minimum of Rs. 75/- to be added to "existing emoluments" and then fixation of the pay in the revised payscale at the stage next above the amount so computed. By virtue of Rule 7(B), the employees, who are in receipt of "special pay" in addition to pay (basic) in the existing scale and where existing scale with "special pay" is replaced by a scale of pay after merging the "special pay", the pay in the revised scale is to be fixed in accordance with Clause (A) described above by including "special pay" in the existing emoluments in addition to basic pay and dearness allowance. Thus, the employees covered by Rule 7(B) while merging special pay into existing emoluments get their pay fixed in the revised payscale on the basis of existing emoluments calculated by incorporating "special pay" within those. Thus, impliedly they carry the benefit of "special pay" merged within the womb of revised pay. Needless to say that the pay in the revised payscale gets fixed on the higher side, thus, incorporating merged special pay within what will be calculated as "pensionable pay" at the time of superannuation, although by that time, special pay will not have retained independent identity. On reference to Rule 7(c), which pertains to those

employees in whose cases revised payscales are not fixed by merging the special pay, the pay in the revised scale is fixed as per Rule 7(A) and, therefore, the special pay retains its identity even after revision of payscales. In case of such employees, they neither get benefit of 20% hike on the special pay, because the same is excluded from computation of "existing emoluments" for the purpose of revision of payscale, nor it merges in the revised payscale as in the case of employees covered by Rule 7(B) thereby enabling the employee to get consequential benefit of fixation of pay in the revised scale on the higher side and ultimate benefit of fixation of pension also on the higher side due to merger of special pay in the basic pay as fixed on revision.

Rules 7(A), (B) and (C) if considered together, it can be seen that the employees who get revised payscale with effect from 1-1-1986 under Rule 7(B) and 7(C) get a different treatment, which perpetuates right upto the stage of fixation of pension. Viewed thus, Clause 3.1 of Government resolution dated 18-8-1987 excluding special pay from the definition of "pensionable pay", is violative of Article 14 of the Constitution of India.

10. In view of Proviso to Rule 6(1) as also Rule 131 of Pension Rules, it is not open for the respondents to apply Clause 3.1 of Government resolution dated 18-8-1987 to the petitioner. Petitioner shall, therefore, be entitled to fixation to pay by computing "pensionable pay" by incorporating his special pay for the purpose. The said clause and amended definition of "pensionable pay" can be made applicable only to those Government employees, who would enter the service on or after 1-1-1986, because those disadvantageously affect the pension of employees who entered the service prior to 1-11-1986, when the definition of "pensionable pay" was not so restrictive.

11. The contention of the petitioner that his special pay was added to the basic pay, for the purpose of arriving at a figure regarding amount to be deducted towards house rent allowance, which is 10% of the basic pay is not challenged by respondents. This is an event indicating that during the tenure of service of the petitioner, even the respondents treated the special pay to be part and parcel of his basic pay. In other words for the purposes of deductions, special pay was part and parcel of basic pay and, therefore, pensionable pay. The respondents, therefore, can not have an about-turn during the course of revision of payscales and deny the benefit of pension on the pensionable pay inclusive of special pay.

12. A weak attempt is made in the reply affidavit to claim that this is a policy decision. We are afraid, the contention is required to be rejected. Implementation of recommendations of Central Pay Commission, may be a policy decision, however, framing of rules while implementing the recommendations, which will be governing the service conditions of various categories of Government employees and amendment to such service conditions, can not be termed to be general policy decision of the State Government.

13. Petitioner has challenged cut off date fixed for giving benefit regarding

enhanced ceiling for accumulation of earned leave, which can be encashed at the stage of retirement on superannuation. Monetary benefits accruing as a result of Fourth Pay Commission are given with effect from 1-1-1986. According to petitioner, Central Government has fixed 1-7-1986 as cut off date for the benefit of enhanced ceiling on accrual of earned leave. The petitioner, therefore, claims the contents of G. R. dated 11-10-1988 giving effect to this enhanced limit from 1-9-1988 to be arbitrary.

On reference to Maharashtra Civil Services (Leave) Rules, 1981, and especially Rule 10 of the said Rules, it can be seen that leave is a permission granted by competent authority at its discretion to remain absent from duty and the same can not be claimed as of right. Admittedly, according to requirement of exigencies of public service, leave of any kind can be refused and revoked. Thus, accumulation of leave under the prevailing rules may not be termed as a right although once accumulated, an employee gets a right to encash the same at the stage of retirement by virtue of Rule 68 of the Pay Rules. In view of this, we are inclined not to interfere with the Government resolution dated 11-10-1988.

14. Resolution dated 3-10-1988 also fixes 1-9-1988 as cut off date for enhanced rates of T.A., D.A. on tour or transfer. The amounts payable as travelling allowance or daily allowance while on tour or transfer are in the nature of reimbursement of the expenses incurred and, therefore, if Government has taken its own time to consider whether there was necessity to enhance the rates and then after having decided to enhance the rates, has fixed the date 1-9-1988 for giving effect by resolution dated 3-10-1988, we are unable to find fault with the same and hence prayer of the petitioner to quash this cut off date is also being rejected.

15. In view of above, writ petition is partly allowed. Petitioner shall be entitled to pensionary benefits by considering special pay of Rs. 300/- which he was drawing on the date of superannuation as part and parcel of his basic pay and G.R. dated 18-8-1987 shall not be applicable to the petitioner to the extent it excludes special pay from the definition of pensionable pay. The benefit of this decision shall also be available to similarly placed employees of the State i.e. those who are appointed on or before 5-5-1990.

Rule is made partly absolute accordingly. No order as to costs.