

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.09.2017

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THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.No.21089 of 2017

S.Rajamohamed

.. Petitioner

-vs-

1. Agricultural Production Commissioner
and Principal Secretary to Government
Fort St. George
Chennai 600 009

2. Director Horticulture and
Plantation Crops
Chepauk
Chennai 600 005

3. Joint Director of Horticulture
Krishnagiri 635 115

... Respondents

Petition under Article 226 of the Constitution of India, praying for the issue of a Writ of Certiorarified Mandamus, calling for the records relating to orders GO (3D) No.193 Agriculture (AA8) Department dated 31.07.2017 and GO (3D) No.194 Agriculture (AA8) Department dated 31.07.2017 on the file of the First Respondent and quash the same and direct the respondents to permit the petitioner to retire on the day of his superannuation i.e. on 31.07.2017 and to release his retirement benefits.

For Petitioner :: Mr.M.S.Krishnan
Senior Counsel for
Mr.J.James

For Respondents:: Mr.K.Dhananjayan
Special Government Pleader

ORDER

The order of suspension and the retention of service of the writ petitioner issued under the Rules are under challenge in this writ petition.

2. The writ petitioner was holding the post of Joint Director of Horticulture and was due to retire from service on 31.7.2017. On the date of retirement, the Government issued G.O.(3D) No.193 Agriculture (AA8) Department dated 31.7.2017 placing the writ petitioner under suspension from service until

further orders, on the ground that an enquiry into grave allegations against him is contemplated. A further order was also issued in G.O.(3D) No.194, Agriculture (AA8) Department dated 31.7.2017 under FR 56(1)(c) of the Fundamental Rules stating that the services of the writ petitioner is retained and accordingly he will be continuing in service, in order to continue the departmental disciplinary proceedings.

3. The learned senior counsel appearing on behalf of the writ petitioner made a submission that the writ petitioner was working in Krishnagiri on the last date of his retirement on 31.7.2017. A charge memo was initially issued on 12.1.2017 in relation to the allegations pertaining to the year 2009-10 and the writ petitioner submitted his explanation on 21.1.2017 and an enquiry was conducted in this regard, and the enquiry officer submitted his final report on 7.7.2017. Another set of charges were framed in charge memo dated 20.3.2017, which is also relating to the year 2010-11 and the writ petitioner submitted his explanation on 28.3.2017 and the enquiry report was submitted by the enquiry officer on 25.7.2017. In both the set of charges, the departmental enquiries were conducted and the enquiry officers submitted their respective reports on 7.7.2017 and on 25.7.2017 respectively.

4. The learned senior counsel advanced his arguments relying FR 56(1), which states that a Government servant in the superior service shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty-eight years. Further it proceeds by stating that he shall not be retained in service after that age except with the sanction of the Government on public grounds, which shall be recorded in writing and he shall not be retained in service after sixty years except in very special circumstances. The learned senior counsel relied on the word "afternoon" by stating that the order of suspension and retaining the services of the writ petitioner ought to have been served to the writ petitioner before noon on 31.7.2017. Admittedly, the order was served after 31.7.2017. Thus, the impugned orders are not in existence and accordingly the writ petitioner be declared as deemed to have been retired from service. The order was though passed on 31.7.2017, the same had not been served in accordance with the rules to the writ petitioner. Thus, the writ petitioner to be treated as a retired employee for all purposes and accordingly, the respondents should proceed for the settlement of his retirement and terminal benefits. Further the learned senior counsel contended that the charges are not so serious warranting any major penalty and therefore, placing the writ petitioner under suspension is unwarranted. In reliance, a judgment of the Supreme Court in the case of State of West Bengal and others v. R.K.B.K. Limited and another reported in (2015) 10 SCC 369 is cited. Paragraph-28 cited by the learned senior counsel is extracted hereunder:-

"28. The aforesaid decision in Rani Sati Kerosene Supply Co. case, as is evident, lays down that passing of the order and communication thereof must be within 30 days and on that basis has opined that the order passed on the file and not communicated to the person aggrieved is not an order that can be taken cognizance of. There can be no scintilla of doubt that unless an adverse order is communicated that does not come into effect. Passing of an order on the file does not become an order in the eye of the law. But the core question would be, if an order is passed within 30 days and communicated thereafter, what would be the effect. In the instant case, as the factual matrix would unveil, the order was passed before expiration of 30 days, but the same was served on the first respondent beyond 30 days. The thrust of the matter is whether the order has to be passed and communicated within 30 days. Para 9 of the Control Order requires the competent authority to pass an order within 30 days from the date of serving the show-cause notice or the suspension of licence. The word used is "shall". Para 10 of the Control Order enables the aggrieved person to prefer an appeal against an order passed under Para 8 or 9 within 30 days to the State Government in Food and Supplies Department."

5. The case cited supra is relating to the essential commodities and services, more so, the West Bengal Kerosene Control Order, 1968. In this regard, the Hon'ble Supreme Court considered with regard to the serving of the order within 30 days by the competent authorities. However, the case on hand is relating to a Government employee and the rule relating to the service conditions and the Fundamental Rules are to be referred on the facts and circumstances of the case. Further before the Hon'ble Supreme Court, the case was considered on the fact that the order issued by the competent authorities under the West Bengal Kerosene Control Order, 1968 was served within a period of 30 days or not. Those circumstances cannot be on par or akin to that of the case on hand in this writ petition. Secondly, the learned senior counsel cited the case of State of West Bengal v. M.R.Mondal and another, (2001) 8 SCC 443 and paragraph-16 is extracted hereunder:-

"16. The learned Judges of the Division Bench of the High Court ought to have seen that there can be no legal impediment for the Department to make preparations ahead of the period of expiry of the one-year contract

given in favour of the plaintiff to facilitate the entrustment of the task of collecting the toll in question for the period subsequent thereto, to a newly selected contractor at competitive rates. The Division Bench further overlooked the vital legal proposition that the memorandum dated 11.3.1998 of the Joint Secretary cannot, per se, have the legal consequence of bringing into existence an extended period of contract and that too for 30 years, though said to be renewable periodically every three years. On a proper consideration of the memorandum dated 11.3.1998, which was also stated to have been never communicated to the plaintiff, and the subsequent memorandum dated 24.8.1999 of the very Joint Secretary, who issued the earlier memo, that memorandum dated 11.3.1998 contained only certain proposals and not any final orders of extension or renewal of the contract as assumed in the judgment under challenge. Para 15 of the memorandum dated 11.3.1998, which has been relied upon as the basis for claiming an extended period of contract, itself has been misconstrued out of context, though by itself, it cannot have the effect of bringing into existence such an extended term of contract to warrant or justify the grant of directions of this nature in the present case. Even assuming for consideration, without accepting that para 15 of the memorandum dated 11.3.1998 had any effect, it can by no stretch of imagination be construed to bring into existence ipso facto an extended period of contract beyond the one-year period for which alone the contract had been given to the plaintiff in this case. An order passed but retained in file without being communicated to the plaintiff can have no force or authority whatsoever and the same has no valid existence in the eye of the law or claim to have come into operation and effect. No reliance can be placed on the same to even assert a claim based on its contents. If its utility depended upon a decision to be taken on the performance of the plaintiff by the competent authority, neither the authority could be compelled to take a decision nor any concrete rights could be said to have been acquired by the plaintiff, to warrant the grant of the type of directions given in this case. It is really surprising that the discretionary power to grant injunction, be it

of prohibitory or mandatory nature, has been availed of to bring into existence and force upon the State a new contract, which could never have been the intention of the State itself."

6. The Hon'ble Supreme Court made an observation that an order passed but retained in file without being communicated to the plaintiff can have no force or authority whatsoever and the same has no valid acceptance in the eye of law or claim to have come into operation and effect. No reliance can be placed on the same to even assert a claim based on its contents. If its utility depended upon a decision to be taken on the performance of the plaintiff by the competent authority, neither the authority could be compelled to take a decision nor any concrete rights could be said to have been acquired by the plaintiff to warrant the grant of the type of directions given in this case. The learned senior counsel relying on the said observation made a submission that the order was passed and not served in this case. Thus, the effect would be that the order was not in existence as on the date of retirement of the writ petitioner and cannot have any validity. In this view of the matter, the impugned order is to be scrapped.

7. There is no quarrel with regard to the legal principle that an order which is passed and not served to the parties is invalid in the eye of law. There is no further opinion by the Courts. Time and again the Courts have held that any order passed by the competent authority should be duly served to the parties concerned. If any order is not so served in accordance with law, then the order cannot be construed as valid in the eye of law. Thus, in this regard, it is emphasized that the order impugned in this writ petition had not been served to the writ petitioner in time, that is to say before 31.7.2017, therefore, the order to be treated as non-est in law. Further, the learned senior counsel also referred to G.O.Ms.No.144, Personnel and Administrative Reforms Department dated 8.6.2007 relating to the detailed instructions issued by the Government with regard to the actions to be taken on the pending disciplinary proceedings. Time limit is also prescribed by the Government by way of instruction to the competent authorities. In this regard, sub-paras (i), (ii) & (iii) of paragraph-5 are referred to and the same are extracted hereunder:-

"5. The Government direct that the following guidelines be followed to avoid suspension orders on the date of retirement of the Government servants in super session of orders issued in the reference second read above.

(i) The Disciplinary authority should not resort to last minute suspension of the Government servants (i.e.) on the date of their retirement. A decision either to allow Government servant to retire from service or

suspend him from service should be taken well in advance (i.e.) three months prior to the date of retirement on superannuation and orders issued in the matter and such a decision should not be taken on the date of retirement, if final orders could not be issued in a pending disciplinary case against a Government servant retiring from service due to administrative grounds.

(ii) If an irregularity or an offence committed by the Government servant comes to notice within a period of three months prior to the date of retirement, the disciplinary authority shall process the case on war-footing and take a decision either to permit the Government servant to retire from service without prejudice to the disciplinary case pending against him or to place him under suspension, based on gravity of the irregularities committed by him.

(iii) In respect of Directorate of Vigilance and Anti-Corruption and Tribunal for Disciplinary Proceedings cases, the disciplinary authorities should strictly adhere to the time limit prescribed by the Government. It is noticed that Directorate of Vigilance and Anti-Corruption and Tribunal for disciplinary Proceedings cases are dragged on for a long time without adhering to the limit prescribed by the Government in Letter first read above. In such cases, the disciplinary authorities should take up the matter with the Directorate of Vigilance and Anti-Corruption or Tribunal for disciplinary Proceedings to expedite such cases and final orders issued within the time limit prescribed. In unavoidable circumstances, if final orders could not be issued, even in such cases, the disciplinary authorities should take a decision to place him under suspension well in advance (i.e.) prior to the date of retirement of the Government servants and not on the date of retirement."

8. Relying on the above instructions, the learned senior counsel contended that the disciplinary authority should not resort to last minute suspension of a government servant and the exercise ought to have been done well before the date of retirement and the last moment order cannot be valid in view of these instructions. Thus, even as per the guidelines issued by the Government, the impugned orders are liable to be set aside.

9. The learned Special Government Pleader appearing on behalf of the respondents, relying on the counter affidavit filed by the respondents, made a submission that one Sri.K.Srinivasaperumal, Kuruvarpatti, Thoothukudi District and two others have submitted a petition with regard to the irregularities in disbursement of inputs to the farmers under the Integrated Horticulture Development Scheme/Medicinal Plants Scheme during the year 2009-10 at Vilathikulam of Thoothukudi District. Thus one Mr.K.Mohan, formerly Joint Director of Horticulture was directed to conduct a preliminary enquiry on the petitions received. Based on the findings of the enquiry officer, charges were framed against the petitioner under charge memo dated 12.1.2017. The enquiry report was received and the same is under consideration for issuing final orders at the Government level. This apart, another departmental disciplinary proceedings were also initiated against the writ petitioner, in which also report was submitted and the same is also under consideration and the departmental disciplinary case as well as the vigilance case against the writ petitioner is also pending. Under these circumstances, the writ petitioner was placed under suspension and not permitted to retire from service. Further the details of the vigilance case has not been enumerated in the counter filed in this writ petition. The counter further proceeds by stating that the orders could not be served at the local address given by the writ petitioner on the date of superannuation, since he went to some other place by locking his rental accommodation. Therefore, the order was pasted on the wall near the door of his rental accommodation. While contacting over phone by the Deputy Director of Horticulture, Krishnagiri, the petitioner informed that he was proceeding to Chennai and now crossing Vellore and asked to serve the order at Chennai. Being a 24 hours government servant, he ought to have stayed at the headquarters till 12.00 midnight on 31.7.2017 and whereas the petitioner vacated the rental accommodation at 8.15 p.m. and proceeded to Chennai without handing over his charges to the immediate subordinate. This behavior clearly shows the attitude of the petitioner regarding dodging with a mala fide intention to escape from the allegations. Admittedly, in two set of charges issued against the writ petitioner, the enquiry reports have been received by the Government and both the reports are under consideration for the purpose of passing final orders in the disciplinary proceedings.

10. The issues to be considered are:-

- (i) Whether the serving of the impugned orders to the writ petitioner after 31.7.2017 is valid or not?
- (ii) Whether an employee facing disciplinary proceedings and due to retire from service on attaining the age of superannuation shall be allowed to escape from the clutches of disciplinary proceedings under the Discipline and Appeal Rules on certain technical grounds?

11. This Court is of the view that the fact regarding the framing of charges, conduct of enquiry and the submission of the final enquiry report in two set of charges are admitted facts. Further, the writ petitioner also was due to retire from service on attaining the age of superannuation on 31.7.2017. Further it is admitted by the parties that the order placing the writ petitioner under suspension and retaining his service under FR 56(1)(c) were issued by the Government on 31.7.2017 and on perusal of the original copy of the order filed along with this writ petition, this Court is able to find that the competent authority viz., the Agricultural Production Commissioner and Principal Secretary to Government signed the order on 31.7.2017 and thus there is no irregularity in passing and signing the order in accordance with the rules. There is no prohibition for the competent authority to sign the order on the last date of retirement of the employee, since on that day the employee was very well in service and he has received the salary for that day and worked in the office in accordance with the rules in force. Thus, this Court is of the considered view that there is no impediment or irregularity in passing an order on the last day of retirement of a government employee. On the second score, regarding the service of the order, this Court has to consider the factual circumstances and to take a pragmatic view than following the technical reasons. A pragmatic approach is necessary in this kind of issues in order to achieve the very object of the initiation of disciplinary proceedings. Every public servant is enjoying a status in the society. Status being an aspect extended and attached to a public servant and by virtue of such a status he has to serve the public 24x7-365 days. Public servant has to maintain utmost integrity and honesty both inside and outside the office. A public servant cannot be compared with an employee of private sector and therefore this Court is of the view that when the writ petitioner is a 24 hours government servant, his conduct as a whole has to be considered.

12. In the case on hand, Rule 17(e) of the Tamil Nadu Civil Services (Discipline & Appeal) Rules states that a member of the service may be placed under suspension from service, where an enquiry into grave charges is contemplated or is pending or a complaint of any criminal offence is under investigation or trial and if such suspension is necessary in the public interest. Therefore, there is no prohibition on the part of the competent authorities to place an employee under suspension under Rule 17(e) of the Tamil Nadu Civil Services (Discipline & Appeal) Rules even on the last day of his retirement. In view of the fact that the writ petitioner was due to retire from service on 31.7.2017, necessarily his services ought to be retained under the Fundamental Rules. FR 56(1) enumerates that every government servant in the superior service shall retire from service on the afternoon of the last day of the month in which he attains fifty-eight years. He shall not be retained in service after that age except with the sanction of the

Government on public grounds, which shall be recorded in writing, but he shall not be retained after sixty years except in very special circumstances. Thus, the principle purport of the rule is that no government servant can be granted with extension of service beyond the age of fifty-eight years. Thus, the Government necessarily has to exercise its power on extending the service under the Fundamental Rules, in order to proceed with the disciplinary proceedings against the government servant under the Discipline and Appeal Rules. Fundamental Rule 56(1) states that no government employee should be allowed to serve beyond fifty-eight years. Therefore, the retention of service is otherwise in accordance with the rules and the exercise by the competent authorities are done only in order to conduct the departmental disciplinary proceedings. Therefore, FR 56(1) is not directly connected with the Discipline and Appeal Rules. It is an independent rule which is to be considered wherever the circumstances warrant for issuance of such orders. The retention of service will arise only after the date of retirement, that is to say, after 31.7.2017 in the case on hand. Thus, the order of retention passed simultaneously cannot be faulted with.

13. Even taking an instance where the government servant was due to retire on 31.7.2017, the question of retention in service will arise only on the afternoon of 31.7.2017. Thus, the retention order passed subsequent to the order of suspension cannot be faulted with. In this view of the matter, the first G.O.(3D) No.193 Agriculture (AA8) Department dated 31.7.2017 impugned in this writ petition is the order of suspension and the G.O.(3D) No.194 Agriculture (AA8) Department dated 31.7.2017 passed thereafter is under FR 56(1)(c). In this view of the matter, there is no irregularity in passing the order of retention after passing the order placing the writ petitioner under suspension. Considering the arguments advanced by the learned senior counsel that technically the order cannot be sustained in view of the fact that it was not served on 31.7.2017, this Court is of the view that the counter in this regard is also to be considered by this Court. The counter categorically enumerates that the writ petitioner was not available on 31.7.2017 in his rental accommodation at Krishnagiri and in fact the door was locked and the order was pasted on the door of his rental accommodation. This fact was recorded by the Deputy Director of Horticulture, Krishnagiri. Further the Deputy Director has made a call to the writ petitioner, who in turn informed the Deputy Director that he had already proceeded to Chennai and the order may be served to him in Chennai. This shows that the writ petitioner was not available, more specifically at 8.15 p.m. on 31.7.2017 at Krishnagiri. This being the fact, this Court is of the view that not serving the order of suspension on 31.7.2017 was only at the instance of the writ petitioner and not at the instance of the respondents. Even as per the file produced before this Court, the Deputy Director of Horticulture, Krishnagiri went to the

rental accommodation of the writ petitioner and found that it was locked. The file produced before this Court shows that the rental accommodation at Third Cross Cooperative Colony at Krishnagiri and the MGM Mansion authorities also gave a letter stating that the writ petitioner was in occupation of the Door No.22 and on 31.7.2017 at about 8.15 p.m. he vacated the room and left the place. Therefore, it is apparently clear that on 31.7.2017 at about 8.15 p.m., the writ petitioner was not available in his accommodation at Krishnagiri. Another fact to be noticed is when the Deputy Director made a call to the writ petitioner through phone, the writ petitioner said that he had already left Krishnagiri and proceeding towards Chennai and the order may be served to him at Chennai. In this view of the matter, it is the writ petitioner who evaded the service of the order of suspension and the respondents cannot be faulted on this score.

14. The learned senior counsel referred to the instructions/guidelines issued by the Government in G.O.Ms.No.144, Personnel and Administrative Reforms Department dated 8.6.2007. The said instructions are issued to the competent authorities in order to initiate the disciplinary proceeding and conclude the same within a reasonable period. The time limit prescribed in such instructions/guidelines are directory and not mandatory. The instructions issued by the Government will not have the force of law and thus the instructions relied cannot be considered in the case on hand, since the writ petitioner was due to retire from service on 31.7.2017. This apart, the instructions issued with regard to fixing the time for initiation or conclusion of the disciplinary proceedings cannot be a matter of legal right for the government employee so as to escape from the liability of disciplinary proceedings. Even this Court, time and again in the matter of guidelines/instructions, has held that the time limit prescribed has to be construed as directory and not mandatory. If an authority is not able to conclude the proceedings or complete the action within a particular time limit on account of certain genuine reasons, then the Courts cannot come to a conclusion that the entire action initiated under law is vitiated. Thus, this Court is of the firm view that this cannot be a ground for any government servant to escape from the liability of disciplinary proceedings.

15. Even otherwise, this Court is of the opinion that no employee can be allowed to escape from the clutches of disciplinary proceedings on flimsy and hyper-technical grounds. A mere technical ground cannot be a reason for an employee to escape from the clutches of departmental disciplinary proceedings. The proceedings initiated under the Discipline and Appeal Rules are to be completed and the same should reach its logical conclusion. Intermittent intervention in disciplinary proceedings by the Courts ought to be exercised cautiously. Intermittent intervention can be undertaken by the

Constitutional Courts only on exceptional circumstances, if an order of suspension or charge memo or retaining an employee under suspension is issued by an incompetent authority or being an allegation of mala fides are attributed, or the same is in violation of the statutory rules. Even in case of raising the allegation of mala fides, the authority against whom such allegation is made to be impleaded as party in the writ proceedings in his personal capacity. In the absence of any of such grounds, the Courts will not normally intervene in the disciplinary proceedings.

16. In the case on hand, though the technical ground of not serving the order of suspension was raised by the writ petitioner, the same was not substantiated by convincing reasons. The reasons furnished by the learned senior counsel are neither candid nor convincing. Contrarily, it seems to be hyper-technical and further not supported by any documents. However, the learned Special Government Pleader for the respondents is able to produce the file showing that they made all the attempts to serve the copy of the impugned order to the writ petitioner on 31.7.2017. The Deputy Director of Horticulture, Krishnagiri went to the rental accommodation of the writ petitioner and made a sincere attempt to serve the same. However, the writ petitioner was not available at 8.15 p.m. in his rental accommodation. Therefore, they have pasted the order on the door and further obtained a letter from the mansion authorities stating that the writ petitioner has vacated the room and proceeded to Chennai. Under these circumstances, this Court is unable to appreciate the attitude of the writ petitioner, who is a responsible public servant. A responsible public servant is supposed to receive the orders passed by the Government and thereafter respond the same in accordance with law. Evading the receipt of an order cannot be a solution or cannot be a conclusion for the government servant. Any government servant against whom action was initiated by the competent authorities has to face the proceedings in accordance with law and mere evasion of receipt of order cannot be a ground to escape from the liability. Even if an order was not purportedly served, as contended by the learned senior counsel, on 31.7.2017, then also this Court is of the opinion that the entire disciplinary proceedings cannot be quashed and those to be concluded in accordance with the rules by adjudicating the matter on merits. The allegations against the government officials are to be dealt with in accordance with law and there cannot be any evasion or the question of quashing the same in writ proceedings will arise.

17. In the case on hand, the order of suspension was issued in accordance with the rules and the writ petitioner was retained in service under FR 56(1)(c). This apart, two set of charges are pending against the writ petitioner and on both the charges the enquiry reports were submitted and the same are under the consideration of the Government for passing final

orders. Under these circumstances, it is not preferable for this Court to adjudicate the merits of the case or exonerate the writ petitioner from the clutches of the disciplinary proceedings. Even admittedly, the enquiry proceedings are completed and they are under consideration for the purpose of passing final orders. Thus, the competent authorities have to consider all these aspects and pass orders without any further delay and considering the fact that the writ petitioner has already attained the age of superannuation, any further delay will have an impact on receipt of the terminal and retirement benefits. In this view of the matter, no further adjudication on merits are required to be undertaken on the grounds raised in this writ petition.

18. After passing of the order in this writ petition, the learned counsel appearing on record after getting instructions from the petitioner, made a submission that the enquiry reports were submitted with regard to the disciplinary proceedings and the writ petitioner has also submitted his further explanations in this regard and under these circumstances, it is suffice if an order and direction is issued to pass final orders in the disciplinary proceedings.

19. Considering the submissions made by the learned counsel, the respondents are directed to pass final orders on the disciplinary proceedings within a period of four weeks from the date of receipt of a copy of this order and no further consideration is required in this writ petition. Accordingly, the writ petition stands dismissed. Consequently W.M.P.No.21963 of 2017 is closed. However, no order as to costs.

Sd/-

Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

ms/ss

To

1. The Agricultural Production Commissioner
and Principal Secretary to Government

Fort St. George, Chennai 600 009

2. The Director Horticulture and Plantation Crops
Chepauk, Chennai 600 005

3. The Joint Director of Horticulture
Krishnagiri 635 115

+ 1 cc to Government Pleader SR.63682

+ 1 cc to Mr. J. James, Advocate SR.63615

W.P.No.21089 of 2017

PVS(CO)

EU(21/09/2017)