

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.07.2017

CORAM

THE HONOURABLE MR.JUSTICE NOOTY.RAMAMOHANA RAO
And
THE HONOURABLE MR.JUSTICE M.DHANDAPANI

W.P.No.21630 of 2013

And

M.P.No.1 of 2013

B.Kulamani

... Petitioner

Vs.

1. The Government of Tamil Nadu,
Rep. by its Secretary,
Home Department,
Fort St.George, Chennai - 9.

2. The Registrar General,
High Court of Madras,
Chennai - 104.

3. The Accountant General (A & E),
Anna Salai, Chennai.

4. The Chairman,
Tamil Nadu Public Service Commission,
Chennai.

.... Respondents

Prayer:

Writ petition filed under Article 226 of the Constitution of India seeking Writ of Certiorarified Mandamus to call for all the records from the respondents regarding the service of the petitioner and in particularly from the 3rd respondent pertaining to the impugned rejection order, PO2/ 3/ 10203615/ COM/ 2010-2011/476 dt.17.02.2011 and quash the same.

For Petitioner : Mr.Lakshmi Narayanan
for M/s.P.Vijendran

For Respondents : Mr.P.Sivashanmugasundaram for R1
Special Government Pleader
Mr.C.T.Mohan for R2
Mr.V.Vijayashankar for R3
Mrs.C.N.G.Niraimathi for R4

ORDER

(Order of the Court was made by NOOTY.RAMAMOHANA RAO,J.)

This writ petition has been instituted challenging the legality and validity of the order passed on 17.02.2011 by the Accountant General (A & E), Anna Salai, Chennai, declaring the net qualifying service put in by the writ petitioner was only nine years six months and twenty four days and hence, the benefit of additional qualifying length of service provided for under Rule 27 of the Tamil Nadu Pension Rules, does not arise in his case for consideration.

2. The relevant facts for the purpose of deciding the issue are: The writ petitioner was selected and appointed as a Civil Judge (Junior Division) on 27.11.1995. While he was working as such at Nangunari, he was placed under suspension on 13.06.2005 as serious allegations of corrupt practices indulged in by him have surfaced and also for various other acts of impropriety and mis-conduct attributable to him. While he was kept under suspension, the need to review his case upon attaining the age of fifty years has arisen.

3. The High Court upon a proper and careful analysis of the service profile and the quality of his services thus, far rendered had formed an opinion that it was necessary in public interest to compulsorily retire the writ petitioner in terms and in accordance with Rule 56(2) of the Fundamental Rules. The recommendation made by the High Court has been accepted and accordingly, the State Government passed orders through their G.O.(2D) No.458, Home (Cts.IA) Department, dated 13.07.2007, retiring the writ petitioner in public service by tendering three months of pay and allowances in lieu of three months notice.

4. It appears that the State Government as a Policy has decided to reinstate all such employees into service who are kept under suspension first and then serve them the order of compulsory retirement passed under Rule 56(2) of the Fundamental Rules. The guidelines in respect thereof are circulated through G.O.No.623, Personnel and Administrative Reforms (Per.R) Department, dated 14.07.1983, of the Government. As a consequence thereof, the writ petitioner has been reinstated to service by a Notification dated 20.07.2007 issued by the High Court, thus lifting the period of suspension. In accordance with the aforementioned Notification dated 20.07.2007, the writ petitioner joined duty on 23.07.2007 afternoon and the orders passed by the State Government through their G.O.(2D) No.458, Home (Cts.IA) Department, dated 13.07.2007, retiring him compulsorily under Rule 56(2) of the Fundamental Rules were then

served on him. Thus, the writ petitioner has been made to retire from service on the afternoon of 30.07.2007.

5. The writ petitioner challenged the order of the State Government contained in their G.O.(2D) No.458, Home (Cts.IA) Department, dated 13.07.2007, by instituting W.P.No.36942 of 2007. The Division Bench comprising of Justice S.J.Mukhopadhyaya and Justice F.M.Ibrahim Kalifulla (as both the learned Judges then were), by their judgment dated 27.03.2008, dismissed the writ petition on merits. The writ petitioner carried the matter in appeal by preferring Special Leave to Appeal (Civil) No.28217 of 2008. The Supreme Court after hearing the learned Senior Counsel for the writ petitioner by its order dated 08.12.2008 dismissed the Special Leave Petition.

6. However, we are informed that long thereafter, Review Application (Writ) No.140 of 2013 is preferred seeking review of the judgment rendered on 27.03.2008. A Division Bench of this Court by its order dated 26.11.2014 allowed the Review Application on the ground that one of the Members of the earlier Division Bench which had rendered judgment in W.P.No.36942 of 2007 was a Member of the Administrative Committee and hence, he ought not to have heard the matter. Hence, the judgment rendered on 27.03.2008 dismissing the writ petition was recalled and the writ petition was restored.

7. Against this order passed in the Review Application on 26.11.2014, the High Court carried the matter by preferring S.L.P.(Civil) No.23629 of 2015 and the Supreme Court by its order dated 10.04.2017 granted leave. Thus, the matter is now receiving the consideration of the Supreme Court. It should also be noticed that on 17.08.2015, the Supreme Court ordered stay of the operation of the impugned judgment and order passed in the aforementioned Review Application on 26.11.2014 until further orders. As of now, the order of stay granted on 17.08.2015 by the Supreme Court is still holding the feet. The net result is that, the order of compulsory retirement passed by the State Government is operating against the petitioner.

8. However in the meantime, the writ petitioner submitted a representation on 20.02.2009 seeking regularization of the period of suspension undergone by him. Upon consideration of the said request, High Court has considered the issue on its administrative side and resolved to regularize the period of suspension undergone by the writ petitioner between 14.06.2005 afternoon upto 23.07.2007 afternoon to be treated as one without pay.

9. It is now contended before us that without any regard for the orders passed by the High Court on 23.10.2009, regularizing

the period of suspension undergone by the writ petitioner, the third respondent/ Accountant General has erroneously calculated the total qualifying length of service put in by the writ petitioner as merely nine years six months and twenty four days duration and also declined to grant addition of further qualifying service under Rule 27 of the Tamil Nadu Pension Rules. Challenging this decision of the Accountant General, the present writ petition is filed.

10. On the previous occasion, we have heard Shri.P.Vijendran, learned counsel for the writ petitioner and on 05.07.2017 and also today, we have also heard Shri.Lakshmi Narayanan, learned counsel appearing on behalf of the petitioner. Shri.C.T.Mohan, learned Standing Counsel for High Court who has accepted notice on behalf of the second respondent has been heard and he has also produced the relevant file/ record before us. We have also heard Shri.P.Sivashanmugasundaram, learned Special Government Pleader appearing for the first respondent, Shri.V.Vijayashankar, learned counsel appearing for the third respondent/ Accountant General and Smt.C.N.G.Niraimathi, learned counsel appearing for the fourth respondent.

11. The main theme of the argument on behalf of the writ petitioner proceeds on the premise that when once the High Court regularises the period of suspension by its proceedings dated 23.10.2009, the Accountant General ought to have computed the qualifying length of service put in by him from 27.11.1995 upto 30.07.2007 continuously and thus ought to have calculated the qualifying length of service put in by the petitioner as eleven years eight months and four days duration, which then would have fetched him pension. Because of the error committed in computing the qualifying length of service by excluding the period of suspension undergone by the petitioner, the Accountant General has not acted in accordance with law.

12. It is further contended that once the suspension period gets regularized by the competent authority, the Accountant General has no choice except to treat the period of suspension undergone by the writ petitioner as part of qualifying length of service only and on that basis the terminal and other pensionary benefits payable to the writ petitioner ought to have been worked out.

13. To furnish an appropriate answer to the above contentions urged by and on behalf of the writ petitioner, we need to survey and take into consideration the relevant provisions of the Tamil Nadu Pension Rules, 1978, and also the Fundamental Rules.

14. The Tamil Nadu Pension Rules, 1978, which were brought into force on 01.01.1979, defined the expression 'pension' in Rule 3(m) as including gratuity, except when the term 'pension' is used in contradistinction of Gratuity, but does not include dearness allowance. Rule 3(o) defined the expression 'qualifying service' as meaning permanent or officiating service including temporary service under emergency provisions rendered in a post included in a pensionable establishment. Rule 5(1) declared that any claim to pension or family pension shall be regulated by the provisions contained by the Rules in force at the time when a Government servant retires or is retired or is discharged or is allowed to resign from service or dies as the case may be. Thus, the Rules that existed as on 30.07.2007 govern the present fact scenario.

15. At the outset, it may also be appropriate to notice the contents of provisions contained in Rule 43(2) of the Tamil Nadu Pension Rules which has spelt out therein, that in the case of a Government servant retiring in accordance with the provisions of these Rules after completing qualifying service of not less than ten years, the pension shall be appropriate amount as set out in the tabulated statement furnished there below. While calculating pension, instead of computing the same on the basis of whole numbers of the years of service, half yearly basis is adopted in as much as the eligibility of the employees who may have rendered service of little more than whole number of years, to secure more pension is not lost out. When half yearly basis is adopted, such length of service which an employee has put in beyond the whole number of years of service can also fetch him proportionately higher quantum of pension.

16. For the purpose of working out the above, we can illustratively take a case where an employee may have rendered twenty five years six months of service before his retirement. Therefore, instead of calculating the pension taking into the account the whole years as the basis, if half yearly basis is adopted, he can be awarded pension for fifty one half years instead of merely for twenty five completed years of service. However, what is essential and relevant for our inquiry is that the minimum qualifying length of service required to be put in by a Government servant to fetch him payment of pension is ten years or in other words, twenty half years.

17. Rule 56 of the Fundamental Rules deals with retirement of Government servants. Rule 56 has spelt out that every Government servant in superior service shall retire from service on the afternoon of the last day of the month in which he attains the age of 58 years, whereas, Rule 56(2) authorises the appropriate authority, if it is of the opinion that it is in

public interest so to do, have the absolute right to retire any Government servant by giving him notice of not less than three months in writing or three months pay and allowances in lieu of such notice at any time after he has attained the age of fifty years or after he has completed thirty years of qualifying service.

18. Rule 56 (3) of the Fundamental Rules provides an opportunity/ option to a Government servant who has attained the age of fifty years or who has completed twenty years of qualifying service to retire from service by giving notice of not less than three months in writing to the appointing authority. Thus, while Rule 56(1) of the Fundamental Rules talks of retirement on attaining the age of superannuation, Rule 56(2) of the Fundamental Rules talks of right in the hands of the competent authority to retire a Government servant compulsorily in public interest after he has completed fifty years of age or upon rendering thirty years of qualifying length of service. While Rule 56(3) of the Fundamental Rules provides option to the employee to retire voluntarily. In the instant case, exercising the power under Rule 56(2) of the Fundamental Rules, the State Government passed orders through their G.O.(2D) No.458, Home (Cts.IA) Department, dated 13.07.2007, retiring compulsorily the writ petitioner.

19. Now, reverting back to the provisions of the Pension Rules, Rule 12(1) of the Tamil Nadu Pension Rules, has set out that the service of a Government servant shall not qualify for pension unless his duties and pay are regulated by the Government or under conditions determined by the Government. Sub-Rule (2) thereof has further clarified that the expression 'service' mentioned in sub-Rule (1) means the service under the Government and paid by the Government from the consolidated fund of the State or a local fund administered by that Government. Thus, Rule 12(1) and (2) make it clear that only such service under the Government counts for which he is paid by the Government from the consolidated fund "pay" but not otherwise.

20. Rule 18 of the Tamil Nadu Pension Rules, upon which, Shri.Lakshmi Narayanan has laid some stress would set out that all leave during service for which leave salary is payable and extraordinary leave granted on medical certificate shall count as qualifying service. Therefore, it is very clear that even if a Government servant has availed leave during service, if he is paid salary/ pay for the said leave period, or for the extraordinary leave granted on medical certificate shall also count for the purpose of qualifying service. The emphasis to be noted supplied by Rule 18 lies on 'leave for which salary is payable'. Put it otherwise sans the pay, such leave does not count as qualifying service.

21. Rule 39 of the Tamil Nadu Pension Rules has also been commended for our consideration and acceptance by Shri.Lakshmi Narayanan, as being helpful to the cause of the petitioner. Rule 39 has set out that a Government servant compulsorily retired from service as a penalty may be granted by the authority competent to impose such penalty pension or Gratuity or both at a rate not less than 2/3 and not more than full compensation pension admissible on the date of his compulsory retirement. We are of the opinion that Rule 39 gets attracted only to such cases where Government servant has been inflicted with the punishment of compulsory retirement, which can be so inflicted upon establishing the mis-conduct attributable to the Government servant, but it does not get attracted to compulsory retirement brought about under Rule 56(2) of the Fundamental Rules as any such retirement is not a punishment.

22. In contrast to the punishment of compulsory retirement, inflicted under Discipline and Appeal Rules, the retirement compulsorily ordered in terms of Rule 56(2) of the Fundamental Rules stands completely on a different footing. Rule 56(2) of the Fundamental Rules empowers the competent authority to make an assessment of the quality of services rendered by the Government servant concerned before he attained the age of fifty years and upon a careful analysis and appreciation of such quality of service, a decision can be arrived at as to whether the individual Government servant shall be retained for further service or should be retired compulsorily.

23. Therefore, the retirement brought about under Rule 56(2) of the Fundamental Rules does not bear any punitive element. It is an exercise indulged in for the purpose of weeding out the un-productive dead wood from the service. The significance of a similar provision contained in Central Fundamental Rule 56 (j) has fallen for consideration in the celebrated case of Union of India Vs.J.N.Sinha and another (AIR 1971 Supreme Court 40) and the relevant principle has been brought out in the following words:

"There is no denying the fact that in all organizations and more so in Government organizations, there is good deal of dead wood. It is in public interest to chop off the same. Fundamental Rule 56(j) holds the balance between the rights of the individual Government servant and the interests of the public. While a minimum service is guaranteed to the Government servant, the Government is given power to energise its machinery and make it more efficient by compulsorily retiring those who in its opinion should not be there in public

interest."

24. Thus, in the instant case, the order of compulsory retirement passed by the State Government in their G.O.(2D) No.458, Home (Cts.IA) Department, dated 13.07.2007, is not by way of punishment and consequently Rule 39 of the Tamil Nadu Pension Rules is not attracted to the case on hand.

25. The learned counsel Shri.Lakshmi Narayanan has also drawn our attention to Rule 22 of the Tamil Nadu Pension Rules. Rule 22 of the Tamil Nadu Pension Rules deals with counting of past service upon reinstatement of a Government servant. Rule 22(1) has set out that a Government servant who is dismissed, removed or compulsorily retired from service, but he is reinstated on appeal or review, is entitled to count his past service as qualifying service. Rule 22 (2) further sets out that the period of interruption in service in between the date of dismissal, removal or compulsory retirement and the date of reinstatement and the period of suspension if any shall not count as qualifying service unless regularised as duty or leave by a specific order of the authority which passed the order of reinstatement.

26. It is also appropriate to notice that Rule 21 of the Tamil Nadu Pension Rules declares that dismissal or removal of a Government servant from service or post entails forfeiture of his past service. Thus, when we read Rules 12, 21 and 22 together, it emerges that if an order of dismissal or removal or compulsory retirement passed against a Government servant is set aside in appeal or review, which obviously includes even judicial review, the past service rendered by such a Government servant qualifies for earning pension does not get forfeited, but however, insofar as the interruption in service is concerned, Rule 22 (2) clearly regulated the said period by setting out that it shall not count for qualifying service unless regularised as duty or leave by a specific order of the authority which passed the order of reinstatement. And for such leave period, the servant shall be paid. In other words, if the leave period is treated as "without pay", such leave period/interruption in service does not count for qualifying service.

27. In the instant case, as was already noticed by us, while regularising the period of suspension between 14.06.2005 upto 23.07.2007 by the petitioner, the High Court has regularised it as without pay, thus, clearly implying that the same shall not be counted as part of duty or qualifying service. Hence, we are of the opinion that the period of suspension undergone by the writ petitioner does not qualify for earning pension to the writ petitioner.

28. In this context, we also take notice of Rule 20 of the Tamil Nadu Pension Rules which specifically dealt with the issue of counting of period of suspension towards qualifying length of service. It sets out therein that the time passed under suspension pending enquiry into conduct counts in full where on conclusion of the enquiry, the Government servant has been fully exonerated or the suspension is held to have been wholly unjustifiable. In other cases, the period of suspension does not count unless that authority competent to pass orders under Rule 54 of the Fundamental Rules expressly declares at the time that it shall count and then it shall count only to such extent as the competent authority may declare it to be so. Thus, in the instant case, in the absence of a specific order in terms and in accordance with Rule 54 of the Fundamental Rules declaring that the period of suspension undergone by the writ petitioner between 14.06.2005 upto 23.07.2007 shall count, or it was wholly unjustifiable the said period as per Rule 20 cannot be counted towards qualifying length of service. When serious allegations of corrupt practices indulged in by the writ petitioner surfaced, he was placed under suspension. Hence, it is not possible for us to hold the suspension of the writ petitioner as not justifiable. It is an altogether different matter that the disciplinary proceedings to establish any such charge of corruption have not been held in this case.

29. Rule 27 of the Tamil Nadu Pension Rules deals with addition to qualifying service in certain special circumstances. Rule 27(1) has set out that any person appointed to a service or post and who retires from service on or after the 01.07.1960 may add to his service qualifying for superannuation pension but not for any other class of pension the actual period not exceeding one-fourth of the length of his service or the actual period by which his age at the time of recruitment exceeds thirty years or a period of five years, whichever is less, if the service or post is one, for which post-graduate research or specialist qualification or experience in scientific, technological or professional fields is prescribed not merely as desirable but as obligatory qualification and for which the age of recruitment prescribed in the service rules applicable to the service or post concerned is above thirty years. The simple reason why the provision contained in Rule 27 does not get attracted to the case of the writ petitioner is that any addition to the qualifying length of service is permissible only in case of grant of superannuation pension but not for the other classes of pensions.

30. It is wholly appropriate in this context to notice that Chapter V of the Tamil Nadu Pension Rules which commences with Rule 32 has spelt out the various classes of pensions and conditions governing their grant. Rule 32 has spelt out

'superannuation pension' which is liable to be granted to a Government servant who, was compelled by a Rule to retire at a particular age. That is where the Government servant retires on attaining the age of superannuation. While Rule 33 talks of 'retiring pension' to be granted to a Government servant who retires or is retired in advance of the age of compulsory retirement in accordance with the provisions of Rule 42.

31. Rule 42 of the Tamil Nadu Pension Rules in turn talks of the retirement effected under Rule 56(d) of the Fundamental Rules as well as under Rule 56(3) of the Fundamental Rules, but it does not cover the retirement under Rule 56 (2) of the Fundamental Rules. Hence, the combined effect of Rules 27, 32 and 33 of Pension Rules, 1976 and Rule 56(2) of the Fundamental Rules, the question of any addition to the qualifying length of service in cases of the instant nature does not arise.

32. It is apt to remember that the retirement in the instant case of the petitioner was brought about in terms of Rule 56(2) of the Fundamental Rules. Though Rule 39 of the Tamil Nadu Pension Rules talks of payment of compulsory retirement pension, but, as was already pointed out by us supra, that would be granted in a case of punishment of compulsory retirement inflicted as a measure of discipline but not for the case of retirement brought about by virtue of the operation of Rule 56 (2) of the Fundamental Rules.

33. Upon a cumulative analysis of all the facts and circumstances of the case and the prevailing legal regime, we are of the opinion that the Accountant General has not committed any error in not taking into account and consideration the period of suspension undergone by the writ petitioner between 14.06.2005 upto 23.07.2007 as qualifying length of service and consequently there was no error committed by him in computing the qualifying length of service commencing from 27.11.1995 and upto 13.07.2007 only in the case of the writ petitioner. Further, there was no error committed by the Accountant General in not adding anything to the qualifying length of service put in by the writ petitioner.

34. Upon critical analysis of all the provisions noticed by us, we find no merits in this writ petition and it is accordingly dismissed but however, without costs. Consequently, the connected miscellaneous petition is also closed.

35. Shri. Lakshmi Narayanan requests that this order may not be construed as coming in the way of the writ petitioner seeking any further appropriate relief at the hands of the High Court in

future. We are sure, that this order will not be construed as a fetter on exercise of any powers on the administrative side by the High Court.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

pri

To

1. The Secretary,
Home Department,
Government of Tamil Nadu,
Fort St.George, Chennai - 9.
2. The Registrar General,
High Court of Madras,
Chennai - 104.
3. The Accountant General (A & E),
Anna Salai, Chennai.
4. The Chairman,
Tamil Nadu Public Service Commission,
Chennai.

+1cc to Mr.V.Vijayashankar, Advocate, S.R.No.48973
+1cc to M/s.P.Vijendran, Advocate, S.R.No.48553
+1cc to the Government Pleader, S.R.No.49117

W.P.No.21630 of 2013

And

M.P.No.1 of 2013

GJII(CO)
CS/17/08/17

WEB COPY