

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 16.11.2018

Pronounced on : 22.11.2018

CORAM

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

W.P.No.6622 of 2012

Dr.A.Xavier Remigius

... Petitioner

Versus

1. Government of Tamil Nadu,
Rep.by its Secretary
Animal Husbandry, Dairy and Fisheries Department,
Fort St.George
Chennai - 600 009.

2. The Director of Animal Husbandry
DMS Compound
Anna Salai
Teynampet
Chennai - 600 006.

... Respondents

PRAYER:Petition under Article 226 of the Constitution of India, praying for the issue of a Writ of Certiorarified Mandamus, after calling for the concerned records from the 1st respondent, quash G.O.(D)No.223, Animal Husbandry, Dairy (M) Fisheries (Ka.Pa.1) Department dated 09.11.2011 issued by the 1st respondent and consequently direct the respondents to pay all the terminal benefits of the Petitioner including Pension by treating him to be a Assistant Veterinary Surgeon appointed on permanent basis for the entire period of service rendered, from the date of superannuation viz., 30.09.2002.

For Petitioner :: Mr.Balan Haridas

For RR1&R2 :: Mrs.Sri Jayanthi
(Special Government Pleader)

ORDER

The writ petition had been filed in the nature of Certiorarified Mandamus calling for the records from the 1st respondent, namely, the Government of Tamil Nadu represented by its Secretary Animal Husbandry, Dairy and Fisheries Department, Chennai, and quash G.O.(D).No.223, namely Animal Husbandry, Dairy and Fisheries Department dated 09.11.2011 issued by the 1st respondent and direct the respondents to pay terminal benefits of the petitioner including pension by treating him by a Assistant Veterinary Surgeon appointed on permanent basis.

2. The writ petitioner Dr.A.Xavier Remigius joined the services of the 2nd respondent namely, the Director of Animal Husbandry, Chennai as Veterinary Assistant Surgeon on 25.09.1973. He was working at Tallakulam Artificial Insemination Centre. He then underwent personal tragedies. He claimed to have suffered an injury in 1979. His wife was admitted in Government Rajaji Hospital, Madurai in August 1980. His child had a disease leading to surgery. He was transferred from Tiruparagundram to Kujiliamparai. He applied for leave to stay back in Madurai. He was on leave from 23.08.1980 to 02.10.1981.

3. A charge sheet dated 04.08.1986 was issued. Three charges were framed. The first charge was that he was insubordinate in not joining the transfer place. The second charge was with respect to unauthorized absence. The third charge was that he worked in a private company. Enquiry was conducted in 1989. The enquiry report was furnished with considerable delay. He questioned the charge memo dated 04.08.1986 by filing O.A.No.1402 of 1986. It was allowed by order dated 04.09.2001.

4. The respondents filed W.P.No.35524 of 2002. The writ petition was dismissed on 03.10.2007. The petitioner was to retire on 30.09.2002. The second respondent issued another charge memo dated 19.09.2002 containing two charges. The first charge was that, he did not report for duty without proper permission between the period 16.09.1986 and 14.07.1992. The second charge was that, he worked with Namakkal Southern Hatchery. The petitioner claimed that they were similar to the earlier charge dated 04.08.1986.

5. He filed O.A.No.5277 of 2002 challenging the charge memo dated 19.09.2002. This was dismissed on 29.11.2002. In the meanwhile, he had attained the age of superannuation on 30.09.2002. He was permitted to retire but retained in service till the completion of disciplinary proceedings. The Enquiry Officer held that the first charge was proved and that the second charge was not proved. The petitioner claimed that the

first charge that he absented during the period from 16.09.1986 to 14.07.1992 was a continuation of the charge memo dated 04.08.1986 which had already been quashed. It was stated that he was not given any posting till July 1992. He was issued the posting order only on 19.07.1992 at Nilgiris. He continuously worked till superannuation on 30.09.2002. Even though the enquiry was completed further orders were not passed.

6. He then filed W.P.No.8452 of 2011 for a direction to conclude proceedings initiated under the charge memo. This Court had directed the 1st respondent to conclude the charge memo and pass final orders. The 1st respondent passed the impugned order dated 09.11.2011, holding that first charge was proved and imposed punishment of termination on service and treated him as a temporary Assistant Veterinary Surgeon, appointed on temporary basis under Rule 10(a)(i). This order has been challenged by the petitioner in his writ petition.

7. He claimed that the 1st respondent had accepted the findings of the enquiry officer without independently assigning reasons. It was further stated that the first charge in the charge memo dated 19.09.2002 was a continuation of the first charge memo dated 04.08.1986. It was stated that he was not given any posting duty. It was also stated that the action of the 1st respondent in treating him as a temporary employee appointed under Rule 10(a)(i) of the Tamil Nadu State and General Subordinate Service Rules and imposing punishment was illegal. He claimed that he was originally appointed on 25.09.1973 as Assistant Veterinary Surgeon on temporary basis and was then selected by Tamil Nadu Public Service Commission. It had been stated that though he retired in the year 2002, the respondent had taken nearly 10 years to conclude the proceedings.

8. In the counter affidavit, filed by the respondents, it had been stated that the petitioner was appointed as temporary Assistant Surgeon under Rule 10(a)(i) of the Tamil Nadu State and General Subordinate Service Rules and joined duty on 25.09.1973. He applied for earned leave on 23.08.1980 for 15 days but was absent from duty till 15.09.1986. He then did not join any post till 14.07.1992. Disciplinary action was initiated and charge memo dated 19.09.2002 was issued by the second respondent. Enquiry was conducted. The Enquiry Officer submitted his report, wherein it was concluded that the second charge of unauthorized absence was proved. The explanation of the petitioner was sought. He also gave his explanation. The 1st respondent had perused the charges and the explanation given by the petitioner and the enquiry report and the additional explanation given by the petitioner. Thereafter the 1st respondent arrived at a conclusion to terminate the petitioner

from service. It was stated that procedures have been followed in accordance with the Tamil Nadu Civil Services (Discipline and Appeal) Rules. It was stated that the order of termination from service was in accordance with the charge framed. It was stated that final orders had been passed pursuant to the orders in W.P.No.8452 of 2011 dated 09.04.2011 by the High Court. It was stated that the writ petition has no merits and has to be dismissed.

9. The petitioner filed a reply affidavit, in which he stated that he was not a temporary employee. He claimed he worked as Assistant Veterinary Surgeon right from the beginning. He initially joined on temporary basis. But, later he was selected by Tamil Nadu Public Service Commission and to worked on permanent basis. It was stated that punishment can be imposed only under the Pension Rules. He claimed that he was entitled to get pension from the date of retirement. He stated that writ petition should be allowed.

10. Heard arguments advanced by Mr.Balan Haridas, learned counsel for the petitioner, Mrs.Sri Jayanthi learned Special Government Pleader for the respondents.

11. The petitioner had joined duty on 25.09.1973 as Assistant Veterinary Surgeon on temporary basis. Thereafter by G.O.Ms.No.1149 Agriculture (AH VII) Department dated 15.06.1987 an order was passed by the Government of Tamil Nadu, accepting the recommendation of the Tamil Nadu Public Service Commission and approving the names of the candidates for appointment by direct recruitment to the post in the category of Veterinary Assistant Surgeon in the Animal Husbandry Department. The Government also relaxed the Rule 5 of the Special Rules for the Tamil Nadu Animal Husbandry Service for the petitioner who was named in SL.No.22. It was further stated that the candidates would be regularly appointed as Veterinary Assistant Surgeon with effect from the date of taking charge in the Animal Husbandry Department. It was further provided that the service of the candidates who were already holding temporary appointment as Veterinary Assistant Surgeon will be reckoned only from the date on which the immediate junior selected by Tamil Nadu Public Service Commission actually took charge pending examination of retrospective regularisation. In effect, the petitioner was selected and his services were regularized. This fact had not been mentioned in the counter affidavit of the respondent. They continued to claim that he was an employee selected under Rule 10(a)(i) of the Tamil Nadu State and General Subordinate Service Rules on 25.09.1973.

12. It was also stated in the counter affidavit that the petitioner was removed from the selection list vide

G.O.Ms.No.1684 Agriculture (AH VII) Department dated 26.08.1987. The Government order had been produced by the petitioner. In the Government order there were two lists of candidates in Appendix I and Appendix II. The petitioner's name was in Appendix II/Notification II. In para-4 of the Government order it had been stated that the names of the candidates mentioned in notification II be deleted from the list of candidates for regular appointment as Veterinary Assistant Surgeon in the Animal Husbandry Department. The petitioner's name was found in SL.No.3. Under the column, 'reason' it was given "Proposed to remove him from service". He was not actually removed from service. The petitioner had absented himself from duty and in this connection a charge memo dated 04.08.1986 was issued to him. Three charges were levelled, the first charge was insubordination by not joining in the transferred place. The second charge was unauthorized absence and the third charge was that he worked in private company. Enquiry was conducted and the enquiry report was furnished with much delay. Thereafter he was permitted to join duty on 16.07.1992. He had questioned the charge memo by filing O.A.No.1402 of 1986. It was allowed by order dated 04.09.2001. The respondents filed W.P.No.35524 of 2002 that was dismissed on 03.10.2007.

13. The Division Bench of this Court in W.P.No.35524 of 2002 specifically observed as follows:

"We perused the entire materials available on record. We also perused the order passed by the Tribunal. The Tribunal found that for the incident that took place in the year 1980, proceedings were initiated in the year 1986; final orders were passed only in the year 1996 i.e., after a lapse of 16 years and the same has not been explained by the petitioners herein. The Tribunal also, going by the judgment of the Supreme Court in the case reported in AIR 1990 Supreme Court Pg.1308 (State of Madhya Pradesh Vs. Rani Singh & Another), Wherein it was held that 12 years delay is vital and that the disciplinary proceedings cannot be continued, allowed the original application filed by the 1st respondent herein is not entitled to backwages and arrears of salary, except for the period of leave to which he was eligible."

14. It is seen that the respondent had not explained the delay in passing final orders. Thereafter, the respondent again issued a charge memo dated 19.09.2002. This contained two

charges. The first charge was that the petitioner did not report for duty without proper permission during the period of 16.09.1986 to 14.07.1992. The second charge was that he was working in Namakkal Southern Hatchery. Again it must be mentioned that he was to retire on 30.09.2002. The Enquiry Officer held that the first charge was proved and the second charge was not proved. He was not furnished with the enquiry report. He therefore filed W.P.No.8452 of 2011 seeking a direction against the respondents to conclude the proceedings. The High Court directed the respondents to conclude the proceedings. The 1st respondent passed the order on 09.11.2011. It is seen that it was passed after more than 9 years from the date when the charge was stated to be proved.

15. It is seen that the petitioner himself had been permitted to rejoin duty in July 1992. The order directing him to report for duty was dated 19.07.1992. He joined duty and continued in service till the date of superannuation. Thereafter, he was permitted to retire. It is stated by the respondent in the counter affidavit, that the order of termination of service was passed, since it was considered that the petitioner was an employee appointed under Rule 10 (a)(i). This premise is wrong. As stated above, the petitioner was selected by the Tamil Nadu Public Service Commission and their recommendation was accepted by the Government and G.O.Ms.No.1149 dated 15.06.1987 has been passed. Even in the subsequent G.O.Ms.No.1684 dated 26.08.1987 the petitioner was included in the notification II and it was remembered "Proposed to remove him from service". It can also be inferred that the respondent had already decided to remove the petitioner from service. This would lead to a further inference that the punishment imposed had been pre-decided and the enquiry process was only a farce. This delay had been explained by the respondent in the counter affidavit as due to administrative reasons. The petitioner cannot be sacrificed to suffer owing to administration slumber by the respondents.

16. In Central Industrial Security Force & others Vs. Abrar Ali (2017) 4 (SCC) 507, the Honourable Supreme Court considered the case of a constable in CISF who was appointed on 10.09.1990. The constable had availed two days of casual leave on 12.08.1999 and 13.08.1999. 14.08.1999 was a second Saturday. He had to resume his duty on 15.08.1999. He reported for duty only in the evening at 5.30 PM. He then deserted and simply disappeared. In this connection, charges were framed against him. It was also found that there was an additional charge that he had kidnapped a local minor girl. He surrendered before the Court on 20.08.1999. Examining these facts vis-a-vis the enquiry conducted against him, the Honourable Supreme Court held as follows:

"Though we are of the view that the High Court ought not to have interfered with the order passed by the disciplinary authority, the penalty of dismissal from service is not commensurate with delinquency. The respondent was found guilty of desertion of the Force for a period of five days and not improving his conduct in spite of imposition of penalties on three occasions earlier. For the above delinquencies, the penalty of dismissal from service is excessive and harsh. In our view, the penalty of compulsory retirement would meet the ends of Justice. We are informed by the counsel for the appellants that the respondent is entitled for pension as he has completed 10 years of service. In order to avoid any controversy, we direct that the respondent shall be entitled for notional continuity of service till the date of completion of minimum service required to make him eligible for pension. He will not be entitled for payment of salary and allowances for that period."

17. In *Shobha Nelson Vs. State of Madhya Pradesh & others*, (2017) 16 (SCC) 448, the Honourable Supreme Court was concerned with the case of Dr. Shobha Nelson and Dr. Sudhir Kumar, who were doctors in Government service and went to Zanzibar in 1975. They submitted a joining report on 13.08.1991. They were allowed to join back in Government service only from 03.01.1996. Thereafter an enquiry was conducted to determine whether they had taken prior permission before leaving for Zanzibar on deputation. The Enquiry Officer was held that they did not seek permission before going on deputation to a foreign country. It was however observed that the appellant Dr. Shobha Nelson had attained the age of superannuation on 18.05.2002. In these circumstances, the Honourable Supreme Court held as follows:

"Having decided that the appellants are entitled to the service from 13-08-1991, the point that is to be determined is whether they should be treated to be in service even during period of their absence between 1975 to 1991. In view of the finding that they did not take permission before going to Zanzibar in 1975, the normal course would have been to permit the respondent to proceed with the departmental inquiry as contemplated in the order dated 03.01.1996.

But taking note of the fact of retirement of both the appellants and death of Dr.S.K.Nelson we do not see any useful purpose being served by directing any inquiry at this stage. We hold that the period from 1975 to 1991 spent by the appellants in Zanzibar shall be treated as duty for the purpose of computation of pension only. They shall not be entitled for any salary or allowance for that period. The appellants shall be treated to have joined back in service on 13.08.1991. They shall be entitled for salary and other benefits to which they are entitled from 13.08.1991 till the date of their superannuation."

In both the above cases, denial of benefits was not contemplated.

18. The learned counsel for the petitioner relied on an unreported Judgment of this Court in W.P.No.32214 of 2012 dated 18.11.2013 in P.P.Bhaskaran Vs. Central Administrative Tribunal & Others. The Division Bench of this Court was concerned with the petitioner who had been appointed as Section Officer in Central Public Works Department on 20.11.1964 on temporary basis. He was then sent on deputation to International Airports Authority of India on 08.07.1975. He retired in December 2000. He was not paid pension since his service not confirmed. The Division Bench of this Court observed as follows:

"Upon reading the above Rules, it is evident that even a temporary employee is eligible for pension if he has put in the qualifying service. Rule 49(3) enables an employee to seek pension provided he had put in a service of not less than 10 years.

In the instant case, as stated above, the petitioner was appointed against a permanent and pensionable post. He had successfully completed the period of probation, though the term used is quasi-permanent and was also awarded increment in pay. The service records of the petitioner reveals that not only was he made permanent, but was also on the rolls of the fourth respondent till 07.06.1978 and the entries have been made by the officers of the fourth respondent. Even in para.6 of the counter affidavit, the fourth respondent has admitted that the petitioner has put in

10 years, 9 months and 17 days of service. Nevertheless, as pointed out earlier, the petitioner has in fact put in above 12 years and 9 months of service and is therefore eligible for pension even if specific orders of confirmation are not communicated. In view of the specific rules enabling even a temporary employee who has put in above 10 years of service to seek pension, any memo or entry in the service register cannot curtail the rights provided under the statute."

19. In the present case, I hold following the ratio in the above Judgments that the penalty of dismissal from service is excessive and harsh. The petitioner herein had originally joined on 25.09.1973 as Assistant Veterinary Surgeon on temporary basis. Thereafter he was recommended for selection by the Tamil Nadu Public Service Commission, and the recommendation was accepted by the respondents. His employment was regularised. In G.O.Ms.No.1684 Agriculture (AH VII) Department dated 26.08.1987, though he was placed in the notification II, his name was not removed. It was only proposed to remove him from service. Thereafter, he was permitted to join duty and he actually joined duty and was in service for more than ten years till his date of retirement.

20. A charge memo was originally issued on 04.08.1986. That was quashed by the Tribunal and also by the High Court. A second charge memo was issued on 19.09.2002. The petitioner was to retire on superannuation on 30.09.2002. Final orders were passed only after the intervention by High Court on 09.11.2011, after a period of 9 years. The reason for the delay was explained as administrative reason. The respondent have not furnished the details with regard to the enquiry concluded. In the order imposing punishment the respondents had treated the petitioner as having been appointed under Rule 10 (a) (i) of the Tamil Nadu State and General Subordinate Service Rules employee which is factually not correct. The entire premises based on which the punishment was imposed is wrong.

21. I hold that the writ petition will have to be allowed. I further hold that the petitioner should be treated as Assistant Veterinary Surgeon appointed on permanent basis, entitled for all terminal benefits including pension. However, he is not entitled for any salary or allowance for the period between 16.09.1986 and 14.07.1992. He shall be entitled for salary and other benefits for the remaining period of service from the date of his original employment on 25.09.1973 till the date of his

superannuation excluding the period between 16.09.1986 and 14.07.1992. The said period shall however be treated as duty for the purpose of computation of pension alone. With the above observations the Writ Petition is allowed, no costs.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To,

1. The Secretary,
Government of Tamil Nadu,
Animal Husbandry, Dairy and Fisheries Department,
Fort St.George
Chennai - 600 009.
2. The Director of Animal Husbandry
DMS Compound
Anna Salai
Teynampet
Chennai - 600 006.

+1cc to Mr.BalanHaridas, Advocate Sr.80008
+1cc to the Government Pleader Sr.80394

सत्यमेव जयते

W.P.No.6622 of 2012

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