IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :28.04.2018

CORAM

THE HON'BLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.No.11212 of 2018

R.Madhanagopal ..Petitioner

.Vs.

1.Government of Tamil Nadu
Rep by its Principal Secretary to Government,
Revenue Department,
Fort St.George,
Chennai 600 009.

2.The Additional Chief Secretary cum Commissioner,
Revenue Administration, Chepauk,
Chennai-5.

3.The District Collector,
Nagapattinam District,
Nagapattinam.

4.The Accountant General of Tamil Nadu,
Office at DMS Compound,
Teynampet, Chennai 600 018. ..
Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Mandamus to direct the respondent to count half of the service rendered by the petitioner for the period from 06.05.1983 to 09.08.2007 along with the regular service from 10.08.2007 till 30.06.2016 as qualifying service and grant pension to the petitioner with all consequential monetary benefits.

For Petitioner : Mr.S.Mani

For Respondents : Mr.D.Venkatachalam
Additional Government Pleader

O R D E R

The relief sought for in this writ petition is for a direction to the respondents to count half of the service rendered by the petitioner for the period from 06.05.1983 to 09.08.2007 along with the regular service from 10.08.2007 till 30.06.2016 as qualifying service and grant pension to the petitioner with all consequential monetary benefits.

2.The grievance of the writ petitioner is that the services rendered by him in the post of Masalji, has not been taken into account for the purpose of reckoning the qualifying service and also to extend the benefit of the Tamil Nadu Pension Rules. In fact, his services are taken into account with effect from the date of regularization without counting the 50% of the services rendered by him as temporary employee. The benefit of counting of the 50% services are already extended by the Government as per the amended Rule 11 of the Tamil Nadu Pension Rules 1978. Thus, the benefit to be extended to the petitioner also.

3.The amended Rule 11 of the Tamil Nadu Pension Rules in respect of qualifying service, which is extracted hereunder:

Rule 11-QUALIFYING SERVICE

1. "Commencement of qualifying service – {(1}) Subject to the provisions of these rules, qualifying service of a Government servant shall commence from the date he taken charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity. In the case of a Government servant retiring on or after the 1st October. 1969,2{.....} temporary or officiating service in a pensionable post whether rendered in a regular capacity or not shall count in full as qualifying service even it is not followed by confirmation.

(2) Half of the service paid from contingencies shall be allowed to count towards qualifying service for pension along with regular service subject to the following conditions:

- service paid from contingencies shall be in a job involving whole time employment and not part time for a portion of the day.
- Service paid from contingencies shall be in a type of work or job for which regular posts could have been sanctioned, for example Chowkidar.

- Service shall be for which the payment is made out on monthly or daily rates computed and paid on a monthly basis and which, though not analogous to the regular scale of pay, shall bear some relation in the matter of pay to those being paid for similar jobs being performed by staff in regular establishments.

- Service paid from contingencies shall be continuous and followed by absorption in regular employment without a break.

- Subject to the above conditions being fulfilled, the weightage for past service paid from contingencies shall be limited to the period after the 1st January 1961 for which authenticated records of service may be available.

- Pension or revised pension admissible as the case shall be paid from the 23rd June 1988.]

[Half of the service rendered by State Government employee under non-pensionable establishment shall be allowed to be counted for pensionary benefits along with regular service under pensionable establishment subject to the following conditions.

(a) Service under non-pensionable establishment should have been in a job involving whole time employment.

(b) The service under non-pensionable establishment should have been on time scale of pay.

(c) The service under non-pensionable establishment should have been continuous and followed by absorption in pensionable establishment without a break.

(3) These orders shall take effect from the date of this Government Order. In respect of those who retired prior to the date of this order, eligible pension or revised pension, as the case may be, shall be paid from the date of this order, and that there can be no claim for

arrears in any case for the period upto the date of this order.

Note: In the case of the employees of the former Pudukkottai State and persons transferred from the former Travancore-Cochin State consequent on the reorganization of State temporary or officiating service rendered in a regular capacity under the former Pudukkottai State or the former Travancore-Cochin State shall count in full for purposes of pension:

Provided that-

(a) in the case of a Government Servant, service rendered before attaining the age of eighteen years shall not count, except for compensation gratuity;

(b) in the case of a Government Servant whose year and month of birth are known, but not the exact date the 16th of the month should be treated as the date of birth. When the year of birth is known but not the month and date 1st July if the year shall be taken.

(c) in the case of a Government Servant with no military service who gives on recruitment only his age, but not the year of his birth the year should be arrived at by deducting from the year of recruitment the given age and then the date of birth should be taken as the 1st July of that year:

Provided further that in the case of a Government servant with previous military service the date of birth is fixed as laid down below:

When a military employee is transferred to a civil department under the Government and assumes a civilian status, the date of birth to be entered in his service book should be the date stated by him at the time of attestation.

When the documents referring to the previous military service of an individual do not give the definite date of birth but only the age stated at the time of attestation, he should be assumed to have completed the stated age on the date of attestation e.g., if one ex-soldier was enrolled on 1st January 1910 and if, on that date, his age was stated to be 18, his date of birth should be taken as 1st January 1892. This procedure will apply to cases arising on or after 27th June 1938.

Notwithstanding anything contained above in cases where S.S.L.C. or any other school certificate is available, the date of birth, as entered therein should be taken into account.
[Explanation.--For the purpose of date of birth, the word 'attestation' refers only to the initial records kept by the Defence Department at the time of appointment of the individual and not in the discharge certificate on discharge from the Defence Department.] '

4. While amending Rule 11(4)(iii), the Government imposed the cut-off date as 01.04.2003. It is stated that "service rendered in non-provincialised service, consolidated pay, honorarium or daily wages basis shall be followed by absorption in regular service before 1st April 2003 without a break".

5. Thus, an employee who worked on temporary basis prior to 01.04.2003 and in case of his regularization after 01.04.2003, he was held ineligible to avail the benefit of 50% services rendered on temporary basis. The object of fixing the cut-off date as 01.04.2003 was to modify the pension scheme with effect from 01.04.2003, to one that of Contributory Pension Scheme. The writ petitioner claim that since he was initially appointed on temporary basis prior to 01.04.2003, the same had resulted in confirmation of his appointment after 01.04.2003. Thus, he should not be denied the benefit of regular old Pension scheme of GPF under the Tamil Nadu Pension Rules, 1978. When a similar issue was raised by the employees of Central Government, the Hon'ble Division Bench of this Court in the case of Union of India Vs. K.Punniyakotti reported in 2014 [2] CTC 777 has held as follows:-

"10. The only issue arises for consideration in this Writ Petition is as to whether new Pension Scheme, which came into force from 01.01.2004, applicable to persons, who were already in employment either on daily wages or as temporary employees and whether, they are entitled to get pension under CCS (Pension) Rules, 1972 on being absorbed in permanent establishment after 01.01.2004.
11. It is not in dispute that the private

Respondents, the Respondents 1 to 16 herein were appointed as Casual Labourers in daily wage basis for cleaning and assisting the Technicians and Scientists carrying out the task in various Laboratories of IGCAR. Government of India has introduced a scheme called "Casual Labourers (Grant of Temporary Status and Regularisation) Scheme , 1993", with effect from 01.09.1993. According to the said scheme, the Casual Labourers employed as on the date of the order, that was as on 01.09.1993, who have rendered one year of continuous service in IGCAR are bound to be conferred temporary employee status and, they are to be regularly selected under Group 'D' after selection for permanent absorption.

13. It is also not in dispute that under the scheme above referred , which came into effect from 01.09.1993, 50% if the service rendered under temporary status would be counted for the purpose of retirement benefits, after their absorption in regular post. The same is made clear in Para 5(iv) of IGCAR' s Office Order dated 13.01.2000. Para 5(iv) reads as follows:

14. Thus, it is to be noted at this juncture that Respondents 1 to 16 having been granted temporary status from 13.01.2000, they are entitled to get more than 21/2 years of temporary status service as qualifying service for pension purpose, prior to absorption in the year 2005 in permanent establishment , viz., Group 'D' post. The said more than 2 ½ years of service cannot be wiped out or cannot be denied merely because new Pension Scheme was introduced by the Government of India from 01.01.2004. It is inequitable on the part of the Petitioners to contend that Respondents 1 to 16 having been absorbed in permanent establishment after the new Pension Scheme introduced, which came into force with effect from 01.01.2004, they are not entitled to get retirement benefits under GRF Rules/CCS (Pension) Rules , 1972.

17. The word "new entrant" has got a definite meaning , ä person, who enters recently" A person already in service either as contingent staff or temporary staff continuously and absorbed in permanent establishment on or after 01.01.2004 cannot be termed as "new entrant' into service . The new Pension Scheme can be applied only to persons appointed for the first time as casual or temporary or permanent

employee on or after 01.01.2004.

18. Similar issue was considered by one of us (N.P.V., J.) in W.P. Nos.26933 & 26934 of 2007, order dated 23.04.2008. In the said case, the order of the Government of Tamil Nadu dated 06.08.2004 introducing new Pension Scheme with effect from 01.04.2003 came up for consideration and it was held that persons appointed / recruited after 01.04.2003 are not governed under the Tamil Nadu Pension Rules, 1978 and the persons appointed prior to the said date even in consolidated salary, or whose appointments as Secondary Grade Teachers were approved subsequently with time scale pay after passing Child Psychology Training, whose earlier services were ordered to be counted by the Division Bench of this Court. In the said case the Teachers were not paid salary before passing of Child Psychology Training, and they were ordered to be treated under the Tamil Nadu Pensions Rules, 1978 as their initial appointment was prior to 01.04.2003, and the said order was implemented.

20. Number of similar cases were considered in respect of the State Government employee under the Tamil Nadu Pension Rules, 1978, wherein also Rule 11(2) of the Tamil Nadu Pension Rules, 1978 provides counting of 50% of the contingency service on similar terms and conditions as enumerated under the above Rule 14 (2) of CCS (Pension) Rules, 1972. In the said case Plot Watcher of 'Forest Department, appointed on daily wage basis from 01.09.1982, without interruption was absorbed in regular service from 24.08.2005 and he retired on 31.07.2011. Applying Rule 11(2) of Tamil Nadu Pension and Rules 1978, 50% of the service from 01.09.1982 till 23.08.2005 was ordered to be counted along with the regular service from 24.08.2005 till 31.07.2011 and ordered sanction of eligible pension and other benefits . In the said case also, regularisation was granted after the new Pension Scheme was introduced with effect from 01.04.2003 by the State Government . The said Order was made in W.P.No. 8205 of 2011 dated 19.04.2011, which was confirmed in W.A.No.27 of 2012 dated 13.02.2012 as well as in S.L.P.No.16119 of 2012 dated 10.05.2012 and in W.P.No.14987 of 2012 dated 14.06.2012 .

22. Similar issue regarding fixing of Pension

> by adding dearness pay by giving cut-off date was held arbitrary and violative of Articles 14 & 16 of the Constitution of India by the Supreme Court in the decision reported in Kallakkurichi Taluk Retired Officials Association v.State of Tamil Nadu, 2013 (1) LLN 360 (SC). The discriminatory treatment meted out to retired persons while granting Pension was not approved by the Honourable Supreme Court in the decision reported in D.S. Nakara v. Union of India, AIR 1983 SC 130."

6. The Hon'ble Division Bench after discussing the similar issue had dismissed the writ petition filed by the Union of India, confirming the order passed by the Central Administrative Tribunal in respect of the Central Government employees. During the course of discussion, the Hon'ble Division Bench has discussed the very same issue in respect of the Tamil Nadu Pension Rules also and the learned single Judge (NPVJ) has decided the issue in respect of the Tamil Nadu State Pensioners with relevance to the Tamil Nadu Pension Rules. Thus, the writ petitioner in this writ petition is also entitled for the same benefit of counting of 50% of the temporary services as per the amended Rule 11 of the Tamil Nadu Pension Rules. Even in case of petitioners appointed on temporary basis prior to 01.04.2003 and confirmation of service was done after 01.04.2003, they are still entitled to avail the benefit of 50% of the counting of past services rendered on temporary basis as per the conditions stipulated in the Rule 11 of the Tamil Nadu Pension Rules, 1978.

7. The respective respondents in the writ petition have to consider the case of the writ petitioner in accordance with the terms and conditions stipulated in the amended Rule 11 of the Tamil Nadu Pension Rules,1978. Accordingly, the benefit of extension of 50% of the services shall be extended, if the writ petitioner is qualified and eligible, based on the findings in this judgment (cited supra) as well as amended Rule 11 of the Tamil Nadu pension Rules.

8. In respect of the Rule 11(iv) prescribing cut of date of 01.04.2003, this Court vide order dated 18.06.2014 made in W.P.No.24236 of 2013, had quashed Rule 11(iv) only in respect of the cut off date of 01.04.2003. Thus, the Rule 11(iv) is not in existence.

9. The learned Additional Government Pleader also confirmed that the State has not preferred any appeal against the said judgment. Thus, the case of the writ petitioner has to be considered without reference to the cut off date of 01.04.2003 and Rule 11(iv) of the Pension Rules. However, the writ petitioner has to fulfill all other conditions stipulated in Rule

11(i, ii and iii) of the Tamil Nadu Pension Rules, 1978 as applicable to the respective writ petitioner in the writ petition.

10. Further, the Hon'ble Division Bench of this Court also considered the similar issue in Writ Appeal (MD).No.51 of 2018 (Batch Case), a judgment was delivered on 27.03.2018 and the relevant paragraphs are extracted herein.

> "21.The appellants seek to non-suit the writ petitioners by referring to the Proviso in Rule 11(4) which states that Rule 11(4) of the Rules shall not apply to Government servants appointed on or after 01.04.2003, to services and posts in connection with the affairs of the State which are borne on pensionable establishes, whether temporary or permanent.
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> 22.Rule 11(4) of the Tamil Nadu Pension Rules was introduced vide amendment to the Rules by notification in G.O.No.41, dated 09.02.2010. The Rule amended as on 09.02.2010 was that half of the service rendered under the State Government in non-provincialised service, consolidated pay, honorarium or daily wages basis on or after 01.01.1961 in respect of the Government employees absorbed in regular service before 01.04.2003 shall be counted for retirement benefit along with regular service subject to the condition that the service rendered shall be on consolidated pay, honorarium or daily wages paid on monthly basis and subsequently absorbed in regular service under the State Government.
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> 23.The said amendment was given effect to only on 09.02.2010, much after the writ petitioners were brought into regular time scale of pay w.e.f.07.08.2009. Therefore, by virtue of the amendment brought about by notification in G.O.No.41, dated 09.02.2010, the benefits which shall accrue to the writ petitioners, cannot be denied. Furthermore, Rule 11(4) of the Tamil Nadu Pension Rules, was introduced for the first time on 25.08.2009, vide G.O.No.408, which prescribed the cut-off date as 01.04.2003.
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> 24.The validity of fixing such a cut-off date was the subject matter of consideration in the case of P.Chinniyan v. State of Tamil Nadu rep.by its Secretary to Government, Forest and Environment (FR-2) Department, Chennai-600 09 and Others reported in (2014) 6 MLJ 316 and the Court held that the prescription of cut-off date

as 01.04.2003 for absorption into regular service under Rule 11(4) to count half of the service rendered prior to absorption has no rational basis and the same is arbitrary and violative of Article 14 of the Constitution of India.

25.It was further held that Rule 11(4) is totally redundant in view of Rule 11(2), which does not prescribe any cut-off date as to absorption into regular service. Therefore, it was held that the benefits given under Rule 11 (2) cannot be deprived and taken away by Rule 11 (4) and thus the cut-off date of absorption as 01.04.2003 prescribed in Rule 11(4) should be ignored, otherwise it will lead to grave injustice. The Court took note of the facts of the said case, where the petitioner therein was working on daily wages from 1967 till 2003 and when he was absorbed as a Mali, he has served for more than 36 years before his absorption in regular service. The said decision in the case of B.Chinnaiyan was followed in the cases of W.P.Nos.21355 and 21356 of 2017, dated 08.09.2017. In the said decision, reference was made to the decision of the Hon'ble Division Bench in the case of Union of India v. K.Punniyakottai reported in 2014 (2) CTC 777, where more or less an identical case was considered arising under the CCS (Pension) Rules, 1972 in respect of the employees of the Central Government. Therefore, the Court concluded that 50% of the services rendered by the employee on daily wages should be considered for computing total length of service.

26.The Two Division Benches in the cases of the State of Tamil Nadu rep. by its Secretary to Government (FR-2) Forest and Environment Department, Fort St.George, Chennai-600 009 v. S.Jayaraman [W.A.No.1482 of 2016, dated 22.01.2018] and Government of Tamil Nadu rep. by its Secretary, Environment and Forest Department, Fort St.George, Chennai-600 009 v. S.Thillai Govindan [W.A.No.1733 of 2017, dated 13.02.2018] took note of the decision in the case of B.Chinnaiyan, wherein the cut-off date was quashed, dismissing the appeals filed by the Government. Thus, the decision in the case of B.Chinnaiyan has received the seal of approval of the Hon'ble Division Benches. Thus, in the present factual position, whether the appellants are justified in contending that the earlier judgments are not binding upon them, despite most of them having been implemented by the appellants.

27.In our considered view, the stand taken by the appellants is wholly unsustainable as the Special Leave Petitions filed against some of the decisions of the Hon'ble Division Bench was not dismissed in limini, but were dismissed on the ground that there were no merits in the appeal. Therefore, the order passed by the Hon'ble Supreme Court has assigned reasons and it is not a dismissal of a Special Leave Petition simpliciter. Therefore, the decisions bind the Government and consequently, the decisions relied on by the learned Special Government Pleader in the cases of Harpal Kaur Chahal (Smt) v. Director, Punjab Instructions, Punjab and Another reported in 1995 Supp (4) SCC 706 and col.B.J.Akkara (Retd.) v. Government of India and Others reported in (2006) 11 SCC 709 are distinguishable on facts".

11. The respondents are directed to reconsider the case of the writ petitioner, in the light of the observations made in this order, for the purpose of granting the relief of counting of service of 50% of the services rendered on temporary basis and pass appropriate orders after verifying the service records and based on Rule 11 of the Tamil Nadu Pension Rules, 1978 and communicate the decision taken to the writ petitioner as early as possible, preferably within a period of four months from the date of receipt of a copy of this order.

12. In the event of counting 50% of the past services, the GPF Account has to be opened after closing the CPF Account, opened on account of the cut of date of 01.04.2003, since, the cut of date was already quashed by this Court and there was no appeal against the order.

13. Accordingly, the writ petition stands disposed of. However, there shall be no order as to costs.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

Msv

To

1.The Principal Secretary to Government,
Revenue Department,
Fort St.George,
Chennai 600 009.

2.The Additional Chief Secretary cum Commissioner,
Revenue Administration, Chepauk,
Chennai-5.

3.The District Collector,
Nagapattinam District,
Nagapattinam.

4.The Accountant General of Tamil Nadu,
Office at DMS Compound,
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+1cc to Mr.S.Mani, Advocate, S.R.No.32119

W.P.No.11212 of 2018

NRJK(CO)
CS/07/06/18