

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.06.2018

CORAM

THE HONOURABLE Mr.JUSTICE V.PARTHIBAN

W.P.No.34128 of 2013 &  
M.P.No.1 of 2013

M.Gunasekaran  
Retired Grade II Police Constable 1295,  
No.280, Ambedkar Street,  
Thannerkulam Village,  
Kakklur Post,  
Thiruvallur District 602 003. .... Petitioner

Vs

- 1.The Superintendent of Police,  
District Police Office,  
Kancheepuram District,  
@ Kancheepuram.
- 2.The Accountant General (A&E),  
Tamil Nadu, Chennai-600 018.
- 3.The Treasury Officer,  
District Treasury Office,  
Thiruvallur District @ Thiruvallur. .... Respondents

PRAYER : Petition filed under Article 226 of the Constitution of India, praying to issue a writ of Certiorarified Mandamus, to call for the records pertaining to the order passed by the first respondent herein in his C.No.J2/49553/2011 D.O.738/2012 dated 07.11.2012 settling the petitioner's out of employment period from 12.11.1996 to 31.08.2011 as LWP (P) and quash the same and direct the first respondent herien to treat the period of out of employment from 18.10.1995 to 31.08.2011 as duty by notionally fixing the pay without backwages for the purpose of calculating the retirement benefits including pension and consequently direct the second and third respondents herein to pay the revised retirement benefits as ordered by the first respondent herein in his C.NO.H2/22445/2012 dated 10.08.2012.

For Petitioner : Mr. Ravishanmugam

For Respondents : Mr.J.Pothiraj,  
Special Government Pleader  
for R1&R3  
Mrs.Hema Muralikrishnan for R2

O R D E R

Heard Mr. Ravishanmugam, learned counsel for the petitioner as well as Mr.J.Pothiraj, learned Special Government Pleader appearing for respondents 1 and 3 and Mrs.Hema Muralikrishnan, learned counsel appearing for 2<sup>nd</sup> respondent.

2. The petitioner has approached this Court, seeking the following relief,

"To issue a writ of Certiorarified Mandamus, to call for the records pertaining to the order passed by the first respondent herein in his C.No.J2/49553/2011 D.O.738/2012 dated 07.11.2012 settling the petitioner's out of employment period from 12.11.1996 to 31.08.2011 as LWP I(P) and quash the same and direct the first respondent herein to treat the period of out of employment from 18.10.1995 to 31.08.2011 as duty by notionally fixing the pay without backwages for the purpose of calculating the retirement benefits including pension and consequently direct the second and third respondents herein to pay the revised retirement benefits as ordered by the first respondent herein in his C.NO.H2/22445/2012 dated 10.08.2012."

3. The case of the petitioner is as follows:-

The petitioner was recruited as Grade II Police Constable on 14.11.1975. He was issued a charge memo under rule 3(b) of the Tamilnadu Police Subordinate Service (Discipline and Appeal) Rules, 1955, on 29.02.1996, alleging that he remained absent from duty without leave or permission from 18.10.1995 and thereby deserted the force. On enquiry, the charge came to be established and finally the disciplinary authority imposed penalty of compulsory retirement from service on 24.10.1996. As against the order of compulsory retirement, an appeal, review and mercy petitions have been filed before the authorities concerned and the Government and all the petitions came to be rejected and thereby confirmed the order of compulsory retirement. The last of the order rejecting the mercy petition filed by the petitioner was on 06.03.2002.

4.The petitioner has filed a Original Application before the Tamil Administrative Tribunal in O.A.No.2364 of 2004, which application came to be transferred to this Court and re-numbered as W.P.No.7095 of 2007, challenging the order of compulsory retirement, dated 24.10.1996 and subsequently confirmed by the order by various authorities, this Court vide order dated 21.10.2011, allowed the writ petition and set aside the punishment of compulsory retirement. While setting aside the order of compulsory retirement, this Court directed denial of backwages for the period of non-employment, however, directed the notional fixation of pay for the said period. It appears that the petitioner in the mean while had attained the age of superannuation on 31.08.2011.

5.After the order passed by this Court in the said proceedings, the 1<sup>st</sup> respondent passed the order on 09.05.2012, by cancelling the order of punishment of compulsory retirement and ordered notional fixation of pay for the period of non-employment from 12.11.1996 to 31.08.2011. Subsequently, an another order was passed by the 1<sup>st</sup> respondent on 07.11.2012, out of employment period from 12.11.1996 to 31.08.2011 treated as Leave Without Pay. On the basis of treatment of the above period, i.e, Leave Without Pay, pension proposal was forwarded and calculated the qualifying service of the petitioner only as 14 years, 9 months and 17 days and not the original service rendered by the petitioner as 29 years, 7 months and 3 days. The treatment of the period from 12.11.1996 to 31.08.2011 as Leave Without Pay, by proceedings dated 07.11.2012, is put to challenge in the present writ petition.

6.Shri Ravi Shanmugam, learned counsel for the petitioner would submit that the order passed by this Court in the earlier proceedings has become final and the directions as contained in paragraphs 15 and 16, are very clear as this Court interfered with the penalty imposed on the petitioner on merits and directed the period of non-employment to be counted for notional fixation of pay. He would draw the attention of this Court to paragraphs 15 and 16 of the order passed by the learned Judge are reproduced below:

15. The third respondent and second respondent did not consider the medical certificates as well as the telegram referred to above. Ultimately, he approached the first respondent, Government. The first respondent issued G.O.Ms.No.181, Home (Pol.V)Department, dated 06.03.2002 refusing to interfere in the matter of punishment. Para 6 of the G.O states that the petitioner furnished the medical certificates along

with his explanation. Medical certificate dated 18.10.1995 recommended medical leave for hydrocele from 18.10.1995 for 20 days. It is stated in para 6 of the G.O. that the petitioner admitted that he was absent from 18.10.1995 to 7.11.1995. It is true that he was absent from duty from 18.10.1995 to 07.11.1995. But the fact is that he took treatment for hydrocele. The same is supported by the medical certificate.

16. In these circumstances, the respondents are not correct in imposing the punishment of compulsory retirement. Therefore, I am of the view that the impugned orders are liable to be quashed. In the normal course, I would have remitted the matter back to fifth respondent to impose appropriate punishment. However, the petitioner reached age of superannuation on 31.08.2011. Hence, I am not remitting the matter back to the fifth respondent. While I set aside the impugned order imposing the compulsory retirement as the punishment for his absence from 08.10.1995. I am inclined to deprive the petitioner the wages for the period of non-employment. However, the petitioner is entitled to notional fixation of pay for the period of non-employment, that is, from the date of compulsory retirement to the date of retirement.

7. The learned counsel for the petitioner would submit that what is denied is only the backwages for the period of non-employment and not the entire service during the period of non-employment. The impugned action by the first respondent therefore runs contrary to the order passed by the learned Judge of this Court and therefore, the same is liable to be interfered with.

8. Upon notice, Mr.J.Pothiraj, learned Special Government Pleader entered appearance on behalf of respondents 1 and 3 and filed a detailed counter.

9. According to the learned counsel for the respondents, the period of non-employment had to be regularized under the rules and therefore, the period came to be treated as Leave Without Pay (LWP) and if any period is treated as Leave Without Pay, the same also treated as non qualifying service for the purpose of

calculation of pensionary benefits. The substance of the submissions made on behalf of the respondents that is reflected in paragraph-10 counter affidavit which is reproduced below:

"10) Regarding grounds (A & c) of the affidavit it is submitted that the petitioner needs no consideration as per rules. As per the directions of the court in W.P.No.7095/2007, dated 21.10.2011, the punishment of compulsory retirement was set aside in order No.J2/249553/2011 and his pay was notionally fixed on 09.05.2012 in D.O.No.402/2013, dt.05.04.2013 of the first respondent. As the period out of employment was treated as LWP(P) no revision in pension could be ordered as the period is non qualifying service for pensionary benefits. The contention of the petitioner is not correct. The court directions in W.P.No.7095/2007, dated 21.10.2011 have been complied with as per rules in force. It is prayed that this Hon'ble Court may be pleased to dismiss the writ petition and thus render justice.

He would therefore submit that the impugned proceedings of the 1st respondent cannot be faulted with and the same is also not contrary to the order passed by this Court in W.P.No.7095 of 2007, dated 21.10.2011.

10.Having considered the rival submissions of the learned counsels and perused the materials and pleadings placed on record, this Court finds that there is considerable force in the contention put forth on behalf of the petitioner that once the order of punishment of compulsory retirement was set aside on merits with a specific direction that the period of non-employment has to be counted for notional fixation of pay for all practical purposes, it should be deemed that the petitioner had worked during the period and earned his pay notionally for the period of non-employment. The denial of backwages only reinforce the fact that the petitioner deemed to have worked and earned the backwages to be foregone by way of the principle 'no work no pay'. In other words, the petitioner is deemed to have earned the wages for the period for the purpose of notional fixation of pay. As a corollary, it is needless to mention that the period of non employment has to be counted for all purposes particularly, pensionary benefits.

11. This Court is also of the considered view that the impugned proceedings, i.e. treating the period of absence from 12.11.1996 to 31.08.2011, as Leave Without Pay, which is considered to be non-qualifying service runs contrary to the order passed by this Court in the said proceedings. By the impugned action that more than half of the service rendered by the petitioner has not been taken for the purpose of pensionary benefits. The said action on the part of the 1<sup>st</sup> respondent amounted to imposing a major penalty on the petitioner without any cause of action. What is denied is only backwages for the period of non-employment and not qualifying service during the said period of non-employment for the purpose of pensionary benefits.

12. This Court further finds that the order passed by the 1<sup>st</sup> respondent on the basis of the audit objection is an attempt to dilute the clear fall out of the specific order passed by this Court in the earlier proceedings and also an attempt to punish the petitioner by taking away more than half of the service rendered by him. This Court does not see any justification for such action on the part of the 1<sup>st</sup> respondent for treating half of the service as non qualifying service. More over, this Court while giving a direction in the earlier proceedings dated 21.10.2011, did not provide any discretion to the respondents to treat the period as non qualifying service, as it merely denied the benefit of backwages alone to the petitioner for the non employment period. As stated above, once backwages denied for non employment period, it is admitted that the petitioner had worked notionally in order to forgo the wages as per the orders of this Court. Therefore, this Court does not see any iota of justification for treating the entire period of non-employment as not qualifying service.

13. For the above said reasons, this Court is of the considered view that the petitioner is entitled to relief as claimed for. Therefore, the impugned order of the 1<sup>st</sup> respondent in C.No.J2/49553/2011 D.O.738/2012 dated 07.11.2012, settling the petitioner's out of employment period from 12.11.1996 to 31.08.2011 as LWP (P), is set aside and the respondents are directed to treat the period of non-employment from 12.11.1996 to 31.08.2011 as duty for all purposes except for payment of backwages and on such treatment, the respondents are directed to pay the revised retirement benefits by treating the said period of non-employment as qualifying service. The direction of this Court shall be complied with by the respondent/competent authority, within a period of eight weeks from the date of receipt of a copy of this order.

14. With the above direction, this Writ Petition stands allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-  
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

- 1.The Superintendent of Police,  
District Police Office,  
Kancheepuram District,  
@ Kancheepuram.
- 2.The Accountant General (A&E),  
Tamil Nadu, Chennai-600 018.
- 3.The Treasury Officer,  
District Treasury Office,  
Thiruvallur District @ Thiruvallur.

+1cc to M/S.Hema Muralikrishnan, Advocate Sr.39212  
+1cc to Mr.Ravichanmugham, Advocate Sr.39291  
+1cc to the Government Pleader Sr.39612

सत्यमेव जयते

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M.P.No.1 of 2013

srg 06/07/2018

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