IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.07.2018

CORAM

THE HONOURABLE Mrs.JUSTICE V.BHAVANI SUBBAROYAN

W.P.No.2798 of 2008
and
M.P.No.1 of 2008

1. M.Chinnadurai (Deceased)
2. Ammasi
3. Mariappan
4. Maheswari
5. SelvaraJ

... Petitioner

(P2 to P5 Substituted as LR's in the place of deceased petitioner as per order dated 12.07.2013 in M.P 1/2013 in W.P 2798/2008)

vs.

1. Government of Tamil Nadu rep.,
   by Secretary to Government,
   Municipal Administration and water Supply Department,
   Fort St.George,
   Chennai - 600 009.

2. The Commissioner of Municipal Administration,
   Chepauk, Chennai 600 005.

3. The Commissioner,
   Salem Municipal Corporation,
   Salem.

4. The Assistant Commissioner,
   Sooramangalam Ward Office,
   Salem Corporation,
   Salem.

5. The Deputy Director of L.F. Audit,
   Salem Corporation, Salem. ... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of Certiorarified Mandamus, calling for the records relating to the orders in [1] Pro.K7/1704/2005 dated 19.04.2005 of the fourth respondent in so far as it relates to premature retirement of the petitioner on 30.06.2003 and relief from service on 30.04.2005 and [2] Ni.Mu.No.969/A2/05 dated 16.01.2006 of the fifth respondent, in so far as it relates to authorizing payment of pensionary benefits to the petitioner from 01.07.2003 and withholding a sum of Rs.52,698/- from the D.C.R.G. Payable to him being the salary paid to him for the period from 01.07.2003 to 30.04.2005, to quash the same and issue consequential directions to the respondents 3 to 5 (i) to issue appropriate orders that the petitioner shall be deemed to have retired from service on 30.06.2005 A.N., with all benefits (ii) to disburse the pay and allowances for the period from 01.05.2005 to 30.06.2005 when the petitioner is kept out of office (iii) to revise the pensionary benefits with effect from 01.07.2005 and (iv) to disburse the sum of Rs.52,698/- withheld from the D.C.R.G., (v) to pay interest at 18% per annum for all the delayed disbursements of items (ii) to (iv).

For Petitioners : M/s.Prasana Devi
For R1 & R2 : Mrs.Thanga Vadhana Balakrishnan
Additional General Pleader
For R3 to R5 : M/s.K.Bhuvaneswari
Standing Counsel

O R D E R

The petitioner prayed for the issuance of a writ of Certiorarified Mandamus, calling for the records relating to the orders in [1] Pro.K7/1704/2005 dated 19.04.2005 of the fourth respondent in so far as it relates to premature retirement of the petitioner on 30.06.2003 and relief from service on 30.04.2005 and [2] Ni.Mu.No.969/A2/05 dated 16.01.2006 of the fifth respondent, in so far as it relates to authorizing payment of pensionary benefits to the petitioner from 01.07.2003 and withholding a sum of Rs.52,698/- from the D.C.R.G. Payable to him being the salary paid to him for the period from 01.07.2003 to 30.04.2005, to quash the same and issue consequential directions to the respondents 3 to 5 (i) to issue appropriate orders that the petitioner shall be deemed to have retired from service on 30.06.2005 A.N., with all benefits (ii) to disburse the pay and allowances for the period from 01.05.2005 to 30.06.2005 when the petitioner is kept out of office (iii) to revise the pensionary benefits with effect from 01.07.2005 and (iv) to disburse the sum of Rs.52,698/- withheld from the D.C.R.G., (v) to pay interest at 18% per annum for all the delayed disbursements of items (ii) to (iv).

2. The learned counsel for the petitioner would submit that the petitioner has joined service as gardener under contingent establishment in the erstwhile Salem Municipality in June 1967 and was later on appointed as cleaner on regular basis

from 01.10.1979 in the Tamil Nadu Municipal Basic Service. He was also serving as cleaner in Nangavalli Salem Water Supply System from 1979 onwards and the post of cleaner was coming under the Tamil Nadu Municipal Basic Service and Tamil Nadu Municipal Corporations Basic Service Rules and as such the petitioner was entitled to serve in the said department till the age of 60 years that is 30.06.2005.

3. The Salem Municipality was later on upgraded as Salem Corporation from 1996 onwards. The fourth respondent had informed the petitioner by proceedings Pro.K.10/2451/2004 dated 07.03.2005 that the petitioner is due to retire from service on 30.06.2005. subsequently, the fourth respondent had issued an another order in proceedings No.K7/1704/2005 dated 19.04.2005, since, the petitioner was appointed from contingent establishment to regular establishment in time scale of pay, his age of retirement is only 58 years and the date of petitioner's retirement is 30.06.2003 and he was permitted to retire on 30.04.2005 afternoon.

4. The fourth respondent had informed that action will be initiated against the petitioner with regard to the period of service rendered by the petitioner beyond the date of retirement that is 30.06.2003, after getting the details and remarks from the Audit Department. The fifth respondent by his order Ni.Mu.No.969/A2/05 dated 16.01.2006 authorised the disbursement of pensionary benefits such as monthly pension from 01.07.2003 commuted value of pension D.C.R.G. A sum of Rs.52,698/- was withheld from D.C.R.G of Rs.72,851/- towards the salary paid to him beyond the date of superannuation 30.06.2003 i.e., from 01.07.2003 to 30.04.2005. The fifth respondent also stated that the orders of the Government has to be obtained to regularise the period of service rendered by the petitioner beyond 58 years of age.

5. The learned counsel for the petitioner would further contend that the petitioner being the member of the TamilNadu Municipal Corporation Basic Service, as per Rule 36 of the said Rules, Rules relates to superannuation to the members of the Basic Service in Government Departments (i.e.) F.R.56 would apply and as per F.R.56 the age of superannuation for the members of Tamil Nadu Basic Service is 60 years and the petitioner ought to have retired from service only on 30.06.2005. The fourth respondent, who had rightly issued an order dated 07.03.2005 that the petitioner was to retire on 30.06.2005, has again issued another order dated 19.04.2005 stating that since he was absorbed from contingent establishment to regular time scale of pay establishment, his superannuation age is 58 years only and ordered his retirement from 30.06.2003. He was relieved from service on 30.04.2005. The order of the 4th respondent is violative of F.R.56 since he is entitled to be in

service till 30.06.2005, but he was prematurely relieved on 30.04.2005.

6. The fifth respondent has also erroneously authorised the pensionary benefits as of the petitioner were due to retire on 30.06.2003 at the age of 58 years, but since allowed to be in service beyond that date and has withheld the amount of Rs.52,698/- being the salary paid to him from 01.07.2003 to 30.04.2005 from the DCRG. Aggrieved by the same, the petitioner has sent a representation on 10.05.2005 to the third and fourth respondents to inform and point out the correct rule position and requested them to allow the petitioner to continue in service till 30.06.2005 afternoon. Since there was no response, the petitioner again sent a representation on 30.01.2006 to the respondents 3, 4 and 5. Again there was no response and an appeal was submitted by him on 20.06.2006 to the second respondent and another representation was sent on 10.06.2007 to the first respondent/Government. Till the date, there was no response from the authorities. Hence, he was forced to file this Writ petition seeking to quash the said orders.

7. The learned counsel for the petitioner has raised various grounds viz., the post of cleaner is included in the Tamil Nadu Municipal Basic Service and Tamil Nadu Municipal Corporation Basic Service and the petitioner was being the member of the Basic Service, ever since his date of entry he should be treated as basic servant only and for the members of the Basic Service, the age of superannuation is 60 years. The rules relating to superannuation applicable to similar members in Government Service are applicable to the members of Tamil Nadu Municipal and Municipal Corporations Basic Service and the respondents erred in assuming that the petitioner was being absorbed from contingent establishment to regular time scale of pay establishment, the age of superannuation is 58 years for him and retiring the petitioner on 30.06.2003 after noon, while he is entitled to continue in service till 30.06.2005 are totally illegal. The act of the fifth respondent in blindly fixing the pensionary benefits as if the petitioner was due to retire on 30.06.2003, but was erroneously allowed to be in service beyond that date till 30.04.2005 and also withholding sum of Rs.52,698/- from the DCRG amount without issuing prior notice to the petitioner and without any order of recovery, terming it as excess pay drawn beyond 30.06.2003, is arbitratory.

8. The learned counsel for the petitioner further raised a ground that even assuming that the petitioner was kept in service beyond the date of superannuation, it was not his fault and he had not made any misrepresentation and continued in service beyond 30.06.2003, but it is the lapse on the part of concerned officials, who were not vigilant. The act of the

authorities is arbitratory and unreasonable violative of Article 14 and 16 of Constitution of India.

9. When the matter stood thus, the petitioner died on 08.09.2012 and his legal heirs have been impleaded by the orders of this court dated 12.07.2013 and the counter affidavit was filed by the third respondent, which was adopted by the first respondent.

10. The learned counsel for the respondents would submit that the order was issued by the fourth respondent in Na.Ka.No.K7/1704/2005 dated 19.04.2005 as per the directions of the Director of Local Funds Accounts and Audit in Circular No.18/06, vide Roc.No.65356/2005 dated 01.03.2006. The proceedings of the fourth respondents is only as per law and therefore, the request of the petitioner to refund the withheld amount of Rs.52,698/- is not legally valid and the petitioner was received only based on the Service Rules. The petitioner's request to relieve him from service on 30.06.2005 instead of 30.06.2003 is unsustainable in law and contrary to Basic Service Rules. The Basic Service Rules will apply only to those persons, who are appointed as basic servants and governed by the said rules. However, the petitioner was initially appointed as contingent servant and subsequently the service of the petitioner was regularized with time scale of pay from 01.10.1979 in the scale of Rs.200-5-300. Hence, the petitioner cannot be considered as basic servant. The basic servants alone are entitled to serve till 60 years. Hence, the order of the fourth respondent is proper and legally valid and thus, the order of withholding of Rs.52,698/- from the DCRG of the individual is correct and the claim of the petitioner for interest at 18% has to be rejected.

11. The learned counsel for the respondents further submit that the though the petitioner was appointed as Gardener in the year 1967 as contingent staff, his service was regularized from 01.10.1979 (i.e) After 12 years, the petitioner's service was regularized with time scale of pay. Since, the petitioner is not a basic Government Servant governed by Basic Service rules, his age of retirement is only 58 years. The fourth respondent has inadvertently informed the petitioner, that he was about to retire from service on 30.06.2005 and based on the classification from the Deputy Director of Local Funds Accounts and Audit, they issued another proceedings and the mistake has been corrected and the petitioner was duly informed that he ought to have been retired from service on 30.06.2003 itself. According to the communication of the Commissioner of Municipal Administrations, Chennai, Circular Roc.No.94676/2004/MCA 3 dated 25.10.2004, as per the Corporation Service Rules, the retirement age of the employees of NMRs is 58

years and not 60 years. Hence, they prayed for dismissed of the writ petition.

12. The learned Counsel appearing for the petitioner has produced G.O.Ms.No.197 dated 14.10.2009, wherein the retirement age of the basic services was increased to 60. The said G.O.Ms.No.197 is extracted hereunder:-

> "1. The Commissioner of Municipal Administration in his letter third cited has stated that in G.O.Ms.No.202 Municipal Administration and Water Supply Department dated 16.10.2008, it has been ordered raising the retirement age of those employed in the first instance on Daily Wage basis and then regularised as Basic Servants and in the Tamil Nadu Corporation Basic Service Rules 1996, the following are the posts in the Basic Service.
>
> CLASS-V
>
> | | | |
> |---|---|---|
> | Category | - 1 | Office Assistant |
> | Category | - 2 | Night Watchman |
> | Category | - 3 | Cleaner |
> | Category | - 4 | Male/Female Attendant |
> | Category | - 5 | Unskilled Worker |
> | Category | - 6 | Sanitary Worker |
>
> 2. Since in G.O.Ms.No.202 Municipal Administration and Water Supply Department dated 16.10.2008 nothing has been stated about Municipal Corporation Employees but only the retirement age has been fixed as 60 years for Municipal employees only, in order to extend the said benefits to all the employees of the Municipal Corporations (except Chennai Corporation) who were in the first instance appointed on daily wage basis and then regularized, the Commissioner of Municipal Administration has requested to extend the said benefit to the employees of Municipal Corporation also who were regularized from daily wage employment.
>
> 3. in the above circumstances,the Government carefully the proposal of the Commissioner of municipal Administration that the benefit granted to Municipal employees in G.O.Ms.202 Municipal Administration and Water Supply Department dated 16.10.2008,fixing the retirement age as 60 years in the case of Municipal Employees appointment in the first instance as Daily wage employee and then regularized and directs that the said benefits be extended to the employees of all Municipal Corporations (except Chennai Corporation) who were

first appointed on Daily wage basis and then regularised, the benefit of fixation of retirement age as 60 years.”

13. From the counter, it could be seen that the petitioner was appointed only as a Gardener under contingent establishment in the erstwhile Salem Municipality in June 1967 and was later on appointed as Cleaner on regular basis from 11.10.1979 in the Tamil Nadu Municipal Basic Service. Hence, the petitioner should be considered as a basic servant, as per the above G.O. The contention of the petitioner is that as per the above G.O, since the age of superannuation for cleaner is 60 and therefore, the petitioner ought to have been retired from service on 30.06.2005, but he has been working till 30.04.2005 and was forced to retire on 30.04.2005. The said contention of the petitioner cannot be accepted, since the said G.O has been issued only on 14.10.2009, (i.e) four years after the petitioner's retirement and hence the petitioner can not cite the said G.O for claiming the age of superannuation as 60 years. Hence, the prayer of the petitioner that he ought to have been retired at the age of 60 is rejected the age of retirement was correctly fixed by the authorities.

14. The respondents have passed an order withholding the DCRG amount in pensionary benefits to a sum of Rs.52,698/- being the salary paid to him from 01.07.2003 to 30.04.2005 taking the superannuation age of the petitioner as 58 years and ought to have been retired on 30.06.2003, which is not accepted by this court, since the petitioner was not at fault and the respondents ought to have issued necessary orders regarding retirement date for the petitioner correctly. When the respondents are at fault and allowed the petitioner to work, after his date of retirement, subsequently they cannot raise objection that he has worked beyond the period of the retirement and he was paid salary for the same.

15. In the case of State of Punjab and Ors Vs Rafiq Masih (White Washer), the Honourable Supreme Court has held in Paragraph 12 as follows:

"12. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

16. From the aforesaid judgment, it could be seen that for no fault of the employee, recovery is not allowed. Here, the petitioner was made to continue his service after his date of retirement and the mistake is not on his part, but on the part of the respondents to believe that his retirement age is only of 60 years. But, suddenly, the respondents have passed an order as per the audit report and for the mistake committed by the respondents, the petitioner should not be penalized and therefore, the withheld amount of Rs.52,698/- has to be paid with interest at 6% per annum, since, the same was paid to the petitioner for the work he has done. As discussed earlier, since the age of superannuation of the petitioner was rightly fixed at 58, no revision is required in pensionary benefits.

17. In the result, the Writ Petition is partly allowed and the impugned order dated 16.01.2006 passed by the fifth respondent is partly quashed insofar as it relates to withholding a sum of Rs.52,698/- from the DCRG payable to the petitioner. Insofar as other reliefs prayed for by the

petitioner in the writ petition are concerned, the writ petition is dismissed. The respondents are directed to release the withheld amount of Rs.52,698/- from the DCRG, with interest at 6% per annum from January 2006 till the date of realisation. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

dss

To
1. The Minicipal Administration and water Supply Department,
   Fort St.George,
   Chennai - 600 009.

2. The Commissioner of Municipal Administration,
   Chepauk, Chennai 600 005.

3. The Commissioner,
   Salem Municipal Corporation,
   Salem.

4. The Assistant Commissioner,
   Sooramangalam Ward Office,
   Salem Corporation,
   Salem.

5. The Deputy Director of L.F. Audit,
   Salem Corporation, Salem.

W.P.No.2798 of 2008

GSP(08/02/2019)