IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 04.01.2019

Delivered on : 05.04.2019

CORAM :

THE HON'BLE MR.JUSTICE SUBRAMONIUM PRASAD

W.P.No. 15124 of 2013

G. Vivek ... Petitioner

vs.

1. The Secretary to Government,
   Commercial Taxes and Registration Department,
   Secretariat,
   Chennai 600 009.

2. The District Collector,
   Singaravelar Maligai,
   Chennai District,
   Chennai

3. The Deputy Secretary to Government,
   Housing and Urban Development Department,
   Secretariat,
   Chennai - 600 009.

4. The Secretary to Government,
   personnel & Administration Reforms Department,
   Secretariat,
   Chennai 600 009. ... Respondents

Prayer : Writ Petition is filed under Article 226 of the Constitution of India, for issuance of a writ of Certiorarified Mandamus, calling for the records relating to the proceedings of the first respondent issued in G.O.MS.No.26 Commercial Taxes and Registration (C2) Department, dated 18.03.2013 and quash the same and consequently direct the respondents to regularize the service of the petitioner for the period from 01.06.2005 to 21.10.2009 as period of Compulsorily Wait to be treated as Duty period with consequential and attendant benefits including arrears of salary and to reckon the entire period of regularized services from the date of appointment on 31.08.2000 for service benefits including pensionable services and to permit the petitioner to operate the GPF A/c. No.32090/Judl, within the time frame.

For Petitioner : Mr. G. Sankaran
Mr.V.Haribabu
Special Government Pleader (T)
for R1 & R4

For Respondents : Mr. B. Anand
(Govt. Advocate)
for R2 & R3

O R D E R

The present writ petition has been filed challenging the proceedings of the first respondent issued in G.O.Ms.No.26 Commercial Taxes and Registration (C2) Department, dated 18.03.2013 and to quash the same. Consequently, direct the respondents to regularize the service of the petitioner for the period from 01.06.2005 to 21.10.2009 and the period of compulsorily Wait to be treated as Duty period with consequential and attendant benefits including arrears of salary and to reckon the entire period of regularized services from the date of appointment on 31.08.2000 for service benefits including pensionable services and to permit the petitioner to operate the GPF A/c. No.32090/Judl, within the time frame.

2. The brief facts of the case is as follows:

(i) The writ petitioner was appointed as Office Assistant in Tamil Nadu Taxation Special Tribunal, Chennai, on 31.08.2000, in a regular sanctioned post on temporary basis. Subsequently, he was promoted to the post of messenger on temporary basis as per the provisions of Tamil Nadu Taxation Special Rules 2000 with effect from 04.04.2001. As per proceeding dated 14.05.2001, the petitioner was alloted GPF subscriber enrolment No.32090/JUDL by the Principal Accountant General (A&E) Tamil Nadu, Chennai and subscription recoveries for GPF was made from his salary from July 2001 onwards. In the year 2004, the Tamil Nadu Taxation Special Tribunal was abolished as per the enactment of Tamil Nadu Taxation Special Tribunal (Repeal) Act, 2004 , subsequent to which the petitioner along with 7 other staffs were relieved from the Tribunal on 31.05.2005 after noon and they were referred to Chennai Collector, for inclusion in reserve list for appropriate action.

(ii) Out of 8 personnels including the petitioner, two personnels namely Mr. C.D. Ekambaram and Mr. R.Kannan were absorbed in the Department of Commercial Taxes in the Secretariat from the relieving date in the Tribunal as per G.O.

Ms.No.83 Commercial Taxes Department dated 15.07.2005. The remaining 6 personnels, 3 personnels i.e., Mr.V. Sivanandhan, Mr.P. Rajasekaran and Mr. M. Devaraj were given employment to different department and regularized by the Government as per G.O. MS. No.17 (Commercial Taxes & Registration Dept.) dated 18.01.2006. The petitioner was not given employment in the aforesaid order. In view of the above, the petitioner filed W.P. No.34968 of 2005 before this Court seeking for regularization of service in the post of Office Assistant and in the post of Messenger. Consequent of this Court's order dated 24.07.2007, the petitioner was regularized in the post of Office Assistant from 31.08.2000 and given employment to Housing and Urban Development Department in the Secretariat, Chennai, as per the proceedings dated 21.05.2009 of the 2nd respondent. After joining in the aforesaid department, the petitioner made a representation on 19.11.2009 with the 3rd respondent seeking for (a) to regularize the period from 01.06.2005 to 21.10.2009 as a special case (b) to permit him to operate his GPF account alloted to him when he was working in the Tamil Nadu Taxation Special Tribunal. Since the said representation has not been considered by the respondents, the petitioner filed W.P. No.15955 of 2012 for the aforesaid relief. This Court, by order dated 04.07.2012, directed the first respondent to consider the representation dated 19.11.2009 of the petitioner and pass necessary orders in accordance with law. In compliance with the order of this Court, the first respondent has passed impugned order in G.O. Ms.No.26, Commercial Taxes and Registration Department, dated 18.03.2013 stating that since the petitioner was not employed in any department during the said period, it would be treated as out of employment period or break in service and the petitioner's service during that period cannot be regularized. Further, it is also stated that the Housing and Urban Development Department has to examine and decide as to whether the petitioner should be permitted to operate his GPF Account since the petitioner is working there. Being aggrieved by this order, the petitioner has filed the present writ petition.

3. The learned counsel for the petitioner would contend that all the 8 personnels were relieved from the services on the abolition of the Tribunal. While all of them have been appointed in various services, there was no reason as to why the petitioner's service should not have been regularized from the date of initial appointment on 31.08.2000 and it is not correct in coming to the conclusion by referring the Note 1 under Fundamental Rule 26 which will not be applicable to the petitioner and it relates to counting of service for increment in a time scale. Officiating Government Servant without substantive appointment, being discharged from service for want of vacancy with reference to counting of earlier service for the purpose of future increment in time scale of pay. Hence, the

aforesaid said provision cannot be made applicable against the petitioner to deny his claim. The said impugned order has been passed misquoting the aforesaid provision of Fundamental Rules.

4. It is further submitted by the learned counsel for the petitioner that while the petitioner appointed on 31.08.2000 to the substantive post has been regularized as per the G.O.MS. No.112, dated 18.11.2008, break in service made in the result of the abolition of the tribunal will be treated as duty in compulsory to

wait for orders of posting. In this regard, the learned counsel for the petitioner has placed reliance on G.O.MS. No.235, Finance, dated 14th March 1977 wherein Rule 9(3) of Fundamental Rules states as follows:

> Compulsory Wait for orders of Posting.
>
> (3) When a Government servant has compulsorily to wait for orders of posting, such period of waiting shall be treated as duty. During such period, he shall be eligible to draw the pay plus special pay which he would have drawn had he continued in the post he held immediately before the period of compulsory wait or the pay plus special pay which he will draw on taking charge of the new post, whichever is less. For this purpose, no temporary post need be created. The compensatory allowances shall be reckoned at the rates admissible at the station in which he was on compulsory wait.

According to the aforesaid rule, when the petitioner has been waiting for orders of posting for the period from 01.06.2005 to 21.10.2009 in the event of relieving from his service due to abolition of the Tribunal by a State Enactment, it cannot be treated as break in service or out of employment. Therefore, the petitioner is entitled to draw the pay plus special pay, which he would have drawn if he continued in the aforesaid post.

5. Having not been considered the aforesaid Rules in the case of the petitioner and when the benefit of the above rules were extended to the similarly situated persons, the impugned order depriving the entire length of service rendered by this petitioner passed by the first respondent is discriminatory and arbitrary. Hence, the learned counsel for the petitioner prays to quash the impugned order passed by the first respondent.

6. Per contra, the learned Government Advocate appearing for the respondent would submit that as admitted by the petitioner "break in service" is nothing but out of employment period. The learned counsel for the Government submitted that after relieving the petitioner from the Tribunal, the petitioner has not performed any duty in Government department till the

date of joining in the Housing & Urban Development in Secretariat. (i.e. 01.06.2005 to 21.10.2009) In these circumstances, the first respondent has passed order that the period from 01.06.2005 to 21.10.2009 i.e. the date after the petitioner's relief from the erstwhile Tamil Nadu Taxation Special Tribunal and the the date prior to his joining in the Housing and Urban Development Department be treated as out of employment period or break in service. It is further submitted by the learned Government Advocate that the Government has specifically not ordered in G.O. Ms.No.112 dated 18.11.2008 to regularize the period from 01.06.2005 to 21.10.2009 as the petitioner has not performed any work in any Government Department. It was also stated that the Housing and Urban Development Department has to decide as to whether the petitioner's earlier GPF account can be operated since the petitioner is presently working there. Hence, the prayer of the petitioner is liable to be set aside.

7. Heard the learned counsel appearing for the petitioner, the learned Government Advocate appearing for the respondents and perused the records.

8. On perusal of the Rule 9(3) of Fundamental Rules, it defines that when a Government servant has compulsorily to wait for order of posting, such period of waiting shall be treated as duty and the Government servant is eligible to draw to the pay plus special pay, during the period of compulsory wait or the same the government servant will draw on taking charge of the new post, whichever is less. The benefit of Rule 9(3) of Fundamental Rules has been extended to Mr. V. Sivanandam by proceedings order No.43388/A1/2011 dated 07.09.2011 passed by the Regional Transport Officer, North East. The order in Tamil is extracted in English hereunder for reference:

Order

> Thiru. V. Sivanandam, Office Assistant who had come to this office from the general list in the District Collector Office was on Compulsory Wait from 01.06.2008 to 20.08.2008 in the Office of the District Collector.
>
> A proposal requesting to regularize the aforesaid period of 81 days of Compulsory Wait was sent to District Collector. In continuation of that, in the reference 1st cited, instruction had been issued by the District Collector, Chennai to get a requisition from the individual concerned to consider the period of Compulsory Wait of 81 days as earned leave/leave eligible or admissible to the individual and regularize it and to pass orders accordingly.
>
> As per the Service Register of the individual the

Earned Leave as on date is 187 days.

Following the consent given by Thiru. V. Sivanandam, Office Assistant in the reference 2nd cited, to treat the aforesaid Compulsory Waiting period of 81 days as Earned Leave and orders have been issued accordingly.

The individual is eligible for salary and other allowances for the aforesaid period. It is certified that appropriate that appropriate entries are made in the Service Register of the individual.

The Tamil Nadu Taxation Special Tribunal, by its order in R.C. No.1584/2000/E4 dated 21.04.2005 had requested the Government to consider the case of the petitioner to regularize his service relaxing the provision of "direct recruitment" appearing in Sl.No.19 & 20 of Table under Schedule-II (Rule 8), under Rule 35 of the TNTST service Rules, 2000, in favour of the petitioner. The Government did not accept the request. The Commercial Tax Department regularized the service of the two personnels i.e.C.D. Ekambaram and R. Kannan from the period of relieving their duty. No reasons have been given by the Commercial Tax Department in their Counter affidavit as to why, the same benefit given to three personnels i.e. V. Sivanandhan, P. Rajasekaran and M. Devaraj by order in G.O.Ms. No.17, dated 18.01.2006 issued by the Commercial Taxes and Registration Department regularizing their services by relaxing of relevant rules cannot be extended to the petitioner. In fact, pursuant to the order of this Court, G.O.Ms.112 dated 18.11.2008 has been passed by the First respondent in which the petitioner has been absorbed in the Housing and Urban Development Department stating that the Government has decided to regularize the petitioner's service with effect from 31.08.2000 the date on which he joined in services as Office Assistant. The aforesaid Order in Tamil is extracted hereunder in English for reference:

Order

Thiru. G. Vivek was appointed as Office Assistant temporarily in Tamil Nadu Tax Imposing Special Tribunal. Thereafter, he was promoted as Messenger. The Registrar of the Tribunal had forwarded a proposal for regularization his service. In the meantime, the Tamil Nadu Tax Imposing Special Tribunal was dissolved and Thiru. G.Vivek was relieved from the Tribunal service and kept in the Common Pool of the District Collector for alternative service. As against the same, the individual has filed a W.P. No.34968 of 2005 before the High Court of Madras wherein the High Court of Madras has passed an order directing to grant benefits granted to Thiru. V. Sivanandham, Thiru.

Rajasekaran and Thiru. M. Devaraja, who had worked in the Tamil Nadu Tax Imposing Tribunal, in the light of the above G.O. No.17, Commercial Tax Department, dated 18.01.2006, read first above, within a period of three months from the date of receipt of a copy of the order.

2. The Government Advocate (Civil) has also offered his opinion that the petitioner is the similarly situated person and the petitioner is to be appointed in any other department as per the order of the High Court of Madras, or else, as against the order passed in W.P. No.34968 of 2005, an appeal may be preferred. The Chairman of the Tribunal has opined that on perusal of the order passed by the High Court of Madras dated 24.07.2007, it seems that the benefit of G.O. Ms. NO.17, Commercial Tax Department, dated 18.01.2006 which was issued for three employees is to be extended to the petitioner also; the petitioner is also a similarly situated person as that of other employees who was appointed along with persons in the Tamil Nadu Tax Imposing Special Tribunal without consultation to the Employment Exchange and hence his services are to be regularized. He also recommended that the analogy followed to Thiru. V.Sivanandham, Thiru.Rajasekaran and Thiru. M. Devaraj, in the light of G.O.Ms.No.17, Commercial Tax Department, dated 18.1.2006 is also to be followed in the case of the petitioner, Thiru. G.Vivek, Office Assistant also and hence his services are to be regularized.

3. The following qualifications were mentioned in the Rules of the year 2000 of Tamil Nadu Imposing Special Tribunal, in connection with appointment of Office Assistant:

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......
......

Thiru. G. Vivek, is in possession of requisite age and educational qualification for appointment to the post of Office Assistant. However, he was appointed by the Chairman of the Tamil Nadu Imposing Special Tribunal without consultation to the Employment Exchange.

4. In these circumstances, on the basis of the Government order read first above and by accepting the recommendation of the Chairman of the Special Tribunal, the rule 8 of the Tamil Nadu Tax Imposing Tribunal, 2000 is relaxed in favour of the the petitioner and it is decided to regularize his services with effect from 31.8.2000 the date on which

he joined in services as Office Assistant.

5. In exercise of power conferred in Tamil Nadu Services Consolidation Procedure Book, Volume I and Part II of Tamil Nadu State and Subordinate Service Rules, Rule 48 and 2000 of 1987 and invoking the powers conferred in Rules 35 of Tamil Nadu Tax Imposing Special Tribunal, the Governor is regularizing the services of Thiru. G.Vivek, Office Assistant (Temporary) by relaxing the Rules 8 and 28 (2) (i) of Tamil Nadu Tax Imposing Special Tribunal and order is passed accordingly.

9. A perusal of the above order shows that Rules 8 and 28(2) (i) of Tamil Nadu Tax Imposing Special Tribunal has been relaxed in favour of the petitioner and his service has been regularized with effect from 31.08.2000. i.e. the date on which he joined in services as Office Assistant. If that be so, then Rules 9(3) of the Fundamental Rules applies to the petitioner.

10. In view of the foregoing discussion and having considered the facts and circumstance of the case, the petitioner is entitled to continue in services from June 2005 to October 2009 and that period should be counted towards the service period. Subsequently, the petitioner is entitled to all the benefits during the period from June 2005 to October 2009 as regularized services from the date of appointment on 31.08.2000. In view of the above, the petitioner is entitled to operate the earlier GPF Account as prayed for.

11. Resultantly, the writ petition is allowed. The impugned order passed by the first respondent is set aside. There shall be no orders as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS-III)

//True copy//

Sub Assistant Registrar

lbm

To

1. The Secretary to Government,
   Commercial Taxes and Registration Department,
   Secretariat,
   Chennai 600 009.

2. The District Collector,
   Singaravelar Maligai,
   Chennai District,
   Chennai

3. The Deputy Secretary to Government,
   Housing and Urban Development Department,
   Secretariat,
   Chennai - 600 009.

4. The Secretary to Government,
   personnelnel & Administration Reforms Department,
   Secretariat,
   Chennai 600 009.

+1cc to Mr.G.Sankaran, Advocate SR.No.34312

W.P.No. 15124 of 2013

GJ II(CO)
GMY(22/05/2019)