IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22/11/2019

C O R A M

THE HON'BLE MR.A.P.SAHI, CHIEF JUSTICE

a n d

THE HONOURABLE MR.JUSTICE SUBRAMONIUM PRASAD

Writ Appeal No.4018 of 2019
against
Writ Petition No.16202 of 2008
CMP.No.25172 of 2019

The Chief Secretary to Government
Public (Special - A) Department
Fort St. George
Chennai 600 009. ... Appellant /Respondent

Vs

M. Uthiraswamy ... Respondent/Petitioner

Prayer : Appeal filed under Clause 15 of the Letter Patent against the order, dated 20/2/2019, passed in W.P.No.16202 of 2008.

WP.NO.16202/2008:

Prayer: Writ petition is filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, calling for the records of the respondent in connection with the impugned order passed by the respondent in G.O. (2D) No.53, Public (Special-A) Department, dated 30.6.2008 and quash the same and direct the respondent to superannuate the petitioner from service.

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For appellant ... Mr.V.Jayaprakash Narayanan
Government Pleader

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J U D G M E N T

(Judgment of the Court was delivered by Subramonium Prasad,J)

Instant writ appeal is directed against the order, dated 20/2/2019, passed in W.P.No.16202 of 2008.

2. Facts in brief are as follows:-

a) Appellant is the State of Tamil Nadu. Respondent entered into the service of the appellant, as Junior Assistant through selection conducted by Tamil Nadu Public Service Commission. By passage of time, he was promoted as District Revenue Officer, on 7/8/1998.

b) When respondent was serving as Tahsildar, in Dharmapuri Taluk, from September 1993 to August 1994, the Government of India, released funds for providing housing and business loans to Sri Lankan repatriates. During an enquiry, it was found that a number of persons claimed the benefit of the scheme on the basis of forged documents.

c) A criminal case was registered in Crime No.8 of 2000, on the file of Vigilance & Anti-Corruption Department of Dharmapuri District, arraying the petitioner as an accused.

d) A charge sheet has been filed before Chief Judicial Magistrate/Special Judge, Krishnagiri District, and has been taken on file in C.C.No.123/2006. Respondent was in continuous suspension.

e) The petitioner was due for superannuation, on 30/6/2008. Since the criminal case was pending, the respondent was not permitted to retire.

f) Respondent has filed W.P.No.16202 of 2008, praying to quash the records in connection with the impugned order, passed in G.O.(2D) No.53, Public (Special -A) Department, passed by the Chief Secretary to Government, Public (Special A) Department, Fort St. George, dated 30/6/2008 by which the writ petitioner who was in suspension was not permitted to retire and direct the appellant to superannuate the respondent from service.

3. In the writ petition, appellant has filed a detailed counter, bringing out various reasons as to why suspension of

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the respondent cannot be revoked, before culmination of the criminal case.

4. The learned Single Judge, by the order impugned herein has directed the appellant to pay the encashment of Earned leave and unearned leave on private affairs, Petitioner's Contribution to General Provident Fund and Family Benefit Fund, in the light of the order passed by a Division Bench of this Court, in W.A.No.458 of 2016, dated 13/4/2016 (The District Collector, Tiruvallur District, Thiruvallur Vs. T.L.Nageswara Rao).

5. The order of the Single Judge been challenged by the State in the instant writ appeal.

6. Heard Mr.V.Jayaprakash Narayanan, learned Government Pleader.

7. Mr.V.Jayaprakash Narayanan, learned Government Pleader, places reliance on Rule 56 (1) of the Fundamental Rules of the Tamil Nadu Government, Rule 7 (1) of Annexure III of Tamil Nadu Leave Rules, 1933 and Rule 21 of the Tamil Nadu Pension Rules, 1978.

8. Rule 56 (1) of the Fundamental Rules of the Tamil Nadu Government, is extracted hereunder:-

> Retirement of Superannuation:- (a) Every Government servant in the superior service shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty-eight years. He shall not be retained in service after that age except with the sanction of the Government on public grounds, which must be recorded in writing but he shall not be retained after the age of sixty years except in very special circumstances:
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> Provided that this clause shall not apply to Government servants who are treated as in superior service for the purpose of these rules but as in the Tamil Nadu Basic Service for the purpose of pension. Such Government servants as well as all basic servants shall retire on attaining the age of sixty years:
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> Provided further that on and from the 1st January 1993, a District Judge, Chief Judicial Magistrate, Subordinate Judge or District Munsif-cum-Judicial Magistrate, who, in the opinion of the High Court, Madras, has potential for continued

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useful service beyond the age of fifty-eight years, shall retire from service on attaining the age of sixty years."

9. Rule 7 (1) of Annexure III of Tamil Nadu Leave Rules, 1933, reads as under:-

> "Leave at the credit of a Government servant in his leave account, other than earned leave and leave on private affairs shall lapse on the date of retirement or on the date of termination of the extension of service, as the case may be. The competent authority (leave sanctioning authority) shall suo motu draw and disburse the cash benefits of encashment of earned leave and leave of private affairs at the credit of the Government servants in Groups B, C and D without formal sanction orders on the date of retirement or on the date of termination of extension of service, as the case may be, or on the next working day, following the date of retirement or the date of termination of extension of service, if the date of retirement or the date of termination of extension of service happens to be a holiday. In respect of Group A Officers, the Accountant General or Pay and Accounts Officer, as the case may be, shall suo motu issue the pay slips for encashment of earned leave and leave on private affairs, as aforesaid, at the credit of the Government Servant without formal sanction orders, on the date of retirement or on the date of termination of extension of service, as the case may be, or on the next working day, following the date of retirement or the date of termination of extension of service if the date of retirement or the date of termination of extension of service happens to be a holiday."

10. Rule 21 of the Tamil Nadu Pension Rules, 1978, reads as under:-

> Forfeiture of service on dismissal or removal - Dismissal or removal of Government servant from a service or post entails forfeiture of his past service.

11. Explanation to 56 (1) of the Fundamental Rules of the Tamil Nadu Government only provides that a person against whom a complaint of criminal offence is under investigation or trial,

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shall not be permitted by the appointing authority to retire on his reaching the date of retirement and shall be retained in service until the criminal case is concluded. Rule 21 of the Tamil Nadu Pension Rules provides that dismissal or removal of the Government Servant from a service or post entails forfeiture of his past service and Rule 7 (1) of Annexure III of the Tamil Nadu Leave Rules, 1933, provides that leave at the credit of a Government Servant, in his leave account, other than earned leave and leave on private affairs, shall lapse on the date of retirement or on the date of termination of the extension of service, as the case may be.

12. Rule 56 (1) of the Fundamental Rules of the Tamil Nadu Government, Rule 7 (1) of Annexure III of Tamil Nadu Leave Rules, 1933 and Rule 21 of the Tamil Nadu Pension Rules, 1978, does not provide for forfeiture of the contribution of a Government Servant of his contribution to the Government Provident Fund or the earned leave or the unearned leave on the termination of an employee.

13. The issue as to whether an employee, who is facing criminal proceedings should be deprived of his encashment of leave salary and his contribution to Special Provident Fund till the disposal of the case filed against him is no longer res integra. A Division Bench of this Court in Secretary to Government, Revenue Department, Secretariat, Chennai Vs. K. Palaniyandi {2019 (5) CTC - 19} has answered the question in favour of the Government servant. The Hon'ble Division Bench has observed as under:-

> "13.Perusal of the above said Rule and the Explanation would show that even a Government Servant, whose service is either terminated by notice or has been compulsorily retired from service as a measure of punishment and where the service of such Government Servant has been extended beyond the date of superannuation, ofcourse in the interest of public service, is certainly entitled for encashment of leave on private affairs.
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> 14.In other words, it is to be noted that even a person who is dismissed from service, is also entitled to the encashment of leave salary. If that being case, we do not find any logic behind the contention of the appellant as if such amount can be paid only after the termination of the proceedings. In other words, there must be a specific reason with object for retention of the said sum, pending disciplinary proceedings. What the Government

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Servant is entitled to even at the worst senorio of dismissal of his service, cannot be denied to be paid on his request, merely because, his service is retained.

15.There are two types of monetary benefits payable to a Government Servant on retirement. One type of such benefits, such as Earned Leave, Provident Fund and Special Provident Fund amount, is a benefit already accrued and got credited to the account of the employee, which he is entitled to receive automatically on attaining superannuation. Those amounts become his personal property. It makes no difference even if he is not permitted to retire and a departmental proceedings is initiated against him. In other words, those amounts are derived out of like his "savings" and therefore, the employer cannot stake any claim or impose any restriction as to when such amount could be paid to the employee even after attaining the age of superannuation. In other words, even as per rules, these amounts are payable either on the date of superannuation or on the date of termination of extension of service. Such payment is to be made even to a person dismissed from service. When such being the position, there cannot be any justification on the part of the employer to retain the said sum by citing the pendency of proceedings.

17.Next contention of the appellants is in respect of Rule 7 of the Tamil Nadu Leave Rules, 1933. A careful perusal of the Rule 7 of thesaid Rules would again show that even the Government Servant, who is terminated from service or compulsorily retired from service as a measure of punishment, is also entitled for encashment of Earned Leave and leave on private affairs. Therefore, the entitlement of such Government Servant to encash such Earned Leave and leave on private affairs is not altered even assuming that he is punished by way of termination of his service. Therefore, we find that the contention raised by the appellants on this ground is also liable to be rejected.

18.It is to be noted at this juncture that there is no total prohibition or denial of the benefit sought for by the writ petitioner in any of the provisions made under the relevant rules. It is

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only a time of disbursement of such benefit is stated. Even as per the rules, these benefits sought by the writ petitioner become payable automatic at the relevant point of time. Therefore, when the entitlement for such payment is not in question and only the time of disbursement is postponed under a given circumstance, especially when the retention of those benefits is not having a bearing on any eventuality, the Court can interfere and direct such payment even before the relevant time for disbursement of such payment, when the beneficiary seeks to get the same immediately. When the entitlement is not in dispute, it makes no difference whether it is paid at the request of the beneficiary or at a latter date viz., relevant time, at which, it is liable to be paid."

(emphasis supplied)

14. Another Division Bench of this Court, in THE STATE OF TAMIL NADU, rep. BY THE SECRETARY TO GOVERNMENT, PUBLIC WORKS DEPARTMENT, SECRETARIAT, FORT ST. GEORGE, CHENNAI AND OTHERS Vs. V.MAHALINGAM (W.A.No.1285 OF 2019), while considering the issue as to whether encashment of earned leave can be given to a Government Servant, facing criminal charge or not has held that there is no bar under Rule 21 of the Tamil Nadu Pension Rules or Rule 56 (1) of the Fundamental Rules, which prohibits payments of such relief. Paragraph Nos.7, 8, 9 are extracted hereunder

"7. Rule 21 of the Tamil Nadu Pension Rules, 1978, is extracted below:- "21. Forfeiture of service on dismissal or removal:- Dismissal or removal of Government Servant from a service or post entails forfeiture of his past service." The Learned Special Government Pleader submits that the forfeiture of past service of a Government Servant on his dismissal or removal from a post entails that no benefits arising out of service could be claimed by him. It must be remembered that the aforesaid rule has to be read in the context of the Tamil Nadu Pension Rules, 1978, where it is found, and cannot be extended beyond its scope. Viewed in that perspective, what has been meant to be conveyed by 'forfeiture' in the said rule is that a Government Servant, who has been dismissed or removed from service, would not be entitled to claim pension relying on his past service. As such, it would be far fetched to read that provision as if all other monetary benefits that have already accrued to him during service would also be lost or deprived.

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> 8. Next, Rule 69 of the Tamil Nadu Pension Rules, 1978, relates to payment of provisional pension when disciplinary proceedings are pending and there is nothing mentioned anywhere in that rule about earned leave and as such, the same does not have any relevance to the issue now under consideration.
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> 9. It is apparent on a reading of Rule 56(1)(c) of the Fundamental Rules that it empowers to continue in service, a Government Servant, who has attained the age of superannuation, till the completion of disciplinary proceedings or criminal prosecution, so that depending on its outcome, a decision regarding imposing any penalty on such delinquent Government Servant could be taken, but there is nothing therein to infer that earned leave of the said Government Servant could be withheld during that period. "

15. The Hon'ble Supreme Court, in STATE OF JHARKHAND AND OTHERS Vs. JITENDRA KUMAR SRIVASTAVA AND ANOTHER {(2013) 12 SCC - 210}, while dealing with Rule 43 (b) of the Bihar Pension Rules, observed as under:-

> 17. It hardly needs to be emphasised that the executive instructions are not having statutory character and, therefore, cannot be termed as "law" within the meaning of the aforesaid Article 300-A. On the basis of such a circular, which is not having force of law, the appellant cannot withhold even a part of pension or gratuity. As we noticed above, so far as statutory Rules are concerned, there is no provision for withholding pension or gratuity in the given situation. Had there been any such provision in these Rules, the position would have been different.

16. Employees Contribution to Provident Fund and leave which has been earned by him (not encashed) are the property of the employee, they cannot be taken away, without due process of law, as enshrined, under Article 300 A of the Constitution of India. There is nothing in the Rules which has been relied by the learned Government Pleader which will enable the Government to withhold the Employee's own contribution to Provident Fund and encashment of accumulated earned leave when the Government servant has attained the age of superannuation. These amounts have to be given to the Government servant, even if the criminal proceedings culminate against the Government servant and the Government servant is terminated from service. If these amounts cannot be forfeited even on termination, there is no justification in withholding the same during the continuation of

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criminal proceedings after the Government servant has attained the age of superannuation.

17. In the result, writ appeal stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS III)

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Sub Assistant Registrar

mvs/pkn.

TO:

The Chief Secretary to Government
Public (Special - A) Department
Fort St. George
Chennai 600 009.

+1cc to Government Pleader SR.NO. 98002

Judgment made in
W.A.No.4018 of 2019

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