IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 11.03.2019	Pronounced on : 12.04.2019

CORAM:

THE HONOURABLE Dr. JUSTICE ANITA SUMANTH

Writ Petition No.3570 of 2017

N.K.Swaminathan ... Petitioner

vs.

The Director of Government Examinations,
College Road, Chennai 600 006 ... Respondent

Prayer:- Petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorarified Mandamus to call for the records relating to the order, dated 26.09.2016, in Na.Ka.No.130871/E5/2016 of the respondent, quash the same and to direct the respondent to fix the petitioner's pension taking into account his basic pay, grade pay and dearness allowance, the petitioner drew as on 31.03.2012 AN. and to pay pension accordingly and to pay future difference in pension from 01.04.2012 till the respondent re-fixes the pension as per order of this Court.

For Petitioner: Mr. R.Vasudevan

For Respondent: Mr. P.Raja, Govt. Advocate (Edn.)

O R D E R

The petitioner was appointed as Junior Assistant on 07.07.1978 in the Education Department. After promotions through the hierarchy, the petitioner retired from service on 31.03.2012 from the post of Personal Assistant to the Director of Government Examinations. His pension was fixed at an amount of Rs.11,395/- per month, calculated as 50% of the basic pay of Rs.17,390/- and grade pay of Rs.5,400/- per month, at a figure of Rs.11,395/-. These are the admitted facts, as per the computation of pension by the respondent dated 01.08.2012.

2. The aforesaid computation also reflects dearness allowance of an amount of Rs.14,814/-. According to the

petitioner, the last drawn dearness allowance was a sum of Rs.11,814/-, which has not been taken into account in the calculation of pension. If the dearness allowance had also been taken into reckoning, the amount on the basis of which the pension would be computed would be Rs.34,604/- per month and the pension, 50% of the same, that is, Rs.17,302/-. This is the position canvassed by the petitioner.

3. The premise of this argument is that the petitioner equates 'dearness allowance' with 'dearness pay'. According to the petitioner, such dearness allowance, once equated with dearness pay is liable to be added to the basic and grade pays for the purpose of computation of emoluments.

4. A representation was filed before the respondent on 06.09.2016 along the aforesaid lines. The petitioner requested the respondent to take into account the component of 'dearness allowance' in the computation of pension and to fix his pension including the value thereof for commutation from 01.04.2012. The representation was rejected vide impugned order dated 26.09.2016 whereunder the respondent points out that as per the VI Pay Commission issued in G.O.Ms.No.234 Finance (Pay Cell) Department, dated 01.06.2009, there was no dearness pay that was specifically payable to employees of the Government of Tamil Nadu. The order is extracted below:-

> '2009ம் ஆண்டு வெளியிடப்பட்ட ஊதியக் குழுவின் அரசாணை எண்.234, நிதித்துறை (ஊகு) நாள் 31.05.2009–ன்படி 01.01.2006–ல் பெற்று வழங்கப்பட்டுள்ள அடிப்படை உதியம் மற்றும் அக ஊதியம் (அடிப்படை ஊதியத்தில் 50% விழுக்காடு) (Dearness Pay) மற்றும் அகவிலைப்படி 24% (Dearness Allowance) ஆகியவற்றினை ஒருங்கிணைத்து அதிலிருந்து அடிப்படை ஊதியம் மற்றும் தர ஊதியம் (Grade Pay) என அன்னவருக்கு நிர்ணயம் செய்யப்பட்டு (நகல் இணைக்கப்பட்டுள்ளளது) அதன் அடிப்படையிலேயே, ஓய்வ, பெறும் நாளான 31.03.2012 அன்று பெற்ற அடிப்படை ஊதியம் மற்றும் தர ஊதியத்தின்படி (Grade Pay) ஓய்வூதியம் பெற்று வழங்கப்பட்டு வருகிறது என தெரிவிக்கப்படுகிறது.'

5. According to the respondent, 50% of the dearness pay and 24% of dearness allowance had already been taken into account in fixation of grade pay and thus, the grade pay actually received by the petitioner as on the date of his retirement called for no further enhancement by way of dearness allowance.

6. The petitioner relies on the judgment of the Supreme Court in the case of Kallakurichi Taluk Retired Officials Association, Tamil Nadu and others v. State of Tamil Nadu, ((2013) 2 SCC 772), disposing a batch of Special Leave Petitions on 17.01.2013. Specific reliance is made to paragraphs 34, 37 and 38 of the aforesaid judgment extracted below for the sake of completion and clarity:

'34. In the context of the instant appeals, it is necessary to understand the overall objective of treating "dearness allowance" (or a part of it) as "dearness pay". There can be no doubt, that 'dearness allowance' is extended to employees to balance the effects of ongoing inflation, so as to ensure that inflation does not interfere with the enjoyment of life, to which an employee is accustomed. Likewise, the objective of 'dearness pay' is to balance the effects of ongoing inflation, so that a pensioner can adequately sustain the means of livelihood to which he is accustomed. Having understood the reason why the Government extends the benefit of 'dearness allowance' and 'dearness pay', to its employees and pensioners respectively, we would venture to search for answers to the twin tests which must be satisfied, for making a valid classification (or a valid discrimination), in the present fact situation.

…...

37. The issue in hand needs to examine from another perspective as well. It must be clearly understood, that no employee has a right to draw 'dearness allowance' as 'dearness pay' till such time as the State Government decides to treat 'dearness allowance' as 'dearness pay'. And therefore, the State Government has the right to choose whether or not 'dearness allowance' should be treated as 'dearness pay'. As such, it is open to the State Government not to treat any part of 'dearness allowance' as 'dearness pay'. In case of financial constraints, this would be the most appropriate course to be adopted. Likewise, the State Government has the right to choose how much of 'dearness allowance' should be treated as 'dearness pay'. As such, it is open to the State Government to treat a fraction, or even the whole of 'dearness allowance' as 'dearness pay'. Based on Rule 30 of the Pension Rules, it is clear that the component of 'dearness pay' would be added to emoluments of an employee for calculating pension. In a situation where the State Government has chosen, that a particular component of 'dearness allowance' would be treated as 'dearness pay', it cannot discriminate between one set of pensioners and another, while calculating the pension payable to them (for the reasons expressed in the preceding paragraph). Of course, a valid classification may justify such an action. In this case, the State Government has not come out with any justification/basis for the classification whereby one

> set of pensioners has been distinguished from others for differential treatment.
>
> 38. The instant controversy should not be misunderstood as a determination of the total carry home pension of an employee. All the Government orders referred to above, deal with the quantum of 'dearness allowance' to be treated as 'dearness pay' for the calculation of pension. 'Dearness pay' is one of the many components, which go into the eventual determination of pension. Therefore, the focus in the adjudication of the present controversy must be on 'dearness pay', rather than on the eventual carry home pension. The relevance and purpose of treating 'dearness allowance' as 'dearness pay', has been brought out in the foregoing paragraphs. Therefore, clearly, the object sought to be achieved by adding 'dearness pay' to the wage of a retiree, while determining pension payable to him, is to remedy the adverse effects of inflation. The aforesaid object has to be necessarily kept in mind, while examining the present controversy. Any classification without reference to the object sought to be achieved, would be arbitrary and violative of the protection afforded under Article 14 of the Constitution of India, it would also be discriminatory and violative of the protection afforded under Article 16 of the Constitution of India.'

7. The Bench in the above matter was considering the determination and composition of allowances to be added to 'pay' for calculating pension. In this context, the State Government has been following a consistent practice of treating 'dearness allowance' as 'dearness pay' in the computation of retirement benefits and the question that arose for resolution before the Bench was whether 'dearness allowance' drawn by a retiring employee should be equated to 'dearness pay' for the purpose of quantifying wages and computing pension. The objective of equating dearness allowance with dearness pay, as observed by the Supreme Court, is to remedy the adverse effects of inflation and offset the effects of the same for retired employees. This is specifically so that even pensioners can adequately sustain the means of livelihood to which they have come to be accustomed to in the course of their working years. This judgement is relied upon by the petitioner who argues that the equating of dearness pay with allowance should be done in the present case as well.

8. The petitioner also relies on a judgement of the Supreme Court in the case of N.D.P.Namboodripad v. Union of India and

others, ((2004) 5 SCC 259) where a Division Bench of this Court states that for the purpose of calculation of pension, emoluments received as the last payment including dearness allowance and other special allowances should be considered and not merely the last salary. Reference is made to paragraphs 17 and 26 of the judgement, extracted below:-

> '17. Therefore, the Respondents are not justified inasmuch as the dearness allowance and special allowance drawn by the Appellant was not taken into account for the calculation of the Appellant's pension. It is true that in the 1st M.L. Jain v. Union of India, MANU/SC/0345/1985 : (1985) 2 SCC 355, the calculations were adopted taking the last salary into consideration. However, the above point of whether the last received emoluments inclusive of dearness allowance and other special allowances should be taken for the purposes of calculating pension or the last salary drawn should be taken was not addressed in that case.
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> ....
>
> 26. Taking into consideration the above; these appeals are partially allowed and order, under appeal stands modified with the following directions:
>
> (a) For the purpose of calculations the emoluments received as last payment including dearness allowance and other special allowances be considered and not merely the last salary of Rs. 3,500/-.
>
> (b) Clauses 2(a) and (b) of Part II of 1st Schedule of the Acts and Rules governing the service condition of the High Court Judges should not be taken into account in order to find out the amount of revised pension.
>
> (c) There should be no ceiling imposed on the amount the Appellant can receive under Clause (b) of the Act.
>
> (d) The Respondents shall be recalculate the pension as indicated above within a period of three months and pay, if any, arrears are due within three months thereafter.'

9. Thus the petitioner would submit that the computation of pension is incorrect in his case and the dearness allowance of

an amount of Rs.11,814/- should be taken as, and equated to dearness pay and taken into account for the purpose of computation of pension.

10. Per contra, Mr.P.Raja, learned Government Advocate (Education) appearing for the respondent would first of all state that reliance upon the case of Kallakurichi Taluk Retired Officials Association (supra) is incorrect, in so far as that decision was rendered in the context of Government Order dated 09.08.1989. The judgement brought on par employees who had retired after 01.06.1988 with employees retiring prior thereto on the aspect of payment of dearness pay. According to him, much water has flown under the bridge thereafter and there was a departure by way of policy introduced in the VI Pay Commission as evidenced by G.O.Ms.No.234, dated 01.06.2009 wherein the basic components of dearness pay and dearness allowance have been taken into account in the fixation of basic pay itself. Thus there needs to be no further addition on account of these factors to the basic pay for the purpose of payment of pension. He draws attention to the last paragraph of the judgment of the Supreme Court in the case of Kallakurichi Taluk Retired Officials Association (supra) emphasising that the order turned only on the aspect of parity sought in the context of Government Order dated 09.08.1989. Paragraph 45 of the case of Kallakurichi Taluk Retired Officials Association (supra) is extracted below:-

> 'The instant appeals are accordingly allowed. The impugned order dated 17.12.2007 passed by the High Court is hereby set aside. The impugned Government Order dated 9.8.1989, to the extent that it extends to employees who retire on or after 1.6.1988, a lower component of 'dearness pay', as against those who had retired prior to 1.6.1988, is set aside, being violative of Articles 14 and 16 of the Constitution of India.'

11. He also points out that the judgement in the case of N.D.P.Namboodripad (supra) relied on by the petitioner has been revised by a later decision of the Supreme Court, in the case of N.D.P.Namboodripad (Dead) by LRs v. Union of India and Others, decided on 08.03.2007, in a Revision Petition filed by the legal heirs of Mr.N.D.P.Namboodripad. The Bench rejects the prayer of the employee for re-fixation of pension observing that the appellant therein had not been receiving any dearness pay. In the light of the definition of Rule 62 of the Kerala Service Rules, it was only basic pay and dearness pay, if any, that would constitute 'emoluments', to be taken into account in arriving at the basis for the computation of pension.

12. He points out that Rule 62 of the Kerala Service Rules is in parimetaria with Rule 30 of the Tamil Nadu Pension Rules, 1978. The Supreme Court has held therein that though the word 'emolument' is a wider term than 'basic pay' in general English, it is designed for the purpose of 'pension'. The definition of pension has been taken note of, in paragraph 14, extracting Rule 62 of the Kerala Service Rules that specifically include only 'dearness pay'. Thus, where the word was defined, there need be no extension of such definition or reliance on the English meaning of the said word. In this view of the matter, the conclusion of the Bench in the Revision Petition was that the term 'emolument' would comprise of only pay and dearness pay.

13. This is clarified in paragraph 14 of N.D.P.Namboodripad (Dead) by LRs (supra), extracted below:-

> '14. As the entire argument of the appellant is based on Rule 62, it is useful to extract it. It reads thus:
>
> 62. The term emolument when used in this part means the emolument which the employee was receiving immediately before his retirement and includes:
>
> (a) pay as defined in Rule 12(23) in Part 1 of these Rules and/or pay of the appointment under Rule 9 or Rule 31 of the Kerala State and Subordinate Service Rules
>
> (b) the dearness pay the employee was actually in receipt of
> Rule 12(23) in Part 1 of the Kerala Service Rules defines 'pay' thus:
>
> Pay:- Means the amount drawn monthly by an officer as -
> (i) the pay, other than special pay or pay granted in view of his personal qualifications, which has been sanctioned for a post held by him substantively or in an officiating capacity or to which is entitled by reason of his position in a cadre, and
> (ii) personal pay and special pay, and
> (iii) any other emoluments which may be specially classed as pay by the Government.
>
> The appellant was not receiving any Dearness Pay. It is also not in dispute that dearness allowance and special allowance were not specially classed as 'pay' by the State Government under Rule 12(23). Therefore dearness allowance and special allowances, do not form part of pay. The word 'emolument' no doubt is a wider term than basic pay. It generally refers to the salary

or profits from employment or office. But the word 'emolument' is not used in the general sense in the service Rules relating to pension. The word is defined for purposes of pension. In fact, all rules governing pension, define the word 'emolument' by giving a special or specific meaning, for purposes of pension calculation. Where a word is defined, there can be no reference or reliance on any general meaning. To bring in 'generality' instead of 'specificity' in defining the term 'emolument' will defeat the very purpose of defining 'emolument' for purposes of pension. Therefore, contextually the definition of 'emolument' should be specific and not 'expansive' or general.'

14. The respondent cites the decision of the learned Single Judge of this Court in the case of Elumalai v. The Secretary to Government, Finance (Pension) Department, Secretariat, Chennai - 9 and three others, in W.P.No.11525 of 2013, dated 10.12.2013, where the issue before this Court concerned the implementation of G.O.Ms.No.371 dated 30.04.1986 and where reliance was placed upon the judgment of the Supreme Court in the case of Kallakurichi Taluk Retired Officials Association (supra). This decision was cited only to bring home the point that the judgment of the Supreme Court in Kallakurichi (supra) was made applicable to the computation of pay for employees retiring between the periods 01.10.1988 and 31.12.1995 and it is only in that context that the learned Single Judge had directed the respondents therein to dispose of the petitioners' representation on the basis of the prevailing Government orders as well as the judgment of the Supreme Court as aforesaid.

15. The learned counsel for the petitioner also relies on the decision of the Division Bench of this Court in the case of B.K.Govindan v. State of Tamil Nadu reported in Writ Petition No.11560 of 2008, dated 23.01.2015 (2015 Law Suit (Mad) 83), where also reliance has also been placed by the Division Bench upon the judgment of the Supreme Court in Kallakurichi Taluk Retired Officials Association (supra). This judgment is distinguishable for the reason that the Court was concerned with the computation of pensionary benefits to an employee who retired in 1987 and thus the position that obtained at that time was to be taken into account. In the present case, the petitioner has retired on 31.03.2012 and the observations and conclusions in the aforesaid order would not be apposite here.

16. Having heard the learned counsel on the rival contentions advanced, I reject the plea of the petitioner as unsustainable.

17. Rule 30 of the Tamil Nadu Pension Rules, 1978, states as follows:-

> '30. Emoluments— In the rules, unless the context otherwise requires,-
> (1) Emoluments means and include:-
> (i) Pay, other than special pay granted in view of his personal qualifications, which has been sanctioned for a post held by him substantively or in an officiating capacity (including temporary capacity under emergency provisions) or to which he is entitled by reason of his position in a cadre:
> (ii) special pay, dearness pay and personal pay; and
> (iii) any other remuneration which may be specially classed as emoluments by the Government."

18. The definition of 'emoluments' is no doubt an inclusive one. However, any payment towards dearness pay would have to be 'dearness pay' alone in terms of Rule 30 of the Tamil Nadu Pension Rules, as categorically explained by the Supreme Court in the case of N.D.P.Namboodripad (dead) by LRs's case (Review Petition) (supra). While the term 'emolument' is one which has a wider meaning ascribed to it in English, it is specifically defined vide an inclusive definition in Rule 30 and there would be no justification whatsoever to expand the definition to beyond what is specifically provided.

19. Accepting the argument of the petitioner would tantamount to inserting another component to the definition of 'emoluments' which is impermissible. Thus, it is only if the petitioner has been receiving 'dearness pay' specifically that the same could be taken note of in the computation of pay for the purpose of arriving at pension and commutation value thereof. In the present case, the components of dearness pay and dearness allowance have been taken note of in the fixation, and telescoped into, basic pay itself. Admittedly, it is not the case of the petitioner that he had been receiving dearness pay. His case is only that 'dearness allowance' that he is entitled to, be equated with 'basic pay'. In the light of the discussion above, I find no justification for accepting this argument.

20. I am also of the view that no prejudice is caused to the petitioner by virtue of my conclusion as above, in so far as the concept of dearness pay/dearness allowance, as explained by the Supreme Court in the case of Kallakurichi (supra), is integrated into basic pay introduced as a compensatory measure in order to compensate the petitioner for inflationary effects faced by him after retirement. However, as G.O.Ms.No.105 dated 07.02.2006 provides, this aspect of the matter has already been

taken into account while fixing basic wage. The merging of dearness allowance equal to 50% of the basic pay/pension with basic pay/pension with effect from 1.1.2006 that has been achieved by virtue of G.O.Ms.No.105 dated 07.02.2006 thus streamlining the concept of an integrated single payment and no allowance except as specifically contemplated by the Rules can be taken into account. The rationale of the judgment in case of Kallakurichi (supra) cannot be pressed into service by the petitioner in the light of G.O.Ms.No.105 dated 07.02.2006. The operative part of the G.O. is extracted below.

> 'The Government has decided to merge Dearness Allowance equal to 50% of the existing basic pay / pension with the basic pay/pension with effect from 1.1.2006. They accordingly direct that with effect from 1.1.2006, Dearness Allowance equal to 50% of the existing basic pay of the State Government employees shall be merged with the basic pay and shown distinctly as Dearness Pay (D.P.) which would be counted for purposes like payment of allowances, contribution to General Provident Fund, retirement benefits, transfer grant in respect of the officers who are entitled for it, Lumpsum allowances on transfer, various advances, etc. However the entitlements for Leave Travel Concession, Travelling Allowance/Daily Allowance while on tour and transfer and Government accommodation shall however continue to be governed on the basis of basic pay alone without taking into account the Dearness Pay.
>
> 2. The Government also direct that in the case of existing pensioners, Dearness Allowance equal to 50% of the present pension shall with effect from 1.1.2006, be merged with pension and shown distinctly as Dearness Pension. This Dearness Pension shall be taken into account for the purpose of calculation of Dearness Allowance.
>
> 3. The Government also direct that with a view to ensure that the pensioners retiring between 1.1.2006 and 31.10.2006 are not facing any loss in fixation of pension, as a special dispensation in their cases, Dearness Allowance equal to 50% of the basic pay would be treated as basic pay for purposes of computation of pension in respect of basic pay received by them prior to 1.1.2006. Consequently, the element of Dearness Pension will exist only for those pensioners who have retired from service upto 31.12.2005.

4. The Government also direct that the merger of 50% Dearness Allowance with basic pay above shall be admissible to full time employees who are at present getting Dearness Allowance and paid from contingencies at fixed monthly rates. The merger of 50% Dearness Allowance sanctioned in this order shall not be admissible to part-time employees.

5. The merger of 50% Dearness Allowance with basic pay will also apply to the teaching and non-teaching staff working in aided educational institutions, employees under local bodies, employees governed by the University Grants Commission / All India Council for Technical Education scales of pay, the Teachers / Physical Directors / Librarians in Government and Aided Polytechnics and Special Diploma Institutions, Village Assistants in Revenue Department, Noon Meal Organisers, Child Welfare Organisers and Anganwadi Workers.

6. The Dearness Allowance equal to 50% of basic pay / pension converted into Dearness Pay / Dearness Pension respectively would be deducted from the existing rate of Dearness Allowance.

7. The expenditure shall be debited to the sub-detailed head of account 03. Dearness Pay under the respective detailed Head. 03. Dearness Allowance.

8. The expenditure in respect of Pensioners / Family Pensioners shall be debited to the detailed head of account 27. Pensions - 07. Dearness Pension.

(BY ORDER OF THE GOVERNOR)

K. GNANADESIKAN,

SECRETARY TO GOVERNMENT.

21. In the light of the discussion above, I find no merit in this writ petition. Dismissed, with no costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

srk/sl

To

The Director of Government Examinations,
College Road, Chennai 600 006.

+2ccs to Mr.R.Vasudevan, Advocate, S.R.No.36447

+1cc to the Government Pleader, S.R.No.37097

Writ Petition Nos.3570 of 2017

SJ(CO)

RRS(23/04/2019)