

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 25.07.2019

JUDGMENT DELIVERED ON : 03-12-2019

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBBIAH

THE HONOURABLE MS.JUSTICE P.T.ASHA

and

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Writ Appeal Nos. 158, 314, 315, 316, 317, 343, 426,
455, 490, 536, 541, 610 and 1235 of 2016

Writ Appeal Nos. 25, 1747 and 1751 of 2017,

Writ Appeal Nos. 70, 836, 994, 1218, 1620, 1621, 1667, 1754, 1803, 1811, 1840,
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W.A.SR.Nos.8420, 121437, 121438 and 121439 of 2018

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W.A. No. 158 of 2016

1. The Government of Tamil Nadu
represented by Secretary to Government
Public Works Department
Secretariat
Chennai - 600 009

2. The Engineer-in-Chief and
Chief Engineer (General)
Public Works Department
Chepauk, Chennai - 600 005

3. The Assistant Executive Engineer
Public Works Department
Cauvery Basin Sub Division
Mailaduthurai
Nagapattinam District

... Appellants

Versus

R. Kaliyamoorthy

... Respondent

W.A. No. 158 of 2016

For Appellants : Mr. Vijay Narayan, Advocate General
assisted by Mr. V. Jayaprakash Narayanan
Government Pleader and
Mr. C. Munusamy
Special Government Pleader (Education)

For Respondent : Mr. M. Ravi

COMMON JUDGMENT

R. SUBBIAH, J

This Full Bench was constituted by the Honourable The Chief Justice pursuant to the order dated 29.08.2018 passed by the Division Bench of this Court in W.A. No. 1218 of 2018 etc., batch to refer the below mentioned issue for an authoritative pronouncement:-

"In view of the provisions of the Tamil Nadu Pension Rules, as amended, if a government servant is regularised in service after 01.04.2003 whether such a person will be entitled to count 50% of

the past service rendered prior to regularisation for the purpose of computing his pension under the old pension scheme."

2. For the sake of clarity, we are paraphrasing the above reference as follows:-

"Whether half of the past service rendered by Government servants whose appointments were regularised after 01.04.2003 can be counted for the purpose of grant of pension under the provisions of the Tamil Nadu Pension Rules, 1978 in the light of the amendments to the aforesaid rules vide G.O. Ms. No.259, Finance (Pension) Department dated 06.08.2003 and G.O. Ms. No.41, Finance (Pension) Department dated 08.02.2010."

3. G.O. Ms. No.259, Finance (Pension) Department dated 06.08.2003 introduced a proviso to Rule 2 to the aforesaid Pension Rules, while G.O. Ms. No.41, Finance (Pension) Department dated 08.02.2010 introduced sub-rule 11 (4) to the aforesaid Rules to which we shall be referring after giving a brief background which has led to the present reference.

4. Such a reference came to be made by the Division Bench on noticing that there are two conflicting decisions rendered by the Division Benches of this Court. In one of the judgments rendered by the Division Bench of the Madurai Bench of this Court in W.A. (MD) Nos. 587, 605, 606 and 1024 of 2014 on 03.12.2014, it was held that persons who were absorbed and/or regularised to service after 01.04.2003 were not entitled to count half of the past service rendered by them for the purpose of conferment of pensionary benefits along with the service rendered by them after regularisation. Another Division Bench of the Madurai Bench of this Court, in its Judgment dated 09.09.2015 in W.A. (MD) No. 760 of

2013 held that such persons, whose service came to be regularised after 01.04.2003 were entitled and/or eligible to count half of the services rendered by them on daily wage basis prior to their regularisation, for the purpose of conferment of pensionary benefits. Thus, this contrary view taken by two Division Bench of this Court has led to the present reference to this Full Bench.

5. For the sake of convenience, the daily wage employees covered in these batch of cases are referred to as "Writ Petitioners" and the State Government or instrumentalities of the Government, wherever they are arrayed in these batch of cases, can be referred to as 'respondents', collectively.

6. Before dealing with the various submissions made by the learned counsel on both sides, it is necessary to elucidate certain factual aspects. The factual scenario involved in these batch of cases has a chequered history to be narrated. In the State of Tamil Nadu, several persons came to be employed on daily wage basis in various Departments of the Government from the year 1980. Those daily wage employees joined the service under the staunch belief that their services will be eventually regularised by the Government in future and that they could be inducted into the permanent rolls of the Government. Some were fortunate to get their service regularised before 01.03.2003 while others could not get their services regularised till they attained the normal age of superannuation. For some others, even though they could get their service regularised, at the time of their regularisation, they had very little left in terms of period of service and therefore, after their retirement, from the cadre post, they could not get pension

inasmuch as they did not have the minimum qualifying years of service for the purpose of grant of pension. Thus, the employees, who were originally appointed on daily wage basis and got their service regularised after 01.04.2003, could not get pension, after their retirement. The Government wanted to do away with the Government pension by announcing a Contributory Pension Scheme to the Tamil Nadu State Government employees with effect from 01.04.2003. Under these circumstances, G.O.Ms.No.259, Finance (Pension) Department, dated 06.08.2003 amended the Tamil Nadu Pension Rules 1978. It introduced a proviso to Rule 2 of the Tamil Nadu Pension Rules, which reads as follows:

"Provided that these rules shall not apply to Government servants appointed on or after the 01.04.2003, to services and posts in connection with the affairs of the State which are borne on pensionable establishments, whether temporary or permanent".

7. A further amendment was introduced to the said Rules in the year of 2010 vide G.O.No.41, Finance (Pension) Department dated 08.02.2010. By virtue of the said Government Order, a new Sub-Rule (4) was added after Sub-Rule (3) to Rule 11 of the said Rules, which reads as follows:-

*(4) Half of the service rendered under the State Government in non-provincialised service, consolidated pay, honorarium or daily wages basis on or after 1st January 1961 in respect of Government employees absorbed in regular service before 1st April 2003 shall be counted for retirement benefits **along with regular service**, subject to the following conditions, namely:-*

"i) Service rendered in non-provincialised service, consolidated pay, honorarium or daily wages basis shall be in a job involving whole time employment;

ii) Service rendered shall be on consolidated pay, honorarium or daily wages basis paid on monthly basis and subsequently absorbed in regular service under the State Government;

iii) Service rendered in non-provincialised service, consolidated pay, honorarium or daily wages basis shall be followed by absorption in regular service before 1st April 2003 without a break."

Provided that this sub-rule is applicable to all employees who rendered service under the State Government in non-provincialised service, consolidated pay, honorarium or daily wages on or after 1st January 1961 and absorbed in regular service before 1st April 2003.

Provided further that wherever there was break in service before their absorption in regular service before 1st April 2003, the same shall be specifically condoned by the orders of the Head of Departments, in which the employees were regularly absorbed and such period of break, shall not count for the purpose of pensionary benefits.)

8. It is in this background several writ petitions were filed before this Court by those who were initially employed on daily wage basis and whose service were regularised after 01.04.2003. Such writ petitions were filed either before their retirement or after, to direct the respondents/State to count half of the service rendered by them on daily wage basis along with their regular service so as to enable them to get pensionary benefits after their retirement. It is to be pointed out that if half of the service rendered on daily wage basis is not counted or taken into account, along with the regular service rendered in a cadre post, the individual daily wage employee will not be entitled for payment of pension after their retirement with effect from 01.04.2003.

9. When the writ petitions filed before this Court by individual daily wage employees, employed in various wings of the Departments of the Government, came up for consideration, this Court directed the respondents-Government to

consider their claim. It is seen from the records that such claim was made by the individual daily wage employees purportedly on the basis of G.O. (D) No.332, Environment and Forest Department dated 19.11.2008 by which the service rendered by one Thiru. Murugan, on daily wage basis for about 20 years was ordered to be counted along with his regular service rendered by him till his retirement on 30.09.2005. It is on the basis of this Government Order, series of writ petitions came to be filed by individual daily wage employees purportedly on the ground that when once the Government considered the claim made by Thiru. Murugan to count half of the service rendered by him, the same benefit has to be extended to them as they are also similarly placed and non-consideration of the same would amount to discrimination. Accepting such submission, this Court passed several orders, some of which were also confirmed by the Division Bench of this Court. To name a few, the Division Bench of this Court by the Judgment dated 15.09.2011 dismissed the Writ Appeal Nos. 27 and 28 of 2012 filed by the Government challenging the order dated 19.04.2011 and 29.06.2011 passed in WP No. 8205 of 2011 and 13832 of 2011 respectively. The Judgment dated 15.09.2011 rendered by the Division Bench of this Court in WA Nos. 27 and 28 of 2012 was also subsequently confirmed by the Honourable Supreme Court in Special Leave to Appeal (SLP) No. 6451 of 2012.

10. The Government also, in compliance of the series of orders passed by this Court, issued various Government Orders, ordering to count half of the service rendered by the individual employees on daily wage basis along with the regular service rendered by them in the cadre post. The following orders have been issued

by the Government; G.O. Ms. No.139, Environment and Forest (FR-2) Department dated 05.09.2013 giving effect to the order dated 14.06.2012 passed by this Court in WP Nos. 14989 of 2012 etc., Similarly, the Government issued G.O. Ms. No.470, Environment and Forest (FR-2) Department dated 31.12.2013 in compliance with the order dated 17.07.2012 in WP No. 17387 of 2012. Yet another order was passed by the Government in G.O. Ms. No.156, Environment and Forest Department dated 21.05.2014 to comply with the order dated 12.07.2012 passed in WP No. 17806 of 2012.

11. It is in this background when the Division Bench of this Court, while hearing a batch of cases along with W.A. No. 1218 of 2018 came across conflicting views taken by two Division Bench of this Court and entertained a doubt regarding the entitlement to pensionary benefits. In view of the conflicting judicial pronouncement in this regard, the Division Bench, has thus referred the issue for consideration by a Full Bench of this Court. The order of reference has been extracted at Paragraph No.1.

12.(i) Mr. Balan Haridass, learned counsel appearing for the writ petitioners/ employees, who are arrayed as respondents in W.A. Nos. 1218 of 2018 etc., batch of cases, would strenuously contend that Rule 11 of The Tamil Nadu Pension Rules (hereinafter referred to as 'Rules'), particularly sub-rule (4) of Rule 11 can be made applicable only to those employees who are appointed to regular service after 01.04.2003. Rule 11 (4) will not apply to the writ petitioners who were appointed long prior to 01.04.2003, though, their services came to be regularised

after 01.04.2003. The writ petitioners therefore cannot be treated or construed as new appointees, rather, they have to be considered and/or treated as existing employees who worked in various departments of the government on daily wage basis for long number of years. Merely because the service of the writ petitioners came to be regularised after 01.04.2003, they cannot be denied the benefit of counting half of the service rendered by them on daily wage basis along with the regular service, after their regularisation, for payment of pension. In this context, the learned counsel relied on Rule 11 (1) of the Rules to contend that for the purpose of commencement of qualifying service, the date on which the daily wage employee had taken charge of the post in a temporary capacity shall be taken into account, even if such service has not been confirmed. Further, Rule 11 (2) clearly stipulate that half of the service rendered by the daily wage employees, who were paid from contingencies fund, shall be counted towards qualifying service subject to certain conditions. Sub-rule (3) of Rule 11 further indicates that half of the service rendered under non-pensionable establishment shall also be counted for retirement benefits along with regular service. In the present case, the petitioners have been initially appointed on daily wage basis in a temporary capacity and therefore, after regularisation of their service, either before or after 01.04.2003, half of the service rendered by them on daily wage basis has to be taken into account for the purpose of calculation of pensionary benefits. The learned counsel also relied on Rule 3 (o) of the Rules, which defines 'qualifying service' to contend that even if a government servant is employed in a temporary service, in a pensionable establishment, he will be eligible to draw pension on completion of ten years of service without even his service being regularised. Therefore, the learned counsel would contend that a

plain reading of 3 (o), 11 (1) to (4) of the Rules would only lead to the irresistible conclusion that these provisions will be applicable to those employees who were appointed either in temporary or regular service after 01.04.2003 and it has nothing to do with the writ petitioners, who were appointed much prior to 01.04.2003 though their services were regularised after 01.04.2003. It was further contented that regularization to service was beyond the control of the writ petitioners. Thus, he would contend that a liberal interpretation to the provisions quoted above is necessary especially when it relates to a beneficial legislation and any contrary interpretation would render the object of the legislature redundant. In this context, the learned counsel relied on the decision of the Honourable Supreme Court in **(Dwarka Prasad vs. Dwarka Das Saraf)** reported in **1976 (1) Supreme Court Cases 128** wherein it was held as follows:-

"18.The law is trite. A proviso must be limited to the subject-matter of the enacting clause. It is a settled rule of construction that a proviso must prima facie be read and considered in relation to the principal matter to which it is a proviso. It is not a separate or independent enactment. 'Words are dependent on the principal enacting words, to which they are tacked as a proviso. They cannot be read as divorced from their context' (1912 AC 544). If the rule of construction is that prima facie a proviso should be limited in its operation to the subject-matter of the enacting clause, the stand we have taken is sound. To expand the enacting clause, inflated by the proviso, sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. A proviso ordinarily is but a proviso, although the golden rule is to read the whole section, inclusive of the proviso, in such manner that they mutually throw light on each other and result in harmonious construction....."

(ii) The learned counsel for the petitioner would further proceed to contend that Rule 11 (2) confers the benefit of counting half of the service rendered

by an employee on temporary, casual and honoraria basis for payment of pensionary benefits.

13.(i) Mr. Suthakar, learned counsel appearing for the writ petitioners (respondents in W.A. No. 150 of 2019) would submit that Rule 11 (4) of the Rules is not an embargo to the daily wage employees, who got absorbed after 01.04.2003, to count 50% of their past services for the purpose of conferment of pensionary benefits. When there is no express exclusion in the Rules, Rule 11 (4), there is no need to challenge it. Rule 11 (4) has not excluded employees, who got absorbed as government servant after 01.04.2003 to count half of the past services rendered by them on daily wage basis. In so far as Rule 11 (1), (2) and (3) are concerned, it relates to employees who got absorbed as government servant after their initial stint of employment in a non-provisionalised, consolidated pay, honorarium or daily wage basis, to count half of their past service rendered on temporary establishment.

(ii) By referring to G.O. Ms. No.430 (Pension) Department dated 06.08.2004, the learned counsel would submit that by virtue of this Government Order, contributory pensionary scheme came into effect and it is clearly stated in this Government Order that it will apply to only those employees who are recruited on or after 01.04.2003, meaning thereby, this Government Order will apply only to fresh appointees who entered the government service after 01.04.2003. The Government Order does not refer to the entitlement of those persons, like the writ petitioners, who joined the government service on daily wage employment prior to 01.04.2003, to get half of their service rendered on daily wage basis counted for the

purpose of conferment of pensionary benefits. The word 'recruited' would only indicate the recruitment of employees afresh after 01.04.2003 and by no stretch of imagination would it cover the writ petitioners who joined the service a decade or two prior to 01.04.2003. Therefore, according to the learned counsel, any classification between the persons who were appointed before 01.04.2003 and after 01.04.2003 with reference to their date of regularisation/absorption will not be a reasonable classification and it is in violation of Article 14 and 16 of The Constitution of India. That apart, there is no nexus to the object sought to be achieved by making such classification among the equals. To lend support to his submission, the learned counsel relied on the Judgment dated 11.07.2019 passed by the Honourable Supreme Court in Civil Appeal No. 10857 of 2016 (*All Manipur Pensioners Association by its Secretary vs. The State of Manipur and others*) wherein the Honourable Supreme Court held as follows:-

"8. Even otherwise on merits also, we are of the firm opinion that there is no valid justification to create two classes viz., one who retired pre-1996 and another who retired post-1996, for the purpose of grant of revised pension. In our view, such a classification has no nexus with the object and purpose of grant of benefit of revised pension. All the pensioners form a one class who are entitled to pension as per the pension rules. Article 14 of The Constitution of India ensures to all equality before law and equal protection of laws. At this juncture, it is also necessary to examine the concept of valid classification. A valid classification is truly a valid discrimination. It is true that Article 16 of the Constitution of India permits a valid classification. However, a valid classification must be based on a just objective. The result to be achieved by the just objective presupposes the choice of some for differential consideration/treatment over others. A classification to be valid must necessarily satisfy two tests. Firstly, the distinguishing rationale has to be based on a just objective and secondly, the choice of differentiating one set of persons from another, must have a reasonable nexus to the objective sought to be achieved. The test for a valid classification founded on an intelligible differentia, which has a rational relationship with the object sought to be achieved. Therefore, whenever a cut-off date (as in the present

controversy) is fixed to categorise one set of pensioners for favourable consideration over others, the twin test for valid classification or valid discrimination therefore must necessarily be satisfied. In the present case, the classification in question has no reasonable nexus to the object sought to be achieved while revising the pension. As observed hereinabove, the object and purpose of revising the pension is due to the increase in the cost of living. All the pensioners form a single class and therefore such a classification for the purpose of grant of revised pension is unreasonable, arbitrary, discriminatory and violative of Article 14 of The Constitution of India. The State cannot arbitrarily pick and choose from amongst similarly situated persons, a cut off date for extension of benefits especially pensionary benefits. There has to be a classification founded on some rational principle when similarly situated class is differentiated for grant of any benefit."

(iii) By relying upon the above decision, the learned counsel would contend that there is no clear prohibition contained in Rule 11 (4) as regards the entitlement of those employees whose services were regularised after 01.04.2003, to get pensionary benefits and therefore, Rule 11 (4) has to be interpreted in a positive manner to give effect to the object of Rule 11. Any interpretation to Rule 11 must follow the Rule of purposive interpretation and any other interpretation other than the one intended to take into account the past services rendered by the daily wage employee will only mitigate against the purpose and object with which the Statute was enacted. In such view of the matter, the learned counsel prayed for holding that the services rendered on daily wage basis shall be counted for the purpose of counting pensionary benefits along with regular service irrespective of the fact whether the service of the daily wage employees was regularised on or after 01.04.2003.

14. (i) Mr. M. Ravi, learned counsel for the some of the writ petitioners, who are respondents in W.A. No. 158 of 2016 etc., batch would vehemently contend

that the respondents have been appointed on daily wage basis in a pensionable establishments such as Public Works Department, Tamil Nadu Veterinary and Animal Sciences University, Fisheries Department etc., long prior to 01.04.2003, however, their services have been regularised by their employer only after 01.04.2003 and no fault is attributable to the writ petitioners as regularisation subsequent to 01.04.2003 was not in their control. The writ petitioners, having rendered more than two decades of service cannot be deprived of their legitimate right to get pensionary benefits after their retirement, by counting half of the service rendered by them on daily wage basis along with the regular service. The respondents-Government have filed several writ appeals against the orders of the learned single Judge of this Court, but could not succeed. Having suffered orders and/or direction issued by this Court, the respondents are estopped from denying pensionary benefits to those daily wage employees whose service was regularised after 01.04.2003. According to the learned counsel, Rule 11 recognises all types of appointment and services, be that such appointment is temporary, on the basis of honorarium or daily rated basis. The Tamil Nadu Pension Rule is a complete code and separate legislation in itself. Therefore, the term "appointment" has to be interpreted keeping in view the benevolent expression given to Rule 11. As per Rule 11, if a person is appointed in a temporary basis in a pensionable establishment and if his service is not regularised till his retirement, yet he is eligible for pension by taking the entire temporary service as qualifying service for the purpose of fixing his pension. The distinction to be drawn is that employee in temporary service in a pensionable establishment is entitled for pension even without his service being regularised till his retirement. On the other hand, even if

the service of the casual employee is regularised, half of the service rendered by him as a casual employee will be reckoned for the purpose of computing the qualifying service for payment of pension. While so, an amendment was introduced to Rule 2 of the Tamil Nadu Pension Rules by virtue of G.O. Ms. No.259, Finance (Pension) Department dated 06.08.2003. In para No.2 of the said Government Order, it was stated as follows:-

"2. The Government of Tamil Nadu had announced in the budget speech 2003-2004 to introduce a new pension scheme based on defined contributions for the employees of this State, who are **newly recruited after 01.04.2003**. Under the new Contributory Pension Scheme, each employee has to contribute certain amount and Government may contribute certain amount.

(ii) Admittedly, para No.2 of the aforesaid G.O. Ms.No.259 dated 06.08.2003 is the basis for introducing the amendment to Rule 2 and it is abundantly clear that the amendment has been brought only to exclude the employees, who are covered under the new Contributory Pension Scheme from the old Pension Scheme. The new Contributory Pension Scheme is admittedly introduced only to the newly recruited employees on or after 01.04.2003. By no stretch of imagination, can an employee who had put in several years of service prior to 01.04.2003 under any nomenclature be it temporary or casual could not be termed as a newly recruited employee. The Government themselves with all responsibility have made it clear that the new Contributory Pension Scheme will be made applicable only to those employees who are newly recruited employees on or after 01.04.2003 and the words employed therein viz., 'newly recruited' would exclude the writ petitioners from the applicability of the new Pension Scheme, rather, they are only entitled to get the benefits under the Old Pension Scheme by virtue of their employment prior to 01.04.2003.

(iii) The learned counsel for the petitioner submitted that the Government was very cautious to use the words *newly recruited* meaning thereby the new pension scheme introduced by the Government will be made only applicable to fresh recruits i.e those who are newly appointed and/or recruited after 01.04.2003 and it has got nothing to do with the writ petitioners who were recruited earlier and have rendered more than a decade of service prior to their regularisation after 01.04.2003. Therefore, the new contributory pension scheme is not applicable to the writ petitioners who were already working in various departments of the Government and whose service came to be regularised after 01.04.2003. When the Contributory Pension Scheme is not applicable to the writ petitioners, naturally, they are entitled to the benefits conferred under Rule 11 of The Tamil Nadu Pension Scheme. Even otherwise, the cut off date for pensionary benefits namely 01.04.2003 was issued by the Government vide G.O. Ms. No.41, Finance (Pension) Department dated 09.02.2010. The cut off date was not even referred in Rule 2 of The Tamil Nadu Pension Rules which deals with applicability of the Tamil Nadu Pension Rules. Rule 2 clearly indicate that the Pension Rules are applicable to all Government servants appointed to services and posts in a pensionable establishments, whether temporary or permanent. In the absence of any cut off date having been indicated in Rule 2, the writ petitioners cannot be brought within the fold of the Contributory Pension Scheme, rather, they are entitled for payment of pension under the Old Scheme by virtue of their appointment in temporary service long back.

(iv) The learned counsel for the petitioner would further contend that there is no restriction or ambiguity in relation to applicability of the Tamil Nadu Pension

Rules to the writ petitioners as they cannot be treated as newly recruited employees merely because they are absorbed into regular service after 01.04.2003. The fact remains that the writ petitioners were already in service and got their service regularised after 01.04.2003 by virtue of their continued and uninterrupted service for long time, without any break. Therefore, the persons, who rendered continuous service prior to 01.04.2003 but were neither permanently appointed nor appointed under Rule 10 (a) (i) of The Tamil Nadu General Service Rules were also considered as an employee and Rule 11 (4) would extend to them though their services were regularised/absorbed after 01.04.2003. Thus, according to the learned counsel, the amended proviso to Rule 2 which rendered the Tamil Nadu Pension Rules inapplicable to those who were appointed on or after 01.04.2003, did not include the persons like the writ petitioners who were appointed prior to 01.04.2003 and whose services were regularised after 01.04.2003. Thus, the amended proviso to Rule 2 is not applicable to the writ petitioners, even though their services came to be regularised in the cadre post and/or regularly absorbed after 01.04.2003, for conferment of pensionary benefits.

(v) The learned counsel would proceed to contend that the respondents - Government thought it fit to bring an amendment to Rule (4) but no amendment was made to the existing provisions contained in Rule 11 (1), 11 (2) and 11 (3) to exclude the applicability of the Pension Rules to those employees whose services were regularised after 01.04.2003. When there is no exclusion to the class of employees like the writ petitioners under Rule 11 (1), (2) and (3), it is clear that there is no bar or prohibition that would disentitle the writ petitioners to count half of the services rendered by them on daily wage basis, along with their regular service

in which they were placed after 01.04.2003. A liberal interpretation would be that any new appointment or recruitment will have to be construed as a fresh selection who will get attracted to the new Contributory Pension Scheme and those who were appointed and/or recruited earlier and who were working continuously for years together cannot be brought within the scope and ambit of the Contributory Pension Scheme. When none of the amendment brought to Rule 2 or Rule 1 are against the writ petitioners, it will not disentitle the writ petitioners to count half of the service rendered by them on daily wage basis along with the regular service rendered by them and consequently, they need not challenge the Rule. The Government themselves have not excluded the applicability of the Rules to the writ petitioners who were rendering service prior to 01.04.2003 and regularised and/or absorbed them in regular service after 01.04.2003. The learned counsel therefore prayed this Court for answering the reference in favour of the employees/ writ petitioners.

15. (i) Mr. Sellapandian, learned counsel appearing for Mr. S. Mani, counsel for the writ petitioners/respondents in W.A. No. 1218 of 2018 etc., would contend that the question that was referred to this larger Bench is no longer *res integra* as it was settled by series of orders/Judgments passed by this Court as well as the Honourable Supreme Court and all the orders relating to the Forest Department were also implemented by way of passing several Government Orders without any pre-condition such as “subject to result of writ appeal etc.,” Therefore, he would contend that the service rendered by the writ petitioners on daily wage basis prior to the regularisation of their service has to be taken into account for the purpose of conferment of pensionary benefits to them. When similarly placed persons like the

writ petitioners were conferred with such benefit, the writ petitioners herein alone cannot be discriminated. The relief granted by this Honourable Court in several decisions is a remedy in rem and not a remedy in personem. Therefore the Government is estopped from re-agitating the issue as regards the enforceability of Rule 11 (4) of The Tamil Nadu Pension Rules in these batch of cases.

(ii) The learned counsel would further contend that in the forest department, from the year 1977, about 3000 men and women came to be appointed on daily wage basis under the *nomenclature* "Plot Watcher" and "Social Forestry Worker". The service of those daily wage employees could not be regularised by the Forest Department, for various reasons, including non-availability of regular cadre post. Those daily wage employees have approached this Court for a direction to the respondents to regularise their service. Based on the orders passed by this Court, the Government had taken a policy decision to bring all the daily rated employees into regular time scale of pay as Forest Watcher and for that purpose, drawn State wide Seniority list in the year 1991 and in the year 1995 which will form the basis for regularising the service of the daily wage employees in a phased manner as and when there exists vacancy in the cadre post of Forest Watcher. However, there are cases where even before the daily wage employee could get their turn for regularisation, they either retire from service or died. Therefore, numerous representations were sent to the Government by specifically stating that even though in the forest department employees were engaged for a long number of years as daily wage employees, on their retirement, they could not even get minimum pension and it was under consideration of the government. At this stage, the Government considered the claim of one Murugan, who was

engaged as Plot Watcher on daily wage basis in the Forest Department for a period of 20 years and retired on 30.09.2005. The service of the said Murugan was regularised on 27.03.2003, two years before his retirement and therefore, he could not get any pensionary benefits. The Government considered the representation submitted by the said Murugan as a special case and issued G.O. (D) No.332, Environment and Forest Department dated 19.11.2008 ordering that half of the services rendered by the said Murugan on daily wage basis be counted for the purpose of conferment of pensionary benefits. Following this Government Order, series of representations were made by those daily wage employees to count half of the service rendered by them on daily wage basis along with the regular service to enable them to get pension after their retirement. The Government also issued G.O. Ms. No.406, Finance (Pension) Department dated 25.08.2009 ordering that those who retired from service before 01.04.2003 are entitled for counting half of the service rendered by them on daily wage basis along with the regular service. By virtue of this Government Order, only a few of the daily wage employees, who retired before 01.04.2003 were benefited and others who retired after 01.04.2003 were aggrieved inasmuch as they could not get the benefit of counting half of the service rendered by them along with the regular service for the purpose of conferment of pension. While so, the Government issued a clarification letter dated 13.10.2009 whereby it ordered that irrespective of the cut off date, half of the service rendered by the employees on daily wage basis be taken into account for the purpose of conferment of pension. Therefore, as per the subsequent clarification issued by the Government on 13.10.2009, some of the employees were benefited for counting half of the service rendered by them as a daily wage

employee for the purpose of conferment of pension, even though their services were regularised after 01.04.2003. However, the Government letter dated 13.10.2009 was not implemented in letter and spirit in all the cases and the cut off date is being cited as a reason for not conferring the benefit of pension by counting half of the service rendered by the daily wage employees. According to the learned counsel, Rule 11 (4) of The Tamil Nadu Pension Rules provides that half of the service rendered under the daily wage establishment shall be reckoned and counted for the purpose of providing pensionary benefits and therefore, the cut off date imposed by the Government is contrary to Rule 11 (4) of the Tamil Nadu Pension Rules. Further, the amendment to Rule 11 (4) has been given effect to by virtue of the order passed in G.O. Ms. No.41 dated 09.02.2010 imposing the cut off date with retrospective effect from 01.04.2003. However, in between 01.04.2003 to 2010, those who retired from service were left in the lurch. There is no saving clause provided while issuing the amendment retrospectively. Whenever any amendment is brought in, either there should be a saving clause or the Government Order ought to have been issued retrospectively so that no one will be deprived of their service benefits. In effect, by virtue of the aforesaid G.O. Ms. No.41 dated 09.02.2010, the cut-off date was introduced for conferring the pensionary benefits and other service benefits to those who were regularised in service on or before 01.04.2003 and those who are regularised after 01.04.2003 were not conferred with any pensionary benefits. The Government by introducing the Contributory Pension Scheme (CPS) has left several persons employed on daily wage basis from the year 1975 without any pensionary benefits after their retirement.

(iii) The learned counsel for the petitioner also invited the attention of this Court to the order passed by this Court on 19.04.2011 in WP No. 8205 of 2011 and on 29.06.2011 in WP No. 13832 of 2011 directing the respondents therein to count half of the service rendered by the petitioners therein on daily wage basis along with regular service for conferment of pensionary benefits. As against the said orders, Writ Appeal Nos. 27 and 28 were filed by the Forest Department. The Division Bench of this Honourable Court, by common judgment dated 13.02.2012, dismissed the writ appeals and confirmed the orders passed in the writ petitions. According to the counsel, by raising the very same grounds, which were raised in WA Nos. 27 and 28, the Government has filed yet another appeal in W.A. No. 1633 of 2011 and it was dismissed by the Division Bench on 15.09.2011. Challenging the same, the Department filed Special Leave to Appeal (SLP) No. 6451 of 2012 and it was also dismissed by the Honourable Supreme court. Further, Writ Appeal Nos. 2 and 3 of 2012 were filed before the Division Bench of this Court as against the order passed by the learned single Judge and the Writ Appeals were dismissed on 11.01.2012. As against the same, SLP (Civil) Nos. 14838 and 14839 of 2012 were filed. The Special Leave Petitions were dismissed by the Honourable Supreme Court on 10.05.2012. The Government also filed Review Application before the Honourable Supreme Court and the same was also dismissed. Pursuant to the order passed by the Honourable Supreme Court, the Government passed G.O. (MS) No. 183, Environment and Forest Department dated 18.07.2012 implementing the order and conferred pensionary benefits to the writ petitioners therein. The learned counsel for the petitioner also invited the attention of this Court to the decision of the Division Bench of this Court in W.A. Nos. 518 of 2013 etc.,

dismissing the writ appeal filed by the Department on 16.04.2013. Thus, it is the contention of the counsel for the petitioner that when there are several orders passed by this Court conferring the benefit of counting half of the service rendered by the daily wage employees along with regular service, imposing a cut off date for such benefit is illegal and arbitrary.

(iv) The learned counsel further proceeded to contend that the Government passed several orders viz., (1) G.O. Ms. No.139, Environment and Forest (FR-2) Department dated 05.09.2013 complying with the order passed by this Court in (i) WP Nos. 14989, 14988, 14992 of 2012 dated 14.06.2012 (ii) WP Nos. 19781 and 19782 of 2012 dated 26.07.2012 (iii) WP Nos. 21049, 21050, 21051, 21052 and 21053 of 2012 dated 03.08.2012 (2) G.O. Ms. No.470, Environment and Forest (FR-2) Department dated 31.12.2013 implementing the order passed on 17.07.2012 in WP No. 17387 of 2012 (3) G.O. Ms. No.156, Environment and Forest (FR-2) Department dated 21.05.2014 implementing the order dated 12.07.2012 in WP No. 17806 of 2012. Thus, similarly placed persons like the petitioners were conferred with pensionary benefits and the writ petitioners alone are discriminated.

(v) The learned counsel for the writ petitioners further submitted that the Division Bench of this Honourable Court in the Judgment dated 27.03.2018 in WA (MD) Nos 51 of 2018 and 1431 and 1432 of 2017 etc., batch had an occasion to consider the argument of the Government to the effect that the earlier decisions of the Division Bench of this Court have been rendered without considering the effect of Rule 11 (4) of the Tamil Nadu Pension Rules and therefore those Judgments cannot be a ground for this Court to extend the benefit of counting half of the

service rendered on daily wage basis and that the daily wage employees, whose service was regularised after 01.04.2003 will be treated as a fresh appointees. According to the counsel for the writ petitioners, the Government also argued that in some of the cases, though Special Leave Petitions have been dismissed, it was an order of dismissal not on merits and therefore, the same does not have any binding precedent. The Division Bench of this Court, having regard to the above contentions, dismissed the appeals preferred by the State by the Judgment dated 27.03.2018 holding in Para No.25 of the Judgment that Rule 11 (4) is totally redundant in view of Rule 11 (2) which does not prescribe any cut off date as to absorption into regular service. Therefore, it was held that the benefits given under Rule 11 (2) cannot be deprived and taken away by Rule 11 (4) and thus the cut-off date prescribed in Rule 11 (4) should be ignored, otherwise, it will lead to grave injustice. According to the learned counsel, in the light of the above observation made by the Division Bench of this Court, the contention of the learned Advocate General appearing for the State that those daily wage employees, whose services were regularised on or after 01.04.2003, are to be treated as fresh appointees has to be rejected. The learned counsel appearing for the petitioners therefore prayed that this Court should answer the reference in the affirmative in favour of the writ petitioners to enable them to get pensionary benefits.

16. (i) Mr. R. Saseetharan, learned counsel appearing for the writ petitioners, who are respondents in W.A. No. 610 of 2016 etc., would contend that the Government enacted Tamil Nadu Pension Rules, 1978 with the object of disbursing pensionary benefits to its employees after their retirement and in the case of his or

her death to their surviving spouse. The object of enacting the Rules is to ensure that a employee, employed with the Government in his young days, is provided with a social security in the form of pensionary benefits. For the purpose of disbursement of pension, a minimum qualifying service is prescribed under Rule 43 (2), as per which, a Government servant, who rendered not less than 10 years of service, is entitled for monthly pension from the date of retirement as provided under the Table appended to the said Rule. This, according to the learned counsel for the petitioner is termed as Non Contributory Pension Scheme as the employees need not contribute anything to get monthly pension after his or her retirement. However, the Government introduced a new pension scheme under G.O. Ms. No.259, Finance (Pension) Department dated 06.08.2003 which is called Contributory Pension Scheme. As per this new scheme, defined contributions will be made by the employee as well as the employer/Government. As per G.O. Ms. No.430, Finance (Pension) Department dated 06.08.2004, it is mandatory for all the new employees who are recruited on or after 01.04.2003 to become members of the scheme and to contribute 10% of basic pay and dearness allowance from his or her salary to the Contributory Pension Scheme. As per clause (ii) of G.O. Ms. No.430, Finance (Pension) Department dated 06.08.2004, a matching contribution will be made by the State Government for each employee, who contributes to the scheme. The preamble portion of the new contributory pension scheme clearly indicates that this will be made applicable to those employees who are 'newly recruited' after 01.04.2003.

(ii) By referring to the term 'recruitment', the learned counsel proceeded to contend that Service Law Jurisprudence did not define the word 'recruitment'.

However, in the Judgment of the Full Bench of this Court in the case of **Government of Tamil Nadu, rep. by its Secretary, Education Department and others vs. Hepzi Vimalabai** reported in **ILR (1994) 3 Madras 769**, wherein the Full Bench of this Court held that recruitment is a process which would cover within its ambit all necessary steps commencing from the stage of notifying the vacancies and ending with appointment of selection of candidates. By referring to this Judgment, the learned counsel for the petitioner elaborated that the process of recruitment commences from filling up the existing vacancies or the estimated future vacancies, issuing notification, calling for applications from eligible candidates, seeking the list of candidates who have registered their names in the employment exchange, conducting written examination or skill test as the case may be, interviewing the candidates who are provisionally selected and publication of the final list of selectees. In such circumstances, the writ petitioners herein cannot be termed as a newly recruited candidate, who are recruited after 01.04.2003. Rather, the writ petitioners were working in various Departments of the Government for a long number of years as Village Librarian on full time basis on consolidated pay of Rs.1,000/- prior to 01.04.2003 after their names have been sponsored by the Employment Exchange. However, after rendering service for a decade, their service came to be regularised only after 01.04.2003. Therefore, at any stretch of imagination, the writ petitioners cannot be brought within the fold of 'newly recruited employees' as termed in the new contributory Pension Scheme introduced by the Government. Consequently, the writ petitioners are entitled for payment of pension as contemplated under Rule 43 (2) of The Rules inasmuch as the writ petitioners have put in more than ten years of service, they are entitled for payment of pension.

(iii) By referring to Rule 11, which deals with commencement of qualifying service, the learned counsel would contend that the qualifying service of the writ petitioners to which they are appointed either substantially or in an official or temporary capacity commences from the date of their appointment, whether in a temporary or officiating or permanent capacity. As per Rule 11 (2), even the employees who were appointed on contingency fund and whose service were regularised after 01.04.2003 are entitled for counting half of the service rendered in such contingency fund employment. Rule 11 (2) also specifically provides for counting half of the service rendered in the post paid from contingency fund, which would mean that the writ petitioners, who are appointed in a post to which remuneration was paid from contingency fund, are entitled for payment of pension and the new pension scheme will not be a bar for counting half of the service rendered by the writ petitioners in contingency fund employment. In this context, the learned counsel also placed reliance on the decision of the Division Bench of this Court in the case of **Government of Tamil Nadu, by its Principal Secretary to Government, Forest and Environment Department, and others vs. K. Sakthivel** reported in **(2018 (1) CWC 689)** wherein the Division Bench of this Court, by referring to series of Judgments passed by the Honourable Supreme Court, has held that Rule 11 (4) is totally redundant in view of Rule 11 (2), which does not prescribe any cut-off date as to absorption into regular service. The benefits given under Rule 11 (2) cannot be taken away by Rule 11 (4) and therefore, the cut-off date prescribed as 01.04.2003 for absorption in Rule 11 (4), should be ignored, otherwise, it will lead to grave injustice. The Division Bench of this Court, by referring to the decision of the Honourable Supreme Court in **Union of India vs. K.**

Punniyakoti reported in **(2014 (2) CTC 777 (DB)** held that 50% of the services rendered by the Daily wage employees should be considered for computing the total length of service. Ultimately, in para No.29 of this Judgment, the Division Bench held as follows:-

"29. As noticed above, the decision to bring the Writ Petitioners into Regular Time Scale of Pay, was taken in the year 1999 and the Writ Petitioners were extended the benefits in the year 1999. By then, several of them, had completed more than 30 years of service, as Daily Wagers. The past service was reckoned for the purpose of justifying their absorption into Regular Time Scale of Pay. Therefore, it will be a misnomer to state that the appointments made to the post of Forest Watchers is a fresh appointment. The stand taken by the Appellants in this regard is to be rejected by merely referring to the preamble portion of G.O. (Ms) No.64, dated 08.03.1999 and G.O. (Ms) No.95 dated 07.08.2009. Therefore, the said contention raised by the Appellants required to be outrightly rejected."

(iv) The learned counsel would further contend that several orders have been passed by the single bench as well as Division Bench of this Court by harmoniously interpreting G.O. Ms. No.259 dated 06.08.2003 and G.O. Ms. No. 430 dated 06.08.2004, Rule 11, 11 (2), 11 (4) to conclude that persons who were appointed before 01.04.2003 and regularised after 01.04.2003 cannot be construed as a fresh recruit disentitling them to get pension. Therefore, according to the learned counsel for the petitioner, a reasonable Rule of construction has to be adopted to hold that persons who were appointed before 01.04.2003 and whose services were regularised after 01.04.2003 are entitled for the benefit of pension. In this context, the learned counsel for the petitioner placed reliance on the decision of the Honourable Supreme Court in **Uttar Pradesh Power Corporation Limited**

vs. Ayodhya Prasad Mishra and another reported in **(2008) 10 Supreme Court**

Cases 139 to drive home the point that a Court of law would interpret a provision which would help in sustaining the validity of law by applying the doctrine of reasonable construction than accepting the interpretation, which may lead such provision unsustainable and ultravires the construction. For the same proposition the learned counsel relied on the decision rendered in **Tarsem Singh vs. Financial Commissioners, Appeals - I and others** reported in **(2006) 6 Supreme Court Cases 344** and **Maharashtra State Board of Secondary and Hr. Secondary Education and another vs. Paritosh Bhupeshkumar Sheth and others** reported in **(1984) 4 Supreme Court Cases 27** and contended that construction of Rule or procedure, which promote justice has to be preferred as against the one that result in miscarriage of justice. Further, even if the language of section is clear, unanimous and does not admit two interpretation, Rule has to be interpreted as in the statute book.

17. Mr. M.R. Jothimanian, learned counsel appearing for the writ petitioner, who is respondent in W.A. No. 1840 of 2018, would contend that the respondent was appointed as Plot Watcher in the Forest Department on 01.06.1986 on daily wage basis, his name was included in the State Wide Seniority List based on which his service was regularised in the cadre post of Forest Watcher on 07.08.2009. However, within few months of rendering service in the cadre post, the respondent retired on 31.05.2010, with the result, he could not get pensionary benefits. According to the learned counsel, the qualifying service for the purpose of conferment of pensionary benefits has to be calculated from the initial date of appointment of the respondent namely 01.06.1986 as has been contemplated

under Rule 11 (2) and half of the service rendered prior to regularisation of his service has to be calculated along with the regular service from 07.08.2009 for the purpose of conferment of pension. Merely because the service of the respondent was regularised after 01.04.2003 i.e., on 07.08.2009, it will not disentitle him to get half of the services rendered by him on daily wage basis prior to 01.04.2003 counted along with his regular service. The introduction of new pension scheme from 01.04.2003 will not negate the claim of the writ petitioner to get pensionary benefits by counting half of the service rendered by him from 01.06.1986 till 06.08.2009 to be counted along with the regular service rendered by him from 07.08.2009 till the date of his retirement on 31.05.2010. According to the learned counsel, even though the respondent had rendered about 23 years of service on daily wage basis, continuously, he was denied his pensionary benefits citing the cut off date imposed on 01.04.2003. In this context, the learned counsel relied on the decision rendered in the case of **Union of India vs. K. Punniyakoti and others** reported in **2014 (2) CTC 777** wherein the Division Bench of this Court held that the respondents therein cannot be treated as new employees for the purpose of conferment of pensionary benefits. The word "new entrant" has got a definite meaning i.e., a person already in service as contingent staff or temporary staff continuously and absorbed in permanent establishment cannot be construed as a new entrant and therefore, the new pension scheme can be applied only to persons appointed for the first time as casual or temporary or permanent employee. The learned counsel also relied on the Judgment dated 27.03.2018 passed by the Division Bench of this Court in W.A. (MD) No. 51 of 2018 and batch of cases holding that the regularisation of the daily wage employees in the year 2009 will not

disentitle them to get half of the services rendered by them on daily wage basis prior to 01.04.2003 for the purpose of conferment of pensionary benefits.

18.(i) Mr. P. Rajesh, learned counsel appearing for the writ petitioners, who are respondents in W.A. Nos. 314 to 317 and 343 of 2016, would contend that the word appointment, for the purpose of conferment of pensionary benefits to the respondents, who were employed on daily wage basis for long number of years prior to their regularisation after 01.04.2003, should be construed as the date on which they were appointed in the non-cadre post and not the date on which their service was regularised after 01.04.2003. Even as per G.O. Ms. No.22, P & AR Department dated 28.02.2006, the Government regularised the service of the daily wage employees on condition that they complete ten years of service. Further, after such regularisation, the half of the service rendered prior to regularisation was also taken into account for the purpose of conferment of pension. It is not an isolated case where half of the service rendered by the daily wage employee has been considered for the purpose of conferment of pension along with regular service but several such employees were benefited and they are in receipt of pension. To lend support to his submission, the learned counsel relied on the Judgment dated 09.09.2015 passed by the Division Bench of this Court in W.A. (MD) No. 760 of 2003 (*The Director, Local Fund Audit, Chennai - 600 106 and others vs. A.R.D. Nayagam*). In that case, the respondent therein was appointed in the year 1980 on daily wage basis and his service was regularised on 23.06.2006, after the cut off date. The Division Bench specifically held that the new pension scheme will not be applicable to the respondent and it is applicable only to the

newly recruited employees after 01.04.2003. Ultimately, the Division Bench dismissed the writ appeal filed by the appellant in that case.

(ii) The learned counsel also relied on the Judgment dated 21.04.2017 passed in W.A. (MD) Nos. 392 of 2015 etc., batch (*The State of Tamil Nadu, by its Secretary, School Education Department and others vs. G. Balasaraswathi and others*) wherein also, the Division Bench observed that the learned single Judge is right in holding that after several orders have been passed by the Division Bench, the State is not justified in relying on Rule 11 (4) of the Tamil Nadu Pension Rules, 1978 and that the Rule itself stands impliedly overruled. The relevant portion of the Judgment dated 21.04.2017 reads as follows:-

"10. The writ Court further observed that in the light of the decision of the Honourable First Bench, the Rule itself stands impliedly overruled. That apart, it was held that if the benefit is not granted, it would amount to discriminating the similarly placed persons. Further, the Writ Court noted that the Government has chosen to extend certain benefits in respect of part time workers as found in G.O. Ms. No.39, 13.06.2011 and therefore the benefit cannot be denied to part time vocational instructors by stating that the said Government Order is applicable to panchayat clerks and not to vocational instructors.

11. Learned Additional Government Pleader after elaborately referring to the factual matrix placed reliance on the decision of the Division Bench in the case of *The Principal Secretary, Social Welfare and Nutritious Meal Programme Department and others vs. M. Palanikani* made in W.A. Nos. 587 etc., batch dated 03.12.2014 and submitted that the Division Bench has allowed the appeals and set aside the order passed by the learned single Judge wherein relief was granted to count 50% of the services in the noon meal scheme

12. Firstly, we may point out that the terms of employment of staff in the noon meal scheme are not in *pari materia* with that of the terms of appointment of vocational instructors. This fact cannot be denied by the appellants. Furthermore, in paragraph 21 of the said Judgment, the Court framed the question which has to be decided with a specific reference and a cut off date which had been fixed namely 01.04.2003. Admittedly, all the writ petitioners were appointed much prior to the said date and the decision of the Honourable

Division Bench is factually distinguishable. Thus, we are of the considered view that the impugned order having been rendered by referring to and relying upon the decisions of the Honourable First Bench, we find no grounds to take a different view in the matter. Accordingly, the writ appeals are dismissed. No costs. Consequently, connected miscellaneous petitions are closed."

(iii) By relying upon the above decision of the Division Bench of this Court, the learned counsel would contend that notwithstanding the fact that the service of the writ petitioners were regularised after 01.04.2003, they are entitled for counting half of the service rendered on daily wage basis along with the regular service for the purpose of conferment of pensionary benefits and he prayed for answering the reference in favour of the writ petitioners.

19. Mr. Prem Narayan, learned counsel appearing for the writ petitioner, who is respondent in W.A. No. 1218 of 2018, would place reliance on Rule 11 of the Tamil Nadu Pension Rules and contend that the Contributory Pension Scheme introduced by the Government vide G.O. Ms. No.259, Finance (Pension) Department dated 06.08.2003 would apply only to the newly recruited employees and it has no application to the writ petitioner, who was appointed long before 01.04.2003 and got his service regularised after 01.04.2003. In other words, the respondent had put in 20 years of service prior to his regularisation on daily wage basis and therefore, he cannot be construed as a new appointee within the meaning of Rule 11 (4). Consequently, the respondent is entitled for counting half of the service rendered by him on daily wage basis along with his regular service for conferment of pension. Therefore, the learned counsel prayed for answering the reference in favour of the respondent herein.

20. (i) Countering the submissions made on behalf of the respective writ petitioners, the learned Advocate General appearing for the State would contend that the reference made to this Full Bench has to be answered in favour of the State. According to the learned Advocate General, at the outset, the writ petitioners were not appointed as per Rules and they were either appointed on casual basis, on Consolidated pay or as contingency-paid employees, employees on daily wages, honorarium etc., which did not confer them a right to get pension after regularisation of their service after 01.04.2003. Though the writ petitioners were employed prior to 01.04.2003 but their services were regularised only after the cut off date on 01.04.2003. By virtue of the cut-off date prescribed for conferment of pensionary benefits, the writ petitioners cannot claim the benefit conferred under Rule 11 (4). That apart, Rule 2 is a clear bar for the writ petitioners to claim the relief inasmuch as it clearly states that it does not apply to persons who were appointed after 01.04.2003. The learned Advocate General had invited the attention of this Court to Rule 2 which deals with applicability of the Rules. Proviso to Rule 2, makes it clear that it shall apply only to all Government servants appointed to services and posts in connection with the affairs of the State, which are borne on pensionable establishments, whether temporary or permanent. It does not apply to a) Persons in casual and daily rated employment b) Persons paid from contingencies c) Persons employed on contract except when the contract provides otherwise etc., Even the proviso to Rule 2 clearly states that it shall not apply to Government servants appointed on or after the 1st April 2003, to services and posts in connection with the affairs of the State which are borne on pensionable establishment, whether temporary or permanent. When such being

the case, in the absence of any challenge made to Rule 2 by any of the writ petitioner, Rule 2 operates as a clear bar for the writ petitioners to get half of their services rendered on daily wage or consolidated pay or honorarium along with the regular service rendered after 01.04.2003.

(ii) The learned Advocate General also submitted that the Government introduced New Contributory Pension Scheme and for the purpose of applicability of the said scheme to the various employees employed in the State, amendments were introduced to Tamil Nadu Pension Rules, 1978 with effect from 1st April 2003. As per the amendment, proviso was introduced to Rule 2 whereby the cut off date as 01.04.2003 was prescribed which adjudges the eligibility of the government servant to get pension as per the Rules. In fact, G.O.Ms.No.259 dated 06.08.2003 was subjected to challenge before a Division Bench of this Court in WP Nos. 9027 and 9035 of 2019 and this Court by judgment dated 10.06.2019 upheld that Government order by holding that the Government is well within its power to fix a cut off date for extending the Pension Rules and the employees cannot have any vested right over such fixation of the cut-off date.

(iii) The learned Advocate General would further contend that by virtue of proviso to Rule 2, the employees covered by sub-rule (2) of Rule 11 and who were absorbed in regular government service after 01.04.2003, are not entitled for getting the benefits conferred under the old Pension scheme, which was substituted by the contributory pension scheme from 01.04.2003.

(iv) Elaborating on the term 'appointed to a service' employed in proviso to Rule 2, the learned Advocate General would contend that it would refer only to regular appointments made as per the Rules and it will not cover casual, ad hoc or

stop gap appointees. Even in the context of clause (1) of Rule 2 of Part I - preliminary of erstwhile Tamil Nadu State and Subordinate Service Rules, a person is said to be appointed to a service when in accordance with the Rules or in accordance with the Rules applicable at the time, as the case may be, he discharges, for the first time, the duties of a post borne on the cadre of such service or commences the probation, instruction or training prescribed thereof. In the present case, the writ petitioners were not appointed in a post borne on the cadre. The writ petitioners were all along working as a casual workers and the question of declaration of probation of their service does not arise even though they have rendered long number of years of service. Therefore, the service of the writ petitioners cannot be treated akin to the one who was appointed to a service and discharged his duties in a post borne on the cadre or they were appointed in a sanctioned post. The writ petitioners also were not deputed for any training as in the case of regular government employees, whose promotion depends upon the completion of training or some other conditions attached to the post. Therefore, the writ petitioners cannot, by any stretch of imagination, be termed as the ones who were appointed to a service as provided under the proviso to Rule 2.

(v) Referring to Part II of General Rules of the Tamil Nadu State and Subordinate Service Rules, with reference to Rule 10 (a) (i) which deals with temporary appointments, the learned Advocate General would contend that such temporary appointments can be made where it is deemed that in the public interest, owing to an emergency it becomes necessary to immediately fill a vacancy in a post borne on the cadre of a service, class or category and taking note of the fact that filling up such post by following the procedures would cause undue delay, the

appointing authority was empowered to appoint a person provided he or she possess prescribed qualifications for the post. Admittedly, the writ petitioners herein were not appointed as contemplated under Rule 10 (a) (i) which alone can be considered as temporary appointment or service. The fact that the writ petitioners were not appointed as contemplated under Rule 10 (a) (i) is not disputed by the writ petitioners. Therefore, the writ petitioners, who are employed as daily wage employees or contingent employees is totally different from that of the persons who are appointed as per Rule 10 (a) (i). The appointment of the writ petitioners therefore cannot be regarded as temporary appointment for the purpose of Rule 2 and the proviso thereto as well as Rule 3 (o) and Sub-rule (1) of Rule 11 of the Rules.

(vi) The learned Advocate General also brought to the notice of this Court that the Government introduced new contributory pension scheme with effect from 01.04.2003 based on defined contribution to be made by the employees who are recruited after 01.04.2003. The old scheme which is wholly based on the contributions made from the employees alone has come to an end as on 31.03.2003. The writ petitioners, whose services were regularised after 01.04.2003 will therefore fall only within the scope and ambit of the new contributory pension scheme and whatever amount they might contribute towards the pensionary accumulation will be paid to them after their retirement. In such circumstances, the question of counting half of the service rendered by the writ petitioners prior to 01.04.2003 will not arise.

(vii) With respect to the contradictions brought to the notice of this Court between sub-rule (2) and sub-rule (4) of Rule 11, the learned Advocate General

would contend that sub-Rule 2 enables counting half of the service paid from contingency fund and such payment shall be either monthly wages or daily wages as indicated in clause (iii) of Sub-rule (2) of Rule 11. Subsequently, by incorporating sub-rule (3) in Rule 11, the very same benefit conferred under sub-rule (2) was extended to government servants working in non-pensionable establishment subject to similar conditions prescribed in sub-rule (2). Thereafter, sub-rule (4) was inserted in Rule 11 extending the aforesaid benefit to services rendered in non-provincialised service, consolidated pay, honorarium or daily wages basis. All the above categories of employees are merely casual employees and wages in respect of those covered under sub-rule (4) is being paid from and out of the contingencies. Thus, the common intention in enacting sub-rules (2) to (4) of Rule 11 is to enable the persons specified therein to count half of the services. However, the condition for availing such concession is that the employees should have been absorbed in regular government service prior to 01.04.2003 and those who were regularised after 01.04.2003 cannot avail such benefits. This is more so that at the time of incorporation of sub-rule (4) to Rule 11, the proviso to Rule 2 has been enacted whereby a cut off date as 01.04.2003 was made as the date for applicability of the Rules. In other words, Rule 11 (4) does not prescribe any new cut off date with retrospective effect but it only reinforces the condition already stipulated to the proviso to Rule 2. Therefore, even if Sub-rule (4) of Rule 11 is ignored as redundant, then the proviso to Rule 2 will come into force which specifically disqualify the persons specified in Rule 11 (4) from claiming the benefits under the old pension scheme. Therefore, it is submitted by the learned Advocate General that there is no discrimination between the persons who are

covered under Rule 11 (2) or (4) in any manner. In such circumstances, a harmonious construction of these Rules, as contended by the counsel for the petitioners, is not warranted.

(viii) As regards the decisions rendered by the single Bench as well as Division Bench of this Court in various orders directing the State to count half of the service rendered by the daily wage employees rendered prior to 01.04.2003 along with the regular service after 01.04.2003, the learned Advocate General would contend that at the time of passing the orders, neither was it brought to the notice of this Court that Rule 11 (4) has not been challenged by the petitioners nor were the proviso to Rule 2 brought to the notice of this Court. In the absence of any challenge to the Rules, which operates as a clear bar for the writ petitioners to get half of the service rendered on daily wage employment counted for the purpose of conferment of pensionary benefits along with the regular service, they are not entitled to question the same. In this context, the learned Advocate General relied on the decision of the Supreme Court in the case of **Supreme Court Bar Association vs. Union of India** reported in **1998 (4) Supreme Court Cases 409** wherein it has been held as follows:-

56. As a matter of fact, the observations on which emphasis has been placed by us from the *Union Carbide case* [(1991) 4 SCC 584] , *A.R. Antulay case* [(1988) 2 SCC 602 : 1988 SCC (Cri) 372] and *Delhi Judicial Service Assn. case* [(1991) 4 SCC 406 : (1991) 3 SCR 936] go to show that they do not strictly speaking come into any conflict with the observations of the majority made in *Prem Chand Garg case* [AIR 1963 SC 996 : 1963 Supp (1) SCR 885] . It is one thing to say that “prohibitions or limitations in a statute” cannot come in the way of exercise of jurisdiction under Article 142 to *do complete justice* between the parties in the pending “cause or matter” arising out of that statute, but quite a different thing to say that while exercising jurisdiction under Article 142, this Court can altogether *ignore* the substantive provisions of a statute, dealing with the subject and pass orders

concerning an issue which can be settled only through a mechanism prescribed in another statute. This Court did not say so in *Union Carbide case* [(1991) 4 SCC 584] either expressly or by implication and on the contrary it has been held that the Apex Court *will take note of the express provisions of any* substantive statutory law and regulate the exercise of its power and discretion accordingly. We are, therefore, unable to persuade ourselves to agree with the observations of the Bench in *V.C. Mishra case* [(1995) 2 SCC 584] that the law laid down by the majority in *Prem Chand Garg case* [AIR 1963 SC 996 : 1963 Supp (1) SCR 885] is “no longer a good law”.

(ix) By referring to the above decision, the learned Advocate General would contend that the writ petitioners have not chosen to challenge Rule 11 (4) and in the absence of the same, the State cannot be directed to count half of the service rendered by the writ petitioners prior to their regularisation along with their regular service after 01.04.2003.

(x) The learned Advocate General would further contend that the cut off date prescribed as 01.04.2003 in the proviso to Rule 2 is having a nexus to the object sought to be achieved by the State and therefore, it cannot be termed as arbitrary or discriminatory. The cut off date imposed by the Government satisfies the twin test of valid classification of casual employees based on the date of their regularisation. In any event, according to the learned Advocate General, the prescription of Rule 11 (4) is merely a repetition of provisions already contained in the proviso to Rule 2 and it would not be construed as imposing a new restriction to count half of the services rendered by daily wage employees for the purpose of pension.

(xi) The learned Advocate General would further contend that the contention of the writ petitioners that most of the orders passed by this Court had been implemented by the Government and therefore refusing to extend similar

benefits in favour of the writ petitioners covered under this batch is discriminatory or arbitrary need not be considered. According to the learned Advocate General, the orders passed by this Court cannot be cited as a binding precedent as those orders have not been passed by considering Rule 11 (2) or the proviso to Rule 2. Most of the orders have been passed by citing the similar orders passed in earlier cases and therefore, the earlier orders passed by this Court will not in any way put against the State to confer the pensionary benefits to the petitioners, as claimed. In this context, the learned Advocate General relies on the decision of the Honourable Supreme Court in the case of **Col. (Retd) B.J. Akkara vs. The Government of India** reported in **2006 (11) Supreme Court Cases 709** to contend that merely because the State Government had implemented the orders passed by this Court will not *ipso facto* confer the writ petitioners a right to claim the same benefit.

(xii) The learned Advocate General also relied on the decision of the Honourable Supreme Court in **Ram Kumar and others vs. Union of India and others** reported in **1998 (1) Supreme Court Cases 306** wherein it was held as follows:-

".....It is the stand of the learned Additional Solicitor General that no pensionary benefits are admissible even to temporary railway servants and, therefore, that retiral advantage is not available to casual labour acquiring temporary status. We have been shown the different provisions in the Railway Establishment Manual as also the different orders and directions issued by the Administration. We agree with the learned Additional Solicitor General that retiral benefit of pension is not admissible to either category of employees."

(xiii) Further reliance has been placed in the Judgment of the Honourable Supreme Court in the case of **General Manager, North West Railways and others vs. Chanda Devi** reported in **(2008 (2) Supreme Court Cases 108)**

wherein it has been held as follows:-

"...It is for the legislature to put the employees to an establishment in different categories. It may create a new category to confer certain benefits to a particular class of employees. Such a power can be exercised also by the Executive for making rules under the proviso appended to Article 309 of The Constitution of India. *Dakshin Railway Employees Union, Trivandrum Division vs. General Manager, Southern Railway and others* (1987) 1 Supreme Court Cases 677, whereupon reliance has been placed by the Gujarat High Court in *Rukhiben Rupabai (supra)* does not lead to the said conclusion as was sought to be interfered by it. The question therein was as to whether any direction was to be issued to include the petitioners therein in the scheme for absorption as formulated pursuant to the directions of the Court.

What was protected by conferring temporary status upon a casual employee was his service and by reason thereof the pension rules were not made applicable. A workman had not been and could not have been given a status to which he was not entitled to."

(xiv) The learned Advocate General, by referring to the above decisions, would submit that when the Statute operates as a bar for the writ petitioners to claim pensionary benefits under the old Pension Scheme, the Government cannot be compelled to confer such benefit upon them contrary to the statute. The orders hitherto passed by this Court in favour of similarly placed persons like the writ petitioners cannot be cited as a binding precedent to extend similar benefits in favour of the writ petitioners as well.

(xv) Lastly, the learned Advocate General has brought to the notice of this Court the difference in the publication of Rule 1, 2 and 11 in the text book edited by private publishers to that of the one released by the Finance Department of Government of Tamil Nadu. According to the learned Advocate General, the incorrect publication or rather an erroneous publication of Rule 1, 2 and 11 in the Text Book published by the Private Publishers is contrary to the one intended by the legislators which is aptly published in the book released by the Finance

Department of Government of Tamil Nadu. The learned Advocate General placed heavy reliance on the text book and contended that this Court had no occasion to consider the correct provision of law relating to Rule 1, 2 and 11 and this had led to passing of several orders in favour of the writ petitioners. The learned Advocate General therefore prayed for answering the reference in favour of the State.

21. By way of reply to the arguments advanced by the learned Advocate General that the books available in the market had printed Rules incorrectly which led to the passing of several orders by this Court, the learned counsel for the respective writ petitioners would submit that even if it is so, the Rules have to be interpreted on the basis of the spirit with which it was enacted and not on the basis of the wordings printed thereof. It is further submitted that Rule 11 (1) and 11 (2) have to be read along with Rule 3 (o) and not in isolation. When Rule 3 (o) is read with Rule 11 (1), then half of the service rendered by the writ petitioners can be counted along with the regular service for the purpose of conferment of pensionary benefits. Even otherwise, by virtue of series of orders passed by this Court, both by the single bench as well as the Division Bench, several daily wage employees were conferred with pensionary benefits and therefore, the petitioners cannot be discriminated. The remedy granted in favour of the persons similarly placed like the writ petitioners is a remedy in rem and it is not a remedy in personem. In such circumstances, the learned counsel for the petitioners prayed for answering the reference in such a manner that the writ petitioners are entitled to get half of their service rendered by them on daily wage basis counted along with the regular service after 01.04.2003.

22. We have heard at length the submissions of the learned counsel appearing for the respective writ petitioners and the learned Advocate General appearing for the State and we have given our anxious consideration to the same.

23. The learned Advocate General appearing for the State has brought to our notice that Rule 11 has been erroneously printed in the text book by private publishers which has also led to confusion. The learned Advocate General has also brought to the notice of this Court the glaring difference in the publication of Rule 11 in the text book published by private publishers and that the one released by the Finance Department of Government of Tamil Nadu. The learned Advocate General has also handed over a copy of The Tamil Nadu Pension Rules - Third Edition published by Finance Department, Government of Tamil Nadu and we have gone through the same. It is apparent that there are vast difference in the book published by the private publishers and the one produced to us, which was published by the Finance Department of the Government, which had gone unnoticed all these years. The relevant provisions of the Rules are re-produced.

Rule 1, 2 and 11, as printed in the text book published by private publishers	Rule 1, 2 and 11, as printed in the book published by Finance Dept, Government of Tamil Nadu
"The Tamil Nadu Pension Rules, 1978 Chapter-I Preliminary 1. Short title and commencement:- (1) These rules may be called the Tamil Nadu Pension Rules, 1978. (2) they shall be deemed to have come into force on the 1st January 1979.	"The Tamil Nadu Pension Rules, 1978 Chapter-I Preliminary 1. Short title and commencement:- (1) These rules may be called the Tamil Nadu Pension Rules, 1978 (2) They shall be deemed to have come into force on the 1st January 1979

Rule 1, 2 and 11, as printed in the text book published by private publishers	Rule 1, 2 and 11, as printed in the book published by Finance Dept, Government of Tamil Nadu
Provided that these rules shall not apply to Government servants appointed on or after the 1st April 2003, to services and posts in connection with the affairs of the State which are borne on pensionable establishments, whether temporary or permanent. 2. Application:- Save as otherwise provided in these rules, these Rules shall apply to all Government servants appointed to services and posts in connection with the affairs of the State, which are borne on pensionable establishments, whether temporary or permanent, but shall not apply to-- - Persons in casual and daily rated employment - Persons paid from contingencies - Persons employed on contract except when the contract provides otherwise; - Members of the All-India Services; - Persons entitled to the benefit of a Contributory Provident Fund; - Persons who are entitled to the benefits under the Factories Act, 1948 and the Employees Provident Fund Act, 1952 excluding those who are governed by Statutory Service Rules and belong to pensionable service	2. Application:- Save as otherwise provided in these rules, these Rules shall apply to all Government servants appointed to services and posts in connection with the affairs of the State, which are borne on pensionable establishments, whether temporary or permanent, but shall not apply to-- - Persons in casual and daily rated employment - Persons paid from contingencies - Persons employed on contract except when the contract provides otherwise; - Members of the All-India Services; - Persons entitled to the benefit of a Contributory Provident Fund; - Persons who are entitled to the benefits under the Factories Act, 1948 and the Employees Provident Fund Act, 1952 excluding those who are governed by Statutory Service Rules and belong to pensionable service <u>Provided that these rules shall not apply to Government servants appointed on or after the 1st April 2003, to services and posts in connection with the affairs of the State which are borne on pensionable establishment, whether temporary or permanent. (emphasis supplied)</u>

Rule 1, 2 and 11, as printed in the text book published by private publishers	Rule 1, 2 and 11, as printed in the book published by Finance Dept, Government of Tamil Nadu
3. <i>Definitions</i>:-- In these rules, unless the context otherwise requires- (o) '<i>Qualifying service</i>' means permanent or officiating service (including temporary service under emergency provisions) rendered in a post included in a pensionable establishment; Chapter-III <u>Qualifying Service:-</u> 11. Commencement of qualifying services:- (1) Subject to the provisions of these rules, qualifying service of a Government servant shall commence from the date he takes charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity. In the case of a Government servant retiring on or after the first October 1969, temporary or officiating service in the pensionable post whether rendered in a regular capacity or not shall count in full as qualifying services even if it is not followed by confirmation.	3. <i>Definitions</i>:-- In these rules, unless the context otherwise requires- (o) '<i>Qualifying service</i>' means permanent or officiating service (including temporary service under emergency provisions) rendered in a post included in a pensionable establishment; Chapter-III <u>Qualifying Service:-</u> 11. Commencement of qualifying services:- (1) Subject to the provisions of these rules, qualifying service of a Government servant shall commence from the date he takes charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity. In the case of a Government servant retiring on or after the first October 1969, temporary or officiating service in the pensionable post whether rendered in a regular capacity or not shall count in full as qualifying services even if it is not followed by confirmation. Note :- In the case of the employees of the former Pudukottai State and persons transferred from the former Travancore-Cochin State consequent on the reorganisation of States, temporary or officiating service rendered in a regular capacity under the former Pudukottai State or the former Travancore-Cochin State shall count in full for purposes of pension. Provided that- (a) in the case of a Government servant, service rendered before attaining the age of eighteen

Rule 1, 2 and 11, as printed in the text book published by private publishers	Rule 1, 2 and 11, as printed in the book published by Finance Dept, Government of Tamil Nadu
	years shall not count, except for compensation gratuity; (b) in the case of a Government servant whose year and month of birth are known, but not the exact date the 16th of the month should be treated as the date of birth. When the year of birth is known but not the month and date 1st July of the year shall be taken (c) in the case of a Government servant with no military service who gives on recruitment only his age, but not the year of his birth, the year should be arrived at by deducting from the year of recruitment the given age and then the date of birth should be taken as the 1st July of that year; Provided further that in the case of a Government servant with previous military service the date of birth is fixed as laid down below. When a military employee is transferred to a civil department under the Government and assumes a civilian status, the date of birth to be entered in his service book should be the date stated by him at the time of attestation. When the documents referring to the previous military service of an individual do not give the definite date of birth but only the age stated at the time of attestation, he should be assumed to have completed the stated age on the date of attestation e.g., if ex-soldier was enrolled on 1st January 1910 and if on that date, his age was stated to be 18, his date of birth should be taken as 1st January 1922. This procedure will apply to cases arising on or after 27th June 193.

Rule 1, 2 and 11, as printed in the text book published by private publishers	Rule 1, 2 and 11, as printed in the book published by Finance Dept, Government of Tamil Nadu
(2) Half of the service paid from contingencies shall be allowed to count towards qualifying service for pension along with regular service subject to the following conditions:- (i) Service paid from contingencies shall be in a job involving whole time employment and not part-time for a portion of the day (ii) Service paid from contingencies shall be in a type of work or job for which regular posts could have been sanctioned, for example Chowkidar (iii) Service shall be for which the payment is made out on monthly or daily rates computed and paid on a monthly basis and which, though not analogous to the regular scale of pay, shall bear some relation in the matter of pay to those being paid for similar jobs being performed by staff in regular establishment. (iv) Service paid from contingencies shall be continuous and followed by absorption in regular employment without a break (v) Subject to the above	Notwithstanding anything contained above, in cases where S.S.L.C. or any other school certificate is available, the date of birth, as entered therein should be taken into account. <i>Explanation:-</i> For the purpose of date of birth the word 'attestation' refers only to the initial records kept by the Defence Department at the time of appointment of the individual and not in the discharge from the discharge the Defence Department. (2) Half of the service paid from contingencies shall be allowed to count towards qualifying service for pension along with regular service subject to the following conditions:- (i) Service paid from contingencies shall be in a job involving whole time employment and not part-time for a portion of the day (ii) Service paid from contingencies shall be in a type of work or job for which regular posts could have been sanctioned, for example Chowkidar (iii) Service shall be for which the payment is made out on monthly or daily rates computed and paid on a monthly basis and which, though not analogous to the regular scale of pay, shall bear some relation in the matter of pay to those being paid for similar jobs being performed by staff in regular establishment. (iv) Service paid from contingencies shall be continuous and followed by absorption in regular employment without a break (v) Subject to the above conditions being fulfilled, the

Rule 1, 2 and 11, as printed in the text book published by private publishers	Rule 1, 2 and 11, as printed in the book published by Finance Dept, Government of Tamil Nadu
conditions being fulfilled, the weightage for past service paid from contingencies shall be limited to the period after the 1st January 1961 for which authentic records of service may be available. (vi) Pension or revised pension admissible as the case shall be paid from 23rd June 1988. (3) Half of the service rendered by a Government servant under non-pensionable establishment shall be allowed to be counted for pensionary benefits along with regular service under pensionable establishment subject to the following conditions:- (i) Service under non-pensionable establishment should have been in a job involving whole time employment (ii) The service under non-pensionable establishment should have been on time scale of pay and (iii) The service under non-pensionable establishment should have been continuous and followed by absorption in pensionable establishment without a break Note :- In the case of the employees of the former Pudukottai State and persons transferred from the former Travancore-Cochin State consequent on the reorganisation of States, temporary or officiating service rendered in a regular capacity under the former Pudukottai State or the former Travancore-Cochin State shall count in full for purposes of pension. Provided that- (a) in the case of a Government servant, service rendered	weightage for past service paid from contingencies shall be limited to the period after the 1st January 1961 for which authentic records of service may be available. (vi) Pension or revised pension admissible as the case shall be paid from 23rd June 1988. (3) Half of the service rendered by a Government servant under non-pensionable establishment shall be counted for retirement benefits along with regular service under pensionable establishment subject to the following conditions:- (i) Service under non-pensionable establishment shall be in a job involving whole time employment (ii) Service under non-pensionable establishment shall be on time scale of pay and (iii) Service under non-pensionable establishment shall be continuous and followed by absorption in pensionable establishment without a break Provided that in respect of those who retired prior to the 14th February 1996, the retirement benefit or revised retirement benefit, as the

Rule 1, 2 and 11, as printed in the text book published by private publishers	Rule 1, 2 and 11, as printed in the book published by Finance Dept, Government of Tamil Nadu
before attaining the age of eighteen years shall not count, except for compensation gratuity; (b) in the case of a Government servant whose year and month of birth are known, but not the exact date the 16th of the month should be treated as the date of birth. When the year of birth is known but not the month and date 1st July of the year shall be taken (c) in the case of a Government servant with no military service who gives on recruitment only his age, but not the year of his birth, the year should be arrived at by deducting from the year of recruitment the given age and then the date of birth should be taken as the 1st July of that year; Provided further that in the case of a Government servant with previous military service the date of birth is fixed as laid down below. When a military employee is transferred to a civil department under the Government and assumes a civilian status, the date of birth to be entered in his service book should be the date stated by him at the time of attestation. When the documents referring to the previous military service of an individual do not give the definite date of birth but only the age stated at the time of attestation, he should be assumed to have completed the stated age on the date of attestation e.g., if ex-soldier was enrolled on 1st January 1910 and if on that date, his age was stated to be 18, his date of birth should be taken as 1st January 1928. This procedure will apply to cases arising on or after 27th June 193. Notwithstanding anything	case may be, admissible to them shall be paid from the 14th February, 1996 and there shall be no claim for arrears in any case, for the period upto the 13th February 1996.

Rule 1, 2 and 11, as printed in the text book published by private publishers	Rule 1, 2 and 11, as printed in the book published by Finance Dept, Government of Tamil Nadu
contained above, in cases where S.S.L.C. or any other school certificate is available, the date of birth, as entered therein should be taken into account. <i>Explanation:-</i> For the purpose of date of birth the word 'attestation' refers only to the initial records kept by the Defence Department at the time of appointment of the individual and not in the discharge from the discharge the Defence Department. No.SRO B-19/2010 - In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, the Governor of Tamil Nadu hereby makes the following amendment to the Tamil Nadu Pension Rules, 1978 AMENDMENT In the said Rules, in rule 11, after sub-rule (3) the following sub-rule shall be added namely (4) Half of the service rendered under the State Government in non-provisionalised service, consolidated pay, honorarium or daily wages basis on or after 1st January 1961 in respect of Government employees absorbed in regular service before 1st April shall be counted for retirement benefits along with regular service, subject to the following conditions, namely:- (i) Service rendered in non-provisionalised service, consolidated pay, honorarium or daily wage basis shall be in a job involving whole time employment (ii) Service rendered shall be on consolidated pay, honorarium or daily wage basis paid on monthly basis and subsequently absorbed in regular	(4) Half of the service rendered under the State Government in non-provisionalised service, consolidated pay, honorarium or daily wages basis on or after 1st January 1961 in respect of Government employees absorbed in regular service before 1st April 2003 shall be counted for retirement benefits along with regular service, subject to the following conditions, namely:- (i) Service rendered in non-provisionalised service, consolidated pay, honorarium or daily wage basis shall be in a job involving whole time employment (ii) Service rendered shall be on consolidated pay, honorarium or daily wage basis paid on monthly

Rule 1, 2 and 11, as printed in the text book published by private publishers	Rule 1, 2 and 11, as printed in the book published by Finance Dept, Government of Tamil Nadu
service under the State Government; (iii) Service rendered in non-provisionalised service, consolidated pay, honorarium or daily wage basis shall be followed by absorption in regular service Provided that this sub-rule is applicable to all employees who rendered service	basis and subsequently absorbed in regular service under the State Government; (iii) Service rendered in non-provisionalised service, consolidated pay, honorarium or daily wage basis shall be followed by absorption in regular service Provided that this sub-rule is applicable to all employees who rendered service under the State Government in non-provincialised service, consolidated pay, honorarium or daily wages basis on or after 1st January 1961 and absorbed in regular service before 1st April 2003. Provided further that wherever there was break in service before their absorption in regular service before 1st April 2003, the same shall be specifically condoned by the orders of the Heads of Departments, in which the employees were regularly absorbed and such period of break, shall not be counted for the purpose of pensionary benefits.

24. As per Rule 2 of the Tamil Nadu Pension Rules, 1978, pension is available to all Government Servants **“appointed to services and posts”** in connection with the affairs of the State which are borne on pensionable establishments. It excludes the following category of persons:-

- i. Persons in causal and daily rated employment;
- ii. Persons paid from contingencies;

- iii. Persons employed on contract except when the contract provides otherwise;
- iv. Members of the All-India Services;
- v. Persons entitled to the benefit of a Contributory Provident Fund;
- vi. Persons who are entitled to the benefits under the Factories Act, 1948 and the Employees Provident Fund Act, 1952 excluding those who are governed by Statutory Service Rules and belong to pensionable service;

25. The expression “**appointed to service and post**” in Rule 2 of the Tamil Nadu Pension Rules, 1978 is not defined. However, the expression 'appointed to service' is defined in Rule 2 (1) of the Tamil Nadu State and Subordinate Service Rules which reads as follows:-

Tamil Nadu State and Subordinate Services Rules

Part I
PRELIMINARY

2. **Definition:-** In these rules, unless there is anything repugnant in the subject or context,

(1) *"appointed to a service" A person is said to be 'appointed' to a service' when in accordance with these rules or in accordance with the rules applicable at the time, as the case may be, he discharges, for the first time the duties of a post borne on the cadre of such service or commences the probation, instruction or training prescribed for members thereof.*

Explanation:- The appointment of a person holding a post borne on the cadre of one service to hold additional charge of a higher post in the same service or a post borne on the cadre of another service or to discharge the current duties thereof does not amount to appointment to the latter service.

.....

26. We also wish to refer to the definition 'temporary appointments' defined in Rule 10 (a) (i) of The Tamil Nadu State and Subordinate Service Rules, which reads as follows:-

GENERAL RULES

10. *Temporary appointments:- Sub-rule (a) (i) (1) Where it is necessary in the public interest owing to an emergency which has arisen to fill immediately a vacancy in a post-borne on the cadre of a service, class or category and there would be undue delay in making such appointment in accordance with these rules and the Special Rules, the appointing authority may temporarily appoint a person, who possesses the qualifications prescribed for the post otherwise than in accordance with the said Rules.*

Provided that no appointment by direct recruitment under this clause shall be made of any person other than the one sponsored by the Tamil Nadu Public Service Commission from its regular or reserve list of successful candidates to any of the posts within the purview of the Tamil Nadu Public Service Commission

(2) Omitted vide G.O. Ms. No.21, P&AR Dept. dated 23.01.1996 wef 23.01.1996

Provided further that appointment by direct recruitment under this clause (1) in respect of posts within the purview of Tamil Nadu Public Service Commission shall be made, only where new posts with new qualifications are created temporarily and where the Tamil Nadu Public Service Commission does not have a regular or reserve list of successful candidates for sponsoring.

27. Rule 2 of the Tamil Nadu Pension Rules, 1978 was amended in the year 2003 vide G.O.Ms.No.259 dated 06.08.2003. Text of the said proviso reads as under:-

[Provided that these rules shall not apply to Government servants **appointed on or after the 1st April 2003**, to services and posts in connection with the affairs of the State which are borne on pensionable establishment, whether temporary or permanent.]

(already extracted above by way of chart)

28. A further amendment was introduced to the said Rules in the year 2010 whereby a new Sub-Rule (4) was added after Sub-Rule (3) to Rule 11 of the said Rules, vide G.O.No.41, Finance (Pension) Department dated 08.02.2010

which reads as follows:-

*(4) Half of the service rendered under the State Government in non-provincialised service, consolidated pay, honorarium or daily wages basis on or after 1st January 1961 in respect of Government employees absorbed in regular service before 1st April 2003 shall be counted for retirement benefits **along with regular service**, subject to the following conditions, namely:-*

"i) Service rendered in non-provincialised service, consolidated pay, honorarium or daily wages basis shall be in a job involving whole time employment;

ii) Service rendered shall be on consolidated pay, honorarium or daily wages basis paid on monthly basis and subsequently absorbed in regular service under the State Government;

iii) Service rendered in non-provincialised service, consolidated pay, honorarium or daily wages basis shall be followed by absorption in regular service before 1st April 2003 without a break."

Provided that this sub-rule is applicable to all employees who rendered service under the State Government in non-provincialised service, consolidated pay, honorarium or daily wages on or after 1st January 1961 and absorbed in regular service before 1st April 2003.

Provided further that wherever there was break in service before their absorption in regular service before 1st April 2003, the same shall be specifically condoned by the orders of the Head of Departments, in which the employees were regularly absorbed and such period of break, shall not count for the purpose of pensionary benefits.)

(already extracted above by way of chart)

29. Having regard to the above rule position, we proceed to examine the claim of the writ petitioners. Admittedly, the writ petitioners herein were appointed in various departments of the Government in non-provincialised services, on consolidated pay, honorarium or daily wage basis, on contingency basis. They

were not appointed against any sanctioned post or regular post. For having rendered such service, they were paid daily wage or wages from the contingency fund. To be specific, the writ petitioners were not appointed in a cadre post whether on temporary or permanent basis against vacancies which were duly notified. They were appointed on daily wage basis prior to 01.04.2003 on various dates. The service of some of the petitioners were also admittedly regularised after 01.04.2003 in a cadre post as and when permanent vacancies arose or had been notified. The writ petitioners therefore claimed that they are entitled to count half of the service rendered by them on daily wage basis or as contingent employees or on honorarium basis or in non-provincialised services etc. along with the regular service as has been contemplated under Rule 11 (4). The petitioners also claimed equity on par with one Murugan, in whose favour, the Government passed G.O. (D) No.332, Environment and Forest Department dated 19.11.2008 by which the service rendered by the said Murugan, on daily wage basis for about 20 years was ordered to be counted along with his regular service rendered by him till his retirement on 30.09.2005. In other words, even though the service of the said Murugan was regularised after 01.04.2003, yet, as a special case, the Government issued G.O. (D) No.332, Environment and Forest Department dated 19.11.2008 and ordered to count half of the service rendered by him on daily wage basis along with his regular service. This had apparently sparked and/or kick-started a volley of writ petitions to be filed before this Court at the instance of persons similarly placed like the writ petitioners in this batch. This Court had also, based on the order passed by the Government in G.O. (D) No.332, Environment and Forest Department dated 19.11.2008 directed the Government to count half of the service

rendered by the persons similarly placed like the petitioners along with their regular service, purportedly on the ground of equity. The State Government filed writ appeals before the Division Bench of this Court, as against few cases in which such directions were issued by the single Bench.

30. Learned Advocate General submitted that Rule 11 (4) makes it clear that Government employees, whose services were regularised before 01.04.2003 are not entitled to government pension .

31. On behalf of the writ petitioners, it was contended that the writ petitioners have been temporarily employed with nomenclature such as daily wage employees, on consolidated pay or on honorarium basis etc. and as per Rule 11 (1) the service rendered by them in such temporary employment has to be counted along with the regular service in a cadre post. We wish to observe that the word temporary or officiating service employed in Rule 11 (1) is referable to 'temporary appointment' contemplated under Rule 10 (a) (i) of Tamil Nadu State and Subordinate Services Rules. On a reading of Rule 10 (a) (i), the wordings employed thereof are explicit and clear. A temporary appointment made to a government service is the one which is made in a post borne on the cadre of a service, class or category, meaning thereby such temporary appointment is made in an existing vacancy or notified vacancy. Rule 10 (a) (i) further makes the position clear that such appointment is permissible to be made by the appointing authority in case of emergency to fill the vacancy, in public interest. For such appointment, the appointing authority has to form an opinion that the procedural process for

appointment to the cadre post will take some time and that such delay would prejudice the public interest. In such circumstances, Rule 10 (a) (i) can be invoked for appointing a candidate on temporary appointment in a sanctioned post. The service of such person, though appointed on temporary appointment can later be regularised by following the due procedure. The significance for invoking Rule 10 (a) (i), apart from public interest, is the existence of sanctioned post or vacancy in a post borne on the cadre of a service, class or category. Thus, Rule 10 (a) (i) cannot be invoked in the absence of an existing vacancy in a cadre post. Therefore, we are of the view that the temporary appointment mentioned in Rule 11 of the Pension Rules, in the realm of Service Law Jurisprudence, is referable only to Rule 10 (a) (i) of the Tamil Nadu State and Subordinate Services. The writ petitioners were however appointed on daily wage basis on payment of honorarium or consolidated pay and did not come within the fold of Rule 10 (a) (i) of the Tamil Nadu State and Subordinate Services Rules. Only the appointments made under the provisions of Rule 10 (a) (i) of the aforesaid Rules alone can be considered as temporary appointment. Therefore, the submissions made on behalf of the petitioners relying upon Rule 3 (o) has to be rejected. Admittedly the Writ Petitioners were not appointed invoking Rule 10(a)(i).

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32. In our opinion, for determination of retirement benefits under Sub-Rule (4) to Rule 11 half of the service rendered by a government employee in the following capacity shall be counted :-

- i. Non-provincialised Services
- ii. Consolidated pay;

- ii. honorarium; or
- iii. daily wage basis.

33. However, to add half of services rendered in the above capacity, such services should have also been regularised between 1st January, 1961 and 31st March, 2003 apart from satisfaction of other conditions stipulated therein.

34. Rule 11 (4) of the Tamil Nadu Pension Rules, 1978 confers an additional benefit to such class of Government servants to include half of the service rendered in the above capacity for determining qualifying service provided their service was regularised before 01.04.2003. Rule 11 (4) by itself is not intended to deny pension to respondents/writ petitioners if appointment was prior to 01.04.2003 in the cadre post, whether temporary or permanent.

35. Rule 11 (4) merely provides a method for determining the “qualifying service” for government employees who were absorbed into service before cut-off date of 01.04.2003.

36. The significance of Rule 11 (4) is to bring the service of a government employee / servant within the realm of qualifying service to count half of the service rendered under the State Government in non-provisionalised service, consolidated pay, honorarium or daily wages basis before 1st April 2003 for retirement benefits, if the absorption to service was before 01.04.2003.

37. Rule 11 (4) of the Tamil Nadu Pension Rules, 1978 allows a

Government employee / servant appointed in a cadre post before 01.04.2003 as per the Rules whether in temporary or permanent capacity to include 50% of the service rendered in (i) non-provincialised services; (ii) Consolidated pay; (iii) honorarium; or (iv) daily wage basis along with regular service subject to conditions stipulated therein.

38. For instance if a government employee/servant was appointed and absorbed between the cut off dates i.e. 01.01.1961 and 01.04.2003, then he/she will be entitled to include half of the service rendered under the State Government in (i) non-provincialised services; (ii) Consolidated pay; (iii) honorarium; or (iv) daily wage basis into his/her services for determination of qualifying service.

39. On the other hand, if a Government employee / servant was not absorbed between the aforesaid cut off dates, he/she will not be entitled to include half of the service rendered under the State Government in (i) non-provincialised services; (ii) Consolidated pay; (iii) honorarium; or (iv) daily wage basis into his/her services even though such person may be entitled to Government Pension under the Rule if he/she was appointed in a cadre post on or before 01.04.2003 but was absorbed after the said date.

40. For example, if a person is appointed prior to 01.04.2003 in a non-provincialised service or on consolidated pay or on honorarium or daily wage basis and later to a cadre post on temporary basis under Rule 10 (a) (i) of The Tamil Nadu State and Subordinate Service Rules before 01.04.2003 and such service is

regularised after 01/04/2003, such Government employee is eligible for Government Pension under the Tamil Nadu Pension Rules but at the same time would not be eligible to include half of services rendered in such capacity viz., i) Non-provincialised Services ii) Consolidated pay; iii) honorarium; or iv) daily wage basis to his regular service.

41. Thus, a government servant who may have been appointed before the cut-off date of 31.03.2003 may be entitled to government pension if he satisfies the requirement of qualifying service in Rule 3(o) of the Tamil Nadu Pension Rules, 1978. However, such a person will not be entitled to add half of the past service held in any one of the four capacity mentioned above prior to 01.04.2003 since his regularisation is subsequent to the cut off date. Therefore, only those who were appointed prior to 01.04.2003 whether as temporary appointment but in accordance with Rule 10 (a) (i) alone will be entitled to get pension.

42. The cut off date i.e. on or after 01.04.2003 in proviso to Rule 2 of the Tamil Nadu Pension Rules, 1978 will not perse bar a person from getting pension if such a person had joined the service in accordance with the provisions of Tamil Nadu State and Subordinate Service Rules i.e in the cadre whether on temporary or permanent basis. Services rendered before the cut off date of 01.04.2003, can be added to the regular service only if the service was regularised before the said date for determining the qualifying service. Therefore, in our opinion, it would be appropriate to say that Rule 11 (4) gives the meaning of qualifying service rather than giving significance to cut off date. Therefore, it is clear that only if the

appointment is in accordance with the Rules and such appointment is prior to 01.04.2003, 50% of the past service can be added along with the regular service.

43. The learned counsel appearing for the writ petitioners placed reliance on several orders passed by the Government, in compliance with the various directions issued by this Court directing the State or instrumentalities of the States to count half of the service of the persons similarly placed like the writ petitioners along with their regular service, even if the service of those persons were regularised after 01.04.2003. It is no doubt true that the Government passed several orders and extended the benefit of counting half of the service rendered in casual or daily wage employment along with the regular service in which the individual was appointed after 01.04.2003. It is also brought to the notice of this Court that this Court issued Mandamus at the instance of the daily wage employees to consider their claim for counting half of the service rendered on daily wage basis. In some cases, when such directions issued by this Court have not been complied with, contempt proceedings have been initiated. Pursuant to initiation of contempt proceedings, the service of the individual rendered on daily wage basis was ordered to be counted. In some cases, the Government or instrumentality of the Government rejected such claim and it was challenged by individual daily wage employee purportedly by citing the cases in which half of the service was ordered to be counted based on the contempt proceedings initiated before this Court. This is how, multiple number of orders came to be passed by this Court. Thus, the orders passed by this Court cannot be construed as a binding precedent. In this context, the learned Advocate General placed reliance on the decision of Col. (Retd). B.J.

Akkara case mentioned supra, wherein it was held that merely because the State Government did not file appeal against certain judgment of the High Court, it cannot operate as a bar for the State to question similar order passed by the High Court. The relevant portion of the decision reads as follows:-

25. A similar contention was considered by this Court in *State of Maharashtra v. Digambar* [(1995) 4 SCC 683] . This Court held: (SCC p. 691, para 16)

“Sometimes, as it was stated on behalf of the State, the State Government may not choose to file appeals against certain judgments of the High Court rendered in writ petitions when they are considered as stray cases and not worthwhile invoking the discretionary jurisdiction of this Court under Article 136 of the Constitution, for seeking redressal therefor. At other times, it is also possible for the State, not to file appeals before this Court in some matters on account of improper advice or negligence or improper conduct of officers concerned. It is further possible, that even where SLPs are filed by the State against judgments of the High Court, such SLPs may not be entertained by this Court in exercise of its discretionary jurisdiction under Article 136 of the Constitution either because they are considered as individual cases or because they are considered as cases not involving stakes which may adversely affect the interest of the State. Therefore, the circumstance of the non-filing of the appeals by the State in some similar matters or the rejection of some SLPs in limine by this Court in some other similar matters by itself, in our view, cannot be held as a bar against the State in filing an SLP or SLPs in other similar matter(s) where it is considered on behalf of the State that non-filing of such SLP or SLPs and pursuing them is likely to seriously jeopardise the interest of the State or public interest.

26. The said observations apply to this case. A particular judgment of the High Court may not be challenged by the State where the financial repercussions are negligible or where the appeal is barred by limitation. It may also not be challenged due to negligence or oversight of the dealing officers or on account of wrong legal advice, or on account of the non-comprehension of the seriousness or magnitude of the issue involved. However, when similar matters subsequently crop up and the magnitude

of the financial implications is realised, the State is not prevented or barred from challenging the subsequent decisions or resisting subsequent writ petitions, even though judgment in a case involving similar issue was allowed to reach finality in the case of others. Of course, the position would be viewed differently, if petitioners plead and prove that the State had adopted a “pick-and-choose” method only to exclude petitioners on account of mala fides or ulterior motives. Be that as it may. On the facts and circumstances, neither the principle of *res judicata* nor the principle of estoppel is attracted. The administrative law principles of legitimate expectation or fairness in action are also not attracted. Therefore, the fact that in some cases the validity of the circular dated 29-10-1999 (corresponding to the Defence Ministry circular dated 11-9-2001) has been upheld and that decision has attained finality will not come in the way of the State defending or enforcing its circular dated 11-9-2001.

44. The aforesaid Judgment of the Honourable Supreme Court would squarely apply to this case. Merely because this Court has passed multiple number of orders in favour of some of the similarly placed persons like the writ petitioners, it will not operate as *resjudicata* or it will preclude the State Government from questioning those orders in a parallel or similar proceedings. In such circumstances, we are of the view that the orders, hitherto passed by this Court, both single Bench or the Division Bench will not operate as a bar for maintaining these writ appeals or writ petitions or those orders will not be considered as the one which laid down any binding precedent to be followed in other cases. An order, which was not passed in accordance with the statutory provisions, need not be followed by the Court at the instance of similarly placed persons.

45. In the light of the above, we answer the reference as follows:-

i) Those who are freshly appointed on or after

01.04.2003 are not entitled to pension in view of

proviso to Rule 2 of Tamil Nadu Pension Rules, 1978
inserted by G.O.Ms.No.259 dated 06.08.2003

(ii) Those government servants/employees appointed prior to 01.04.2003 whether on temporary or permanent basis in terms of Rule 10 (a) (i) of Tamil Nadu State and Subordinate Service Rules will be entitled to get pension as per the Tamil Nadu Pension Rules, 1978.

(iii) In case, a government employee/servant had also rendered service in non-provincialised service, or on consolidated pay or on honorarium or daily wage basis and if such services were regularised before 01.04.2003, half of such service rendered shall be counted for the purpose of conferment of pensionary benefits.

(iv) Those government servants who were appointed in the aforesaid four categories before the cut off date and later appointed under Rule 10 (a) (i) of Tamil Nadu State and Subordinate Service Rules before 01.04.2003 and absorbed into regular service after 01.04.2003 will not be entitled to count half of

their past service for the purpose of determination of qualifying service for pension.

(v) Those government servants who were appointed in the aforesaid four categories before 01.04.2003 but were absorbed in regular service after 01.04.2003 will not be entitled to count half of their past service for the purpose of determination of qualifying service for pension."

(R.P.S.J.,)

(P.T.A.J.,)

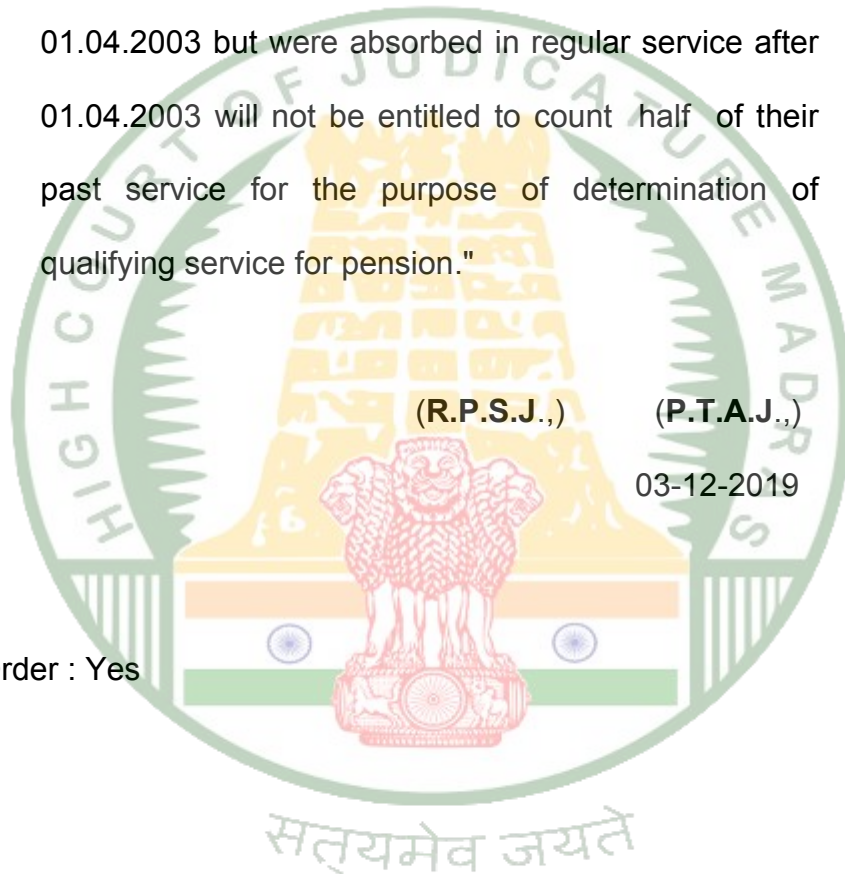
(C.S.N.J.,)

03-12-2019

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Index : Yes

Speaking Order : Yes



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W.A.No.158 of 2016 etc., batch

R. SUBBIAH, J
P.T. ASHA, J
and
C. SARAVANAN, J

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Pre-delivery Common Judgment in
W.A.No.158 of 2016 etc., batch

03-12-2019

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