



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: **26.02.2020**
CORAM:

**THE HONOURABLE MR.JUSTICE A.P.SAHI, CHIEF JUSTICE
AND
THE HONOURABLE MR.JUSTICE SUBRAMONIUM PRASAD**

W.A. [MD] Nos.68 of 2014 & 769 of 2018

and

M.P. (MD)No.1 of 2014 in W.A. (MD) .No.68 of 2014

and

C.M.P. (MD) .No.4554 of 2018 in W.A. (MD) .No.769 of 2018

- 1.The State of Tamilnadu
represented by its
Secretary to Government,
Health and Family Welfare (K2) Department,
Fort St.George,
Chennai - 600 009.
- 2.The Director of Medical and Rural Health Services,
Office of the Director of Medical and
Rural Health Services,
Chennai - 600 006.
- 3.The Joint Director,
Medical and Rural Health Services and
Family Welfare Department,
Periyakulam,
Theni District.

: Appellants/Respondents in both W.As.,

Vs.

R.Balakrishnan : Respondent/Petitioner in both W.As.,

COMMON PRAYER: Writ Appeals filed under Clause 15 of Letters Patent, against the common order dated 28.11.2012 passed by a learned Single Judge of this Court in W.P.(MD) Nos.3914 & 3913 of 2006 respectively.

Prayer in WP(MD) . 3913/ 2006 :

Writ Petition filed under Article 226 of the Constitution of India, praying for issuance of Writ of Certiorari to call for the records relating to the order passed by the 1st respondent in his proceedings G.O.(D).No.63, Health and Family Welfare (K-2) department, dated 25/01/2002 and quash the same as illegal.



Prayer in WP(MD). 3914/ 2006 :

Writ Petition filed under Article 226 of the Constitution of India, praying for issuance of Writ of Certiorarified Mandamus, to call for the records relating to the order passed by the 2nd respondent in his proceedings Ref. No. 11546/Sc1/2002(-2) dated 28/01/2005 and quash the same as illegal and consequently direct the respondent to allow the petitioner to reite from service with effect from 31/01/2005 with all consequential service and other monetary benefits.

For appellants
in both W.As., : Mr.V.R.Shanmuganathan
Special Government Pleader

For respondent
in both W.As., : Mr.G.Prabhu Rajadurai for
Mr.K.Appadurai

COMMON JUDGMENT

[Judgment of the Court was delivered by **SUBRAMONIUM PRASAD, J**]

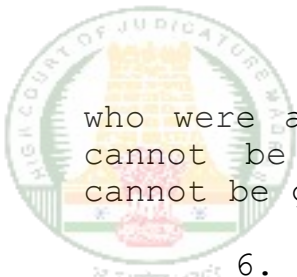
The Government has filed these Writ Appeals, challenging the order dated 28.11.2012, by which the learned Single Judge has allowed the writ petitions of the respondent/petitioner wherein the respondent/petitioner prayed for a Writ of Certiorari quashing the order, placing him under suspension before retirement and the order not permitting him to retire from service.

2. The respondent/petitioner was working as a Medical Store Officer with the State Government. He was due to retire on 31.01.2005. The respondent/petitioner was facing a criminal trial on the date of reaching superannuation and was under suspension. He was, therefore, not permitted to retire by order dated 25.01.2005, in view of Rule 56 (1) (c) of the Fundamental Rules. The orders placing him under suspension and not permitting to retire were the subject matter in the writ petitions from which this appeal arises.

3. The learned Single Judge came to a conclusion that the respondent/petitioner was discriminated against from other co-employees, who had been permitted to retire, even though they were facing the same criminal trial on the date of their retirement. The learned Single Judge allowed the writ petition. This order has been challenged by the State Government.

4. Heard learned counsel for the parties.

5. The learned Counsel for the State would contend that the order of the learned Single Judge, which is impugned herein, is directly contrary to the mandate of Rule 56 (1) (c) of the Fundamental Rules. He would state that the fact that other persons



who were also facing criminal case have been permitted to retire, cannot be treated as a precedent and the respondent/petitioner cannot be given the same benefit.

6. Rule 56 (1) (c) of the Fundamental Rules is extracted hereunder:

"(c) Notwithstanding anything contained in clause (a), a Government servant who is under suspension,
(i) on a charge of misconduct; or
(ii) against whom an enquiry into grave charges of criminal misconduct or allegations of criminal misconduct, is pending; or
(iii) against whom an enquiry into grave charges is contemplated or is pending; or
(iv) against whom a complaint of criminal offence is under investigation or trial shall not be permitted by the appointing authority to retire on his reaching the date of retirement, but shall be retained in service until the enquiry into the charge of misconduct or criminal misconduct or the enquiry into allegations of criminal misconduct or the enquiry into contemplated charges or disciplinary proceeding taken under rule 17(c) of the Tamil Nadu Civil Services (Discipline and Appeal) Rules or rule 3(c) of the Tamil Nadu Police Sub-ordinate service (Discipline and Appeal) Rules, as the case may be, in respect of item (iv) above is concluded and a final order passed thereon by the competent authority or by any higher authority."

7. A perusal of Rule 56 (1) (c) of the Fundamental Rules categorically states that a Government Servant, who is under suspension on the date of attaining superannuation and against whom a complaint of criminal offence is under investigation or trial, shall not be permitted to retire on his reaching the age of retirement, but he will be retained in service, until the conclusion of the enquiry into the charge of misconduct or criminal trial. It is therefore contended that, in view of the mandate of the Fundamental Rules, the order of the learned Single Judge cannot be sustained and therefore, is set aside.

8. On the other hand, the learned counsel for the respondent would contend that the respondent/petitioner is under suspension from the year 2005. 15 years have passed. The criminal case is not yet concluded. The learned counsel for the respondent/petitioner further contends that on the one hand, he was permitted to retire and on the other hand, he was not even paid the subsistence allowance as well as other emoluments to which he is entitled to and other similarly placed employees who also were under suspension and are facing the same criminal trial have been permitted to retire.



9. The impugned judgment is contrary to Rule 56 (1) (c) and therefore cannot be sustained and has to be set aside. We are informed that the Government has yet not released the contribution of the respondent to the provident fund and has also not paid the earned leave due to him. It is settled law that the State Government cannot withhold the contribution of an employee to his Provident Fund and the Earned Leave Encashment, which the employee is entitled to receive on attaining the age of superannuation, even if the employee is convicted in a criminal case or is prevented from retiring because of the pendency of the disciplinary or criminal proceedings.

10. A Division Bench of this Court in the case of the Chief Secretary to Government, Public (Special - A) Department, Fort St. George, Chennai Vs. M.Uthiraswamy, [W.A.No.4018 of 2019], decided on 22.11.2019, after considering various judgments of this Court and the Hon'ble Supreme Court, has held as under:

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

11. Further, Rule 53 of the Fundamental Rules states that the Government Servant, who deemed to have been placed under suspension, shall be paid subsistence allowance. The proviso to Rule 53(1) of the Fundamental Rules states that if the Government Servant continuous to be under suspension even after the date of retirement, the amount of subsistence allowances shall be reduced to the amount of pension, which will be provisionally admissible to him, whether or not, the Government Servant is exonerated from the charges for which he was placed under suspension. Rule 53(1) of the Fundamental Rules is reproduced hereunder:

"53. (1) A Government servant who is placed or deemed to have been placed or continues to be under suspension shall be entitled to the following



payments, namely:-

(a) Subsistence allowance at an amount equal to half of the pay last drawn by the Government servant and in addition dearness allowance, if admissible on the basis of half of the pay last drawn:

Provided that where the period of suspension exceeds six months, the authority which made or is deemed to have made, the order of suspension shall be competent to vary the amount of subsistence allowance for any period subsequent to the period of the first six months as follows:-

(i) The amount of subsistence allowance may be increased by a suitable amount, not exceeding fifty per cent of the subsistence allowance admissible during the period of the first six months, if, in the opinion of the said authority, the period of suspension has been prolonged for reasons to be recorded in writing, not directly attributable to the Government servant;

(ii) the amount of subsistence allowance may be reduced by a suitable amount, not exceeding fifty per cent of the subsistence allowance admissible during the period of the first six months, if, in the opinion of the said authority, the period of suspension has been prolonged for reasons to be recorded in writing, directly attributable to the Government servant;

(iii) the amount of dearness allowance shall be based on the increase or the decrease in the amount of subsistence allowance, as the case may be, admissible under clause (i) or (ii) above:

Provided further that if a Government servant under suspension continues to be under suspension after the date of retirement, the amount of subsistence allowance shall be reduced to the amount of pension which will be provisionally admissible to him, whether or not the Government servant will be exonerated of the charges for which he was placed under suspension and the provisions of the preceding proviso shall not apply to such cases.

(b) The authority which made or which is deemed to have made the order of suspension may, if it is satisfied that the Government servant continues to incur the expenditure for which the compensatory allowances are granted, direct that the Government servant shall be granted in addition, such compensatory allowances as are admissible from time to time on the basis of pay of which the Government



servant was in receipt on the date of suspension as the Government may sanction by general or special order.

(c) Government servants under suspension shall be paid house rent allowance in full at the rates admissible at the place where they are ordered to stay during suspension with reference to the pay last drawn before suspension. Where the headquarters of a Government servant under suspension is changed on his request, he shall be eligible for the house rent allowance at the rates admissible at the earlier headquarters or at the new headquarters whichever is less."

12. In view of the above, the respondent/petitioner, therefore, entitled to the allowances, which is payable to him under Rule 53 of the Fundamental Rules. We, therefore, direct the State Government/appellants to forthwith release the contribution of the respondent/petitioner to the Provident Fund and also the Earned Leave Encashment, which is payable to the respondent/petitioner under Rule 53 (1) of the Fundamental Rules, within a period of one month from the date of receipt of a certified copy of this judgment.

13. The impugned order is set aside and the Writ Appeals are disposed of, with the above direction. However, there is no order as to costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CO)

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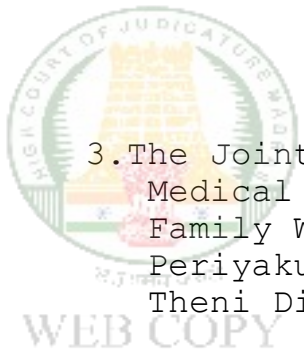
Sub Assistant Registrar(CS)

gcg/mm

To

1.The Secretary to Government,
Health and Family Welfare (K2) Department,
Fort St.George,
Chennai - 600 009.

2.The Director of Medical and Rural Health Services,
Office of the Director of Medical and
Rural Health Services,
Chennai - 600 006.



3.The Joint Director,
Medical and Rural Health Services and
Family Welfare Department,
Periyakulam,
Theni District.

+1 CC to Mr.K.APPADURAI, Advocate (SR-8566[F] dated 26/02/2020)

COMMON JUDGMENT MADE IN
W.A.[MD] Nos.68 of 2014 & 769 of 2018
26.02.2020

MK (16.03.2020) 7P 5C