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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE :27.07.2021

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THE HON'BLE MRS.JUSTICE PUSHPA SATHYANARAYANA
AND

THE HON'BLE MR.JUSTICE KRISHNAN RAMASAMY

W.A.NO.807 OF 2021

AND

C.M.P.NO.4432 OF 2021

1. The Additional Chief Secretary to Government,
Highways and Minor Ports (HL1) Department,
Secretariat, Chennai-09.
2. The Chief Engineer,
Highways Department,
Planning and investigation,
Chennai-25.
3. The Divisional Engineer,
Highways Department,
Investigation Division,
Salem-04.

.. Appellants/Respondents

Vs

M.Namadev

.. Respondent/Petitioner

Prayer: Writ Appeal is filed under Clause 15 of the Letters Patent, against the order passed by the learned single Judge dated 30.01.2020 in W.P.No.2090 of 2020.

Prayer in W.P.No.2090 of 2020: Writ Petition filed under Act 226 of the Constitution of India for issuance of a Writ of



Mandamus directing the 2nd respondent to disburse the earned leave and unearned leave encashment and gratuity accrued to me while I was in service with eligible interest within the time frame fixed by this Honorable Court.

For Appellant .. Mr.Neelakandan, State Govt.Counsel

For Respondent .. Mr.A.Thiyagarajan

JUDGMENT

(Judgment of the Court was delivered by KRISHNAN RAMASAMY, J.)

This intra-Court Appeal has been directed against the order dated 30.01.2020 in W.P.No.2090 of 2020 passed by a learned single Judge of this Court, in and by which, while allowing the Writ Petition filed by the respondent herein, directed the appellants herein to settle the Earned Leave and Unearned leave encashment, Special GPF and Gratuity to the respondent.

2. The respondent herein is the writ petitioner. While he was working as Assistant Divisional Engineer, National Highways, Investigation Division, Salem, came to be dismissed from service vide G.O.(3D) No.12, Highways & Minor Ports (HL1) Department dated 03.09.2019 pursuant to his conviction and sentence under the Prevention of Corruption Act, 1988 imposed vide judgment dated 30.05.2017 by the learned Judicial Magistrate/Special Judge, Ariyalur. According to the respondent, he is entitled to payment of leave encashment of salary both earned and unearned as per Rule 7 of the Tamil Nadu Leave Rules, 1933 and 86 (A) of Fundamental Rules and also Gratuity which were earned during his service. Therefore, the respondent has made a representation dated 16.08.2019, seeking to sanction leave encashment salary of both earned and unearned leave and Gratuity. Since no response was forthcoming despite his representation, the respondent has moved this Court by filing a writ petition. By order, dated 30.01.2020, learned single Judge, while following a decision of this Court reported in 2019(5) CTC 19, held that the respondent is entitled to both earned and unearned leave encashments and



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also G.P.F. and Gratuity and accordingly, directed the appellants herein to settle the same. Questioning the same, the appellants/authorities have come forward with the present Writ Appeal.

3. Mr.R.Neelakandan, learned State Government counsel appearing for the appellants would contend that the learned Judge has granted the benefit of G.P.F. which, in fact, was never sought for by the respondent/writ petitioner in his Writ Petition. He would submit that since a criminal case pertains to illegal gratification was pending against the respondent, though he reached the superannuation on 31.10.2005, by virtue of Rule 56(1)(c) of the Fundamental Rules, he was not permitted to retire and retained in service vide G.O.(3D) No.142 dated 31.10.2005 and ordered that all service rights of the respondent shall be freezed at the level reached on the date of superannuation. Therefore, he would contend that as per Rule 7 of the Tamil Nadu Leave Rules, 1933, since the respondent was placed under suspension and not permitted to retire from service on the date of his superannuation, he is not entitled for encashment of earned leave and unearned leave on private affairs. He would point out that as per Rule 40(1) of the Tamil Nadu Pension Rules, 1978, a Government servant who is dismissed or removed from service, shall forfeit his pension and gratuity. Therefore, the learned State Government counsel would pray this Court to set aside the order of the learned single Judge.

4. The learned counsel appearing for the respondent would fairly accede to the submission made by the learned State Government counsel that in view of his dismissal from service, the respondent is not entitled to gratuity and pension, however, he contended that the encashment of earned leave and unearned leave, is nothing but acquiring a property owned by a person and therefore, notwithstanding the order of dismissal, the same cannot be denied and hence, the respondent is entitled to encashment of earned leave and leave on private affairs.

5. Heard both sides and perused the entire materials available on record.

6. Admittedly, though the respondent reached superannuation on 31.10.2005, however, the Government, by invoking Rule 56(1)(c) of the Fundamental Rules, not permitted



him to retire but retained in service vide G.O.(3D) No.142 dated 31.10.2005 and also ordered that all service rights of the respondent shall be freezed at the level reached on the date of superannuation. In this regard, it is worthwhile to extract the Rule 56(1)(c) as under:

"(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.

Explanation.-For the purpose of this clause, the expression 'criminal misconduct' shall have the same meaning as in Section 13 of the Prevention of Corruption Act, 1988 (Central Act 49 of 1988).

Instruction under Rule 56 (1) (c).-Whether a Government servant referred to in clause (c) is fully exonerated or not, he shall be considered to have been on extension of service for the period from the date of retirement to the date of termination of the proceedings. During such an extension of



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service, the service rights which have accrued to the Government servant shall freeze at the level reached on the date of retirement and the salary during that period shall not exceed the pension which has accrued to the Government servant on that date."

7. A perusal of the said instruction would show that a Government Servant referred to in clause 56(1)(c) shall be considered to have been on extension of service for the period from the date of retirement to the date of termination of the proceedings. It is further seen from the said instruction that during such extension period, the service rights, which have accrued to the Government Servant, shall freeze at the level reached on the date of retirement. As regards 'service rights' referred to in the above said instruction, have been succinctly dealt with as to how they have to be construed, by a Division Bench of this Court in "The Secretary to Government versus K.Palaniyandi" in its judgment in W.A.(MD) No.105 of 2019 dated 04.07.2019 and in para 11, it has been held as under:

"11.Here it is pertinent to note that the "service rights" referred to in the said instruction deemed to have been frozen is to be construed not in respect of the monetary benefits already accrued in the account of the Government Servant, such as Earned Leave Salary etc.,. and on the other hand, the term "service rights" referred to therein is to mean as referable to increment, promotion etc. Certainly, "service benefits" already derived cannot be treated at par with expected or anticipated "service rights" to prevent the Government Servant from encashing such leave salary benefits already accrued in his account."

8. In fact, Rules 7 to 12 of the Tamil Nadu Leave Rules, 1933, contain the statutory provisions for earned leave. It could be seen from the aforesaid provisions that the leave account of every permanent Government Servant shall be credited with earned leave, not exceeding the maximum limit of 240 days. The said rules further provide that if the leave standing to the credit of the Government Servant is not taken within a year as per the Service Rules, it may be encashed or accumulated. The



accumulated leave may be availed by the Government Servant during his tenure of service or at the time of retirement or leaving the employment which obviously means that the right of the Government Servant to receive same stands vested with him during that period itself which he can utilize at anytime he chooses.

9. The Hon'ble Supreme Court of India in "[State of Jharkhand -vs- Jitendra Kumar Srivastava](#)" reported in [(2013) 12 SCC 210] has made it abundantly clear that leave encashment cannot be taken away without any statutory provision. In short, 'earned leave' which is created by statute, partakes the character of an emolument protected as a right to property of the concerned Government Servant under Article 300-A of the Constitution.

10. Therefore, it is clear that a Government Servant, whose service is either terminated by notice or has been compulsorily retired from service as a measure of punishment and where the service of such Government Servant has been extended beyond the date of superannuation, is certainly entitled for encashment of leave salary.

11. As regards entitlement of gratuity and pension is concerned, even the respondent has not sought for and being dismissed from service, the respondent is not entitled to the same.

12. In view of the above, we are of the opinion that the order of the learned single Judge giving direction to the appellants to settle the payment towards GPF and Gratuity to the respondent, cannot be sustained except to the extent of payment of both earned leave and unearned leave salary.

13. Accordingly, the Writ Appeal stands partly allowed. The appellants are directed to disburse the payment towards leave encashment of salary both earned and unearned leave of the respondent, within a period of eight weeks from the date of



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receipt of a copy of this order. No costs. Consequently, connected CMP is closed.

Sd/-

Assistant Registrar(CS-IV)

// True Copy //

Sub Assistant Registrar

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To

1. The Assistant Chief Secretary to Government,
Highways and Minor Ports (HL1) Department,
Secretariat, Chennai - 9.
2. The Chief Engineer,
Highways Department,
Planning and Investigation,
Chennai-25.
3. The Divisional Engineer,
Highways Department,
Investigation Division,
Salem-04.

+1cc to Mr.A.Thiyagarajan, Advocate, S.R.No.36158

+1cc to the Government Pleader, S.R.No.36547

W.A.No.807 of 2021

SJ(CO)
RLP(14/09/2021)