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W.P.(MD)No.10019 of 2016

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 05.01.2023

CORAM

THE HONOURABLE MRS.JUSTICE **S.SRIMATHY**

W.P.(MD)No.10019 of 2016

D.Elangovan

... Petitioner

vs.

- 1.The Principal Secretary to Government,
Ministry of Health and Family Welfare,
Fort St.George, Chennai-600 009.
- 2.The Director of Public Health and Preventive
Medicine,
359, Anna Salai, DMS Complex,
Teynambet, Chennai-600 006.
- 3.Joint Director of Health Services,
Head Quarters Government Hospital,
Periakulam – 626 501.
- 4.The Secretary,
Tamilnadu Public Service Commission,
Frazer Bridge Road, Chennai-600 003.

... Respondents



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PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Certiorarified Mandamus, to call for the records pertaining to G.O.No.355/2016, dated 01.03.2016 and to quash the same and consequently, to pass an order directing the respondent to allow the petitioner to retire with all benefits available to a person retiring in the normal circumstances.

For Petitioner : Mr.B.A.Muruganantham
For R1 to 3 : Mr.N.Muthuvijayan
Special Government Pleader

ORDER

This writ petition is filed writ of Certiorarified Mandamus, to quash the impugned G.O.No.355 of 2016, dated 01.03.2016 and consequently, to pass an order directing the respondent to allow the petitioner to retire with all benefits available to a person retiring in the normal circumstances.

2. The petitioner was appointed as a Specialist Doctor Neuro Surgeon, selected by TNPSC and was appointed on 01.01.2001. On 09.04.2006, the



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petitioner sustained head injury and applied for leave. The petitioner was directed to appear before the Medical Board, but the contention of the petitioner is due to head injury he was undergoing severe vertigo problem and he was not able to attend the Medical Board and he could not join duty at Periyakulam Government Hospital. Moreover, he was not able to travel long distance. Hence, he applied for leave again and informed the higher authority about the inability to return to the duty. But the 3rd respondent refused to grant leave to the petitioner. From June 2006, the petitioner repeatedly requested the higher authorities to re-post him to the Head quarter's Hospital at Dindigul or post him to the teaching hospital, so that he can avail the treatment simultaneously. However, the petitioner's request was not replied. After a gap of about 3 years, the petitioner got a letter to appear for an enquiry before the Joint Director of Theni at Periakulam. The petitioner appeared for the enquiry before on 23.12.2009 with all his medical reports, records and scan reports. The petitioner contended that the enquiry officer



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seemed to have been satisfied with the explanations and documents. However, there was no response from the higher authorities regarding the re-posting the petitioner. The petitioner was under the impression that he was in a compulsory waiting period. In that period, the Court summons of MLC cases were directed to the petitioner to attend them all without fail. Obeying the orders and attending the Court is considered on duty service and therefore, could be no break of service at all. In the meanwhile, on 22.07.2011 the respondents have issued direction to the petitioner to join duty at Vendasandur Government Taluk Head Quarter's Hospital and the petitioner had joined on 03.08.2011. Even though it is a Head Quarter's Hospital, there is no scope for super specialists. Even though the petitioner is a super specialist, he still obeyed the orders and joined the transferred post. He was also transferred and posted at Government Head Quarter's Hospital, Dindigul, again, the petitioner joined without any delay. Except for the period of absence that too due to neuro surgical operations, the



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petitioner obeyed all the orders. Thereafter, the enquiry report was served on the petitioner on 19.09.2013 which is 11 days prior to the petitioner's retirement, i.e., after a gap of about 4 years, the respondents directed the petitioner to explain over the enquiry report. On receiving the enquiry report, then only the petitioner came to know that the enquiry officer has held the charges were proved. After the receipt of the reply, the respondents have imposed the punishment on 27.09.2013, whereby the petitioner was removed from service and treated the “request period” as unauthorized absence. The said order was passed almost after 7 years, that too on the verge of retirement which is three days before the retirement date and the petitioner was denied terminal benefits because the order was passed for removal from service. Aggrieved over the same, the present writ petition is filed.

3. The respondents have filed counter affidavit stating that the petitioner was on unauthorized absence, hence, the charge memo was issued with four



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charges which is extracted here under:

“Charge 1:

That Dr.D.Elangovan while working as Assistant Surgeon at Government Headquarters Hospital, Dindigul was unauthorizedly absented from duty with effect from 9.4.2000 till date.

Charge 2:

That he did not appear before the Medical Board at Salem on 24.4.2006 and 5.6.2006 and thereby dereliction of his duties and violated rule 20(1) of Tamil Nadu Government Servants Conduct Rules 1973.

Charge 3:

That he disobeyed the orders of his superiors, even though the leave memo applied for by him was refused and he was directed to rejoin duty in Telegram dated: 11.4.2006. 16.5.2006 and in memo Ref. No.3106/E2/2006, dated: 30.5.2006 of the Joint Director of Health Services, Dindigul and in Show Cause memo Ref No 41814/E4/1/2008 dated: 9.11.2006 of the Director of Medical and Rural Health Services, Chennai-6 and thereby



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violated Rule 20(1) of Tamil Nadu Government Servants Conduct Rules 1973.

Charge 4:

That by his above act he caused dislocation to the smooth functioning of the Hospital and denied treatment to the poor needy patients came to the Government Headquarters Hospital, Dindigul in the particular specialty and thereby dereliction in his duties as a responsible Public Servant and violated rule 20 (1) of Tamil Nadu Government Servants Conduct Rules.”

4. The counter affidavit also states that initially, the petitioner was on medical leave from 09.04.2006 which was granted based on his telegram, dated 10.04.2006. Thereafter, the petitioner was directed to appear before the Medical Board on 12.04.2006 but the petitioner did not appear. Again, he was directed to appear before the medical board in Salem on 24.04.2006 but the petitioner did not appear. The petitioner extended the Medical Leave for 180 days from 15.05.2006. The Joint Director refused the leave application and directed him to join duty.



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Again, the petitioner was referred to Medical Board at Salem on 05.06.2006 but he did not appear. Hence, a show cause notice, dated 30.05.2006, was issued directing him to submit an explanation for his unauthorized absence. In the meanwhile, another Doctor was posted in the petitioner's place at Dindigul. Therefore, the petitioner was directed to join in Periakulam Government Hospital but the petitioner has not joined and hence, the petitioner had not attended his duties from 09.04.2006. Thereafter, he applied for extra ordinary leave on medical grounds without medical certificate for 180 days and remained unauthorizedly absent. Even though the petitioner was granted re-posting order on 26.08.2006, the petitioner did not join duty. In the enquiry, the charges were held to be proved. However, the enquiry report was not served to the petitioner by the enquiry officer himself but it was communicated subsequently by the disciplinary authority on 12.05.2013. In the meanwhile, the petitioner has submitted a petition requesting to post him, vide letter, dated 28.12.2010. The petitioner was



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accommodated in the available vacancy at Dindigul. The petitioner though attended the Court cases and undertook critical surgeries his unauthorized absence till he joined duty on 03.08.2011 cannot be neglected. The petitioner was unauthorizedly absented from 09.04.2006 to 02.08.2011. The petitioner was holding a very responsible position but the petitioner has deserted the service and unauthorizedly absented himself in spite of several directions to join service. Hence, after obtaining opinion from TNPSC, the petitioner was removed from service. Hence, the petitioner is not entitled to any benefits and the punishment is proportionate.

5. Heard Mr.B.A.Muruganantham, learned Counsel appearing for the petitioner and Mr.N.Muthuvijayan, learned Special Government Pleader appearing for the respondents 1 to 3 and perused the records.



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6. On perusal of the medical records of the petitioner it is seen that the petitioner met with an accident on 09.04.2006, wherein the petitioner had head injury and subsequently the petitioner was suffering from vertigo. Even the respondents admit that the petitioner had head injury and he was having neuro problem. The contention of the respondents is that the petitioner applied for leave through telegram dated 10.04.2006 and hence medical leave was granted from 09.04.2006 (the date of accident). Thereafter the respondent directed the petitioner to appear before Medical Board on 12.04.2006, then on 24.04.2006, 05.06.2006 in Salem, but the petitioner did not appear, but extended the Medical Leave for 180 days from 15.05.2006, but the Joint Director refused the leave application and directed him to join duty. Hence, a show cause notice, dated 30.05.2006, was issued directing him to submit an explanation for his unauthorized absence. In the meanwhile, the petitioner had requested vide letters dated 25.06.2006, 22.08.2006, 29.08.2006 to allow him to join in Dindigul and



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the reasons cited is Dindigul being native place, he could get assistance and medical treatment at Dindigul, but the respondents did not consider the same. Moreover the petitioner had submitted application for Medical Leave and it cannot be stated that the petitioner had not informed the respondents. In such circumstances, the period from the first request letter it cannot be considered as unauthorized absence. Even though the petitioner has no right to choose the place of work and it is absolutely domain of the respondents, but by taking the petitioner's ailment into consideration the respondents ought to have acted sympathetically. Because of these facts, this Court is of the considered opinion that the petitioner had lost the valuable period of service from 25.06.2006 (the first "request for joining" letter).

7. Thereafter the respondents had not issued any posting orders, but the petitioner had received summons from court to attend MLC cases and the



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petitioner had attended the court cases. Hence the petitioner is taking a plea that attending court cases is part of his duty as a doctor and having attended the court cases the said period ought to be treated as duty period. Since the petitioner had attended court cases the said plea ought to be considered. But the respondents has not considered this plea in proper perspective.

8. After issuance of show cause notice dated 30.05.2006, there was no progress in the disciplinary proceedings, then enquiry was conducted on 23.12.2009 and the enquiry report dated 30.06.2010 was submitted. Therefore this Court is of the considered opinion that the disciplinary proceedings is prolonged and as per the Circular dated 04.11.2010 the disciplinary proceedings is liable to be quashed.

9. The respondents did not serve the copy of the enquiry report and call for



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objections from the petitioner. Infact the respondents failed to act on the enquiry report. After a lapse of four years suddenly the respondents served the copy of the enquiry report on 19.09.2013, on the verge of petitioner's retirement. The petitioner attained superannuation on 30.09.2013. It is also pertinent to note that the respondents the covering letter dated 12.05.2013, but the petitioner has received the report on 19.09.2013. The respondents have kept quite from 30.06.2010 (the date of enquiry report) to 19.09.2013 (the date of serving the copy of the enquiry report). Curiously, the petitioner was allowed to report for duty through proceedings dated 22.07.2011, the petitioner had joined the service on 03.08.2011 and he was allowed to work until 27.09.2013. When the petitioner was on the verge of attain superannuation, that is within three days the petitioner would have attained superannuation i.e. on 30.09.2013, but the respondents have imposed a punishment of removal from service, which is so unfortunate. The respondents had received the enquiry report on 30.06.2010 and the respondents



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have kept quite from 30.06.2010 to 19.9.2013. In the meanwhile, the petitioner was allowed to work and he was paid salary. In such circumstances, the action of the respondents by suddenly waking up and imposing punishment of removal from service is absolutely perverse. Moreover, once the petitioner is allowed to rejoin and work for the period from 03.08.2011 to 27.09.2013, then the respondents have no power to impose a punishment of removal from service, dismissal from service or terminate from service, since the same is taking away the right of the petitioner who had rendered his service for the period 03.08.2011 to 27.09.2013 (the alleged unauthorized absence is from 09.04.2006 to 02.08.2011). Infact the respondents deemed to have forfeited their right to impose the aforesaid major punishments.

10. Admittedly, the petitioner has not appeared before the Medical Board. Opportunity was granted to the petitioner at least four times. But subsequently,



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the petitioner was allowed to serve from 03.08.2011 onwards which would clearly indicated that the petitioner has attended the Medical Board, that is why the respondents have allowed the petitioner to join the service from 03.08.2011 to 27.09.2013 and the petitioner has worked as per the posting orders. Therefore, the punishment imposed by the respondents is absolutely disproportionate.

11. The respondents have consulted the TNPSC and the TNPSC has opined to remove the petitioner from service. The respondents have blindly accepted the opinion of TNPSC and passed an order, which is against the settled proposition that the appointing authority ought to decide as per the facts and circumstances of the case and it is total non-application of mind. Moreover, the opinion of TNPSC is only “opinion” and it is not binding on the appointing authority.

12. On perusing the records, it is seen that the petitioner was not in service



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from 09.04.2006 to 03.08.2011. Even though the petitioner was allowed to join the service from 03.08.2011, in between period the petitioner has attended the Court cases and also had attended certain critical surgeries, which is evident from the counter affidavit of the respondents wherein the respondents have stated as under:

“Though the attendance of the petitioner on Court cases and in the critical surgeries, if any, might not be taken as negatively, it is not neglected that, he was on unauthorized absence from duty, till he rejoined duty on 03.08.2011 (i.e.) for 5 years and 4 months. Otherwise his services as a Neuro surgeon under the Government have not been under-estimated at any point of time.”

When the respondents accept that the petitioner had attended court cases and has attended critical surgeries in between period from 25.06.2006 (the first “request for joining” letter) until 03.08.2011, therefore the punishment of removal from service is perverse.



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13. Even for this period also, the petitioner sought posting near Dindigul, since he was under treatment and Dindigul is his native District. He sought transfer and posting in Dindigul so that he could get treatment and recover soon. The respondents have declined to considered the said request also. It was on a later point of time the petitioner's request was considered and he was posted in Dindigul District.

14. It is seen that the petitioner had sought for unearned leave on loss of pay on medical grounds from 16.11.2006 for a period of 180 days (6 months). Had the respondents sanctioned the same then the petitioner would have rejoined on the service after the said 6 months. But the respondents had declined the petitioner's request. If the respondent had granted the same the petitioner there would not be any cause of action and the petitioner would not have lost his service.



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15. Having held so that the order is preserve, this Court is bound to remit the case back to the respondents for modifying the punishment. But the perverse attitude of the respondents, the petitioner had attained superannuation on 30.09.2013, at this point of time if the case is remitted back the petitioner would be put to undue hardship. Therefore, this Court proceed to modify the punishment.

16. For the reasons stated above, this Court is inclined to pass the following orders:

- a. The impugned orders dated 25.09.2013 and 01.03.2016 are quashed.
- b. Consequently the respondents are directed to treat the period of leave from 09.04.2006 to 14.05.2006 as duty period.



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c. The petitioner had sought Medical Leave for 180 days from 15.05.2006 to 15.11.2006. Again, the petitioner had sought Medical Leave on loss of pay for 180 days from 16.11.2006 to 15.05.2007. And both the spells shall be treated as Unearned Medical leave on Loss of Pay.

d. Since the petitioner had attended court cases and has carried out critical surgeries the period from 16.05.2007 to 02.08.2011 and then the petitioner has joined the duty from 03.08.2011 to 30.09.2013 shall be duty period.

e. However the petitioner is liable for punishment and the respondents shall impose punishment of stoppage of increment for a



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period of three years without cumulative effect and the same punishment shall be imposed from 16.05.2007 onwards.

f. The respondents shall implement this order and disburse the benefits including pensionary benefits within a period of eight weeks from the date of receipt of a copy of this order.

17. With the above said observations, the writ petition is allowed in above terms. No costs.

Index : Yes / No

05.01.2023

Internet : Yes

NCC : Yes / No

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To

- 1.The Principal Secretary to Government,
Ministry of Health and Family Welfare,
Fort St.George, Chennai-600 009.
- 2.The Director of Public Health and Preventive
Medicine,
359, Anna Salai, DMS Complex,
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