(2007) 12 MAD CK 0178

In the Madras High Court

Case No : Writ Petition (MD) No. 9408 of 2007

Alagammal APPELLANT

Vs

State of Tamil Nadu RESPONDENT

Date of Decision : 19-12-2007

Acts Referred:

Constitution of India, 1950 — Article 12, 14
Fundamental Rules — Rule 56
Tamil Nadu Municipal Services Pension Rules, 1970 — Rule 7
Tamil Nadu Pension Rules, 1978 — Rule 11, 16, 2, 21, 43(2)

Citation : (2007) 12 MAD CK 0178

Hon'ble Judges : N. Paul Vasanthakumar, J

Bench : Single Bench

Advocate : N. Sudalai Muthu, for the Appellant; V. Chellammal, Special Government Pleader, for the Respondent

Judgement

N. Paul Vasanthakumar, J.—Prayer in the writ petition is to quash the order passed by the 3rd respondent in Government Letter No.

Mu.Mu. No. 11987/Na.O.Sa(1)05, dated 19.4.2005 and direct the respondents to sanction regular pensionary benefits to the petitioner in terms

of G.O.Ms. No. 186 Municipal Administration and Water Supply Department, dated 27.9.1995 from 1976 with interest.

2. The case of the petitioner is that she was appointed as Sanitary Worker in the 4th respondent Municipality from June, 1950 to 30th June, 1976.

On 30.6.1973, though she was ordered to retire, again she was permitted to work till 30.6.1976 on production of medical certificate. Petitioner

has put in 26 years of continuous service. She applied for pensionary benefits and the same was rejected on the ground that the petitioner retired

only as a contingent staff and therefore she is not eligible to get pensionary benefits. When petitioner submitted representations, 4th respondent on 29.12.2004 forwarded the same to the second respondent. The third respondent sent a reply stating that the petitioner had not completed ten years of service from the date of regularisation and so she was not eligible for pensionary benefits. According to the petitioner, the Sanitary Workers were regularised by G.O.Ms. No. 2469 Health and Family Planning Department, dated 1.10.1973 and as per G.O.Ms. No. 270 Municipal Administration and Water Supply Department, dated 16.3.1990, adhoc pension was ordered to be sanctioned to the persons who retired before 14.1.1990 on par with those who retired after 14.1.1970. When the petitioner applied to the 4th respondent to intimate the reason for non-sanction of pension under the Right to Information Act, the 4th respondent replied that the petitioner worked as contingent staff from 1950 to June, 1976 and records were not maintained. Hence the petitioner has filed this writ petition to quash the said order and for sanction of pension to the petitioner from 1.7.1976.

3. Third respondent filed counter affidavit wherein it is stated that as per Rule 7 of the Tamil Nadu Municipal Services Pension Rules, 1970, the provisions of the Tamil Nadu Pension Rules, 1978, as amended from time to time shall mutatis mutandis apply to the Municipal Employees insofar as they are not inconsistent with the 1970 Rules. Rule 2 of Chapter-I of the Tamil Nadu Pension Rules, 1978, also states that the Tamil Nadu Pension Rules shall apply to the 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 paid on daily rated basis and to persons paid with contingency. Petitioner having worked temporarily during her entire service in Dindigul Municipality and her wages having been paid under the contingent establishments, she is not eligible to get pension. The third respondent also sent a letter to the 4th respondent on 19.4.2004 and stated that no records were sent by the Commissioner, Dindigul Municipality to prove that the petitioner worked in time scale of pay at the time of her retirement and as per Rule 2 and 43(2) of the Pension Rules, 1978, pension can be sanctioned only to those who retire in a pensionable post or in time scale of pay with minimum qualifying service of ten years. Since the

petitioner has not satisfied with the above conditions, petitioner is not

entitled to get sanction of pension.

4. The learned Counsel for the petitioner on the basis of the typed set filed in support of the writ petition, contended that the petitioner was retired

from service by the order of the Welfare Officer of the Dindigul Municipality dated 30.6.1976 along with 24 others and in that order it was stated

that for filling up the said posts, separate orders will be passed. Petitioner submitted representations to the respondents on 5.7.1976, 26.12.1976,

15.4.1977, 3.2.1978, 2.12.1982 and requested for sanction of pension and other benefits. The learned Counsel also submitted that the husband of

the petitioner viz., Kuttaiyan, who was also a Sanitary Worker of Dindigul Municipality, retired from service on 30.6.1976, and he had given the

service particulars of himself and the petitioner stating that the date of appointment as June, 1950; date of retirement as 30.6.1976; scale of pay as

Rs. 30-3-130-4-150-5-165; last drawn salary as Rs. 127/-; the minimum pension eligible from 23.6.1988 as Rs. 375/- per month; the total

service as 23 years and four months; regular service 2 years, 7 months and 14 days; half of the contingent service as 11 years and 7 months; and

the qualifying pensionable service as 14 years, 2 months and 14 days. The qualifying service of gratuity is stated as 28ï¿½ years and the gratuity

eligible as per the scale fixed prior to 1978 was shown as Rs. 1,333.50 (28 ï¿½ (127 + 63.50) 190.50/4). It is further stated therein that the

amount already received was Rs. 190.50 and the balance amount to be paid to the petitioner and her husband was shown as Rs. 1,143/- each.

5. The learned Counsel also pointed out that the above said details were submitted to the Chief Minister''s Grievance Cell with a request to

sanction pension and gratuity and the Minister for Local Administration on 6.4.1995 forwarded the same to the Director of Municipal

Administration for necessary and immediate action as per the endorsement made in the copy of the representation submitted to the Chief

Minister''s Cell. However, no action was taken by the Director of Municipal Administration based on the details furnished by the Petitioner and her

husband. Petitioner''s husband died on 5.4.1998 without receiving the pension and after his demise, petitioner submitted representation to the

Commissioner of Dindigul Municipality to sanction her pension and also arrears of pension of her husband from 1.7.1976 and family pension from

5.4.1998. Copy of the same was also submitted to the Director of Municipal Administration, Chennai. The Commissioner, Dindigul Municipality

through his memo dated 2.12.2004 stated that the petitioner and her husband retired on 30.6.1976 and after expiry of 28 years, no records are

available and therefore requested the petitioner to submit the proof for their service details. Petitioner again submitted the details on 19.1.2005.

However, the Commissioner, Dindigul Municipality addressed a letter to the third respondent on 12.2.2005 by stating that the petitioner retired

from service on 30.6.1976 and the Welfare Officer has issued an order in his proceeding dated 19.3.1976 and also certified that the petitioner

served in the Municipality as Sanitary Worker for more than one year and retired from service on attaining the age of superannuation on 30.6.1976

and recommended for sanction of adhoc pension in terms of G.O.Ms. No. 270 Municipal Administration and Water Supply Department, dated

16.3.1990. The third respondent sent a reply to the 4th respondent by stating that adhoc pension can be sanctioned to persons who retired prior

to 14.1.1970 and the petitioner having been paid regular time scale of pay from 1.10.1973, she cannot be paid the adhoc pension and for payment

of regular pension petitioner is not having ten years of regular service. Even after the said order, petitioner submitted representation on 25.4.2005

to the third respondent and on 18.11.2005 the Government sent a letter to the petitioner stating that the petitioner should approach the Municipal

Administration and Water Supply Department for sanction of pension. Petitioner again sent a representation to the Commissioner, Municipal

Administration on 27.2.2006 and till date petitioner has not been sanctioned the pension or the arrears of pension to petitioner''s husband and also

family pension payable to the petitioner on the death of petitioner''s husband. As the petitioner is now aged 89 years, who retired in the year 1976,

the learned Counsel submitted that based on the materials furnished by the petitioner as stated supra, respondents may be directed to sanction

pension and gratuity payable to the petitioner and also arrears of pension and gratuity payable to the petitioner till the date of death of her husband

and family pension after his demise. The learned Counsel also cited a decision of this Court reported in 2006 (5) CTC 320 O.A. Chinna Alagi v.

State of Tamil Nadu in support of his contentions.

6. The learned Special Government Pleader appearing for the respondents on the basis of the averments contained in the counter affidavit

submitted that the petitioner was appointed only as contingent staff and her services were not regularised and even assuming that from 1973 her

services were regularised, petitioner was not having ten years of completed pensionable service and therefore petitioner is not entitled to get

pension and similar is the case insofar as the petitioner''s husband is concerned.

7. I have considered the rival submissions made by the learned Counsel for the petitioner as well as respondents.

8. The facts in this case are that the petitioner and her husband were appointed as Sanitary Worker in the 4th respondent Municipality as

contingent staff in the year 1950 and the Government issued G.O.Ms. No. 2469 Health and Family Planning Department, dated 1.10.1973 and

issued guidelines for appointing sanitary workers in the local bodies and in Clause 4 of the said Government Order it is stated that Sanitary

Workers be granted scale of pay of Rs. 100-3-130-4-150-5-165 and they are, in addition to the said pay, eligible to get DA of Rs. 35 besides

HRA and other benefits and that they are also entitled to continue upto 60 years of age, provided they are medically fit. In the letter of the third

respondent addressed to the 4th respondent dated 19.4.2005, it is stated that the Sanitary Worker posts, which the petitioner and her husband

were holding were given regular time scale of pay from 1.6.1973 and they were brought in the pensionable service as per the Tamil Nadu Pension

Rules, 1978. Therefore, there is no controversy with regard to their regularisation of service from 1.6.1973 and their continuance as regularised

Sanitary Workers till 30.6.1976 with time scale of pay.

9. The only objection as could be seen from the order is that the petitioner and her husband were not having ten years of qualifying pensionable

service. Admittedly the petitioner and her husband served as contingent staff from June, 1950 till 31.5.1973 as full time employee of the 4th

respondent and brought to regular time scale of pay from 1.6.1973, without any break in service and thus, the petitioner and her husband were

having 23 years of contingent service and 3 years and 4 months of regular service.

10. The Government took a policy decision through G.O.Ms. No. 118 Finance (Pension) Department dated 14.2.1996 and paragraphs 2 and 3

of the order reads as under,

2. The Government have examined the question of extending the concession ordered in the G.O. First read above to the case of Government

employees who were borne on non-pensionable establishment and subsequently brought into pensionable establishment and have decided to count

half of the service rendered under non-pensionable establishment along with service under pensionable establishment for pensionary benefits. They

accordingly direct that half of the service rendered by State Government employees 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.

iii) The service under non-pensionable establishment should have been continuous and followed by absorption in pensionable establishment without

a break.

3. These orders shall take effect from the date of this G.O. In respect of those who retired prior to the date of this order eligible pension or revised

pension, as the case may be, shall be paid from the date of this order and that there can be no claim for arrears in any case for the period upto the

date of this order.

11. Similar issue as to whether the contingent service can be counted for pensionable service was considered by the Tamil Nadu Administrative

Tribunal in O.A. No. 3282 of 1999 and by order dated 20.12.2001, the Tamil Nadu Administrative Tribunal considered the relevant Government

Orders and directed to count 50% of the said contingent services as pensionable service on the ground that the contingent service was on full time

basis, monthly salary was paid and without any break in service and the contingent staff were brought into regular time scale. The State

Government challenged the said order of the Tribunal in W.P. No. 1892 of 2003 State of Tamil Nadu and Ors. v. Alagar and Ors. and a Division

Bench of this Court by Judgment dated 23.1.2003, upheld the order of the Tribunal by observing as follows:

2. They were all Causual Labourers under the control of the Deputy Director of Animal Husbandry, Sheep Farm, Sattur, Virudhunagar District.

They were appointed in 1970s and 1980s and were continuously in service since then. They were paid daily wages out of the contingent fund.

Their services were subsequently regularised. These persons retired between 1999 and 2000. However, they were refused the pension. The

Tribunal took the view that since they were in continuous service, they would be liable to be given their pension on the basis of the calculations

made, i.e., half of their non-pensionable service shall be counted along with their pensionable service for the purpose of enabling them to get

pension. The Tribunal has directed the authorities to go into the calculations and then grant the pension.

3. We do not find anything wrong with this approach. After all, if the casual workers have put in service of 20 or 30 years as the case may be, they

are bound to receive the pension as per the available rules. The writ petition has no merits. It is dismissed.

12. In this case, if 50% of the contingent services are counted as pensionable service, the petitioner and her husband will have more than 14 years,

2 months and 14 days of pensionable service and the same could be seen from the details furnished by the petitioner''s husband to the Chief

Minister''s Special Cell, which was forwarded to the Director of Municipal Administration for immediate action by the Minister of the Local

Administration as early as on 6.4.1995. Hence the petitioner and her husband are entitled to get sanction of pension under the Tamil Nadu Pension

Rules, 1978, and also gratuity.

13. Rule 11 of the Tamil Nadu Pension Rules, 1978, clearly states that a Government Servant retiring on or after the 1st October, 1969, with

temporary or officiating service in a pensionable post, whether rendered in a regular capacity or not shall count in full as qualifying service even it is

not followed by confirmation. As per Rule 21 of the Tamil Nadu Pension Rules, 1978, if a Government Servant is dismissed or removed from

service, then his past service will be forfeited. Thus, under the Tamil Nadu Pension Rules, 1978, it is clear that even if a Government servant was appointed temporarily and was holding the post for more than ten years in a pensionable establishment, pension is bound to be sanctioned,

provided he retired after 1.10.1969.

14. The Supreme Court in the decision reported in A.P. Srivastava (Dead by Lrs.) Vs. Union of India (UOI) and Others, considered the eligibility

to get pension by a temporary Government Servant, who retired on reaching superannuation. In paragraphs 5 and 6, the Supreme Court held as

follows,

5. In view of the rival submissions at the bar, the question for consideration is whether there is any rationale behind the rule disentitling pension to a

government servant when an order of compulsory retirement is passed in exercise of power under Rule 56(j) of the Fundamental Rules? As has

been noticed earlier after completion of a particular period of service the employer has a right to compulsorily retire the employee in public interest

and similarly the employee has a right to voluntarily retire on giving three monthsï¿½ notice. It has been held by this Court time and again that the

pension is not a charity or bounty nor is it a conditional payment solely dependent on the sweet will of the employer. It is earned for rendering a

long service and is often described as deferred portion of payment for past services. It is in fact in the nature of social security plan provided for a

superannuated government servant. If a temporary government servant who has rendered 20 years of service, is entitled to pension, if he

voluntarily retires, there is no justification for denying the right to him when he is required to retire by the employer in the public interest. In other

words, the condition precedent for being entitled to pension in case of a temporary government servant is rendering of 20 years of service.

6. In view of the legal position that an order of compulsory retirement is not a punishment and pension is a right of the employee for services

rendered, we see no justification for denying such right to a temporary government servant merely on the ground that he was required to retire by

the employer in exercise of power under Rule 56(j) of the Fundamental Rules. In our considered opinion a temporary government servant would

be entitled to pension after he has completed more than 20 years of service even if he is required to retire by the employer in exercise of power

under Rule 56(j) of the Fundamental Rules.

15. The sanction of pension to a retired Government Servant is not a charity and it is given as the reward for the past services rendered, as held by

the Honourable Supreme Court in the following decisions.

(a) D.S. Nakara and Others Vs. Union of India (UOI), .

19. What is a pension? What are the goals of pension? What public interest or purpose, if any, it seeks to serve? If it does seek to serve some

public purpose, is it thwarted by such artificial division of retirement pre and post a certain date? We need seek answer to these and incidental

questions so as to render just justice between parties to this petition.

20. The antequated notion of pension being a bounty, a gratuitous payment depending upon the sweet will or grace of the employer not claimable

as a right and, therefore, no right to pension can be enforced through Court has been swept under the carpet by the decision of the Constitution

Bench in Deokinandan Prasad Vs. The State of Bihar and Others, wherein this Court authoritatively ruled that pension is a right and the payment of

it does not depend upon the discretion of the Government but is governed by the rules and a government servant coming within those rules is

entitled to claim pension. It was further held that the grant of pension does not depend upon anyoneï¿½s discretion. It is only for the purpose of

quantifying the amount having regard to service and other allied matters that it may be necessary for the authority to pass an order to the at effect

but the right to receive pension flows to the officer not because of any such order but by virtue of the rules. This view was reaffirmed in State of

Punjab and Another Vs. Iqbal Singh, .

In the said Judgment, the Supreme Court followed its earlier decisions reported in Deokinandan Prasad Vs. The State of Bihar and Others, and

State of Punjab and Another Vs. Iqbal Singh, .

(b) All India Reserve Bank Retired Officers Association and others Vs. Union of India and others, (para 5)

5. The concept of pension is now well known and has been clarified by this Court time and again. It is not a charity or bounty nor is it gratuitous

payment solely dependent on the whim or sweet will of the employer. It is earned for rendering long service and is often described as deferred

portion of compensation for past service. It is in fact in the nature of a social security plan to provide for the December of life of a superannuated employee. Such social security plans are consistent with the socio-economic requirements of the Constitution when the employer is a State within

the meaning of Article 12 of the Constitution. All the Bank employees who had retired prior to November 1, 1990 were governed by the CPF

scheme. However, by the introduction of the pension scheme under the Regulations those employees who retired on or after January 1, 1986 have

been given an option to switch over to the pension scheme provided they refund the employerï¿½s contribution to the CPF scheme together with

interest thereon and further agree to pay interest at six per cent per annum from the date of receipt of the fund amount on superannuation till the

repayment thereof. The grievance of the petitioners is that all employees who were governed by the CPF scheme on the date of their

superannuation constituted a homogeneous class and the pension scheme introduced under the Regulations seeks to divide them between those

who retired on or before December 31, 1985 and those who retired on and after January 1, 1986; to the latter the benefit of the pension scheme is

extended by option while to the former that benefit is denied altogether. This artificial division between members belonging to the same group,

contend the petitioners, is a flagrant violation of Article 14 of the Constitution as held in Nakara case.

(c) State of Punjab Vs. Justice S.S. Dewan (Retired Chief Justice) and others, ,

8. Conceptually, pension is a reward for past service. It is determined on the basis of length of service and last pay drawn. Length of service is

determinative of eligibility and the quantum of pension. The formula adopted for determining last average emoluments drawn has an impact on the

quantum of pension. In D.S. Nakara case the change in the formula of determining average emoluments by reducing 36 monthsï¿½ service to 10

monthsï¿½ service as measure of pension, made with a view to giving a higher average, was regarded as liberalisation or upward revision of the

existing pension scheme. On the basis of the same reasoning it may be said that any modification with respect to the other determinative factor,

namely, qualifying service made with a view to make it more beneficial in terms of quantum of pension can also be regarded a s liberalisation or

upward revision of the existing pension scheme. If, however, the change is not confined to the period of service but extends or relates to a period anterior to the joining of service then it would assume a different character. Then it is not liberalisation of the existing scheme but introduction of a

new retiral benefit. What has been done by amending Rule 16 is to make the period of practice at the Bar, which was otherwise irrelevant for

determining the qualifying service, also relevant for that purpose. It is a new concept and a new retiral benefit. The object of the amendment does

not appear to be to go for liberalisation. The purpose for which it appears to have been made is to make it more attractive for those who are

already in service so that they may not leave it and for new entrants so that they may be tempted to join it. Though Rule 16 does not specifically

state that the amended rule will apply only to those who retired after 22-2-1990, the intention behind it clearly appears to be to extend the new

benefit to those only who retired after that date. For these reasons the principle laid down in D.S. Nakara case that if pensioners form a class

computation of their pension cannot be by different formula affording unequal treatment merely on the ground that some retired earlier and some

retired later, will have no application to a case of this type. Therefore, on both the grounds the High Court was in error in applying the ratio of the

decision in D.S. Nakara case to this case. As rightly contended on behalf of the State, benefit of the amendment would be available to only those

direct recruits who retired after it has come into force.

(d) In the Division Bench decision reported in 2007 (2) LLN 169 C. Damodarasamy v. Government of India, while speaking for the Bench, I had

an occasion to deal with similar issue, wherein the Division Bench followed the above cited decisions and ordered to pay pension to one LIC

officer.

16. In the decision relied on by the learned Counsel for the petitioner, reported in 2006 (5) CTC 320 (cited supra), the learned Judge took note of

the 21 years of contingent services without break and found that the failure on the part of the department in not taking steps to regularise the

services of the contingent staff cannot be put against the said staff and on that account pensionary benefits cannot be denied. I have also

considered the issue as to whether non-regularisation of service of the Government Servants, who worked for more than 30 years can be

sanctioned pension, in W.P. Nos. 15258 and 15468 of 2006 and by order dated

18.7.2007 I have held as follows:

...having regard to the fact that the petitioners are having more than 30 years of service and they are allowed to retire on attaining the age of

superannuation, I am of the view that the petitioners are entitled to get sanction of pension from the date of retirement and a direction is issued to

the respondents to sanction pension. The arrears of pension payable to the petitioners from the date of retirement shall be calculated and paid to

the petitioners within three months from the date of receipt of copy of this order.

The above said judgments also support the case of the petitioner herein, even though there is a slight distinction in this case as admittedly the

petitioner and her husband were brought to regular service from 1.6.1973.

17.The learned Counsel for the petitioner further submitted that the petitioner is also entitled to receive the arrears of pension and gratuity payable

to the petitioner''s husband from 1.7.1976 till his death on 5.4.1998 and from 6.4.1998, petitioner is entitled to receive family pension due to the

death of her husband, or atleast from 14.2.1996, the date of issue of G.O.Ms. No. 118 Finance (Pension) Department, dated 14.2.1996.

18. Petitioner''s husband''s services were also regularised from 1.6.1973 and he retired on the same date i.e., on 30.6.1976, he was also having 14

years, 2 months and 14 days of pensionable service as calculated in the case of the petitioner. Hence the petitioner is also entitled to get sanction of

arrears of pension and gratuity of her husband from 14.2.1996 till his demise on 5.4.1998. Petitioner being widow, she is entitled to get family

pension, apart from her service pension payable from 14.2.1996 as per G.O.Ms. No. 118 Finance (Pension) Department, dated 14.2.1996.

19. It is unfortunate that the petitioner at the age of 89 years and having retired as early as on 30.6.1976, is forced to come to this Court for getting

her service pension and family pension. Had the respondents applied their mind, pension could have been paid to the petitioner and her husband

from 14.2.1996 itself. The attitude adopted by the respondents show how the respondents have avoided from taking decision in a just and proper

manner. When the Government passes an order taking into consideration the realities of the ground situations, the Officers of the Government are

expected to strictly act on the basis of the decisions of the Government, without narrowly interpreting the Rules by avoiding dogmatic and wooden approach.

20. In the result, the writ petition is ordered with the following directions:

(a) The third respondent is directed to calculate the arrears of pension payable to the petitioner from 14.2.1996 and gratuity and pay the same to

the petitioner within a period of two weeks from the date of receipt of copy of this order.

(b) The third respondent is further directed to sanction and pay the arrears of pension and gratuity payable to the petitioner''s husband from

14.2.1996 to 5.4.1998 and family pension from 6.4.1998 to the petitioner, within a period of two weeks from the date of receipt of copy of this

order.

(c) There will be no order as to costs.

