

(2011) 07 MAD CK 0293

Madras High Court

Case No: Writ Petition No. 9303 of 2008

P. Mayan

APPELLANT

Vs

The Secretary to Government
Home (Prisons) Department, The
Additional Director General of
Prisons, The District Probation
Officer and A. Sadasivam The
District Probation Officer

RESPONDENT

Date of Decision: July 7, 2011

Hon'ble Judges: V. Dhanapalan, J

Bench: Single Bench

Advocate: R. Rengaramanujam, for the Appellant; V.M. Velumani, Spl. G.P., for the Respondent

Judgement

@JUDGMENTTAG-ORDER

V. Dhanapalan, J.

Heard Mr. R. Rengaramanujam, learned Counsel appearing for the Petitioner and Ms. V.M. Velumani, learned Special Government Pleader appearing for the Respondents.

2. The Government Order passed by the first Respondent-Secretary to Government, Home (Prisons) Department, Secretariat, Chennai, dated 8.1.2007 in G.O.Ms. No. 29, Home (Prisons-2) Department, has been called in question by the Petitioner, wherein the Petitioner's claim for regularisation of the period of service from 20.3.2001 to 1.11.2002 as leave and as duty after verifying the records, has been negatived and the Petitioner sought to quash the same and also to quash the consequential Government Lr. No. 64291/Prison 2/2007-1, dated 8.9.2007 and for consequential direction to regularise the above period.

3. It is the case of the Petitioner that he was originally appointed as Office Assistant in the Office of the Probation Officer, Nagapattinam under the control of the Prison Department. His services were regularised with effect from 2.11.1981. He was discharging his duties sincerely. While that being so, due to illness, the Petitioner had applied for medical leave (unearned leave on medical certificate) from 20.3.2001 to 18.4.2001 and was under treatment. While so, he received the relieving order on the instruction of the Chief Probation Superintendent, Chennai, in proceedings in R.C.12209/Na3/99, dated 22.3.2001, based on which, the third Respondent has relieved him from the Office of the Probation Officer, Nagapattinam on 27.3.2001. The Petitioner was declared as surplus in view of the reduction of Office Assistants as per the policy of the Government and his name was included in the list of surplus Office Assistants and was forwarded to the District Collector for providing him alternative employment; thereafter, the District Collector, Nagapattinam provided employment to him in the District Court, Nagapattinam and was posted as Office Assistant in the Principal District Munsif Court, Mayiladuthurai, with the result, the above relieving order was issued by the third Respondent with instruction to join duty in the new Department.

4. Aggrieved by the above order, the Petitioner approached the Tamil Nadu Administrative Tribunal (hereinafter referred to as "the Tribunal") for redressal of his grievance on the ground that number of his juniors are continuing in the Department and he being senior, was erroneously declared as surplus and surrendered to the Collector, and therefore, the order dated 22.3.2001 was challenged before the Tribunal and he obtained an order of stay, by order dated 27.4.2001 in O.A. No. 3074 of 2001. Due to the abnormal situation, the Petitioner's health condition deteriorated and he extended his medical leave upto 18.5.2001 and therefore, he was directed to appear before the Medical Board for medical examination and accordingly, he appeared before the Board on 8.5.2001 and the Medical Board recommended for sanction of his leave on medical certificate in Letter No. 3718/ME/2001, dated 8.5.2001 and the same was communicated by the Joint Director of Health Services, Nagapattinam.

5. It is the further case of the Petitioner that immediately, he reported for duty before the third Respondent along with the said order of the Tribunal and the recommendations of the Medical Board. The fourth Respondent got wild and orally refused him to join duty. Therefore, the Petitioner proceeded on leave from the next day onwards. Subsequently, one Mr. Panneerselvam, Probation Officer, Mayiladuthurai, who took additional charge of the post, permitted the Petitioner to join duty and accordingly, he joined duty and thereafter, he attended the works from 22.5.2001 till the issuance of re-allotment of departmental transfer order. The Attendance Register, MTC-70 Register and the Election Duty Appointment Order and some of the vital documents which the Petitioner claims, reveal that he was on duty on those period in question. However, he has not been paid for the duty pay for the period he had worked in the office of the third Respondent and therefore, he filed

Miscellaneous Application in M.A. No. 5907 of 2001 in O.A. No. 3074 of 2001 before the Tribunal and the said Miscellaneous Application was allowed by the Tribunal, observing as follows:

3. It is now stated that the Petitioner is continuing in the office of the third Respondent viz., the District Probation Officer, Nagapattinam District, Nagapattinam. Since the stay is continuing and the original application is pending, it is needless to mention that the Petitioner is entitled for the salary.

4. In the circumstances, the petition is allowed. The third Respondent is directed to pay the salary to the Petitioner till the disposal of the O.A. since counter has been filed in the main O.A., post the main O.A. No. 3074 of 2001 for final disposal before the IInd Court on 12.11.2001.

6. According to the Petitioner, the Tribunal finally dismissed O.A. No. 3074 of 2001 on 11.6.2002 and thereafter, he was re-allotted to Kivalur Sub-Library and he joined duty as Office Assistant on 2.11.2002, and when he requested to settle his leave salary and duty pay salary for the period from 20.3.2001 to 1.11.2002, the Respondents refused to grant salary for the sole reason that he filed the case before the Tribunal, which was subsequently dismissed. He made representation to the Collector. However, the Government in the impugned order in G.O.Ms. No. 29, Home (Prisons-2) Department, dated 8.1.2007, regularised the period of his absence from 20.3.2001 to 1.11.2002 as extraordinary leave without pay and allowance. Therefore, the Petitioner preferred a revision petition to the first Respondent on 28.3.2007 and a representation to the Special Officer of the Hon"ble Chief Minister's Grievance Cell, Secretariat, Chennai, and there was No. reply to the revision petition till date. But the Petitioner received a communication in response to the representation to the Chief Minister's Cell, wherein, the first Respondent reiterated the same view already taken by the Department in G.O.Ms. No. 29, dated 8.1.2007.

7. Having No. other remedy, the Petitioner has challenged the above G.O. in this Writ Petition on the ground that the order fails to take note of the report given by the Medical Board on 8.5.2001 recommending the medical leave applied for by him, the Attendance Register, MTC-70 Register maintained in the Office, the Election Duty Order and the order of stay granted by the Tribunal, and therefore, the impugned order is arbitrary and passed with non-application of mind and hence, liable to be set aside.

8. The first Respondent has filed counter affidavit and inter-alia stated that it is true that the Petitioner was appointed as Office Assistant in the Office of the Probation Officer, Nagapattinam and his services were regularised with effect from 2.11.1981. As per the norms prescribed by the Government in G.O.Ms. Nos. 745 and 746, Finance Department, dated 22.9.1995, for the employment of Office Assistants in Government Offices, one Office Assistant for every 15 Ministerial Staff was stipulated and accordingly, 42 posts of Office Assistants were identified as surplus in

the Prison Department. The Petitioner is one among the said 42 Office Assistants identified as surplus. As the Petitioner was working in the Office of the Probation Officer, Nagapattinam, his name was surrendered to the Collector of Nagapattinam District, for placement in any of the vacant posts in the District. Subsequently, the District Collector, Nagapattinam allocated the Petitioner to the Office of the Principal District Munsif Court, Mayiladuthurai, vide proceedings of P.A.(General) to the Collector in No. 3875/99/A4, dated 2.3.2001. It was received by the second Respondent on 5.3.2001 and communicated to the Chief Probation Superintendent, as per the Additional Director General of Prison's proceedings in No. 60884/E1(2)/99, dated 9.3.2001, which was received by him on 14.3.2001. A copy of the above placement was sent directly by the District Collector to the Office of the third Respondent, namely the Probation Officer, Nagapattinam (and not the District Probation Officer, as stated in the affidavit), along with the copy meant for individual, which was received in the Office on 9.3.2001. Thereafter, by referring the proceedings of the District Collector, the Petitioner in his petition dated 12.3.2001, requested the Chief Probation Superintendent not to transfer him to the other Department and allow him to continue in the Prison Department, as he had put in more than 20 years of service. However, the Chief Probation Superintendent directed the third Respondent to relieve the Petitioner immediately. Accordingly, the Petitioner was relieved on 27.3.2001 with the instruction to the Petitioner to report for duty in the Office of the Principal District Munsif Court, Mayiladuthurai. It is further stated in the counter affidavit that it is true that the Petitioner was on unearned leave on medical certificate from 20.3.2001 to 18.4.2001.

9. In the counter affidavit, the stand of the Respondents is that the contention of the Petitioner that number of his juniors were continuing in the Prison Department, and being a senior, he was erroneously declared as surplus and surrendered to the Collector of Nagapattinam, is not at all correct and it is baseless. In surrendering 42 posts, the list of juniors identified as surplus, was taken into account and the Petitioner is one among them. Even though the interim stay was granted on 27.4.2001, originally in the case filed by the Petitioner in O.A. No. 3074 of 2001 before the Tribunal, it was finally dismissed by the Tribunal on 11.6.2002, wherein, the following observations were made:

Without any meaning or justification the applicant has come and obtained a stay order. The applicant cannot compel the department or employer to keep him on employment even though there is No. necessity for his engagement as such. The Government has found that as many as 42 persons are not wanted and have No. jobs in the Jail Department in Nagapattinam. The Government has taken the trouble to find out alternative employment, without just sending them away after termination. Therefore, the applicant must be thankful to the Government for providing him alternative employment and that too without break of service and with continuity of service. The application is without merits. The order is perfectly legal and proper. Therefore, the application fails and the same is dismissed.

10. That being the position, the Petitioner gave a petition on 12.3.2001 requesting him to allow to continue in the Prison Department and he went on leave from 15.3.2001 to 19.3.2001 and availed two days' permission (17th and 18th March 2001 are Government Holidays). From 20.3.2001 to 18.4.2001, he proceeded on unearned leave on medical certificate and he extended the unearned leave for 30 days upto 18.5.2001. The Petitioner was referred to the Medical Board for examination and the Board, in its letter dated 8.5.2001, found him fit for duty on 8.5.2001 itself, though he got the medical leave certificate until 18.5.2001. Therefore, it is evident that the Petitioner went on leave just to evade his joining in the other place, after knowing pretty well that his orders of transfer was due to re-deployment, which is based on the general policy of the Government. The Petitioner, on his transfer to Judicial Department, was relieved from the post and therefore, there is No. question of allowing the Petitioner to join in the Office of the Probation Officer, Nagapattinam, where No. post of Office Assistant existing, does not arise. Therefore, the action of the Probation Officer in having refused to allow the Petitioner to join duty, is in order. It is also stated in the counter affidavit that there was certain commotion and the Petitioner misbehaved because he was not allowed to do his work, besides the happenings in the Office.

11. Regarding payment of pay and allowances for the period he claims to be on duty, as per the order of the Tribunal in Miscellaneous Application No. 5907 of 2001 in O.A. No. 3074 of 2001, it is the stand of the Respondents that this order could not be given effect to, since the Petitioner was already relieved from the Prison Department and the Petitioner is No. more an Office Assistant of the Prison Department, since No. post of Office Assistant was available in the Office of the Probation Officer, Nagapattinam. After detailed written submissions filed before the Tribunal and on request by the Respondents, O.A. No. 3074 of 2001 filed by the Petitioner was dismissed on 11.6.2002 with a remark, appreciating the Government mechanism for re-deploying the individual, rather than throwing him out of employment. Therefore, the question of claiming pay for the Petitioner for the period succeeding the date of relief from the Office of the Probation Officer, Nagapattinam, till the date of joining of the new station, the Sub-Library, Kizhvelur on 2.11.2002, does not arise.

12. It is the further case of the Respondents in the counter that as there was No. post of Office Assistant in the Office of the Probation Officer, Nagapattinam, the act of the Petitioner in having signed the Attendance Register and claiming that he was on duty, is totally incorrect and not agreeable and he is not at all eligible to claim pay and allowance for the said period. As per the powers vested under Rule 5-A of the Fundamental Rules, the Government regularised the period of absence of the Petitioner from 20.3.2001 to 1.11.2002 as extraordinary leave without allowances without medical certificate in relaxation the sub-rules (2) and (3) of Rule 18 of the Fundamental Rules, as per G.O.Ms. No. 29, Home (Prison-2) Department, dated 8.1.2007. A reply was also given by the Government in their letter No.

64291/Prison-2/2007, Home Department, dated 8.9.2007 to the Petitioner reiterating the decision already taken by the Government in regularising the Petitioner's period of absence as extraordinary leave without allowances and without medical certificate. Therefore, the impugned order of the Government is perfect and in order and hence, Respondents pray for dismissal of the Writ Petition.

13. Learned Counsel for the Petitioner in his foremost submission, contended that the order of stay was granted by the Tribunal, which the Respondents have not obeyed, even though stay order has been communicated to them and therefore, the period of stay has to be counted as duty with pay and allowances for all purposes, as per the Fundamental Rules. But without looking into the above order of stay, the Respondents took a critical view saying that the said order could not be given effect to, since the Petitioner was already relieved from the Prison Department, which is arbitrary exercise of power and contra to the order of the Tribunal. In support of his contentions, learned Counsel for the Petitioner relied on the decision of the Supreme Court reported in 2004 (11) SCC 550 : CDJ 2004 SC 1290 (Electronics Corporation of India Ltd. and Ors. v. Satheesh S.Rao Sonawalkar).

14. On the other hand, learned Spl.G.P. appearing for the Respondents contended that as per the Fundamental Rules, the period of absence of the Petitioner from duty, was treated as extraordinary leave without allowance, without medical certificate, in relaxation of sub-rules (2) and (3) of Rule 18 of the Fundamental Rules and as per the Government Order, a decision was taken by the Respondents and order passed therein, which is in accordance with law, and there is No. legal infirmity. Learned Spl.G.P. also pointed out that the Tribunal has appreciated the efforts of the Government in re-deploying the surplus persons and the Petitioner, instead of joining in the transferred place, continued in the same Department, and therefore, he cannot claim regularisation of the period as duty with allowance and pay.

15. On the above background of pleadings, I have heard the learned Counsel on either side and perused the records and the relevant Rules.

16. It is not in dispute that the Petitioner was appointed as Office Assistant in the Office of the Probation Officer, Nagapattinam with effect from 2.11.1981 and he was regularised in that post from the said date. It is seen that the Government has taken a policy decision and accordingly issued G.O.Ms. Nos. 745 and 746, Finance Department, dated 22.9.1995 for the employment of Office Assistants in Government Offices in the ratio of one Office Assistant for every 15 Ministerial Staff. Accordingly, 42 posts of Office Assistant were identified as surplus in the Prison Department and the Petitioner being one among them, was found that he has to be re-deployed and therefore, the District Collector re-deployed the Petitioner and posted him in the Office of the Principal District Munsif Court, Mayiladuthurai, as per proceedings of the Collector, dated 2.3.2001. While so, the order of placement was received by the second Respondent on 5.3.2001 and communicated to the Chief

Probation Superintendent, as per the Additional Director General of Prison's proceedings, dated 9.3.2001, which was received by the Petitioner on 14.3.2001. That being so, aggrieved by the action of the Respondents, as the Petitioner being the senior among the Office Assistants and when the juniors were retained, moved the Tribunal in O.A. No. 3074 of 2001 challenging the order dated 22.3.2001 passed by the Respondents. The Tribunal granted interim stay on 27.4.2001 observing that, "Admit. Notice returnable by two weeks. Private notice permitted. Interim stay."

17. It is further seen that the Petitioner was on medical leave from 20.3.2001 to 18.4.2001. However, the medical leave was extended due to health deterioration upto 18.5.2001. Therefore, the Respondents referred the Petitioner to appear before the Medical Board and the Medical Board recommended for sanction of medical leave, by proceedings dated 8.5.2001 and the same was communicated by the Joint Director of Health Services, Nagapattinam. The Petitioner therefore reported for duty along with the order of stay granted by the Tribunal. However, the Respondents did not permit the Petitioner to join duty. Then, the Petitioner proceeded on leave from the next day onwards and subsequently, Mr. Panneerselvam, Probation Officer, Mayiladuthurai, who took additional charge of the post, permitted the Petitioner to join duty from 22.5.2001 and it is stated by the Petitioner that the relevant Attendance Register, MTC 70 Register and the Election Duty Appointment Order and some of the vital documents, revealed that he was on duty. In the meanwhile, the Petitioner also moved the Tribunal by filing Miscellaneous Application in M.A. No. 5907 of 2001 in O.A. No. 3074 of 2001 for payment of salary and the Tribunal allowed the application and directed the third Respondent to pay the salary to the Petitioner till the disposal of the O.A. Subsequently, the Tribunal dismissed the said O.A. No. 3074 of 2001 on 11.6.2002.

18. In the above circumstances, after the dismissal of the case before the Tribunal on 11.6.2002, the Petitioner joined duty as Office Assistant in the new station in Sub-Library, Kizhvelur on 2.11.2002. The Petitioner subsequently made a claim to settle his leave salary and duty pay for the period from 20.3.2001 to 1.11.2002, and the said claim was rejected by the first Respondent in the impugned order in G.O.Ms. No. 29, Home (Prison-2) Department, dated 8.1.2007, stating that the Additional Director General of Prisons, sent proposal to the Government to regularise the period of absence of Thiru.P.Mayan from 20.3.2001 to 1.11.2002 as extraordinary leave without pay and allowances, as he was not eligible for pay and allowances for the period of his absence, in view of the dismissal of the Original Application filed by the Petitioner before the Tribunal and the Government, after careful examination, decided to accept the proposal of the Additional Director General of Prisons and regulated the period of absence of Thiru.P.Mayan (Petitioner herein), formerly Office Assistant of Prison Department, from 20.3.2001 to 1.11.2002 as extraordinary leave without allowances, without medical certificate, in relaxation of Rule 18(2) and (3) of the Fundamental Rules in favour of the Petitioner, in exercise of the powers conferred under Rule 5-A of the Fundamental Rules.

19. In the light of the impugned order in G.O.Ms. No. 29, dated 8.1.2007, it is to be seen that whether the claim of the Petitioner is in accordance with law and the impugned order passed by the Respondents, is correct. A perusal of the impugned order reveals that the Petitioner was one among 42 Office Assistants identified as surplus in the Prison Department, as per the orders of the Government in G.O.Ms. Nos. 745 and 746, Finance Department, dated 22.9.1995. The District Judge, in turn, in proceedings dated 12.3.2001, transferred the Petitioner and posted as Office Assistant in the Principal District Munsif Court, Mayiladuthurai and the Petitioner was relieved of his duties in the Office of the Probation Officer, Nagapattinam, on 27.3.2001. In the meanwhile, he applied for medical leave for eight days with effect from 20.3.2001, which was not sanctioned and aggrieved by the transfer, the Petitioner filed O.A. No. 3074 of 2001 before the Tribunal and obtained interim stay against his transfer and the said O.A. No. 3074 of 2001 was dismissed on 11.6.2002 and the Petitioner joined duty in Keezhvelur Sub-Library on 2.11.2002.

20. From the above statements made by the first Respondent in the impugned G.O., it is clear that interim order of stay was granted by the Tribunal and from the typed set of papers filed along with the Writ Petition, it is seen that the copy of the order of stay was also communicated to the Respondents. Though in the impugned order in G.O.Ms. No. 29, the date of the order of interim stay of the Tribunal is mentioned as 27.3.2001, from the typed set of papers filed along with the Writ Petition, it is clear that the order of stay is dated 27.4.2001.

21. The question of regularisation of the period of leave or the absence during the period in question, has to be examined in the light of the above interim order of stay granted by the Tribunal. It is clear from the records that the Petitioner was on medical leave from 20.3.2001 to 18.4.2001 and thereafter, the Petitioner extended the leave upto 18.5.2001. In the meanwhile, he moved the Tribunal and obtained interim order of stay on 27.4.2001. The Petitioner, along with the interim order of stay, reported for duty before the Respondents immediately, but he was not permitted to join duty. However, Mr. Panneerselvam, the Probation Officer, Mayiladuthurai, who took additional charge of the post, permitted the Petitioner to join duty on 22.5.2001. This fact is not refuted by the Respondents in the counter affidavit. The order of stay of the Tribunal is in force from 27.4.2001 till the disposal of the Original Application on 11.6.2002. It is not the case of the Respondents that the order of stay granted by the Tribunal is modified. The claim of the Petitioner is that he was in the Office of the Probation Officer, as he was permitted to join duty by the Probation Officer, Mayiladuthurai. Even in the transferred place of the Petitioner at Keezhvelur Sub-Library, the order of stay was operating. The Petitioner's entitlement for regularisation of his services has to be considered in accordance with the order of the Tribunal.

22. It is true that the Government relaxed the Rules in Fundamental Rules in F.R.18(2) and (3) taking sympathetic consideration while regularisation of the period

of his absence. The Respondents have power to relax the Rules in favour of the Government employees, but in this case, the Respondents have not given due consideration of the order of stay granted by the Tribunal. On the other hand, the stand taken by the Respondents in paragraph 8 of the counter affidavit, is that the order could not be given effect to, since the Petitioner was already relieved from the Prison Department and the Petitioner is No. more an Office Assistant of the Prison Department. When once the order of the Respondents, dated 22.3.2001 has been challenged before the Tribunal and the Tribunal is seized of the matter and passed an order of interim stay, during the period of stay upto 2.11.2002 and till the dismissal of the Original Application in O.A. No. 3074 of 2001, as there is No. change in the circumstances in respect of the stay granted by the Tribunal, the Petitioner's claim for regularisation of the period of duty in the Prison Department, has to be considered, taking into account the stay granted by the Tribunal/Court and not by just giving any relaxation of the Rules to deny the benefit to the Petitioner on the ground that the order could not be given effect to. It is not for the Executive to interpret the order of the Court/Tribunal and it is always incumbent upon the Executive to obey the order of the Court/Tribunal when there is an order passed under the solemn functioning of the Court/Tribunal and it is not for the Executive to interpret by giving any relaxation of the Rules and to say something, otherwise than to defeat the order of the Court/Tribunal.

23. A complete perusal of the impugned order reveals that the first Respondent, without application of mind and without looking into the order of stay granted by the Tribunal during the period, passed the order dis-entitling the Petitioner for the period in question for regularisation. It is also equally important that the Petitioner was on leave from 20.3.2001 and there was No. interim stay till 27.4.2001 and on 27.4.2001, the Petitioner obtained interim order of stay and subsequently reported to the authority concerned. However, the Petitioner was allowed to join duty only on 22.5.2001. If that is so, the Petitioner is entitled for regularisation of the period during the period of stay from 27.4.2001 to 11.6.2002 in the Department, where he has been allowed to work, which is a matter for consideration by the Respondents and therefore, the period in question claimed by the Petitioner, has to be considered by the Respondents in accordance with the Rules and taking into account the order of stay passed by the Tribunal. The legal position is also settled by the Supreme Court in the case reported in 2004 (11) SCC 550 : CDJ 2004 SC 1290 (Electronics Corporation of India Ltd., and Ors. v. Satheesh S.Rao Sonawalkar).

24. For the foregoing reasons and discussion and taking into account the over-all facts and circumstances of the case and the orders passed by the Tribunal, the impugned order dated 8.1.2007 and the consequential letter dated 8.9.2007, suffers from legal infirmity and it cannot be sustained and accordingly, the same are set aside insofar as the denial of regularisation of the period of service of the Petitioner during the period of stay which was in force from 27.4.2001 to 11.6.2002 and to that extent, the impugned order and the impugned letter are quashed. The first

Respondent is directed to consider the claim of the Petitioner for the above period, i.e. from 27.4.2001 to 11.6.2002 for which period, there was an order of interim stay, and pass appropriate orders within eight weeks from the date of receipt of a copy of this order.

25. With the above observations and direction, the Writ Petition is disposed of. No costs.