

(2010) 03 MAD CK 0247

Madras High Court

Case No: Writ Petition No. 3909 of 2009

S.B. Kalyanasundaram

APPELLANT

Vs

The Secretary to Government,
Public Works Department and
The Chief Engineer/Buildings
Public Works Department

RESPONDENT

Date of Decision: March 19, 2010

Acts Referred:

- Tamil Nadu Civil Services (Discipline and Appeal) Rules, 1955 - Rule 17, 24, 9(6)(3)

Hon'ble Judges: V. Dhanapalan, J

Bench: Single Bench

Advocate: K. Venkatramani for M. Muthappan, for the Appellant; Sneha, Government Advocate, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

V. Dhanapalan, J.

The prayer in the writ petition is to quash the order dated 23.02.2009 passed by the 1st Respondent in Letter No. I7256/B2/08-II and for a further direction to the Respondents to treat the period from 11.02.2007 to 15.03.2007 as compulsory wait and direct them to draw and disburse the salary due with allowances along with interest @ 12% per annum.

2. The case of the Petitioner as set out in the affidavit would run thus:

(i) The Petitioner entered the service of the Respondent Public Works Department as a Junior Assistant on 04.03.1972. In the year 1979, he was promoted as Assistant and further promoted as Superintendent in August 2001 and after serving for more than three decades, he was superannuated from service on 31.03.2008.

(ii) The Petitioner's daughter was married to an Indian Engineer, who was employed in the United States of America. They left India long back and are residing at North Carolina State in the U.S.A. The Petitioner with an intention to visit them along with his wife, submitted an application on 11.05.2003 seeking No Objection Certificate (NOC) for applying passport. The Petitioner was granted permission and he was issued with the passport on 24.06.2005. Subsequently, the Petitioner submitted a petition for issuing No Objection Certificate from the Government to visit U.S.A for a period from 01.11.2005 to 29.12.2005. The Petitioner's request was rejected on the ground that he was facing disciplinary proceedings. Again, the Petitioner reviewed his application for issuing NOC to visit U.S.A along with his wife from 01.07.2002 to 30.09.2006 and submitted a petition on 25.01.2006 in a proper format. The said request was also rejected on the ground that the Petitioner is facing a charge memo under Rule 17(a) of Tamil Nadu Civil Services (Discipline and Appeal) Rules (hereinafter referred to as "Rules"). Thereafter, he approached this Court by filing a writ petition in W.P. No. 16245 of 2006 and the same was allowed on 03.07.2006 with a direction to the Respondent therein to issue a No Objection Certificate and also sanction Earned Leave for a period of 180 days.

(iii) The 1st Respondent, under Rule 24(a) of the Tamil Nadu Government Servants Conduct Rules, issued NOC to the Petitioner for a private visit, by his proceedings dated 11.08.2006. The Petitioner was also granted earned leave for a period of 180 days from 14.08.2006 to 09.02.2007 with permission to avail Government Holidays on 13.08.2006, 10.02.2007 and 11.02.2007 and he was directed to report for duty on 12.02.2007, failing which disciplinary action will be taken against him. Pursuant to the above direction of this Court, the Petitioner visited U.S.A. and returned to India in time. While he was staying in U.S.A., he submitted a representation requesting the Respondent to give him posting at Kancheepuram Sub-Division itself, since he was due for superannuation on 31.03.2008.

(iv) Thereafter, the Petitioner reported for duty on 12.02.2007 before the Assistant Executive Engineer, PWD Building Construction & Maintenance Sub-Division, Kancheepuram, through a representation. The Petitioner was given an endorsement by the said Assistant Executive Engineer, in the letter dated 12.02.2007 stating that the post of Superintendent in the Office of the Assistant Executive Engineer, Kancheepuram has already been filled up and there is no vacancy to accommodate him and requested the Petitioner to approach the Superintending Engineer, PWD, Building Construction and Maintenance Division, Chennai for a posting. In the meanwhile, the Petitioner received a communication dated 09.02.2007 from the Chief Engineer, Buildings, PWD, Chepauk, Chennai - 5, on 13.02.2007 stating that the Petitioner has been given a posting as Superintendent at Erode Building Construction and Maintenance Division and he has been directed to take the reposting orders from the Superintending Engineer, Erode and thereafter report for duty,

(v) The Petitioner, on 13.02.2007, after receiving the letter as a posting order, has requested the Superintending Engineer PWD, Erode to give a reposting order so as to enable him to report for duty at the Sub-Division and the Petitioner was given a posting by letter dated 22.02.2007 by the Superintending Engineer, PWD Building Construction and Maintenance Division, Erode, posting him at Erode and also directed the Petitioner to take the reposting order from the Executive Engineer, PWD, Erode. The Petitioner received the order on 05.03.2007. In the meanwhile, the Petitioner received the order from the Executive Engineer, PWD, Building Construction and Maintenance Division, Erode dated 28.02.2007, posting him as Superintendent, Building Maintenance Sub-Division, Tharapuram, Erode District and directed him to report for duty immediately. The Petitioner received the order on 15.03.2007 and reported for duty on 16.03.2007 and made a representation on that date itself requesting that the period in which he was kept on wait for posting from 12.02.2007 to 15.03.2007 as "compulsory wait" and requested to draw and disburse the salary for the period. According to the Petitioner, he was paid monthly salary for 10 days in the month of February 2007 and for the period from 11.02.2007 to 15.03.2007, he was not paid salary and that he was superannuated from service on 31.03.2008.

(vi) The Petitioner made several representations to the Respondents to treat the period from 11.02.2007 to 15.03.2007 as compulsory wait so as to enable him to draw the salary for the period. As there was no response from the Respondents, the Petitioner filed a writ petition in W.P. No. 28703 of 2008 for a direction to the Respondents to treat the period from 11.02.2007 to 15.03.2007 as compulsory wait and further direct them to draw and disburse the salary. The said writ petition was disposed of on 04.12.2008 with a direction to the 2nd Respondent to pass orders on the representation made by the Petitioner on 16.03.2007 within a period of eight weeks from the date of receipt of a copy of the order.

(vii) Thereafter, the 1st Respondent passed the impugned order dated 23.02.2009 rejecting the claim of the Petitioner for treating the period from 11.02.2007 to 15.03.2007 as compulsory wait. Challenging the impugned proceedings on the ground that it is against the Rules and the principles of natural justice and passed without assigning valid reasons, the Petitioner has moved this Court. It is his grievance that he has been victimized for having approached this Court and obtained an order to visit abroad for a period of six months from 14.08.2006 to 09.02.2007.

3. In the counter affidavit filed on behalf of the Respondents, it is stated that the Petitioner's representation dated 15.12.2006 requesting the Executive Engineer, to give posting at Kancheepuram was received by the Executive Engineer, Buildings (Construction & Maintenance) Division, Kancheepuram on 29.12.2006 and that the Petitioner has not represented to the Respondents for his posting at Kancheepuram, as stated in the affidavit.

3a. It is further stated that the Assistant Executive Engineer, Buildings (Construction & Maintenance) Sub Division, Kancheepuram has nothing to do with the representation of the Petitioner, to post him at Kancheepuram. The post, for the period from 13.08.2006 to 11.02.2007 could not be kept vacant for the Petitioner in the interest of administration and hence, another Superintendent was posted to that Sub Division. According to the Respondents, the Petitioner has admitted that he was served with the posting orders on 12.02.2007 with a direction to get reposting from the Superintending Engineer, Buildings (Construction and Maintenance) Circle, Erode. The Superintending Engineer, Erode has issued posting orders on 22.02.2007, which according to the Respondents is the normal time taken in administrative office, considering the factors such as the office procedure of putting up office note to the Superintending Engineer (who is a Touring Officer) and intervening Government Holidays. But, the Petitioner has stated that he had received the order on 05.03.2007. The Executive Engineer has issued reposting orders on 28.02.2007, whereas the Petitioner has stated that he has received the order on 15.03.2007.

3b. It is also stated that the Petitioner was not interested to rejoin duty in Dharapuram Buildings Sub Division. The individual, a P.W.D., Superintendent, vested with Administration works or Accounts after putting up 3 decades of service, ought to have been aware of the fact of getting the posting orders/re-posting orders from the Officers concerned. It has been stated in Government Letter No. 44890/FR III/95-I/dated 28.08.1995 that a Government Servant who desires to join duty on expiry of leave should report in person to the authority concerned. It is the case of the 2nd Respondent that the Petitioner should have been aware of this rule position. Ignorance cannot be an excuse. In the instance case, it is seen that on each occasion, the Petitioner has lethargically waited for his postings to reach him and not approached the authority concerned within stipulated him. Hence, the reluctance of the Petitioner to rejoin duty in Dharapuram has only delayed his joining in the new station. The Department is not responsible for such delay.

3c. According to the Respondents, a single genuine representation is enough for consideration and favourable orders. Numerous representations of the Petitioner are not valid with reference to rules and delay has been caused in the instant case and it was totally on the part of the Petitioner, to make delay wantonly to rejoin duty. The Petitioner was served with posting/reposting orders then and there, but he has not approached the authorities to receive the orders in person, within time. The 2nd Respondent/Chief Engineer (Buildings) has issued order dated 09.02.2007, i.e. well in advance of his expiry of leave. Thereafter, it is the burden and foremost duty of the Petitioner to report for duty by getting the orders properly in person.

3d. The Respondents would also state that the Petitioner, with a motive has found fault with the Superintending Engineer, as posting orders were served on the Petitioner on 09.02.2007 before his expiry of leave, i.e. 11.02.2007. With regard to

the filling up of vacancy, the Petitioner has stated that the said Sub Division is heavily work loaded and V.I.P. Visit works were looked after in that Sub Division. The Sub Division could not be kept vacant and it is the duty of the higher officials to cope up with the works without any backlog. Therefore, according to the Respondents, the Petitioner is not eligible for compulsory wait and the impugned order is well within the Rules and prayed for dismissal of the writ petition.

4. Heard Mr. K. Venkatramani, learned Senior Counsel appearing for the Petitioner and Mrs. Sneha, learned Government Advocate appearing for the Respondents.

5. Learned Senior Counsel appearing for the Petitioner has strenuously contended that as per Rule 9(6)(3) of the Fundamental Rules, when a Government servant has to compulsorily wait for orders of posting, such period of waiting shall be treated as duty. He would further contend that while the Petitioner was in U.S.A., he made a representation to the Respondents requesting to give posting order at Kancheepuram Sub-Division, as he is left with only one year of service. He has pointed out that various orders have been issued by the competent authorities and the dates on which they were issued would itself go to show that there is delay on the part of the Respondents.

6. Per contra, Mrs. Sneha, learned Government Advocate appearing for the Respondents would contend that the Petitioner's representation was not made to the competent authority; but, it was made before the Assistant Executive Engineer. She would submit that the Petitioner ought to have made his representation before the Chief Engineer (Buildings), who is the competent authority to deal with the matter. She would further submit that the delay is purely on administrative grounds, considering the factors such as the office procedure of putting up office note to the Super-intending Engineer and intervening Government Holidays. She also pointed out that Posting orders were issued to the Petitioner on 09.02.2007 well in advance on expiry of his leave; but, he has not chosen to join in the place of posting.

7. I have considered the submissions made by the Learned Counsel on either side and perused the material documents annexed to the typed set of papers and also analysed the relevant provisions of law.

8. It is not in dispute that the Petitioner initially entered the service of the Respondent Public Works Department as a Junior Assistant on 04.03.1972, then promoted as Assistant in the year 1979 and further promoted as Superintendent in August 2001, and after serving for more than 3 decades, he was superannuated from service on 31.03.2008. It is seen that the Petitioner's daughter was married to an Indian Engineer, settled in the United States of America. With an intention to visit his daughter residing at North Carolina in the U.S.A., along with his wife, the Petitioner submitted an application on 11.05.2003 seeking No Objection Certificate for applying passport. Thereafter, as there was no issuance of No Objection Certificate from the Respondents, the Petitioner renewed his request for No

Objection Certificate in his application dated 25.01.2006. The said request was rejected on the ground that the Petitioner was facing a charge memo under Rule 17(a) of the Rules. Finding that there was no positive response from the Respondents in the issuance of No Objection Certificate, the Petitioner moved this Court in W.P. No. 16425 of 2005 and the said petition was allowed on 03.07.2006 with a direction to the Respondent to issue a No Objection Certificate and also sanction Earned Leave for a period of 180 days.

9. Pursuant to the above direction, the 1st Respondent issued No Objection Certificate as per Rule 24(a) of the Conduct Rules for a private visit to U.S.A., in his proceedings dated 11.08.2006 and the Petitioner was also granted Earned Leave for a period of 180 days from 14.08.2006 to 09.02.2007 with permission to avail Government Holidays on 13.08.2006, 10.02.2007 and 11.02.2007 and he was directed to report for duty on 12.02.2007, failing which disciplinary action will be taken against him. Based on the above proceedings, the Petitioner visited U.S.A. and he returned to India on 09.02.2007. While the Petitioner was staying in U.S.A., he made a representation to the Respondents requesting to give him posting at Kancheepuram Sub-Division itself, since he was due for superannuation on 31.03.2008. It appears that the Petitioner had reported for duty before the Assistant Executive Engineer, PWD Building Construction & Maintenance Sub-Division, Kancheepuram on 12.02.2007, where he was relieved from duty before availing leave for the visit to U.S.A. The said letter was returned to the Petitioner with an endorsement stating that there is no vacancy to accommodate him and requested him to approach the Superintending Engineer, PWD, Building Construction and Maintenance Division, Chennai for a posting.

10. It is the case of the Respondents that the Petitioner made a representation on 15.12.2006 requesting the Executive Engineer, to give posting at Kancheepuram and it was received by the Executive Engineer, Buildings (Construction & Maintenance) Division, Kancheepuram on 29.12.2006. According to the Respondents, the Assistant Executive Engineer has nothing to do with the representation of the Petitioner seeking to post him at Kancheepuram. It is the case of the Respondents that the period from 13.08.2006 to 11.02.2007 could not be kept vacant in the interest of administration and hence, another Superintendent was posted to that Sub Division at Kancheepuram. It is also the admitted case that the 2nd Respondent/Chief Engineer (Buildings) has issued order dated 09.02.2007 well in advance of the expiry of the Petitioner's leave and that he has to report to duty on 12.02.2007. But, in the counter of the Respondents, it is stated that the Petitioner has himself admitted that he was served with the posting orders on 12.02.2007 with a direction to get reposting from the Superintending Engineer, Buildings (Construction and Maintenance) Circle, Erode and the Superintending Engineer, Erode has issued posting orders on 22.02.2007. A specific averment has been made in paragraph 6 of the counter that this is the normal time taken in administrative office, considering the factors such as the office procedure of putting up office note to the

Superintending Engineer (who is a Touring Officer) and intervening Government Holidays.

11. The consistent stand of the Respondents is that the Petitioner has served as a Superintendent in the Respondent Department for more than three decades and noting the procedures, he ought to have approached the authorities concerned and obtained orders to report for duty and he ought not to have awaited for orders to be served on him.

12. It is to be noted that the order of posting was issued on 09.02.2007 and signed by the Superintending Engineer on 12.02.2007 and counter signed by the Administrative Officer, P.W.D on 12.02.2007. The said letter has been sent, by the Executive Engineer, P.W.D. Kancheepuram on 13.02.2007 and it reached the Petitioner on 13.02.2007. The Superintending Engineer, Erode issued posting order on 22.02.2007 and it was forwarded to the Superintending Engineer, Chennai. Then, the Superintending Engineer, P.W.D., Chennai signed the order on 02.03.2007 and it was sent to the Petitioner on 05.03.2007 and correspondingly, the the Executive Engineer, Erode issued the re-posting order on 28.02.2007 and the same was forwarded on 14.03.2007 and sent to the Petitioner on 15.03.2007.

13. A perusal of the entire documents would reveal that several proceedings corresponding the Respondent Department and the Petitioner were initiated from 09.02.2007 to 05.03.2007 and the reasons attributed for the delay as stated in the counter of the Respondents is due to administrative exigencies; particularly, it has been stated that the delay is due to office procedures of putting up office note to the Superintending Engineer, who is a Touring Offi-cer and the intervening Government Holidays. The Executive Engineer also issued an order of reposting on 28.02.2007. It was sent to the Petitioner on 15.03.2007. In this context, the claim of the Petitioner has to be examined based on Rule 9(6)(3) of the Fundamental Rules, wherein, it is provided that when a Government servant has to compulsorily wait for orders of posting, such period of waiting shall be treated as duty. During such period, he shall be eligible to draw the pay plus special pay which he would have drawn had he continued in the post he held immediately before the period of compulsory wait or the pay plus special pay which he will draw on taking charge of the new post, whichever is less.

14. A careful analysis of the above provisions would make it clear that whatever be the period of wait for orders of posting, it has to be treated as compulsory wait and that period has to be treated as duty and that the Petitioner herein is entitled for special pay for that period. It is also made clear that the compensatory allowances shall be reckoned at the rates admissible at the station in which he was on compulsory wait.

15. In the light of the above position and analysing Rule 9(6)(3) of the Fundamental Rules, the impugned order dated 23.02.2009 passed by the 1st Respondent rejecting

the claim of the Petitioner cannot be sustained and the same is liable to be set aside. Accordingly, it is set aside and the 1st Respondent is directed to consider the Petitioner's claim treating the period from 12.02.2007 to 15.03.2007 as compulsory wait and pass appropriate orders within a period of six (6) weeks from the date of receipt of a copy of this order.

The writ petition is allowed with the above direction. No costs.