

THE HIGH COURT OF SIKKIM: GANGTOK
(Civil Appellate Jurisdiction)

Dated : 27th April, 2023.

DIVISION BENCH: THE HON'BLE MR. JUSTICE BISWANATH SOMADDER, CHIEF JUSTICE
THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

WRIT APPEAL No. 08 of 2022

1. State of Sikkim,
Through the Chief Secretary,
Secretariat, Tashiling,
Gangtok, East Sikkim.

 2. Home Department,
Through the Principal Secretary,
Government of Sikkim,
Secretariat, Tashiling,
Gangtok, East Sikkim.

 3. Department of Personnel, A.R. & Training,
Public Grievances,
Through the Secretary,
Government of Sikkim,
Secretariat, Tashiling,
Gangtok, Sikkim.
- ...Appellants

Versus

Dr. Mool Raj Kotwal,
S/o late S.N. Kotwal,
R/o Shunyata,
Tibet Road, Gangtok,
East Sikkim, PIN-737101

...Respondent

Appearance:

Mr. Zangpo Sherpa, Additional Advocate General with Mr. Yadev Sharma, Govt. Advocate and Mr. Sujan Sunwar, Asst. Govt. Advocate for the appellants.

Mr. Karma Thinlay, Senior Advocate with Mr. Yashir Namgyal Tamang, Advocate for the respondent.

JUDGMENT : (per the Hon'ble, the Chief Justice)

The instant Intra-Court Mandamus Appeal arises in respect of a judgment and order dated 08th September, 2022, passed by a learned Single Judge of this Court in W.P.(C) No.14 of 2022 (*Dr. Mool Raj Kotwal vs. State*

of Sikkim & Ors.). By the impugned judgment and order, the learned Single Judge proceeded to allow the writ petition by *inter alia* declaring that the writ petitioner was entitled to leave encashment as per Rule 36 read with Rule 32 of the Sikkim Government Service (Leave) Rules, 1982 (for short, "the Leave Rules") for the period 2005 to 2019, in which period, having been re-employed, the petitioner had served the State Government.

The instant appeal has been preferred by the State of Sikkim through its Chief Secretary along with two of its Departments.

Briefly stated, the relevant facts of the case are as follows: -

The respondent-writ petitioner retired from service as a Medical Specialist on 31st January, 2005. On the very next day, i.e., on 01st February, 2005, he was re-employed as Medical Advisor-cum-Chief Consultant in the Sir Thutob Namgyal Memorial Hospital (for short, "STNM Hospital") initially and thereafter for short periods in various capacities until 2019. On 28th May, 2019, the respondent-writ petitioner was relieved from his assignment as Principal Medical Advisor to the Hon'ble Chief Minister — on re-employment — with effect from 31st May, 2019. On 31st May, 2019, the Department of Personnel, Administrative Reforms, Training and Public Grievances (DOPART), Government of Sikkim, issued an Office Order No.710/G/DOP allowing the respondent-writ petitioner to draw cash equivalent of his leave salary in lieu of 300 days unutilised earned leave standing to his credit as on 31st May, 2019. Subsequently, on 27th February, 2020, another Office Memorandum bearing No.4528/GEN/DOP was issued seeking to clarify regarding leave encashment of earned leave to Government employees on extension of service, re-employment, etc. On 21st May, 2020, the DOPART issued Office Order No.493/G/DOP, cancelling the earlier Office Order No.710/G/DOP dated 31st May, 2019, which allowed the respondent-writ petitioner to draw cash equivalent of his leave salary in lieu of 300 days of unutilised earned leave standing due to his credit as on



31st May, 2019. On 21st March, 2022, a letter bearing No. GOS/HOME/Acctt./726 was issued by the Home Department intimating the respondent-writ petitioner that the DOPART vide Office Order No.493/G/DOP dated 21st May, 2020, cancelled the earlier Office Order No.710/G/DOP dated 31st May, 2019. This communication informed the respondent-writ petitioner that they were unable to release the payment, as desired by him. Aggrieved by denial of such benefit of leave encashment, the respondent-writ petitioner approached the writ Court under Article 226 of the Constitution of India, seeking such reliefs as prayed for in the writ petition. Before the writ Court, the respondents (being the appellants herein) filed their counter-affidavit and the matter was heard by the learned Single Judge and the writ petition was allowed, as stated at the outset.

The main issue which arises for consideration, in the facts and circumstances of the instant case, is whether the respondent-writ petitioner was entitled to leave encashment — in other words, cash payment in lieu of unutilised earned leave — after completing his tenure as a re-employed Government servant in accordance with Rule 36 of the Leave Rules.

As stated earlier, the respondent-writ petitioner had retired from service as a Government employee (Medical Specialist) on 31st January, 2005. Admittedly, he was paid cash equivalent of unutilised earned leave, in accordance with Rule 36 of the Leave Rules, consequent upon his retirement from Government service on 31st January, 2005.

We now need to examine as to whether he can once again claim leave encashment of unutilised earned leave; this time after completing his tenure of around 14 years as a re-employed Government servant in accordance with Rule 36 of the Leave Rules. In order to examine this issue, we need to first look at Rule 36 of the Leave Rules, which reads as follows:

"36. Cash payment in lieu of unutilized earned leave and half pay leave on the date of retirement.- The Government may sanction to a Government servant who retires from service under the Sikkim Government Service Rules, 1974, cash equivalent of the leave salary in respect of earned leave and half pay leave subject to overall limit of 300 days. Cash equivalent

to half pay leave shall be equal to leave salary as admissible for half pay leave. To make up for the shortfall in earned leave, no commutation of half pay leave shall be admissible.”

A plain reading of the above Rule reveals that leave encashment is provided under the said Rule only in respect of a Government servant who retires from service under the Sikkim Government Service Rules, 1974 (for short, “the Service Rules”). However, before we look at the relevant provisions of the Service Rules, we need to look into Rule 32 of the Leave Rules, which is a provision regarding applicability of the Leave Rules in respect of those Government servants who are re-employed after retirement.

Rule 32 reads as follows:

“32. Leave during a period of re-employment after retirement.- In the case of a Government servant re-employed after retirement, the provisions of these rules shall apply as if he had entered government service for the first time on the date of his re-employment.”

At this juncture, it would be appropriate to take note of the fact that while allowing the writ petition, the learned Single Judge had held *inter alia* that in order to correctly interpret Rule 36 of the Leave Rules for the purpose of its application to re-employed retired Government servants, the same must be read with Rule 32 of the Leave Rules and not in isolation.

Now, coming back to Rule 36 of the Leave Rules — which requires us to consider the relevant provisions of the Service Rules that specifically deals with retirement — we need to take notice of Chapter XII of the Service Rules. Chapter XII of the Service Rules is an entire chapter dealing with retirement. We, therefore, need to read Chapter XII wholly, which begins with Rule 98 and ends at Rule 102. For the purpose of our case, however, we need to focus only on Rule 98 and Rule 102 of the Service Rules, which are specific provisions regarding retirement on superannuation and re-employment (both applicable in the case of the respondent-writ petitioner).



For convenience, Rule 98 of the Service Rules (which actually contains two sub-Rules thereunder) and Rule 102 of the Service Rules are reproduced hereinbelow:

"98. Retirement on superannuation.-

(1) The date of retirement on superannuation of any Government Servant in the regular service shall be the afternoon of the last day of the month in which he attains the age of 58 years. The Government retains the right to change the prescribed age of retirement.

Provided that the Government Servant who had attained the age of 58 years or more on the date of issue of this Notification shall retire from the service with effect from the afternoon of 31st October 1983.

(2) Notwithstanding the provision of sub-rule (1), the age of retirement on superannuation of teachers in the regular service shall be extendable by 4 (four) years [by way of re-employment] beyond the age of 58 (fifty-eight) years after review of their performance by the Departmental Committee to be constituted by the State Government, on their attaining the age of 57 (fifty-seven) years:

Provided that those teachers who have attained the age of 58 (fifty-eight) years and are continuing in their service beyond 58 (fifty-eight) years shall retire on 31st December, 2014.

Explanation.- The word **"teacher"** does not include Principal of Senior Secondary Schools, Headmasters/Headmistresses of Secondary Schools and faculty members of District Institute of Education and Training / State Institute of Education, namely,- Principal, Senior Lecturers, Lecturers and Coordinators.

Explanation.- For the purpose of this rule, a Government Servant whose date of birth falls on the first day of any month shall have attained the age of fifty-eight years on the afternoon of the last day of the preceding month.

x x x x

102. A Government Servant, who is retired according to the provisions of rule 98, may be re-employed by the Government if it is satisfied that such employment is definitely in the interest of the Government and that the Government Servant is physically and mentally fit. The period for re-employment shall be determined by the Government.

Provided that the day fixed plus the retiring pension shall not, on the day of re-employment, exceed the pay last drawn by the Government Servant before retirement, and also that the pay plus the retiring pension shall not, at any time, exceed the maximum of the pay scale of the post held by him during the period of re-employment."

A plain reading of Rule 98 of the Service Rules clearly postulates retirement on superannuation. Sub-Rule (1), in particular, is with regard to the date of retirement on superannuation of any Government employee. Rule 102 of the Service Rules, on the other hand, provides for re-employment by the Government of a Government servant who has retired according to the provisions of Rule 98.

In the facts of the instant case, the respondent-writ petitioner — as a regular Government employee — superannuated on 31st January, 2005. He took benefit of leave encashment under Rule 36 of the Leave Rules,



consequent upon his attaining superannuation and now seeks to avail leave encashment once again as provided under Rule 36 of the Leave Rules.

As discussed hereinabove, Chapter XII of the Service Rules — dealing with retirement — contains within its fold, Rule 102, which clearly provides for re-employment by the Government of a Government servant who has retired according to the provisions of Rule 98 of the Service Rules. Keeping this aspect in mind, we now need to re-examine Rule 32 of the Leave Rules, which was also taken notice of by the learned Single Judge. A plain reading of this Rule clearly reveals that a legal fiction has been consciously introduced in order to make the Leave Rules applicable in respect of those Government servants who have been “re-employed” after retirement. This legal fiction appears from the phrase “..... as if he had entered Government service for the first time on the date of his re-employment.”, which appears after the phrase, “In the case of a Government servant re-employed after retirement, the provisions of these rules shall apply”. In other words, in terms of Rule 32, any Government servant re-employed after retirement shall be *deemed* to have entered Government service for the first time on the date of his re-employment; thereby bringing that re-employed Government servant squarely within the fold and ambit of the Leave Rules. In such circumstances, Rule 36 of the Leave Rules — which is in respect of cash payment in lieu of unutilised earned leave and half pay leave on the date of retirement — shall be *deemed* to be clearly applicable in respect of those Government servants who have been re-employed.

In such circumstances, we do not notice any error of reasoning in respect of the impugned judgment and order passed by the learned Single Judge. That apart and in any event, in an Intra-Court Mandamus appeal, interference is usually warranted only when palpable infirmities or perversities are noticed on a plain reading of the impugned judgment and order. In the facts of the instant case, on a plain reading of the impugned



judgment and order, we do not notice any such palpable infirmity or perversity. We hasten to add that the impugned judgment and order is supported with cogent and justifiable reasons.

For reasons stated above, the instant appeal is liable to be dismissed and stands accordingly dismissed. Connected applications, if any, stand disposed of accordingly.

(Meenakshi Madan Rai)
Judge

(Biswanath Somadder)
Chief Justice

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