

THE HIGH COURT OF SIKKIM: GANGTOK

(Civil Extraordinary Jurisdiction)

SINGLE BENCH: HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

W.P. (C) No. 14 of 2022

Dr. Mool Raj Kotwal,
S/o Late S.N. Kotwal,
R/o Shunyata,
Tibet Road,
Gangtok,
East Sikkim.

..... **Petitioner**

Versus

1. State of Sikkim,
Through the Chief Secretary,
Government of Sikkim,
Secretariat, Tashiling,
Gangtok, East Sikkim,
Pin - 737101.

2. Home Department,
Through the Principal Secretary,
Government of Sikkim,
Secretariat, Tashiling,
Gangtok, East Sikkim,
Pin - 737101.

3. Department of Personnel, A.R. & Training,
Public Grievances,
Through the Secretary,
Government of Sikkim,
Secretariat, Tashiling,
Gangtok, East Sikkim,
Pin - 737101.

.... **Respondents**

Application under Article 226 of the Constitution of India, 1950.

[For issuance of Writ of or in the nature of Mandamus and or any other appropriate Writ, order of direction of the like nature for quashing of Office Order No.493/G/DOP dated 21st May 2020 issued by Department of Personnel, Government of Sikkim and letter no.GOS/Home/Actt./726 dated 21.03.2022 issued by Chief Accounts Officer, Home Department, Government of Sikkim.]

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Appearance:

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

Mr. Sudesh Joshi, Additional Advocate General with Mr. Thinlay Dorjee Bhutia, Government Advocate, Mr. Yadev Sharma, Government Advocate and Mr. Sujan Sunwar, Assistant Government Advocate for the Respondents.

Date of hearing : 23.08.2022 & 08.09.2022

J U D G M E N T (O R A L)
08.09.2022

Bhaskar Raj Pradhan, J.

1. The petitioner retired from service as a Medical Specialist on 31.01.2005. On 01.02.2005, the petitioner was re-employed as Medical Advisor-cum-Chief Consultant in the STNM Hospital initially and thereafter, for short periods in various capacities until 2019. On 28.05.2019, the petitioner was relieved from his assignment as Principal Medical Advisor to the Hon'ble Chief Minister on re-employment, w.e.f., 31.05.2019. On 31.05.2019, the Department of Personnel, Adm. Reforms, Training & Public Grievances, Government of Sikkim (DOPART), issued Office Order No.710/G/DOP allowing the petitioner to draw cash equivalent to leave salary in lieu of 300 days unutilized earned leave standing to his credit as on 31.05.2019. On 27.02.2020, Office Memorandum No.4528/GEN/DOP was

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issued seeking to clarify on leave encashment of earned leave to government employees on extension of service, re-employment, etc. It provided:

“Rule 36 of the Sikkim Government Service (Leave) Rules, 1982 provides to a Government Employee who retires from the service under the Sikkim Government Service Rules, 1974, cash equivalent of leave salary in lieu of earned leave on full day standing at his/her credit on the date of his retirement subject to a minimum of 300 days. Therefore, a maximum of 300 days of earned leave due at credit also includes the period of leave earned by a Government Employee during extension of service, Re-employment etc.”

2. On 21.05.2020, the DOPART issued Office Order No.493/G/DOP cancelling Office Order No.710/G/DOP dated 31.05.2019, which allowed the petitioner to draw cash equivalent to leave salary in lieu of 300 days of unutilized earned leave standing due to his credit as on 31.05.2019. On 21.03.2022, letter bearing No.GOS/HOME/Acctt./726 was issued by the Home Department intimating the petitioner that the DOPART vide Office Order No.493/G/DOP dated 21.05.2020 has cancelled the Office Order No.710/G/DOP dated 31.05.2019. This communication informed the petitioner that they were unable to release the payment as desired by him.

3. Aggrieved by the denial of the benefit under Rule 36 of the Sikkim Government Service (Leave) Rules, 1982

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(the Leave Rules), the petitioner has approached this court invoking its extraordinary writ jurisdiction seeking an appropriate writ to quash Office Order No.493/G/DOP dated 21.05.2020 issued by the DOPART; letter bearing No. GOS/HOME/Acctt./726 dated 21.03.2022 issued by the Home Department as well as a declaration that Office Memorandum No.4528/GEN/DOP dated 27.02.2020 is not applicable to the petitioner's case as it would not have retrospective effect. The petitioner also seeks a declaration that he is entitled to leave encashment of Rs.20,51,100/- as per Rule 32 read with Rule 36 of the Leave Rules for the period of 2005 to 2019 during the period of his re-employment. The petitioner seeks further declaration that he is also entitled to leave encashment as similarly placed re-employed employees for the same period who were also given the benefit under the said provisions. The petitioner seeks a direction upon the respondents to disclose the list of beneficiaries of all the government employees who got the benefit of leave encashment on being re-employed as on 21.05.2020.

4. The respondent nos. 1, 2 and 3 (respondents) have filed their counter-affidavits contesting the writ petition. The fact that the petitioner was in the service of the

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Government of Sikkim and that he was re-employed is not in issue. The respondents state that after the petitioner's retirement he was re-employed as a Medical Advisor-cum-Chief Consultant in the STNM Hospital for a period of two years and his term of re-employment was further extended from time to time till he was relieved. The petitioner vide letter dated 23.05.2019 submitted his representation requesting to be relieved from his re-employment and the concerned authority, duly considering the representation, relieved him from his assignment, w.e.f., 31.05.2019, vide Officer Order No.632/G/DOP dated 28.05.2019. It is contended that the Leave Rules has no provision governing encashment of unutilized leave earned during re-employment. It is admitted that the respondents had been inadvertently issuing orders of leave encashment of unutilized earned leave in respect of re-employed officers and as such, when the petitioner applied for it, the respondents issued Office Order No.710/G/DOP dated 31.05.2019. It is stated that after the formation of the new government in 2019, when the issue regarding encashment of unutilized earned leave by the re-employed employees at the time of their termination from re-employment came to light, it was observed that the re-employed employees were

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being erroneously given the double benefit of leave encashment of 300 days at the time of retirement and at the time of being relieved from the re-employment which was putting unnecessary financial burden on the state exchequer. The issue was carefully examined and in order to mitigate the same, Office Memorandum No.4528/GEN/DOP dated 27.02.2020, clarifying it, was issued. Pursuant thereto, Office Order No.710/G/DOP dated 31.05.2019, earlier issued to the petitioner, was cancelled. The respondents further states that the petitioner, after a lapse of almost a year, once again approached the respondents vide letter dated 15.11.2021 with a request for payment of leave encashment of 300 days as unutilized earned leave which was considered and declined vide letter No.2772/G/DOP dated 18.02.2022. It is submitted that the petitioner's claim for encashment of unutilized earned leave for his re-employed period under Rule 36 of the Leave Rules is not correct as it provides for encashment of earned leave to the employees who retires from service and not for the petitioner who had already retired in the year 2005 as per Rule 98 of the Sikkim Government Service Rules, 1974 (the Service Rules) and who has also availed the benefit of leave encashment under Rule 36 of the Leave Rules.

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5. The Leave Rules came into force on 01.04.1981. Rule 2 thereof provides the extent of its application. Rule 3 defines various terms but not the word “*retirement*” or the phrase “*retires from service*”. Rule 6 provides for earning of leave. Rule 32 deals with leave during a period of re-employment after retirement. Rule 36 provides for cash payment in lieu of unutilized earned leave on the date of retirement. The said provisions are quoted herein below for clarity:-

“2. Extent of application.- *Save as otherwise provided in these rules, they shall apply to government servants appointed to various services and posts in connection with the affairs of the State of Sikkim, but shall not apply to:-*

- (a)
- (b)
- (c)
- (d)
- (e)
- (f) *persons employed on contract except when the contract provides otherwise.*

3. Definitions:-

(1) *In these rules, unless the context otherwise requires,-*

- (a)
- [(aa)]
- (b)
- (c)

(2) *Words and expressions used herein and not defined but defined in the Sikkim Government Service Rules, 1974 shall have the meaning respectively assigned to them in those rules.”*

“6 Earning of leave.- *Save as otherwise provided in these rules, leave shall be earned for the period for which a Government servant is on duty only.*

Explanation I.- *Duty includes periods of casual leave, departmental examination leave under rule 25, in-service training, joining time, quarantine leave but does not include the period of extraordinary leave, examination leave, study leave, maternity leave and all*

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other kinds of leave including special disability leave for accidental injury.

Explanation II.- *For the purpose of this rule, the period spent on deputation to autonomous bodies, public undertakings, shall count as duty only if contribution towards leave salary and pension are paid either by the borrowing employer or the government servant.”*

“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.”*

“36. Cash payment in lieu of unutilized earned 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 leave salary in lieu of the period of earned leave on full pay standing at his credit on the date of his retirement subject to a maximum of 300 days.”*

6. Heard Mr. Karma Thinlay Namgyal, learned Senior Advocate for the petitioner as well as Mr. Sudesh Joshi, learned Additional Advocate General for the respondents. The learned Senior Advocate submitted that as the petitioner was re-employed as per rules and given all other benefits of a Government Servant, it would be erroneous to deny him leave encashment only even when it cannot be disputed that after his re-employment the petitioner had once again served the State Government as a Government Servant for several years until his retirement. He submits that the State’s objection on a confined interpretation of the phrase “*retires from service*” in Rule 36 of the Leave Rules is in ignorance of Rule 32 which provides that it would be applicable even in case of re-employment.

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7. The learned Additional Advocate General on the other hand submits that the petitioner was re-employed under Rule 102 of the Service Rules which postulates only three kinds of retirement as provided in Rule 98, 99 and 99A. Relieving the petitioner at the end of the period of his re-employment cannot be considered as retirement.

8. The central issue relevant to decide the controversy between the petitioner and the respondents seems to be on the meaning of the phrase “*retires from service*” as used in rule 36 of the Leave Rules.

9. The Leave Rules has been enacted to provide for various matters concerning leave of Government servants appointed to various services and posts in connection with the affairs of the State of Sikkim. Rule 2 provides that the Leave Rules shall not apply, *inter alia*, to “(f) persons employed on contract except when the contract provides otherwise”.

10. Office Order No.1839/G/DOP dated 31.01.2005 is the office order by which the petitioner was re-employed. It states that the petitioner is re-employed for a period of two years, w.e.f., 01.02.2005. Office Order No.203/G/DOP dated

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06.02.2007, extends the term of re-employment of the petitioner for a period of two years, w.e.f., 01.02.2007. Office Order No.1791/G/DOP dated 24.01.2009, further extends the petitioner's re-employment for a period of one year, w.e.f., 01.02.2009. Office Order No.1774/G/DOP dated 29.1.2010, extends the petitioner's re-employment for a period of two years, w.e.f., 01.02.2010. There is no office order for the period 2012 till 2015 filed by the petitioner reflecting extension of his re-employment. However, in view of the categorical stand of the respondents that subsequent to his retirement the petitioner was re-employed for a period of two years initially and the term was extended from time to time till he was relieved, it is not an issue. Office Order No. 3345/G/DOP dated 31.1.2015, extends his period of re-employment for a period of two years, w.e.f., 01.02.2015. Office Order No.172/G/DOP dated 19.01.2017, extends the petitioner's re-employment period by two years, w.e.f., 01.02.2017. Office Order No. 4852/G/DOP dated 04.01.2019, extends the petitioner's re-employment for a further period of one year, w.e.f., 01.02.2019. Thus, it is evident that the petitioner was re-employed for short terms of two years or one year and before the expiry of each term it was extended continuously till he was relieved.

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11. The Office Order No.5354/G/DOP dated 23.1.2019, reflects that in terms of the Office Memorandum No.4189/GEN/DOP dated 21.11.2018, the basic pay of the petitioner was fixed at Rs.1,19,929/- per month, w.e.f., 01.01.2016. Further, the petitioner was also allowed to draw two annual increments in the existing pay level of pay matrix thereby raising his basic pay as under:-

- (i) Rs.1,25,529/- pm w.e.f. 01.07.2016
- (ii) Rs. 1,31,329/- pm w.e.f. 01.07.2017

Further, the petitioner was also allowed to draw other allowances reckoning basic pay as under:

- (i) Rs.1,87,700/- pm w.e.f. 01.01.2016
- (ii) Rs.1,93,300/- pm w.e.f. 01.07.2016
- (iii) Rs.1,99,100/- pm w.e.f. 01.07.2017

12. The petitioner has contended that on his re-employment, he continued as regular employee availing all the benefits. He further asserted that during the period of re-employment, benefits like annual increments were being granted to the petitioner on regular intervals. The respondents admit the facts stated therein as matters of record.

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13. The pleadings in the present proceedings also make it clear that the petitioner was re-employed giving all benefits of a regular Government Servant although for short durations, extended again and again from the year 2005 till 2019.

14. The learned Additional Advocate General points out that the re-employment of the petitioner is in terms of Rule 102 of the Service Rules. Rule 102 provides that:-

“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 of re-employment shall be determined by the Government:

Provided that the pay 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.”

15. Chapter XII of the Service Rules regulates retirement of government servants. Rule 98 deals with retirement on superannuation. Rule 99 deals with compulsory retirement. Rule 99 A deals with voluntary retirement. The Service Rules also does not define the word “retirement” or the phrase “retires from service”.

16. It is certain that the Government has the power to re-employ a person who has retired in terms of Rule 102 of the Service Rules. It is also certain that the period for re-employment would be as determined by the Government. It is thus clear that the petitioner's re-employment for the entire period of 2005 till 2019 was legitimate and in terms of Rule 102 of the Service Rules.

17. None of the office orders issued by the respondents re-employing the petitioner and thereafter, extending his period of re-employment, state that the period of re-employment is contractual. If it was contractual employment then Rule 2 (f) of the Leave Rules would disentitle the petitioner in claiming any benefit under it unless when the contract provided otherwise. It is neither the claim of the petitioner nor the contest of the respondents that his re-employment was contractual. If it was so, there would have been a contract.

18. During the course of the arguments, the learned Senior Counsel as well as the learned Additional Advocate General relied upon various judgments to explain to this court the meaning of the phrase "retires from service". A perusal, however, reflects that none would be applicable to

the facts of the present case and those judgments were the opinion of the court based on the peculiar facts of those cases.

19. In *Union of India & another vs. Sampat Raj Dugar & another*¹, the Supreme Court held that certain expressions do not have a single universal meaning and their content varies with the context. The aphorism that a word is not a crystal and that it takes its colour from the context is no less true in the case of these words.

20. In *Superintendent and Remembrancer of Legal Affairs to Government of West Bengal vs. Abani Maity*², the Supreme Court held that a statute is not to be interpreted merely from the lexicographer's angle and the court must give effect to the will and inbuilt policy of the legislature as discernible from the object and scheme of the enactment and language employed therein. Words in a statute often take their meaning from the context of the statute as a whole.

21. In *State Bank of India vs. A.N. Gupta & others*³, relied upon by the learned Additional Advocate General, the

¹ (1992) 2 SCC 66

² (1979) 4 SCC 85

³ (1997) 8 SCC 60

Supreme Court held that it cannot be said that an employee retires only on superannuation and there is no other circumstance under which an employee can retire. Retirement on superannuation is not the only mode of retirement known to service jurisprudence.

22. In *R.N. Rajanna (Dr.) vs. State of Karnataka & another*⁴, the Supreme Court held that though the word “retirement” may take within its fold all or any kind of retirement when the same is used in the context of “superannuation” or retirement by way of superannuation, in service parlance the well-settled meaning it already acquired and even in the normal course to be assigned is that it has relevance and relates to discharge from a post on account of the age fixed for such retirement, uniformly for all or a particular class or category of service-holders.

23. The Service Rules are the rules regarding recruitment and conditions of service of a person appointed to the services and posts in connection with the affairs of the State of Sikkim. Rule 98 deals with retirement on superannuation at the age of 58 years. Rule 99 deals with compulsory retirement and Rule 99A deals with voluntary

⁴ (2004) 1 SCC 249

retirement. Rule 102 makes it clear that the Government has power to re-employ a Government Servant in the interest of the Government and the tenure of re-employment is the call of the Government. The only condition as provided in the proviso to Rule 102 is that the pay 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.

24. Rule 32 of the Leave Rules makes it applicable to a Government Servant who has been re-employed after retirement and further provides that it would apply as if he had entered Government Service for the first time on the date of his retirement. By this, the intention of the legislature is amply clear. By way of a deeming fiction even the re-employed retired government servant is deemed to have entered the service for the first time. The Leave Rules deals with various rights of a Government Servant during his tenure of service with regard to different types of leave which can be availed of. By the deeming fiction contained in Rule 32, the re-employed Government Servant can avail of the leave rights under the Leave Rules.

25. Quite evidently, Rule 6 of the Leave Rules, which permits a Government Servant to earn leave would also be applicable to him. Although Rule 6 provides two explanations on what days it would not include, it does not clarify that the days of service by the re-employed Government Servant after retirement would be excluded. Thus, this court is of the firm opinion that the phrase “*retires from service*” as used in Rule 36 of the Leave Rules cannot be limited to the three types of retirement as contemplated in Rule 98, 99 and 99A of the Service Rules. In fact, the phrase “*retires from service*”, as used in Rule 36, must give meaning to Rule 32 which provides that the Leave Rules shall be applicable even to a re-employed Government Servant. So read, it is quite clear that Rule 36 of the Leave Rules would be applicable to re-employed retired Government Servants. The learned Additional Advocate General argued that unlike a case of retirement from service, the petitioner’s re-employment was terminated vide Office Order 632/G/DOP dated 28.05.2019 and therefore, it would not amount to retirement. The facts speak otherwise. The last extension of the petitioner was till 31.05.2019 as would be evident from the certificate issued by DOPART bearing no. 2868/GOS/DOP dated 11.06.2019. The petitioner vide

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his communication dated 23.05.2019 sought the permission of the Hon'ble Chief Minister to retire from 31.05.2019. The DOPART vide Office Order no. 632/G/DOP dated 28.05.2019, relieved the petitioner from his assignment, w.e.f., 31.05.2019. This court is thus of the view that the phrase "retires from service" would be wide enough to include the coming to an end of the petitioner's re-employment.

26. Communication bearing No.3526/GEN/DOP dated 28.08.2020, issued by the DOPART to its State Public Information Officer in reply to the Right to Information application of the petitioner provides that leave encashment orders in respect of two retired officers have been enclosed. Communication bearing No.13355/G/DOP dated 01.09.2020, issued by the DOPART to the Assistant State Public Information Officer as well as Office Orders bearing No.448/GOS/DOP dated 05.06.2015, 1509/G/DOP dated 12.05.2017, 1180/G/DOP dated 13.04.2017, reflects that four persons named therein were retired government employees, who were on re-employment, were issued office orders duly allowing them to draw unutilized earned leave. The petitioner contends that he had obtained the above information on the basis of Right to Information application

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made by him, by which he was informed that six retired government servants who had been re-employed had been granted leave encashment as per Rule 36 of the Leave Rules. The respondents also admit these facts as matter of record. The respondents, however, explained that the Leave Rules being silent with regard to the provisions/rules governing the encashment of unutilized leave earned during the re-employment period by the re-employed employee after the termination of their re-employment period, they had been inadvertently issuing the orders of leave encashment to re-employed government servants and therefore they were availing the double benefit of leave encashment once at the time of retirement and then after being relieved from the re-employment. This was putting a lot of unnecessary financial burden to the state exchequer. The respondents therefore, after the formation of the new government, finally resolved the issue by issuing Office Memorandum No.4528/GEN/DOP dated 27.02.2020. There is no pleading in the counter-affidavit of the respondents as to whether any steps had been taken by them against the other re-employed retired Government Servants who had been given benefit under Rule 36 of the Leave Rules.

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27. In the petitioner's case as well, in the first instance, immediately after his resignation was accepted, the respondents issued Office Order No.710/G/DOP dated 31.05.2019, permitting him to draw cash equivalent of leave salary in lieu of 300 days unutilized earned leave standing due to his credit as on 31.05.2019. The explanation sought to be provided subsequently vide Office Memorandum No.4528/GEN/DOP dated 27.02.2020, may not be a correct interpretation of Rule 36 of the Leave Rules, as evidently, it does not consider Rule 32 thereof, as explained above. Further, the Office Memorandum No. 4528/GEN/DOP dated 27.02.2020, being a subsequent Memorandum could not be able to nullify the accrued rights of the petitioner on the date he was relieved from service in the year 2019. The respondents' suggestion that there was financial burden upon the state exchequer by providing the retired re-employed Government Servants leave encashment for earned leave again for the period of re-employment is not justified considering the fact that several others similarly placed had been given the benefit. As such, isolating the petitioner's accrued benefit to save the purported burden on the state exchequer would be arbitrary and discriminatory.

28. The writ petition is allowed. The impugned Office Order No.493/G/DOP dated 21.05.2020 and letter no. GOS/HOME/Acctt./726 dated 21.03.2022, are quashed and consequently, the Office Order No.710/G/DOP dated 31.05.2019, is revived. It is declared that Office Memorandum No.4528/GEN/DOP dated 27.02.2020, does not correctly interpret Rule 36 for the purpose of its application to re-employed retired Government Servants which must be read with Rule 32 of the Leave Rules and not in isolation. It is also declared that the petitioner is entitled to leave encashment as per Rule 36 read with Rule 32 of the Leave Rules for the period 2005 to 2019, in which period, having been re-employed, the petitioner had served the State Government.

29. The writ petition is allowed and disposed of, as also the pending I.A.

30. The parties shall bear their respective costs.

(Bhaskar Raj Pradhan)
Judge

Approved for reporting : **Yes**
Internet : **Yes**

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