

(2013) 01 MAD CK 0275

In the Madras High Court

Case No : Writ Petition (MD) No. 9148 of 2007, M.P. (MD) No. 1 of 2008 and
M.P. (MD) No's. 1 and 1 to 3 of 2009

C. Zophar Jothipaul

APPELLANT

Vs

The Chief Educational Officer, Tuticorin, Tuticorin District and
Others

RESPONDENT

Date of Decision : 08-01-2013

Acts Referred:

Constitution of India, 1950 — Article 21, 226

Citation : (2013) LabIC 1217 : (2013) 1 LLN 537

Hon'ble Judges : K. Ravichandrabaabu, J

Bench : Single Bench

Advocate : J. Ashok in both WPs, for the Appellant; Jessi Jeeva Priya for M/s. S. Subbiah (in both WPs) for R2 and R4, for the Respondent

Final Decision : Allowed

Judgement

Honourable Mr. K. Ravichandrabaabu, J.—Both the writ petitions are filed by one and the same petitioner. In W.P. MD) No. 9148 of 2007, the petitioner challenged the transfer order, dated 25.10.2007, passed by the second respondent and in W.P. MD) No. 5305 of 2008, the petitioner challenged the order of dismissal, dated 26.05.2008, passed by the second respondent. In both the proceedings, the respondents are one and the same.

2. As the facts narrated by the petitioner in both these writ petitions are one and the same, they are extracted hereunder in common:-

The petitioner was appointed as B.T. Assistant (Math's) in the third respondent's school on 31.08.2005. He gave a complaint to the District Collector, Tuticorin on 15.10.2007 against the respondents 4 and 5 complaining about the collection of donation from the students. He gave another complaint on 17.10.2007 against the very same respondents 4 and 5 to the Inspector of Police, North Police Station, Tuticorin, complaining about the theft of answer sheets of the 10th Standard examination. Aggrieved against the said action of the petitioner, the

second respondent through his proceedings, dated 25.10.2007, transferred the petitioner from third respondent's school to another school. The said order of transfer was challenged in W.P. MD) No. 9148 of 2007. On 06.11.2007, this Court granted interim stay of the transfer order for four weeks. Even thereafter, the petitioner was not permitted to join duty. Hence, the petitioner gave a complaint on 07.11.2007 to the police against the violation of the interim order of stay. He also issued a contempt notice to the respondents. Subsequently by an order passed on 27.11.2007 in M.P. (MD) No. 2 of 2007 in W.P. MD) No. 9148 of 2007, the learned Single Judge gave liberty to the Management to initiate departmental proceedings against the petitioner. Aggrieved against the same, the petitioner filed a Writ Appeal in W.A. (MD) No. 304 of 2008. On 04.12.2007, the petitioner was suspended from service by the proceedings of the second respondent. On the very same day, the second respondent also issued a charge memo containing five charges against the petitioner. The petitioner submitted his explanation to the charge memo on 19.12.2007. On 27.03.2008, the second respondent had written a letter to the third respondent to arrange for reinstating the petitioner into service after the withdrawal of the cases filed by the petitioner against the Management. On 04.04.2008, the order of suspension was revoked and the petitioner was directed to resume duty at Kailasapuram school, to which, he was transferred. However, the petitioner through his latter, dated 07.04.2008, requested permission to join duty at the third respondent school. In the meantime, the interim stay granted by this Court in W.P. MD) No. 9148 of 2007 was also extended till 11.06.2008. However, without permitting the petitioner to join duty at the third respondent school, the second respondent issued a notice, dated 24.04.2008, calling upon the petitioner to attend for an enquiry to be held on 26.04.2008. The petitioner objected for the enquiry to be conducted by the persons against whom he had given complaint. Again by another notice, dated 02.05.2008, the second respondent directed the petitioner to appear for the enquiry to be held on 12.05.2008. On the very same day, the petitioner sought for certain documents. Without furnishing those documents and without considering his detailed reply, dated 19.12.2007, the enquiry report was submitted on 16.05.2008 and consequently, a second show-cause notice, dated 17.05.2008, was issued by the second respondent calling upon the petitioner to give his explanation to the proposed punishment of dismissal from service. On the very same day, the petitioner gave a reply. Thereafter, on 26.05.2008, the second respondent passed an order of dismissal from service against the petitioner, which is impugned in W.P. MD) No. 5305 of 2008. Insofar as the impugned order of transfer is concerned, the main ground of attack is that the same was passed with malice and in a biased manner, in view of the fact that the petitioner had given complaint against the respondents 4 and 5 before the District Collector as well as the Inspector of Police. Insofar as the other impugned order of dismissal is concerned, the petitioner challenged the same on the main ground that the same is hit by the principles of natural justice and without following the well established principle that "no one should be a Judge of his own cause". Issuing of the charge memo as well as conducting of the enquiry

was done by one and the same person, namely, the second respondent and that the members of the enquiry committee consisted of respondents 2 to 5, out of whom, the petitioner had already given complaint against the respondents 4 and 5.

3. The respondents 2 and 4 filed separate counter affidavit in both the writ petitions. It is stated therein that the petitioner was transferred on 16.10.2007 from the third respondent school to T.D.T.A. High School, K. Kailasapuram. He refused to receive the said order and had gone on casual leave. There are some complaints against the petitioner which are pending. Keeping all these points in mind, the management, on the administrative reason, transferred the petitioner. Insofar as the order of dismissal is concerned, the respondents 2 and 4 in their counter affidavit stated that the petitioner did not raise any objection against the constitution of the enquiry committee consisting of respondents 2 to 5 and other persons either at the time of enquiry or before its commencement. The enquiry committee has to be necessarily constituted with the Headmaster of the Institution, where he originally served and the other Headmaster of the Institution, to which, he was transferred. One more teacher from other institution, by name, Julian Samnayagam, was also made as a member of the committee and the Correspondent of the school was also made as the committee member. Therefore, the constitution of the enquiry committee was not with any mala fide or bias. The petitioner appeared before the enquiry committee on 12.05.2008 and made a statement and did not seek for any personal enquiry. Therefore, the petitioner is estopped from making any allegations against the members of the enquiry committee. It is also false to contend that the enquiry committee threatened the petitioner to withdraw the criminal case filed against the respondents 4 and 5. The enquiry committee is not the disciplinary authority and therefore, they could not have made any such threat. As the allegations made by the petitioner against the respondents 4 and 5 were not of personal in nature, the petitioner cannot object to the presence of the respondents 4 and 5, in the enquiry committee. The petitioner cannot command that the School Committee should appoint a Sub Committee or an independent Enquiry Officer for the purpose of conducting an enquiry, and there is no need for the same as the petitioner did not ask for the same at any stage. The second respondent alone is the appointing authority and he also being the disciplinary authority, is competent to take disciplinary proceedings against the petitioner. The petitioner did not show in any manner, as to how, the report of the enquiry committee was otherwise biased, inasmuch as, the conclusions reached by the enquiry committee was based on the records available. The second respondent applied his own mind on the materials available and by considering the report of the enquiry committee had come to the conclusions and removed the petitioner from service.

4. Learned counsel appearing for the petitioner submitted that both the impugned proceedings are tainted with mala fide and they are an out come of biased action by the respondents against the petitioner. He further contended

that admittedly, the members of the enquiry committee consisted of respondents 2 to 5, out of whom, the second respondent issued the charge memo. Likewise, against the respondents 4 and 5 only the petitioner had specifically given complaint before the District Collector and Inspector of Police. Thus, the participation of respondents 2 and 5 as enquiry committee members had violated the principles of natural justice, more particularly, the principle that "no man should be a judge of his own cause". He further contended that though the petitioner sought for about 14 documents, without furnishing the same, the enquiry was conducted and therefore, the same is again in violation of principles of natural justice.

5. The learned counsel also submitted that the impugned order of dismissal does not refer anything about the merits or the enquiry report submitted by the enquiry committee. Thus, it is totally a non-speaking order. While coming to the charges levelled against the petitioner it is submitted by the learned counsel that the petitioner's complaint filed against the respondents 4 and 5 before the District Collector and Police are still pending and therefore, such conduct of the petitioner cannot be put against him to frame the charges. Insofar as the charges with regard to the misappropriation is concerned, the learned counsel submitted that no details were given in the charge memo as to how such amount was misappropriated by the petitioner. The learned counsel further submitted that the petitioner had given the Auditor's Report showing that no such misappropriation was ever taken place. The said Auditor's Report was not placed before the enquiry committee.

6. In support of all his contentions, the learned counsel for the petitioner relied on the following decisions :-

1. Arjun Chaubey Vs. Union of India (UOI) and Others,
2. Crawford Bayley and Co. and Others Vs. Union of India (UOI) and Others,
3. Mohd. Yunus Khan Vs. State of U.P. and Others,
4. Abraham Amalanathan Vs. The Deputy Inspector General of Police, The Superintendent of Police, The District Superintendent of Police and The Deputy Superintendent of Police
5. M. Sundaravalli, B.A.B.Ed. Vs. The Correspondent St. Mary's High School Kuthukkal Valasai Thenkasi, Nellai District and The District Educational Officer Nellai District, Tirunelveli
6. G. Jayakumar Vs. The Joint Registrar of Co-operative Societies, Common Cadre Service Committee President, Vellore District, Vellore, The Special Officer, Ussoor Primary Agricultural Co-operative Bank Limited, Ussoor, Vellore District, Vellore and Additional Registrar (Credit), Office of the Registrar, Kilpauk, Chennai-600010
7. Per contra, the learned counsel appearing for the respondents 2 and 4

submitted that the correctness of the decision making process cannot be gone into by this Court under Article 226 of the Constitution of India, since the impugned order came to be passed only by the competent authority by considering all the facts and circumstances of the case. The petitioner never objected to the constitution of the committee at any point of time and therefore, he cannot raise such objection before this Court against the constitution of the enquiry committee consisting of respondents 2 to 5 herein. The explanation submitted by the petitioner was without any documentary proof.

8. In support of his submissions, he relied on a decision reported in 2012 Writ L.R. 463 in the case of T. Sanjeeva Rao vs. The Director of School Education and another.

9. Heard the learned counsel for the petitioner as well as respondents.

10. The petitioner was working as a B.T. Assistant in the third respondent school. Admittedly, he gave complaints against the respondents 4 and 5 before the District Collector, Tuticorin and Inspector of Police, North Police Station, Tuticorin on 15.10.2007 and 17.10.2007 respectively, complaining about the theft of answer sheets and the collection of donation from the students. Immediately, the petitioner was transferred, by an order, dated 25.10.2007, by the second respondent. The said order was challenged by the petitioner in W.P. MD) No. 9148 of 2007. This Court granted interim stay of the said order.

Thereafter, he was suspended from service on 04.12.2007 and issued with a charge memo on the very same day. Admittedly, the said charge memo was issued by the second respondent, who has also been arrayed in his personal capacity as fourth respondent in these writ petitions. An enquiry committee was constituted, admittedly, consisting of respondents 2 to 5. Thereafter, the impugned order of dismissal came to be passed on 26.05.2008 by the second respondent. Thus, from the above said admitted facts, it is seen that the second respondent had acted as a person issuing the charge memo, conducting an enquiry and also passing the order of punishment. Likewise, the fifth respondent also acted as one of the members of the enquiry committee. The fact remains that the petitioner had given complaint against those respondents 2 (R-4 in his personal capacity) and 5 only on 15.10.2007 to 17.10.2007. Therefore, the act of the respondents in proceedings against the petitioner, undoubtedly, show that they have acted as the Judges of their own cause and consequently, violated the principle that no one shall be a Judge of his own cause (*Nemo debet esse judex propria causa*). When the petitioner had given complaints against the respondents 2 and 5, they ought not have taken part and conducted the enquiry as its members. Certainly, such participation would raise a strong doubt in the mind of the petitioner that there will not be any fair and unbiased enquiry. Such apprehension is justifiable notwithstanding the fact that the said complaints given by the petitioner against the respondents 2 and 5 were not against their personal capacity, but only, against their official capacity. Whatever, may be the position, when the petitioner made the complaints against those respondents,

their act in participating as members for the enquiry committee, to enquire into the charges levelled against the petitioner, more particularly, in respect of the first charge, which deals with the petitioner's complaint against the respondents 2 and 5, undoubtedly, would amount to an act of bias and mala fide. It is now stated by the petitioner's counsel that the complaints filed by the petitioner against those respondents are still pending. Whether it is pending or disposed of, the respondents 2 and 5 ought not have participated in the enquiry against the petitioner, especially when the enquiry is always expected to be conducted by a neutral and unbiased person, so as to establish the confidence in the mind of the delinquent that he can participate in the enquiry without any fear of bias or mala fide. But the conduct of the respondents 2 and 5 in this case seems to have not imposed such confidence in the mind of the petitioner and therefore, the enquiry conducted against the petitioner is vitiated on the ground of bias and mala fide.

11. The charge memo was issued by the second respondent and he also participated as one of the committee members in the enquiry.

Thereafter, he passed the order of dismissal. Thus, he had played the role in three different capacities under three different circumstances against the petitioner. The second respondent may be a competent authority to pass the order of dismissal, but, that does not mean that he can also issue the charge memo and conduct the enquiry against the petitioner. Apart from the above said position, it appears that there was no witness examined in the enquiry and the report seems to have been filed based on the charges levelled against the petitioner as well as the explanation given by him. This also is against well established procedures for conducting the disciplinary proceedings against a delinquent. Even assuming that the petitioner's explanation was not satisfactory, the enquiry should be conducted by following the proper procedure and by examining the necessary witnesses or marking of the relevant documents. The said procedure is totally absent in this case. Therefore, the enquiry conducted against the petitioner is totally vitiated apart from the ground of malice, bias and violation of principles of natural justice as well as against the principle that no man should be a judge in his own cause. Further, when the order of dismissal is perused, it only shows that the same came to be passed in total non-application of mind or without considering any of the merits of the matter. The said order of dismissal is extracted hereunder:-

(***)

Manager, High/Hr. Sec. School/Spl. Schools & TTI CSI Thoothukudi 0 Nazareth Diocese.

12. A perusal of the said order shows that there was no reference about the charge memo or the explanation given by the petitioner or the enquiry report submitted by the enquiry committee. Therefore, it appears that the said order came to be passed by the second respondent in a total non-application of mind, that too, without following the mandatory procedure before passing an order of

punishment.

13. While coming to the charges levelled against the petitioner, it is seen that the first charge deals against the petitioner's conduct in giving the complaint against the management. The second charge is in respect of misappropriation of Rs. 1,11,200/- from the children welfare fund. The third charge is in respect of producing a wrong medical certificate for his leave. Fourth charge is one and the same as that of the first charge. Fifth charge is in respect of the misappropriation of NCC subscription. When the petitioner had made complaint against the respondents 2 and 5 before the District Collector and Police and when it is said to be still pending, I failed to understand as to how charges Nos. 1 and 4 are maintainable against the petitioner. Likewise in respect of charge Nos. 2 and 5, there are absolutely no specific particulars or materials given in those two charges. In effect, those charges are only vague without there being any material particulars so as to enable the petitioner to defend those charges.

14. The learned counsel for the petitioner also brought to the notice that the Audit Report dated 25.06.2007 by the Chartered Accountant of the Nattathi Child Development Centre, and submitted that no such lapses or misappropriation was noted by the Auditor in the said report. It is seen that the said audit report was not placed before enquiry committee. Even in respect of the so called misappropriation of NCC subscription is concerned, no particulars were given by the second respondent in the said charge. Therefore, when those two charges are vague, they also cannot be sustained.

15. Insofar as the other charge, namely, producing wrong medical certificate is concerned, it appears that no person was examined by the management to prove the said charge. Therefore, even on merits, I find no justification on the part of the management to sustain those charges.

16. While coming to the decisions relied on by the learned counsel for the petitioner, the Hon'ble Supreme Court in *Arjun Chaubey Vs. Union of India (UOI) and Others*, has held that no person can be a judge in his own cause and anyone who has a personal stake in an inquiry must keep himself aloof from the conduct of the inquiry.

17. In *Mohd. Yunus Khan Vs. State of U.P. and Others*, , the Hon'ble Supreme Court has observed that a person, who is a witness in a case can neither initiate the disciplinary proceedings nor pass an order of punishment. It is further observed therein that the legal maxim *nemo debet esse judex in propria causa* (no man shall be a judge in his own cause) is required to be observed by all judicial and quasi-judicial authorities as non-observance thereof is treated as a violation of the principles of natural justice.

18. Both the above judgments are considered by a learned Single Judge of this Court, in a decision reported in 2011 (1) CWC 833 (cited supra), wherein, the learned Judge apart from considering those two judgments have also considered various other judgments and observed as follows:-

7. To adjudicate an issue in which an authority has any act or part, the principles of fairplay and good governance would require his exclusion. Such an exclusion should start at the time of initiation of a proceeding till the conclusion. The concept of a person having a dual role is abhorrent to the concept of justice. Therefore, it is not necessary that an authority has to be biased in a proceeding in which he has got some personal interest. But when there is a substantial possibility of bias, then fairness would compel him to be away from it. Therefore, the basic principles underlines the rule of likelihood of bias, which is "Justice must not only be done but appears to be done". This principles has been enunciated in consonance with Article 21 of the Constitution of India which provides for fairness in action. Therefore, the real question is not whether a person is biased, as it is difficult to prove the state of mind of such a person. This concept has been evolved in order to sustain and uphold the public confidence in the impartiality of a system, either administrative or quasi-judicial.

24. The mere fact that the then Superintendent of Police has ordered the preliminary enquiry, approved the preliminary enquiry, directed a subordinate officer to frame charges, approved the charges and appointed an enquiry officer would leave no room to hold that he was convinced about the charges levelled against the petitioner. Therefore, the facts would clearly establish that the proceedings are vitiated as the then Superintendent of Police acted in a dual role and it is the case of the accuser becoming the judge. Admittedly, he had a personal stake in the enquiry initiated against the Petitioner and therefore, his involvement would vitiate the proceedings.

25. In all fairness, the then Superintendent of Police ought to have recused himself from taking any role in the proposed action against the Petitioner. There is absolutely no explanation as to why he himself did not given any Complaint over the conduct of the Petitioner. It is not as if he has applied his mind and then approved the proceedings. Admittedly, he is a party to the alleged occurrence. Therefore, there is nothing for him to satisfy about the charges framed against the Petitioner and about the alleged occurrence. Hence in all fairness, the then Superintendent of Police ought to have asked his higher authorities to initiate proceedings by bringing to their notice about the alleged misconduct on the part of the Petitioner. Therefore, this Court is of the view that doctrine of necessity does not have any application to the present case on hand.

19. Likewise, in an another decision reported in M. Sundaravalli, B.A.B.Ed. Vs. The Correspondent St. Mary's High School Kuthukkal Valasai Thenkasi, Nellai District and The District Educational Officer Nellai District, Tirunelveli , a learned Single Judge of this Court observed that the role of a Judge and witness cannot be played by the one and the same person. In that case, the first respondent therein not only framed the charges, but also appeared as a witness and deposed before the enquiry officer and also issued final order of termination. Therefore, the learned Judge has observed that there is violation of principles of natural justice. Even assuming that the enquiry conducted in this case is proper, still, the

order of punishment imposed on the petitioner does not contain any details or reference about the enquiry report. Hence, the same is not valid. In a decision reported in *G. Jayakumar Vs. The Joint Registrar of Co-operative Societies, Common Cadre Service Committee President, Vellore District, Vellore, The Special Officer, Ussoor Primary Agricultural Co-operative Bank Limited, Ussoor, Vellore District, Vellore and Additional Registrar (Credit), Office of the Registrar, Kilpauk, Chennai-600010*, a learned Judge of this Court has held that the disciplinary authority while dealing with punishment, ought to assign appropriate reasonings, which is the heart-beat of the decision as may be rendered while arriving at a final conclusion. The relevant portion of the paragraph 15 is extracted hereunder:-

15... Though the Enquiry Officer's Report had been placed before the Disciplinary Authority, yet each and every charge levelled against the Petitioner-delinquent have not been discussed in detail by them. The charges have not been dealt with by the Disciplinary Authority "in toto" and the findings of the Enquiry Officer, have not been analysed, and ultimately, the First Respondent has come to the conclusion that 13 out of 23 charges having been proved, is a major factor to be taken into account before passing the order of punishment and without giving their own reasoning by passing a speaking order, orders have been passed by the Respondents in a casual way. In "Stricto-sensu", it is the hallmark and ordained principle in the service law jurisprudence that the Disciplinary Authority, while dealing with the punishment, ought to have assigned appropriate reasonings, which is the heartbeat of the decision as may be rendered while arriving at a final conclusion in the disciplinary proceedings. Such reasoning should be supported by material documents, and the authorities have to apply their mind in respect of each and every charge, so as to arrive at a conclusion either to accept the report of the Enquiry Officer or to reject the same by giving valid reasons, and only then appropriate punishment should have been imposed. Similarly, the Appellate/Revisional Authority should also deal with the matter in the manner as prescribed under the statutes/Rules, etc.

20. On the other hand, the learned counsel for the respondents relied on a decision reported in 2012 Writ L.R. 463 (cited supra) to say that this Court cannot go into the order of dismissal. The facts of the said case are totally different and distinguishable. In that case, the Hon'ble Division Bench has held that when the appellant therein was given opportunity to participate in the enquiry, there was definitely no violation of principles of natural justice and therefore, they came to the conclusion that there was no infirmity in the order of the learned Single Judge. But, here in this case, as I have already found that there is a clear violation of principles of natural justice, the said decision relied on by the learned counsel for the respondents also does not support his case. By considering all the facts and circumstances of the case, this Court is of the view that the impugned order of transfer as well as the subsequent order of dismissal challenged in both these writ petitions are against law and liable to be set aside. However, insofar as the charge Nos. 2 and 5, which relate to the alleged

misappropriation are concerned, though it is held that those charges are vague and cannot be sustained, however, it would not preclude the school management to issue fresh charges against the petitioner with full details and particulars in respect of the said alleged misappropriation is concerned. If any such charges are framed against the petitioner, it is needless to say that the petitioner should be given full opportunity and the enquiry should be conducted by a third party enquiry officer, without giving any room for allegation of bias or mala fide.

With these observations, these writ petitions are allowed and the impugned orders are set aside. No costs. Consequently, connected miscellaneous petitions are closed.
