

(2013) 07 MAD CK 0137
In the Madras High Court
Case No : Writ Petition No. 42390 of 2002

Dr. E. Karthikeyan

APPELLANT

Vs

Tamil Nadu Pollution Control Board

RESPONDENT

Date of Decision : 11-07-2013

Acts Referred:

Citation : (2013) 8 MLJ 699 : (2013) WritLR 899

Hon'ble Judges : C.S. Karnan, J

Bench : Single Bench

Advocate : N.G.R. Prasad for M/s. Row and Reddy, for the Appellant; A. Ilango, for the Respondent

Final Decision : Allowed

Judgement

C.S. Karnan, J.—The brief facts of the case are as follows:-

The petitioner stated that he joined the Tamil Nadu Pollution Control Board on 01.02.1989, as an Environmental Scientist. During his service, he

was subjected to frequent transfers, even though these transfer orders were not due to administrative exigencies. He was shocked to receive a

charge sheet dated 17.01.1992. The contents of the charge sheet was that he had been absenting himself frequently right from the date of joining

service i.e., 01.02.1989. It was also alleged that he had disobeyed the order of transfer and he had been lethargic in his work. On 04.02.1992, he

had submitted a detailed explanation and denied the charges. The charge sheet, did not disclose any such specific instances. He also explained that,

from 01.02.1989 to 28.08.1992 i.e., the date of removal, he had been on earned leave and also on leave of loss of pay during different spells and

it had been intimated to the Board. An Enquiry Officer was appointed and he had

conducted enquiry on 11.06.1992. On that day, he could not appear for the said enquiry, since he felt sick and requested the Enquiry Officer for an adjournment. Accordingly, the Enquiry Officer seems to have adjourned the enquiry to 17.08.1992. On 17.08.1992, as he had not recovered from his illness he had requested for an adjournment once again, by enclosing an authenticated medical certificate.

The petitioner further stated that he received a letter dated 28.08.1992, removing him from service. The order stated that since he had sought adjournment for the second time, it was presumed that he had no further objection to the charges levelled against him. The respondent did not supply him with the proceedings of the enquiry that was alleged to have been conducted on 17.08.1992 or any other connected proceedings. He was not provided with the report of the Enquiry Officer and he was put to prejudice on account of non-furnishing of the enquiry report as he could not defend himself effectively by submitting an explanation.

2. The petitioner submits that the respondent did not conduct any enquiry before terminating his service. If they had conducted an enquiry, they would have sent the proceedings of the enquiry. At least, they should have given him the report of the Enquiry Officer and asked for his comments.

In that event, he would have convinced the first respondent that the report of the Enquiry Officer was biased and one-sided and against the principles of natural justice. The order of removal from service dated 28.08.1992 is in gross violation of principles of natural justice.

3. The petitioner further contended that the Board had stated that before terminating his service, they had conducted a full-fledged enquiry as per Regulation 8(2) of the Tamil Nadu Pollution Control Board Regulations. As per Regulation 8(2), an oral enquiry has to be held; if it is decided by the official Incharge or is directed by the authority concerned, he should have been given an opportunity to cross-examine the witnesses, but in his case, no such opportunity was given. The respondents have not even indicated to him as to who were examined at the domestic enquiry. He understands from the contents of the order dated 28.08.1992, that no witnesses were examined at the enquiry and also no documents were marked. As such, the statements made in the order dated 28.08.1992 is without substance. Therefore, the order of removal dated 28.08.1992 is

ex-facie illegal and is in gross violation of Regulation 8(2) of the Tamil Nadu Pollution Control Board Regulations. The petitioner further stated that

against the order of the dismissal authority, he filed an administrative appeal to the Pollution Control Board in November 1994 and he explained

the reasons for the delay in preferring this Department appeal, wherein he raised substantial question of law such as to vagueness of the charge

sheet, denial of reasonable opportunity to defend the case, non-furnishing of enquiry report etc., The same was brought to the notice of the

appellate authority and it was communicated that neither the Enquiry Officer's proceedings nor the report of the Enquiry Officer was given to him

and as such he was greatly prejudiced. The Appellate Authority had not decided his appeal on merits and merely rejected it on the ground that the

appeal was belated as per Regulation 25. In fact, the regulation 25 will apply only in Government. He made representations on 14.10.1995 and

09.08.1996 to consider his appeal on merits but it was of no avail. Therefore, he filed writ petition in W.P. No. 13917 of 1996 before this Court.

This Court was pleased to dispose of the writ petition in W.P. No. 13917 of 1996, by its order dated 26.02.2001 with the following

observations:-

5. The period of limitation which is prescribed in the Rules must be considered reasonably. The petitioner has suffered a punishment of termination

of service. The period of limitation requires to be considered liberally. No doubt the petitioner has to file a proper petition for Condonation of

delay as required u/s 19(3) of the Regulations. But without returning the papers or even referring the Regulation 93, the appeal has been rejected

by mentioning Regulation Nos. 13 and 25. Regulation 25 relates to revision to be filed before the Government.

I am inclined to hold that no prejudice would be caused in entertaining the appeal, considering the nature of the penalty imposed against the

petitioner.

Therefore, the respondents are directed to take up the appeal filed by the petitioner on file and dispose of the same on merits within a period of 4

months from the date of receipt of a copy of this order.

In the result, the writ petition is disposed of with the above said observations.

4. Pursuant to the above said order, the petitioner submitted a representation

dated 06.08.2001 to the respondent-Board, enclosing a copy of his appeal and the judgment of this Court passed in the writ petition and requested the respondent to consider his appeal on merits. However, there was no reply. Again the petitioner submitted a reminder on 16.11.2001 and 18.12.2001. As there was no response from the Board, he was constrained to file contempt petition No. 289 of 2002. This Court was pleased to order notice to the learned standing counsel of the Board on 30.04.2002. It was only thereafter, that the respondent-Board passed the impugned order on 30.05.2002, which is perfunctory. Thereafter, this Court was pleased to close the contempt petition on 18.06.2002 since the orders had been passed by the Board and communicated to the respondents.

5. The petitioner further submits that the impugned order dated 28.08.1992 and 30.05.2002 are illegal, arbitrary and unconstitutional since the respondent-Board did not consider his appeal on merits, as directed by this Court. The respondents ignored the fact that the enquiry proceedings and the report of the Enquiry Officer had not been communicated to him and as such, the entire proceedings are therefore vitiated. No second show-cause notice was given to him by the disciplinary authority when they imposed a major penalty. Hence, the petitioner entreats the Court to quash the impugned orders dated 28.08.1992 and 30.05.2002 passed by the respondents-Pollution Control Board.

6. On the side of the respondent, no counter statement has been filed even though, the writ petition has been filed in the year 2002, therefore, this Court is constrained to dispose the case without any further delay.

7. The learned senior counsel appearing for the petitioner vehemently argued that the enquiry was held by the respondent-Board and was followed by the order of removal dated 28.08.1992 and the Appellate Authority order dated 30.05.2002 which are in gross violation of the principle of natural justice. The writ petitioner could not attend the enquiry on 17.08.1992 due to his illness. As such, he had sent certificate of posting on 03.08.1992, along with medical certificates issued by the recognized medical officer, and requested the respondent-Board for an adjournment of the enquiry, but the respondent themselves presumed and assumed that the petitioner had no objection to the charges and on that score removed

him from service. Therefore, the Enquiry Proceedings were not decided on merits and it was one sided decision and it caused great prejudice to

the petitioner, since the petitioner was not given an adequate opportunity to present his case effectively and do cross-examination of the

management witnesses, if any. The order of removal dated 28.08.1992, without furnishing a copy of enquiry proceedings and the order dated

30.05.2002 of the Appellate Authority confirming it, is in violation and run against the judgment of the Hon"ble Apex Court reported in Union of

India and others Vs. Mohd. Ramzan Khan, and Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc., .

8. The learned senior counsel for the petitioner further contended that if the petitioner had been furnished a copy of the enquiry proceedings, he

would have explained to the disciplinary authority as early as 03.08.1992 and he had sent a letter along with a medical certificate and this was

followed by a telegram dated 18.08.1992 and in spite of it, the petitioner was set ex-parte and dismissed from service and thereby he had been

put into irreparable loss and hardship and the interest of the petitioner had been prejudiced. The order dated 30.05.2002 of the Appellate

Authority, that too after a contempt petition was filed, is really very cursory and is doing lip service to the orders of this Court. A perusal of the

orders dated 30.05.2002 of the Appellate Authority will show that none of the points raised by the petitioner had been considered or discussed.

The learned senior counsel, in support of his contention had cited a judgment which is reported in Amar Nath Chowdhury Vs. Braithwaite and

Company Ltd. and Others, .

A. Domestic enquiry-Appeal-Participation of disciplinary authority deciding-Impermissibility-The same person, acting as disciplinary authority

removing the employee from service and thereafter, in his capacity as Chairman-cum-Managing Director of the employer company, presiding over,

and participating in the deliberations of, the meeting of the Board of Directors while deciding the said employee"s appeal-In the absence of an

enabling statutory provision such dual function, held violated the rule against bias-In view of the definition of the expression ""Board"" plea to uphold

such dual function by applying the doctrine of necessity, rejected-Hence, the non-speaking order dismissing the appeal, passed by the Board set-

aside and the matter remitted to the Board to decide the appeal by a speaking order in accordance with law-Braithwaite and Co. (Conduct,

Discipline and Appeal) Rules, R. 3(d)-Appeal-Non-speaking order of dismissal of-If proper-Domestic enquiry-Natural justice-Bias-Nemo Debet

Esse Judex in Propria Causa.

9. The learned senior counsel for the petitioner further argued that in any event, removal of an employee from service for long absence is too harsh

and is required to be substituted by appropriate lesser punishment. Further, the non-appearance of the petitioner before the Enquiry Authority is

neither willful nor wanton and not due to any disobedience but only due to illness and the same has been supported by the medical certificates

issued by the competent doctor, who medically treated him. If the respondent, after giving sufficient opportunity to the petitioner, by way of

granting adjournment had conducted enquiry in the presence of the petitioner, then only the respondent can pass meritorious order. If the Enquiry

Proceedings had been decided on merits, no one would be prejudiced but in the instant case, no such opportunity had been given to the petitioner

and an ex-parte order was passed which has been highly prejudicial to the interest of the petitioner. All ex-parte order passed by the Department

or Court, could be set-aside at any stage in order to meet the ends of justice. The Appellate Authority should have communicated the enquiry

report, if any, and sought for the petitioner's comments before confirming the harsh punishment imposed by the respondent. If the report of the

Enquiry Officer had been communicated to the petitioner, he would have had an opportunity to explain his case. The order of removal dated

28.08.1992 issued by the disciplinary authority is contrary to the mandatory provisions of Regulations 8 (2) of the Tamil Nadu Pollution Control

Board. As per the findings of the impugned order, list of witnesses were not mentioned and list of documents had also not been marked. The

learned counsel has cited the below mentioned judgments in support of his arguments:-

(i) G. Vallikumari Vs. Andhra Education Society and Others,

A. Education and Universities-Delhi School Education Act, 1973 (18 of 1973)-Ss. 8, 12 and Ch. IV-Extent and nature of Government control

under, over private recognized aided/unaided minority educational institutions-

Constitutionality of S. 8(2)-S. 8(2) subjecting all dismissal, removal, reduction in rank or termination to the approval of Director of Education (Government of Delhi)-S. 12 excluding all unaided private minority schools from the preview of Ch. IV-Rights of minorities in private recognized institutions under Article 30, held, are violated only by S. 8(2) and not by Ss. 8(1), (3), (4) and (5) whether aided or unaided partly holding exclusions in S. 12 as discriminatory accordingly, held, Ch. IV except S. 8(2) is applicable to private recognized aided as well as unaided minority educational institutions and the authorities concerned of the Education Department are bound to enforce the same against all such institutions-Constitution of India-Ar. 13 -Doctrine of severability Application-Unconstitutional statutory provisions severed from valid ones-Statute Law-Severability.

(ii) *Krushnakant B. Parmar Vs. Union of India (UOI) and Another*, Service Law-Misconduct-Absence from duty/unauthorized absence/Absenteeism-Wilful absence-Proof-Necessity-Appellant unauthorizedly absent from duty during three consecutive periods (36 days, 32 days and 234 days)-Consequent allegations of failure to maintain devotion to duty and conduct unbecoming of government servant and dismissal based thereupon-Sustainability-Held, for sustaining such allegations it must be proved that unauthorized absence was wilful-If absence is due to compelling circumstances under which it is not possible to report for or perform duty, such absence cannot be held to be wilful and employee guilt of misconduct-In instant case, neither inquiry officer nor appellate authority found absence of appellant wilful despite his specific defence that he was prevented from attending duty and was not allowed to sign attendance register-Evidence produced by appellant to substantiate his claim was ignored by authorities concerned and on basis of irrelevant facts and surmises he was held guilty-Impugned order of dismissal passed by the dismissal authority, and affirmed by appellate authority, CAT and High Court, set-aside-Considering that appellant had suffered a lot since 1996 when proceedings were initiated against him, matter not remitted to disciplinary authority-Appellant directed to be reinstated and paid 50% back wages-Departmental Enquiry-Judicial review/validity-Central Civil Services (conduct) Rules, 1964.

(iii) M. Natarajan Vs. The Managing Director, Chennai Metropolitan Water Supply and Sewerage Board and others (W.A. No. 1172 of 2001, dated 23.02.2007)

11. In view of the above cited decisions, we are of the view that the respondents having regularized the period of absence from 12.05.1997 to 27.07.1997 and the subsequent period till joining duty by the appellant, the charge framed against the appellant are not maintainable. Therefore, the consequential enquiry and the subsequent imposition of punishment of compulsory retirement are also unsustainable. The learned single judge has not averted to this aspect of the matter in the impugned order dated 18.12.2000.

12. In view of the above referred finding the order of the learned singled judge is set-aside and the writ appeal is allowed. Respondents are directed to reinstate the appellant in service as Depot Manager with continuity of service, back wages and all consequential monetary benefits, within a period of eight weeks from the date of receipt of copy of this order.

10. The learned senior counsel for the petitioner further submitted that the petitioner is continuously suffering from illness. Hence, he had produced 5 medical certificates on different occasions viz., 12.02.1991, 29.03.1991, 19.04.1992, 01.06.1992, 13.07.1992 and 03.08.1992 and as such it

is evident that his health did not permit him to attend his duty on the said dates. Supporting his contentions, the learned counsel has enclosed

medical certificates. The learned counsel further contended that the petitioner had joined in the respondent-Department as Junior Scientist on

01.02.1989 and he has been regularized in the service on 30.10.1989 and the regularization came into effect from 01.02.1989. This regularization

had been given to the petitioner within a period of 9 months, since he is a sincere and hard working employee and as he had performed his duty to

the full satisfaction of his superiors. The petitioner has been frequently transferred from one place to another viz., on 20.04.1990, he was

transferred from Madras to Tuticorin; on 08.01.1991, he was transferred from Tuticorin to Ambattur. On the very same day, he was transferred

from Environmental Lab, Ambattur to Greams Road, Chennai. The learned senior counsel further pointed out that this Court was pleased to direct

the respondent to dispose the Department appeal on merits. This order has been

passed in writ petition in W.P. No. 13917 of 1996. It clearly shows that there is a prima facie case on the side of the petitioner and hence, this Court was pleased to give the direction of disposing the appeal on merits, but the Appellate Authority had disposed the appeal cursorily and that too also after a contempt petition was filed before this Court and as such, the respondent had passed the order in a prejudicial manner due to which the petitioner has been put into great hardship.

11. The learned counsel for the respondent argued that the petitioner has been disobedient to his superiors and frequently absented himself from duty thereby causing hardship for daily operation of the laboratory. The petitioner is not attending to his analytical duties sincerely and his services are undependable and he has no responsibility and discipline as an Environmental Scientist. The learned counsel further contended that the Enquiry Officer has held that the charges were proved and hence he was removed from service through Board's proceedings dated 28.08.1992. Against this order, the petitioner filed an appeal on 24.11.1994 i.e. after a period of two years. If he had not been satisfied with the Enquiry Officer's upgraded order, he should have filed the Department Appeal within three months. As per this Court's direction in W.P. No. 13917 of 1996, the Board held a meeting on 04.12.2001 and decided the matter on merits. The learned counsel further submitted that from the date of his appointment, within a span of 30 months service period, he absented himself for 10 months in various spells unauthorizedly. Complaints also were received about his indifferent quality of work and absence. Due to non-performance in his work, the District Environmental Engineer, Tuticorin was not able to achieve the target fixed by the Chairman of the Board. Therefore, he was transferred from Mobile Environment Laboratory, Tuticorin to advanced Environmental Laboratory, Madurai for better administration. As such, the petitioner has become an inefficient employee of the Board.

12. The learned counsel for the respondent further contended that the impugned order had been passed after well considering the writ petitioner's service records available on the file of the Board. Therefore, the Board was constrained to pass removal order against the petitioner, due to his insincerity and independability in discharging his assigned duties and his

disobedience to his superiors and frequent absence from duty, thereby causing hardship to daily functioning of the office of the board.

13. Per contra, the learned senior counsel for the petitioner submitted that the frequent absence of the petitioner was due to illness which was consequent to the frequent transfer ordered by the respondent. Regarding insincerity and independability, no discussions had been made and no findings had been given and no documentary evidence was produced and all these are only hypothetical theory of the respondents. Regarding disobedience to superiors, there is no circumstantial evidence or any other supporting documents. The learned counsel for the first respondent had contended that several complaints were received against the petitioner, but those complaints have not been placed before the Enquiry Authority as well as Appellate Authority. In the absence of documentary proof, the impugned orders have been passed which is illegal and unconstitutional.

Hence, the learned counsel entreats the Court to allow the writ petition.

14. After the above discussions, this Court is of the view that:-

(i) The petitioner is a qualified scientist and he has been selected by the Public Service Commission Board after conducting competitive exams and as such, it is evident that he is qualified to do his work as a scientist. The value of scientist cannot be compared with other categories of employees

of any Department, especially considering that he is an Environmental Scientist whose value to the general public is of paramount importance.

(ii) Within 10 months of joining duty, he has been regularized. It clearly proves that he has been sincere, efficient in his service and obedient to his superiors.

(iii) As per medical certificates submitted before this Court, it is seen that the petitioner fell sick on 5 occasions.

(iv) As per this direction of this Court in W.P. No. 13917 of 1996, this Court had directed the Appellate Authority to dispose the appeal, by

considering the period of limitation liberally. However, this Court is of the view that the writ petitioner was set exparte before the enquiry authority.

On the basis of exparte order, the petitioner has filed the Department appeal. So, the Department appeal is not maintainable since the enquiry

proceedings of the Enquiry Officer was not conducted in the presence of the petitioner. Therefore, there is a lacuna in the order dated 28.08.1992

passed by the Enquiry Authority. Therefore, fresh enquiry is of paramount importance as only then the details of the charges can be decided on merits.

(v) At this stage, a fresh enquiry cannot be ordered since an inordinate delay had already been caused.

(vi) In the facts and circumstances of the case, the punishment of removal from service due to frequent absence, as pointed out by the respondent

is too harsh, as the petitioner's services had been regularized. As such, this Court is of the view that the punishment imposed should be substituted

by a lesser punishment.

(vii) This Court is of the view that "removal" and "dismissal" from service stand almost on the same footing and both could bring about termination

of service. The only difference between the two is that in the case of dismissal, the employee is disqualified from future employment with his current

employer whereas in the case of removal, he is not debarred from getting future employment. Hence, this Court is of the view that the petitioner

has to be reinstated considering that he had been removed from service and not dismissed, however without any back-wages, as at this stage the

petitioner being advanced in age does not have scope of getting employment anywhere else.

15. On considering the factual position of the case and arguments advanced by the learned counsels on either side and on perusing the impugned

orders of the respondents and this Court's view listed above as (i) to (vii), this Court holds that the writ petition has enough force to allow it.

Therefore, this Court directs the respondent-Board to reinstate the petitioner, with continuity of service and attendant benefits, without back

wages, forthwith i.e., within 15 days from the date of receipt of this order. In the result, the above writ petition is allowed with the above

observations. Consequently, the order bearing reference Proc. No. CS/25261/2001, dated 30.05.2002 along with the Pro. No.

PER/P2/1441/LAD-1/91, dated 28.08.1992 of the respondent-Board is quashed and the respondents are directed to reinstate the petitioner, with

continuity of service and all other attendant benefits, but without back wages within 15 days from the date of receipt of a copy of this order.

Connected miscellaneous petitions are closed. Accordingly ordered.