
(1981) 08 MAD CK 0040
In the Madras High Court

N. Udayappan

APPELLANT

Vs

Government of Tamil Nadu

RESPONDENT

Date of Decision : 26-08-1981

Acts Referred:

Constitution of India, 1950 — Article 309
Evidence Act, 1872 — Section 114

Citation : (1982) 2 MLJ 439

Hon'ble Judges : T. Sathiadev, J

Bench : Division Bench

Judgement

T. Sathiadev, J.—Petitioner was appointed as Sub-Inspector in the Police Department on 3rd-October, 1949. He was promoted as Deputy Superintendent of Police and was working in Tanjore East District. On 5th August, 1971, he was posted as Inspector of M2 Police-Station. He took up the investigation of Crime No. 2147 of 1971 on 18th August, 1971. This had its origin on a complaint preferred on 29th July, 1971, by the Shed Master of Madras Port Trust that stainless steel sheets were stolen from Madras harbour and that out of five cases of stainless steel sheets landed from S.S. Chilka on 6th July, 1971, two cases were missing. Therefore, there was a complaint; it was registered earlier to the petitioner taking charge of the case. He conducted the investigation and found out that one Narasinga Moorthy Nadar had received the stolen property from the thieves and hence conducted a search on 24th August, 1971, of the premises belonging to him, and stainless steel was found. A mahazar was prepared which was signed by him. The case diary pertaining to the seizure was sent to the Commissioner of Police and the Assistant Commissioner of Police and both of them have initiated the diary on 25th August, 1971, i.e., the very next day. While this being the position, it appears that Narasinga Moorthy Nadar had filed a petition to the Inspector-General of Police making false allegations against him stating that he had forced him to pay Rs. 40,000 by 30th August, 1971, and that the stainless steel sheets were purchased from market by the petitioner and the documents were prepared after 30th August, 1971, as though the sheets were

recovered from him on a search conducted on 30th August, 1971. On the basis of the complaint made by him, charges were framed against the petitioner and he denied the charges.

2. This resulted in G.O. Ms. No. 1430, Home, dated 12th June, 1974, being passed directing the Tribunal for Disciplinary Proceedings, Madras, to conduct an enquiry into the allegations made against the Petitioner. It held an enquiry and found: that all the three charges have been proved and recommended the imposition of penalty of dismissal from service. Thereupon, a show cause memo, dated 17th March, 1977, was served on the petitioner to show cause against the provisional conclusion to dismiss the petitioner. He submitted elaborate explanations pointing out that when Narasinga Moorthy Nadar himself had applied to the High Court for return of the stainless steel sheets as belonging to him, his claim that they had been purchased by the petitioner and foisted upon him, is baseless, false and the material documentary evidence marked as Ex. D. 20 to D24 on this aspect had not even been referred to by the Tribunal, knowing quite well that by referring to those documents, it would not be possible for it to hold the petitioner guilty. He had also disputed the finding arrived at on all the three charges. In spite of elaborate representations made, the impugned order was passed, after consulting not only the Public Service Commission but also the Inspector-General of Police, which opinion had weighed with the respondent in arriving at the conclusion to dismiss the petitioner, and which is not contemplated under the Rules. Against this order of dismissal passed on 1st July, 1978, this writ petition is filed on the ground that it is vitiated by several irregularities and illegalities.

3. Mr. Krishnamani, counsel for the petitioner, at the outset contends that the opinion taken from the Inspector-General of Police, which is read as item No. 5 in the impugned order, is contrary to the Rules framed under Article 309 and it has influenced the decision of the Government and hence, the impugned order is also vitiated by violation of the principles of natural justice.

4. It is not disputed that the Inspector-General of Police was consulted and his opinion obtained on the enquiry report of the Tribunal. What is claimed is that, such a procedure of consulting the Heads of the Departments was being followed as a convention since 1950 and a decision having been taken by the Government independently after careful scrutiny of the enquiry report of the Tribunal for Disciplinary proceedings, the finding is in no manner vitiated. It is not claimed that the procedure of consulting the Inspector-General of Police, based on G.O. Ms. No. 329, Public (Services), dated 23rd January, 1950, as notified in Memorandum No. 5670/50-1, Public (Services), dated 14th December, 1950, is as: per the rules framed under Article 309 of the Constitution of India. If a procedure which is contrary to the rules framed is adopted, it is needless to state there has been a transgression of the ordained procedure which has to be scrupulously followed. Not only an omission to follow but a deviation from the rules, would also result in illegality being committed while taking disciplinary

proceedings. When the opinion of the Public Service Commission alone has to be obtained under Regulation 18(1) of the Tamil Nadu Public Service Commission Regulations, 1954, it would not be open to respondent to consult any other forum under any circumstances, unless the rules enable such a consultation. Though in paragraph 13, it is stated that the Government independently after careful scrutiny of the enquiry report took a decision, in paragraph 12, it is stated as follows:

They had not acted upon the recommendations of the Inspector-General of Police alone.

Therefore, when a stand is taken to the effect that there is a convention to consult Heads of Departments, it by itself means that the opinions rendered by such authorities are taken into account, and if the opinion of an authority, which is not contemplated under the rules to be called for is also considered while passing final orders, it would only result in the finding being influenced by such a consultation. When it is stated that the opinion of the Inspector General of Police "alone" had not been taken into account, it evidently means that opinion was also considered while passing orders. The letter sent by him on 24th December, 1971, is claimed in the order, as one that has been "read". Having read the opinion, the respondent cannot still swear that the opinion rendered by him had not been taken into account as a factor for arriving at the decision to dismiss the petitioner.

5. In Chandra Mohan Vs. State of Uttar Pradesh and Others, , it has been held that if consultation is done with an authority not contemplated under the Rules apart from consulting the prescribed authorities, the conclusion arrived at thereon is illegal. In dealing with the powers to be exercised by the Governor while selecting Judicial Officers, it was held by the Supreme Court that the duty to select is so integrated with the exercise of the power which could be exercised only in consultation with the person or persons designated therein.

To state it differently, if A is empowered to appoint B in consultation with C, he will not be exercising the power in the manner prescribed if he appoints B in consultation with C and D. We would, therefore, hold that if the Rules empower the Governor to appoint a person as District Judge in consultation with a person or authority other than the High Court, the said appointment will not be in accordance with the provisions of Article 233(1) of the Constitution.

When it has been thus clearly held that any consultation not intended to be done, if done, will influence the mind of the deciding authority, in this case, it has to be held that this impugned order is vitiated by taking into account the recommendation of an authority, which has not been contemplated under the Rules. Whatever be the convention adopted it cannot override Rules framed under Article 309 of the Constitution of India, and hence neither the said G.O. nor the Memorandum can be relied upon to validate such an order. Hence the first contention of the learned Counsel has to be upheld.

6. Mr. Krishnamani would then contend that in spite of the finding of the Tribunal, the State Government is bound to apply its mind to the evidence adduced and also the written submissions made by the delinquent before passing the impugned order whereas it had adopted the procedure in copying the common form without realising the gravamen of the complaint made before the Tribunal against the petitioner by a person who had no regard for truth or to solemn statements made before Court. The learned Counsel for the petitioner proceeds to contend that on the face of the order, there is no indication that the respondent had endeavoured to comprehend what were the charges levelled against the petitioner and to what extent false evidence had been rendered for which a Government servant should not be made to suffer and in any event, false evidence could not form the basis for the State to arrive at a decision which results in the petitioner being dismissed from service. He states that Exhibit D-21 is CrI. M.P. No. 2792 of 1974, filed by Narasingamurthy Nadar in the High Court for return of the stainless steel sheets, wherein he had sworn to a claim that they were seized from him by the petitioner on 24th August, 1971. Exhibits D-20 to 24 relate to these proceedings in the High Court. He also filed a contempt application wherein he has specifically mentioned that the stainless steel sheets were seized from him on 24th August, 1971. Having sworn before the High Court, to this effect, he had come with a different version before the Tribunal that a sum of Rs. 40,000 was extorted from him by the petitioner, that sheets have been purchased out of that amount through Advocate Pratap Kothari and that the mahazar and other documents have been fabricated as if the seizure was effected on 24th August, 1971. The learned Counsel also refers to the fact that the Assistant Commissioner of Police and the Commissioner of Police; have initialled the case diary on 25th August, 1971, being the very next day itself and contends that this also would go to show that there could not have been a fabrication of these documents, subsequent to the seizure and the mahazar having been signed by him on 24th August, 1971. He contends that such vital documents have not been discussed in the order of the Tribunal, being fully aware that if such documents are to be considered, it would not result in holding the petitioner guilty of the charges.

7. It is surprising that the Tribunal presided by a Judicial Officer, should avoid considering sworn affidavits filed in this Court and to what extent after having sworn to such affidavits in a Court, Narasingamurthy Nadar could come forward with a different version before it. Apart from this aspect, when it is claimed that what was purchased by an Advocate whose name has been disclosed, was foisted on him, no reason is given as to why he had not been examined. The initials of the Assistant Commissioner of Police and the Commissioner of Police found in the case diary are also significant factors even in the context of the claim made that there is an alteration of date. So long as the genuineness of the initials is not in dispute, as contended by Mr. Krishnamani there has been failure on the part of the Tribunal to take into account its probative value. The failure to consider vital documents like Exhibits D-20 to D-24, and also the failure to

examine the Advocate, are material omissions in the report, of the Tribunal and also in the impugned order.

8. To substantiate his contention that the non-examination of the Advocate and non-consideration of the vital documents would result in an error apparent on the face of the order, he relies upon the decision in *Habeeb Mohammad Vs. The State of Hyderabad*, wherein it was held that it is the bounden duty of the prosecution to examine a material witness, particularly when no allegation has been made that, if produced, he would not speak the truth, and that if such examination is avoided, not only an adverse inference arises in view of Illustration (g) to Section 114 of the Evidence Act, but the circumstance of his being withheld from the Court casts a serious reflection on the fairness of the trial. He also relies upon the decision in *Union of India (UOI) Vs. H.C. Goel*, in which it was held that if an order of dismissal is based on no evidence, there can be no doubt that a writ of certiorari would issue to set aside such an order even without any allegation of mala fides. Yet another decision relied upon is the one reported in *P.S. Mohana Srinivasan Vs. Girija*. In dealing with the onus, to be laid, it was held that it is the petitioner who will have to place indisputable oral and documentary evidence and if conclusions are arrived at on irrelevant conjectures, it would result in an error of law being committed. Therefore, when material evidence had not been considered, such an order cannot be sustained.

9. In the light of these decisions, it has to be held that the Tribunal has committed a material error on the face of the record in its failure to consider the vital documents and in non-examination of the vital witness.

10. The further contention of Mr. Krishnamani is that if for any reason it is to be held that the consultation of the Inspector General of Police had not vitiated the order, even then on the failure to furnish a copy of the recommendation made by Mm, the order is vitiated for failure to abide by principles of natural justice. He states that when the recommendation of the Tamil Nadu Public Service Commission is made available, the recommendation of the Head of Department ought to have been served. This contention has also to be sustained, if for any reason it is to be held that such consultation has not vitiated the order.

11. Learned Advocate-General, would still contend that whatever may be said about charges 1 and 2, in so far as charge No. 3 is concerned, when it has been established that the petitioner had received illegal gratification, that itself is sufficient to entail the dismissal of the petitioner. He relies upon the decision in *State of Orissa Vs. Bidyabhushan Mohapatra*, wherein this view has been taken. Here again, it, should be noted that the other infirmities and illegalities made out above, would still result in the impugned order being set aside.

12. Even in respect of the third charge, Mr. Krishnamani, would contend that there is only a summary consideration of this charge. It is only in paragraphs 20 and 21, this charge is dealt with, by the Tribunal in its order. What has been stated by the Tribunal is as follows:

It is therefore, more probable to believe that he would have demanded money from P.W. 16 and other accused persons for releasing them on bail. In fact, no material had been placed before me to show that the evidence of P.W. 13 to P.W. 15 is unreliable....

Ultimately, the Tribunal holds in the same paragraph that the charge is established. As rightly contended by Mr. Krishnamani, it is only in a single paragraph that the evidence and circumstances relating to this charge is dealt with on surmises and summary conclusions. Therefore, it cannot be held that charge No. 3 had been properly dealt with by the Tribunal and hence the finding arrived at thereon cannot be treated as sufficient to sustain the order and the punishment imposed.

13. As pointed out above, on all these grounds, the impugned order deserves to be set aside. The resultant effect is, the matter will have to go back to the Tribunal, which will have to dispose of the matter afresh, and while doing so, it should avoid this manner of non-consideration of vital documents and non-examination of material witnesses.

14. Whenever a charge for illegal gratification is levelled against a public servant, the Disciplinary Tribunal has an onerous duty to discharge and unless acceptable and convincing evidence is forthcoming, it would be committing grave injustice if it is to act upon witness who have no regard to their sworn statements made before Courts. If it be found Narasingamurthy Nadar had perjured, then he should be prosecuted and dealt with.

15. As for the respondent, in the impugned order there is practically no indication of any careful consideration of the matter. Hence in turn, while passing order, it has to assign reasons for the conclusion arrived at by following the Rules framed under Article 309 of the Constitution without deviation. In this view the writ petition is allowed. No costs.