
(2010) 10 MAD CK 0277

In the Madras High Court

Case No : Writ Petition (MD) No. 7059 of 2007 and M.P. (MD) No. 1 of 2007

P. Radhakrishnan

APPELLANT

Vs

The Secretary to Government Backward Classes, Most
Backward Classes and Minorities Welfare (BC) Department
and The Directorate of Backward Classes and Minorities
Welfare Department

RESPONDENT

Date of Decision : 08-10-2010

Acts Referred:

Constitution of India, 1950 — Article 14
Prevention of Corruption Act, 1988 — Section 13
Tamil Nadu Civil Services (Discipline and Appeal) Rules, 1955 — Rule 17
Tamil Nadu Government Servants Conduct Rules, 1973 — Rule 20
Tamil Nadu Pension Rules, 1978 — Rule 32, 56, 56(1), 6, 9(2)

Citation : (2010) 10 MAD CK 0277

Hon'ble Judges : P. Jyothimani, J

Bench : Single Bench

Advocate : G. Sridevi, for the Appellant; P. Gurunathan, Government Advocate,
for the Respondent

Final Decision : Allowed

Judgement

P. Jyothimani, J.—The writ petition is directed against the order passed by the first Respondent in G.O.(2D) No. 36, dated 22.12.2006, ordering recovery of an amount of Rs. 100/-to be cut from the pension and a sum of Rs. 3,13,940/-out of which Rs. 2,39,069/-to be recovered from the DCRG and balance amount of Rs. 74,871/-from pension at the rate of Rs. 921/-as first instalment and Rs. 1,450/-for 51 months and also forbearing the Respondents from making the recovery.

2. Pending writ petition, this Court has passed an order of interim stay on 05.08.2008 which was subsequently made absolute by an order dated 13.07.2009. The Petitioner, who has retired as Special Officer of the Directorate of Backward Classes and Minority Welfare Office, Chepauk, Chennai, was

originally appointed as Typist through TNPSC joined duty on 24.11.1966 and after several promotions, he was promoted as the District Backward Classes and Minority Welfare Officer and posted at Madurai. It was in 2001, he was promoted as Special Officer and reached the age of superannuation on 30.06.2004 and he was allowed to retire without prejudice to the pending disciplinary proceedings. When he was working as District Backward Classes and Minority Welfare Officer, Madurai, he was issued charge memo dated 21.09.2001 containing three charges under Rule 17(b) of the Tamil Nadu Civil Services (D&A) Rules which relate to i) the promotion of three assistant cooks on consolidated pay as cooks/watchwomen in the time scale of pay from 01.07.2000 against the instructions of the Commissioner which stipulates that such persons shall not be appointed as Cook/watchman/watchwomen in the time scale of pay, ii) he has transferred 19 employees violating the orders of the Government banning general transfer of Government servants for the year 2000 and iii) by violating the said Government Order, he has violated Rule 20 of the Tamil Nadu Government Servants Conduct Rules, 1973.

3. The Petitioner has submitted an explanation on 19.10.2001 denying the charges to the effect that he has not received any such instructions of the Commissioner, that there was no ban in the Government letter with regard to the request transfer and mutual transfer and that the Petitioner has only followed the Government Order and therefore, he did not violate the Rule 20 of the Tamil Nadu Government Servant Conduct Rules, 1973. It is stated that the Commissioner for Disciplinary Authority, Salem in the letter dated 10.03.2004 has fixed the date of enquiry to appear on 16.03.2004 and 17.03.2004 and the Petitioner requested for change of the said dates since there was a review meeting called for in Trichy, Perambalur, Karur, Thanjavur, Nagai and Thirvarur from 15.03.2004 to 18.03.2004. In spite of that, it is stated that the Enquiry Officer has completed the enquiry *exparte* and submitted his report on 19.06.2004 based on which a further explanation was called for by the Respondent vide letter, dated 14.09.2004. The Petitioner has submitted his explanation on 12.10.2004 stating that his inability to attend the enquiry was due to the review meeting conducted in his office itself. In spite of the same, the first Respondent has issued a show cause notice, directing the Petitioner to explain within 15 days for the purpose of recovery as to why recovery cannot be imposed on the Petitioner for a sum of Rs. 3,13,940 and Rs. 100/-to be cut from the pension of the Petitioner for 12 months. on 28.11.2005, the Petitioner has submitted his explanation and thereafter, the order of punishment has been imposed on him, as against which the present writ petition has been filed on various grounds that the order is violative of principles of natural justice under Article 14 of the Constitution of India; that the *exparte* order of recovery has been made without giving sufficient opportunity to the Petitioner as per Rule 17(b) and therefore, the same is liable to be set aside; that the enquiry has not been conducted in the manner known to law and there was no oral enquiry that the Petitioner has not been supplied with the materials and that the explanation

itself has not been properly considered by the first Respondent. The deduction of Rs. 2,39,069/- from the pension which includes DCRG is against the Pension Rules and 1/3rd of pension amount alone can be deducted.

4. In the counter affidavit filed by the Respondents, it is stated that as per the instructions of the Director of Backward Classes and Minorities Welfare, dated 6.3.2000, the District Backward Classes and Minorities Welfare Officers are not entitled to fill up any post in the school and college hostels in the cadre of Cooks, in the time scale of pay. The further instructions issued by the Government, dated 10.03.2000 relates to the temporary ban on general transfers for the year 2000. Against the said instructions, the Petitioner has promoted 3 cook helpers who were paid consolidated pay of Rs. 500/- as cooks in the time scale of pay and effected transfer orders to 19 staff against the instructions issued by the Government. It was thereafter, the Petitioner was transferred as Special Officer (Planning) and charges under Rule 17(b) came to be framed on 21.09.2001. Afterwards, the Government has decided to refer the matter to the Commissioner for Disciplinary Proceedings and it is transferred to the Tribunal for Disciplinary proceedings for enquiry by Government letter, dated 21.02.2002 and thereafter, it was transferred to the Commissioner for Disciplinary Proceedings, Salem. The Commissioner for Disciplinary Proceedings Salem, has directed the Petitioner to appear for enquiry for which the Petitioner replied that there was preoccupation with official duties on those dates and it was in those circumstances, the Commissioner for Disciplinary Proceedings, based on his explanation, sent a report to the Government on 24.06.2004. In the meantime, by an order dated 30.06.2004 passed by the Government, the Petitioner was allowed to retire on attaining the age of superannuation without prejudice to the pending disciplinary proceedings. Thereafter, he was served with a copy of the finding of the Tribunal on 14.09.2004 to offer his explanation and he has also offered his explanation and after considering the same and the finding of the tribunal, the charges were held to be proved. Thereafter, for the proved charges, after consulting with TNPSC, the impugned order came to be passed directing the recovery as stated above. It is admitted that charges were framed under Rule 17(b) of the Rules and that the Petitioner was permitted to retire on the attainment of the age of superannuation on 30.06.2004 without prejudice to the pending disciplinary proceedings against him. It is stated that when the Tribunal for disciplinary proceedings has requested him to submit his explanation and appear for enquiry and the Petitioner did not participate since he was preoccupied on the said dates due to official duty and based on his explanation, a report has been sent, and a copy of the enquiry report communicated to the Petitioner to submit his further explanation and he has also submitted his explanation without containing any further reason and therefore, based on the enquiry officer's report and further explanation, the impugned order has been passed and according to the Respondents, the same is in accordance with law. The other grounds on which the impugned order came to be challenged are denied and it is stated that the enquiry has been conducted in the manner known

to law and charges were framed and explanations were called for and enquiry report was considered and final order was passed and it is stated that it was the duty of the Petitioner to appear for enquiry before the Commissioner for Disciplinary Proceedings, Salem when summons issued to appear on 16.03.2004 and 17.03.2004 and he has informed that he was preoccupied and therefore an exparte enquiry report was submitted which according to the Respondents, is in accordance with law.

5. On the merits of the case, it is stated that various instructions were communicated and the conduct of the Petitioner as stated in the charges are in violations of the instructions. On fact it is not in dispute that by G.O(D) No. 28, Backward Classes, Most Backward Classes and Minorities Welfare Department, dated 30.06.2004, the Petitioner was allowed to retire from service on attaining the age of superannuation on 30.06.2004 without prejudice to the disciplinary proceedings pending against him and accordingly, the Petitioner was allowed to retire on 30.06.2004. The charge memo was issued on 21.09.2001 and the final order came to be passed as it is seen from the impugned order only 22.12.2004. It is not the case of the Respondents that as per the Fundamental Rules 56(a) and (c), the Petitioner was not permitted to retire on attaining the age of superannuation on public grounds.

6. It was held by a Division Bench of this Court in N.M. Somasundaram v. The Director General of Police, Madras and Ors. reported in 1997 W.L.R 120, while referring to the above-said Rule 56(c) of the Fundamental Rules that in the absence of any order not to allow the public servant to retire on attaining the age of superannuation on public grounds, the authority competent to proceed with the disciplinary proceedings loses its jurisdiction to continue the proceedings under 56(c) of the Fundamental Rules which is as follows:

56(c)A Government servant under suspension on a charge of misconduct should not be required or permitted to retire on his reaching the date of compulsory retirement but should be retained in service until the enquiry into the charge is conducted and a final order passed thereon by the competent authority

It has been emphasised by the Division Bench to come to a conclusion that unless a positive order is passed directing the Government servant not to retire on the age of superannuation, disciplinary authority loses its right or jurisdiction to proceed with the disciplinary proceedings. When the said Fundamental Rules are made applicable to the Petitioner, as per Rule 56(c), the only option available to the Respondents at the time of attaining the age of superannuation by the Petitioner was by passing an order not to allow him to retire. In spite of the Rule if the Petitioner was allowed to retire from service, there is no question of continuing disciplinary proceedings even for recovery from the pension amount. That was the view expressed by the Hon'ble Supreme Court in Bhagirathi Jena Vs. Board of Directors, O.S.F.C. and Others, . The Supreme Court while referring to the provisions of the Orissa State Financial Corporation Staff Regulations, 1975 has held as follows:

6. It will be noticed from the above said regulations that no specific provision was made for deducting any amount from the provident fund consequent to any misconduct determined in the departmental enquiry nor was any provision made for continuance of the departmental enquiry after super annuation.

7. In view of the absence of such a provision in the above said regulations, it must be held that the Corporation had no legal authority to make any reduction in the retiral benefits of the Appellant. There is also no provision for conducting a disciplinary enquiry after retirement of the Appellant and nor any provision stating that in case misconduct is established, a deduction could be made from retiral benefits. Once the Appellant had retired from service on 30.06.1995, there was no authority vested in the Corporation for continuing the departmental enquiry even for the purpose of imposing any reduction in the retiral benefits payable to Appellant. In the absence of such an authority, it must be held that the enquiry had lapsed and the Appellant was entitled to full retiral benefits on retirement

7. A Division Bench of this Court in *The State of Tamil Nadu Vs. R. Karupiah, Inspector of Police (Under Orders of Suspension) and The Registrar, Tamil Nadu Administrative Tribunal*, while referring to the scope of Tamil Nadu Pension Rules, has held that the Pension Rules would be made applicable only if the Fundamental Rules, 56(1)(c) is complied with. It was also categorically held by the Division Bench that no disciplinary proceeding could be continued after allowing the government servant to retire on reaching the age of superannuation unless an order retaining him in service is made. It was also held that the provisions of the Rule 56(1)(c) are mandatory. The said Rule 56(1) of the Fundamental Rule relates to the retirement on superannuation. For the sake of brevity, it is relevant to extract the Fundamental Rules 56(1)(a) and (c) as follows;

56(1) Retirement on Superannuation -(a)Every Government servant in the superior service shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty-eight years. He shall not be retained in service after that age except with the sanction of the Government on public grounds, which must be recorded in writing but he shall not be retained after the age of sixty years except in very special circumstances;

Provided that this clause shall not apply to Government servants who are treated as in superior service for the purpose of these rules but as in the Tamil Nadu Basic Service for the purpose of pension. Such Government servants as well as all basic servants shall retire on attaining the age of sixty years:

Provided further that on and from the 1st January 1993, a District Judge, Chief Judicial Magistrate, Sub-ordinate Judge or District Munsif-cum-Judicial Magistrate, who, in the opinion of the High Court, Madras, has potential for continued useful service beyond the age of fifty-eight years, shall retire from service on attaining the age of sixty years

c)Notwithstanding anything contained in Clause (a), a Government servant who is under suspension,

(i)on a charge of misconduct; or

(ii)against whom an enquiry into grave charges of criminalm is conduct of allegations of criminal misconduct, is pending; or

(iii)against whom an enquiry into grave charges is contemplated or is pending; or

(iv)against whom a complaint of criminal offence is under investigation or trial.

Shall not be permitted by the appointing authority to retire on his reaching the date of retirement, but shall be retained in service until the enquiry into the charge of misconduct or criminal misconduct or the enquiry into allegations of criminal misconduct or the enquiry into contemplated charges or disciplinary proceeding taken under Rule 17(c) of the Tamil Nadu Civil Services (Discipline and Appeal) Rules or Rule 3(c) of the Tamil Nadu Police Sub-ordinate Service (Discipline and Appeal) Rules, as the case may be, in respect of item (iv) above is concluded and a final order passed thereon by the competent authority or by any higher authority.

Explanation: For the purpose of this clause, the expression "criminal misconduct" shall have the same meaning as in Section 13 of the Prevention of CorruptionAct,1988(Central Act 49 of1988).

Instruction under Rule 56(1)(c): Whether a Government servant referred to in Clause (c) is fully exonerated or not, he shall be considered to have been on extension of service for the period from the date of retirement to the date of termination of the proceedings. During such an extension of service, the service rights which have accrued to the Government servant shall freeze at the level reached on the date of retirement and the salary during that period shall not exceed the pension which has accrued to the Government servant on that date

8. By referring to the said Rules in the context of the Tamil nadu Pension Rules, the Division Bench has made the following observation also by referring to Rule 9(2) (a) of the Tamil Nadu Pension Rules, 1978 and other relevant Rules which is as follows:

24. Further, on a perusal of the sub-rules 2(a) and 6(b) to Rule 9 of the amil Nadu Pension Rules, which are extracted below, they reveal that they come into existence only in the event of fulfilling the requirements under Rule 56(1)(c) of the Fundamental Rules, even it can be said that they are the extension of Rule 56(1)(a) and (c) of the Fundamental Rules. In the event of non compliance of Rule 56(1)(c) of the Fundamental Rules, the Petitioners can not seek the aid of the above said rules for their unjust act.

25. Sub Rule 2(a) to Rule 9 of the Tamil Nadu Pension Rules 1978, reads as follows:

2(a)The departmental proceeding referred to in Sub-rule (1), if instituted while the Government servant was in service, whether before his retirement or during his re-employment, shall, after the final retirement of the Government servant be deemed to be proceedings under this rule and shall be continued and concluded by the authority by which they were commenced in the same manner as if the Government servant had continued in service;

Provided that where the departmental proceedings are instituted by an authority subordinate to the Government, that authority shall submit a report recording its findings to the Government.

26. Sub-Rule 6(b) reads as follows:

6(b) departmental proceedings shall be deemed to be instituted on the date on which the statement of charges is issued to the Government servant or pensioner or if the Government servant has been placed under suspension from an earlier date, on such date; and

27. We also find a "NOTE" to Rule 32 which deals with Super annuation Pension.

28. Rule 32 of the Tamil Nadu Pension Rules reads as follows:

Rule 32: Superannuation Pension-A super annuation pension is granted to a Government servant entitled or compelled, by rule, to retire at a particular age.

Explanation -For purposes of this rule

(1)The date of compulsory retirement of a Government servant in superior service is the date on which he attains the age of (58years). The date of compulsory retirement of a Government servant in Last Grade Service is the date on which he attains the age of 60 years.

(2)The age of retirement of trained teachers in the educational institution under the management of Government is the date on which he attains the age of 58 years.

(3)The date of retirement in the case of persons who had taken part in the freedom struggle and courted imprisonment and who have been appointed to the posts of social workers up to the end of December 1965, shall be the date on which they attain the age of 60 years.

NOTE: A Government servant under suspension, on a charge of misconduct, shall not be required or permitted to retire but shall be retained in service until the enquiry into the charge is concluded and final order is passed by a competent authority (Emphasis supplied)

29. From the above note, it is also clear that to proceed against a Government servant, who is under suspension on a charge of misconduct, after his retirement, the fulfilling of the requirements under Rule 56(1)(c) of the Fundamental Rules is a mandatory one, otherwise, the competent authority cannot have any jurisdiction on the retired Government servant to proceed against him and the non compliance of the said rule is vitiated all the

proceedings initiated against the first Respondent and therefore, the same are not sustainable under law and are liable to be set aside"

9. Therefore, it is clear that when once the mandatory provision of the Fundamental Rule 56(1)(c) has not been followed by the authority competent not allowing a Government servant to retire due to the pendency of the disciplinary proceedings, merely by allowing the Government servant to retire without prejudice to the pending disciplinary proceedings cannot be deemed to be the compliance of the mandatory requirement or Rule 56(1)(c) of the Fundamental Rules. That will be applicable even for the purpose of recovery under Rule 9 of the Tamil Nadu Pension Rules as stated above. Under Rule 9(2) (a) and 9(6) (b) of the Tamil Nadu Pension Rules can be applied for the purpose of continuing the pending the disciplinary proceedings under the pension rules only if the government servant is not allowed to retire on the date of superannuation by a positive order. Inasmuch as the order permitting the Petitioner to retire from service subject to the disciplinary proceedings cannot be by any stretch of imagination equated to that of a positive order not allowing to retire as contemplated under Rule 56(1)(c) of the Fundamental Rules, there is no difficulty to conclude on the factual matrix of this case that the entire proceedings and ultimately, the impugned order passed by the first Respondent becomes a non-est in the eye of law.

10. Law is well settled that if the statute requires a particular thing to be done in a particular manner, the same has to be done in that manner and not otherwise. If really, the disciplinary authority decided to continue the disciplinary proceedings, even after the date of retirement of the Petitioner, the only option opened to the disciplinary authority was to invoke the mandatory provision of Rule 56(i)(c) of the Fundamental Rules.

11. There is one other additional fact which has to be considered namely that even otherwise, the disciplinary proceedings is vitiated by violation of the principles of natural justice. When once, the charges framed against the Petitioner were categorically denied by him in the explanation, it is incumbent on the part of the disciplinary authority to conduct appropriate and fair enquiry. It is astonishing to note that when the Commissioner for Disciplinary Proceedings, Salem to whom the matter was referred, has called for the Petitioner to participate in the enquiry on 16.03.2004 and 17.03.2004, it was not as if the Petitioner has disobeyed the said direction of Commissioner for Disciplinary proceedings, Salem but he has only requested by informing him that he was to attend review meeting from 15.03.2004 to 18.03.2004 in six districts as per the proceedings of the Commissioner, dated 12.03.2004 which is relating to his duty and in fairness the Commissioner for Disciplinary Proceedings, Salem should have considered the genuine request and given an opportunity to the Petitioner to participate in the enquiry especially when the charges were framed under Rule 17(b). On the other hand, the Commissioner, disciplinary authority, Salem has simply closed his eyes and treated as if he is entitled to conduct enquiry exparte

and submit his report. The disciplinary authority in utter violation of principles of natural justice ignoring all canons of law has simply issued a show cause notice to the Petitioner to offer explanation to the Enquiry Officer's report. In fact even in the explanation, dated 12.10.2004, the Petitioner has categorically stated that he was unable to attend the enquiry before the Commissioner of disciplinary authority, Salem, on 16.03.2004 and 17.03.2004 because of his preoccupation in his official duty in the Respondent department and in spite of it, it is pertinent to note that the disciplinary authority has not even chosen to consider his explanation and straight away passed the impugned order of punishment which can never be as an order passed in accordance with law. Even on this ground of patent violation of principles of natural justice, the impugned order has to go apart from the want of jurisdiction on the part of the Respondents in continuing the disciplinary proceedings under Pension Rules even after the retirement of the Petitioner on the age of superannuation without prejudice to the disciplinary proceedings.

12. In such view of the matter and looking into any angle, I am of the view that the impugned order of the first Respondent in making recovery cannot be sustained in the eye of law. Accordingly, the impugned orders are set aside and the writ petition stands allowed. No costs. Consequently, M.P.(MD) No. 1 of 2008 is closed.