
(2009) 06 MAD CK 0008
In the Madras High Court
Case No : Writ Petition No. 31218 of 2006

P. Thangaiyah

APPELLANT

Vs

State of Tamil Nadu and The Executive Engineer (A.E)
Command Area Development Programme, Parambikulam-
Aliyar Project

RESPONDENT

Date of Decision : 09-06-2009

Acts Referred:

Constitution of India, 1950 — Article 309, 311(2), 320(3)
Tamil Nadu Civil Services (Discipline and Appeal) Rules, 1955 — Rule 17

Citation : (2009) 06 MAD CK 0008

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : P.V.S. Giridhar, for the Appellant; P. Gurunathan, GA, for the Respondent

Final Decision : Allowed

Judgement

K. Chandru, J.—Heard both sides.

2. The petitioner has filed O.A. No. 6762 of 1997, seeking to challenge the order of the first respondent, dated 28.2.1997 in G.O.(3D) No. 21,

Agriculture Department, wherein by which the petitioner was imposed with the punishment of stoppage of increment for 3 years with cumulative effect.

3. On notice from the Tribunal, the first respondent has filed a detailed reply affidavit, dated 29.01.1998. In view of the abolition of the Tribunal,

the matter stood transferred to this Court and was renumbered as W.P. No. 31218 of 2006. At the relevant time, the petitioner was working as an

Assistant Executive Engineer, Tank Irrigation and Modernisation Circle, Virudhunagar. Even at the time of filing of the O.A., he was 55 years old

and had reached the age of superannuation during the year 2000 and had retired from service.

4. The petitioner was placed under suspension by an order, dated 22.10.1987. He was also given a charge memorandum under Rule 17(b) of the

TNCS (D&A) Rules. The major allegation against the petitioner was that the quality of on farm development (OFD) executed by him was poor

and there was a misuse of cement supply for the use in the scheme work at Kunda Dam subdivision. An enquiry was conducted against the

petitioner by the Executive Engineer (Agriculture Engineering) CAD, Parambikulam Azhiyar Project, Udumalpet. The petitioner was furnished with

a copy of the enquiry report. He gave a detailed explanation, dated 18.03.1991, denying the charges. He also raised several points regarding the

infirmities in the departmental enquiry conducted against him.

5. On receipt of the explanation from the petitioner, the first respondent State consulted the TNPSC. The TNPSC gave its advice, dated

11.11.1995. On the basis of the advice and accepting the findings of the enquiry officer, the Government imposed the punishment against the

petitioner as set out above. During the pendency of the O.A., the petitioner did not have the benefit of any interim order. The respondents also

circulated the original records relating to the case of the petitioner.

6. Mr. P.V.S. Giridhar, the learned Counsel for the petitioner raised the following contentions:

a)The enquiry officer conducted the enquiry in a biased manner. He also acted as a Judge and Prosecutor. He further examined and cross

examined the petitioner.

b)The documents filed in the enquiry were not marked through any witnesses and the petitioner was not given copies of the documents. He was

also not permitted to inspect those documents.

c)The petitioner had examined 4 witnesses in his defence, but they were strangely shown as witnesses for the department.

d)The first respondent did not apply his mind independently, but mechanically accepted the same.

7. Per contra, in the reply affidavit, it is stated that the enquiry officer had acted in terms of the guidelines prescribed under the handbook on

disciplinary procedures. It was also stated that the petitioner did not ask for

documents in terms of the questionnaire furnished to him. It was admitted that four witnesses were present and the petitioner had examined them in the enquiry. It was also stated that the respondent State had applied its mind before passing the final order of penalty.

8. In support of his submissions, the learned Counsel for the petitioner relied upon the judgment of the Supreme Court in Bareilly Electricity Supply Co. Ltd. Vs. The Workmen and Others, . He placed reliance upon the following passage found in para 14, which is as follows:

14. ...But the application of principal of natural justice does not imply that what is not evidence can be acted upon. On the other hand what it means is that no materials can be relied upon to establish a contested fact which are not spoken to by persons who are competent to speak about them and are subjected to cross-examination by the party against whom they are sought to be used. When a document is produced in a Court or a Tribunal the questions that naturally arise is, is it a genuine document, what are its contents and are the statements contained therein true. When the appellant produced the balance-sheet and profit and loss account of the company, it does not by its mere production amount to a proof of it or of the truth of the entries therein. If these entries are challenged the appellant must prove each of such entries by producing the books and speaking from the entries made therein. If a letter or other document is produced to establish some fact which is relevant to the enquiry the writer must be produced or his affidavit in respect thereof be filed and opportunity afforded to the opposite party who challenges this fact. This is both in accord with principles of natural justice as also according to the procedure under Order 19 of the CPC and the Evidence Act both of which incorporate these general principles.

9. The learned Counsel also stated that principles of natural justice requires that he should be given the copies of the documents relied on by the department and that will vitiate the enquiry. For this purpose, he placed reliance of the judgment of the Supreme Court in State of Madhya Pradesh v. Chintaman Sadashiva Vaishampayan reported in AIR 1961 SC 1623.

There is no dispute that under Article 311(2) the respondent is entitled to have such a reasonable opportunity. A proper opportunity must be afforded to him at the stage of the enquiry after the charge is supplied to him as

well as at the second stage when punishment is about to be imposed on him. If the first enquiry was materially defective and denied the respondent an opportunity to prove his case it is impossible to hold that a reasonable opportunity guaranteed to a public servant by Article 311(2) had been afforded to the respondent in the present case.

10. The counsel also submitted that the enquiry officer himself recommended strongly the punishment to be imposed on the petitioner. But, a perusal of the report does not show any such recommendation was made by the disciplinary authority. Hence this submission has no relevance.

11. The learned Counsel placed reliance upon the judgment of the Supreme Court in *State of Uttaranchal and Others Vs. Kharak Singh*, for the purpose of proving that this Court has got power to judicially review a disciplinary proceedings which was conducted contrary to the principles of natural justice. For this purpose, he placed reliance upon the following passages found in paragraphs 19 and 20 of the said judgment:

19. As pointed out above, awarding appropriate punishment is the exclusive jurisdiction of the punishing/disciplinary authority and it depends upon the nature and gravity of the proved charge/charges and other attended circumstances. It is clear from the materials, the officer, who inspected and noted the shortfall of trees, himself conducted the enquiry, arrived at a conclusion holding the charges proved and also strongly recommended severe punishment of dismissal from service. The entire action and the course adopted by the enquiry officer cannot be accepted and is contrary to the well-known principles enunciated by this Court.

20. A reading of the enquiry report also shows that the respondent herein was not furnished with the required documents. The Department's witnesses were not examined in his presence. Though the respondent who was the writ petitioner specifically stated so in the affidavit before the High Court in the writ proceedings, those averments were specifically controverted in the reply-affidavit filed by the Department. Mere denial for the sake of denial is not an answer to the specific allegations made in the affidavit. Likewise, there is no evidence to show that after submission of the report by the enquiry officer to the disciplinary authority, the respondent herein was furnished with the copy of the said report along with all the relied upon documents. When all these infirmities were specifically pleaded and

brought to the notice of the appellate authority (i.e. Forest Conservator), he rejected the same but has not pointed out the relevant materials from the records of the enquiry officer and disciplinary authority to support his decision. Hence, the appellate authority has also committed an error in dismissing the appeal of the respondent.

12. The learned Counsel contended that since the first respondent consulted the TNPSC and called for its advice and accepted the views of the TNPSC, he ought to have been given the report before its acceptance and not after passing the order. Therefore, he placed reliance upon the judgment of the Supreme Court in *Yoginath D. Bagde Vs. State of Maharashtra and Another*, . He also referred to the following passages found in paras 28, 29 and 31:

28. In view of the provisions contained in the statutory rule extracted above, it is open to the disciplinary authority either to agree with the findings recorded by the enquiring authority or disagree with those findings. If it does not agree with the findings of the enquiring authority, it may record its own findings. Where the enquiring authority has found the delinquent officer guilty of the charges framed against him and the disciplinary authority agrees with those findings, there would arise no difficulty. So also, if the enquiring authority has held the charges proved, but the disciplinary authority disagrees and records a finding that the charges were not established, there would arise no difficulty. Difficulties have arisen in all those cases in which the enquiring authority has recorded a positive finding that the charges were not established and the delinquent officer was recommended to be exonerated, but the disciplinary authority disagreed with those findings and recorded its own findings that the charges were established and the delinquent officer was liable to be punished. This difficulty relates to the question of giving an opportunity of hearing to the delinquent officer at that stage. Such an opportunity may either be provided specifically by the rules made under Article 309 of the Constitution or the disciplinary authority may, of its own, provide such an opportunity. Where the rules are in this regard silent and the disciplinary authority also does not give an opportunity of hearing to the delinquent officer and records findings different from those of the enquiring authority that the charges were established, it is an opportunity of hearing which may have to be read into the

rule by which the procedure for dealing with the enquiring authority's report is provided principally because it would be contrary to the principles of natural justice if a delinquent officer, who has already been held to be not guilty by the enquiring authority, is found guilty without being afforded an opportunity of hearing on the basis of the same evidence and material on which a finding of not guilty has already been recorded.

29. We have already extracted Rule 9(2) of the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979 which enables the disciplinary authority to disagree with the findings of the enquiring authority on any article of charge. The only requirement is that it shall record its reasoning for such disagreement. The rule does not specifically provide that before recording its own findings, the disciplinary authority will give an opportunity of hearing to a delinquent officer. But the requirement of hearing in consonance with the principles of natural justice even at that stage has to be read into Rule 9(2) and it has to be held that before the disciplinary authority finally disagrees with the findings of the enquiring authority, it would give an opportunity of hearing to the delinquent officer so that he may have the opportunity to indicate that the findings recorded by the enquiring authority do not suffer from any error and that there was no occasion to take a different view. The disciplinary authority, at the same time, has to communicate to the delinquent officer the TENTATIVE reasons for disagreeing with the findings of the enquiring authority so that the delinquent officer may further indicate that the reasons on the basis of which the disciplinary authority proposes to disagree with the findings recorded by the enquiring authority are not germane and the finding of not guilty already recorded by the enquiring authority was not liable to be interfered with.

.....

31. In view of the above, a delinquent employee has the right of hearing not only during the enquiry proceedings conducted by the enquiry officer into the charges levelled against him but also at the stage at which those findings are considered by the disciplinary authority and the latter, namely, the disciplinary authority forms a tentative opinion that it does not agree with the findings recorded by the enquiry officer. If the findings recorded

by the enquiry officer are in favour of the delinquent and it has been held that the charges are not proved, it is all the more necessary to give an opportunity of hearing to the delinquent employee before reversing those findings. The formation of opinion should be tentative and not final. It is at this stage that the delinquent employee should be given an opportunity of hearing after he is informed of the reasons on the basis of which the disciplinary authority has proposed to disagree with the findings of the enquiry officer. This is in consonance with the requirement of Article 311(2) of the Constitution as it provides that a person shall not be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. So long as a final decision is not taken in the matter, the enquiry shall be deemed to be pending. Mere submission of findings to the disciplinary authority does not bring about the closure of the enquiry proceedings. The enquiry proceedings would come to an end only when the findings have been considered by the disciplinary authority and the charges are either held to be not proved or found to be proved and in that event punishment is inflicted upon the delinquent. That being so, the right to be heard would be available to the delinquent up to the final stage. This right being a constitutional right of the employee cannot be taken away by any legislative enactment or service rule including rules made under Article 309 of the Constitution.

13. With reference to the last submission made by the learned Counsel, it was stated in the reply affidavit that the Government had independently come to the conclusion holding the petitioner guilty and there was no requirement for furnishing the copy of the views obtained by the TNPSC.

This stand of the respondent is well merited and is in tune with Article 320(3) of the Constitution.

14. The Supreme Court had in more than one occasion interpreted the scope of Article 320(3) of the Constitution. It is not necessary to multiply the citations. It is suffice if a reference is made to the judgment in Ram Gopal Chaturvedi Vs. State of Madhya Pradesh, . Para 7 of the said order reads as follows:

7. It was argued that the impugned order was invalid as it was passed without consulting the State Public Service Commission under Article

320(3)(c) of the Constitution. There is no merit in this contention. The case of State of U.P. v. M.L. Srivastava decided that the provisions of

Article 320(3)(c) were not mandatory and did not confer any rights on the public servant and that the absence of consultation with the State Public

Service Commission did not afford him a cause of action.

15. However, the argument of the learned Counsel for the petitioner regarding the non supply of the documents and the non examination of the

witnesses in support of the documents merits acceptance. Further, the State Government also did not give any reasons while accepting the report

of the enquiry officer.

16. In the light of the above factual matrix as well as the legal precedents referred to above, the writ petition is entitled to succeed and accordingly,

the writ petition is allowed. The impugned order of penalty imposed on the petitioner is set aside. Since the petitioner had already retired from

service, the respondents are directed to restore the increments available to the petitioner and calculate the terminal benefits payable to the

petitioner accordingly. This exercise shall be carried within a period of 12 weeks from the date of receipt of copy of this order. However, there will

be no order as to costs.