

(2010) 11 MAD CK 0165
In the Madras High Court
Case No : Writ Petition No. 24500 of 2001

T. Neethivilangan

APPELLANT

Vs

The General Manager (Operations) and The Managing
Director, Both of Tamil Nadu State Transport Corporation Ltd.

RESPONDENT

Date of Decision : 12-11-2010

Acts Referred:

Industrial Disputes Act, 1947 — Section 33 C(2)

Citation : (2010) 11 MAD CK 0165

Hon'ble Judges : M.M. Sundresh, J

Bench : Single Bench

Advocate : V. Ayyadurai, for the Appellant; Vijayan, for Ramasubramaniam and Associates, for the Respondent

Final Decision : Allowed

Judgement

M.M. Sundresh, J.—The Petitioner herein was an employee of the Respondents. While the Petitioner was working as a Junior Superintendent, a charge memo was issued on 30.11.1983 by the first Respondent, on the ground that the Petitioner has failed to inform about the malpractice committed by a Co-employee by name Rajagopalan. In pursuant to the said charge memo, the Petitioner was dismissed in and by the order dated 05.03.1994, subject to the approval of the Jurisdictional Industrial Tribunal u/s 33C(2) of the Industrial Dispute Act. However, the Industrial Tribunal has refused to approve the dismissal order in and by the order dated 13.07.1994. Challenging the same, the Respondents filed a writ petition before this Court and as against the order of dismissal; a further appeal was preferred before the Hon'ble Apex Court. The Respondent's further appeal was also rejected by the Hon'ble Supreme Court in the year 1998. Accordingly, the order of termination passed against the Petitioner dated 05.03.1994 was set aside.

2. Since even after the orders passed by the Hon'ble Apex Court the Petitioner was not reinstated, a writ petition was filed in W.P. No. 1498 of 1999 praying to

direct the Respondents to reinstate with all consequential benefits. The writ petition was allowed by this Hon"ble Court in and by his order dated 04.11.1999 as reported in (2001) 3 CTC 470 (T. Neethivilangan v. The Managing Director, Tamil Nadu State Transport Corporation, Unit I, Kumbakonam) directing the Respondents to reinstate the Petitioner with all the benefits by granting liberty to take action in accordance with law. With reference to a pending criminal case, the Petitioner was also given liberty to file suit for damages depending upon the criminal case filed against him.

3. Challenging the order of the learned Single Judge of this Court, an appeal was filed by the Respondents in W.A. No. 157 of 2000 which was also dismissed. Alleging non-compliance of the orders passed by this Court, the Petitioner filed an application for contempt in Contempt Application No. 450 of 2000. The Respondents filed a further appeal before the Hon"ble Supreme Court which was also dismissed as reported in M.D., Tamil Nadu State Transport Corporation Vs. Neethivilangan Kumbakonam, . Thereafter, the Petitioner was reinstated on 16.07.2001 as Superintendent. Even though he was entitled to the post of Assistant General Manager, on 16.07.2001 itself the Petitioner was suspended on the ground of pendency of the criminal case. Thereafter the contempt application was closed on 09.08.2001. The criminal cases filed against the Petitioner in CC No. 28/87 and 15/98 ended in acquittal by the judgment dated 21.06.2006. The Petitioner attained the age of superannuation on 07.11.2007.

4. In the mean while charges have been framed against the Petitioner on 07.12.1983 alleging that the Petitioner has committed temporary misappropriation for a sum of Rs. 630.60 being the provident fund contribution of the employees inasmuch as after having collected the said amount in the month of June 1983, he has remitted it only on 27.08.1983. An explanation was given by the Petitioner stating that in view of the settlement arrived at between the employees and the Respondents regarding the fixation of pay and in view of the further dispute regarding the date of the initial employment, the provident fund paid by the employees was not remitted and the same has been kept in a locker belonging to the Respondents. It was further explained by the Petitioner that after keeping the amount in the locker he has failed to remit the same to the concerned account which he did on 27.11.1993 belatedly. The Enquiry Officer found that the charges leveled against the Petitioner are proved inasmuch as the Petitioner having received the said amount has not remitted it at the earliest. The Enquiry Officer has also relied upon the evidence of MW1 who was not originally cited as a witness to substantiate the case that the Petitioner did receive the amount but not remitted it in the account. However, the Enquiry Officer has not gone into the explanation given by the Petitioner but merely held that the facts as stated by MW1 would be sufficient enough to hold the charges have been proved. In pursuant to the Enquiry Officer's report the first Respondent has issued a second show cause notice dated 11.02.1994 to which the Petitioner has submitted his explanation.

5. Thereafter by the order dated 09.08.2001 the first Respondent has revoked the second show cause notice dated 11.02.1994 and issued a fresh show cause notice on 19.09.2004. The Petitioner gave his explanation on 06.09.2001 and on 01.10.2001, alleging that the action of the Respondents is contrary to the orders passed by the Hon''ble Courts, amounting to victimization and deliberate with a view to harass him. The Petitioner also gave his explanation on the merits of the charges framed against him. An order of termination was passed by the first Respondent stating that the explanation of the Petitioner is not satisfactory and the past conduct also warrants an order of dismissal. Challenging the order of dismissal dated 09.10.2001, the present writ petition has been filed.

6. Shri.V. Ayyadurai, learned Counsel for the Petitioner submitted that the writ petition will have to be allowed for lack of bonafides on the part of the Respondents. In support of the said submission, the learned Counsel has relied upon the judgment of the Hon''ble Apex Court reported in Kuldeep Singh Vs. The Commissioner of Police and Others, . It is further submitted that the findings of the Enquiry Officer as well as the first Respondent are perverse without affording a proper opportunity. In support of the said contention the learned Counsel has made reliance upon the judgment reported in 2008 1 LW 497 (K. Krishnan v. The Special Commissioner and Commissioner of Land Administration and Ors.). The learned Counsel also submitted that the departmental enquiry being quasi-judicial, the same is liable to be set aside for non-consideration of the contentions raised by the Delinquent Officer. According to the learned Counsel the Enquiry Officer has committed wrong in putting the onus of the Delinquent Officer. The learned Counsel further submitted that considering the nature of charge - temporary misappropriation which is also not proved on record, the quantum of punishment is grossly disproportionate warranting interference of this Court. Further the first Respondent ought not to have taken into consideration of the past conduct of the Petitioner without affording him an opportunity about the nature of the past conducts and to show cause as to why they should not be taken into account. In support of the above said submissions the learned Counsel has made reliance upon the following judgments:

Roop Singh Negi Vs. Punjab National Bank and Others, .

(2009) 4 SCC 78 (M. Chandru v. Chennai Metropolitan Development Authority).

Therefore the learned Counsel submitted that the writ petition will have to be allowed.

7. Per contra the learned Counsel for the Respondent submitted that the Enquiry Officer has correctly found that it is for the Petitioner to disprove the charges. The Petitioner's explanation has been taken into consideration by the first Respondent. The proceedings were not continued in view of the pendency of the earlier proceedings. Considering the charges leveled against the Petitioner no interference may be called for. Hence, the learned Counsel for the Respondent submitted that the writ petition will have to be dismissed.

8. The facts narrated above would indicate that, at the time of framing the charges in the present case there was an earlier charge framed against the Petitioner. The Petitioner was dismissed on 05.03.1994, pertaining to the earlier charge. Even though the earlier charges were pending the Respondents proceeded against the Petitioner for the subsequent charges as well. The Petitioner and the Respondents were agitating the dismissal order passed earlier on 05.03.1984 before the Courts of law which ended only on 04.05.2001, when the Hon"ble Supreme Court dismissed the appeal filed by the Respondents.

9. Therefore, while during the pendency of the earlier charges the Respondent have proceeded with the subsequent charge, there is absolutely no basis for not proceeding with the subsequent charge which resulted in the order impugned against the Petitioner. There is also no reason as to why the first Respondent has withdrawn the second show cause notice and proceeded to issue a new one afresh. No counter affidavit has been filed to explain the reasons for the delay in conducting the proceedings against the Petitioner. It is no doubt true that mere delay by itself cannot be a ground to quash the proceedings but the delay of 17 years which has not been explained would be a sufficient ground to hold that the proceedings against the Petitioner cannot be sustained.

10. During the enquiry proceedings the Petitioner has specifically stated that after receiving the amount of Rs. 630.60 he has kept the same in the locker belonging to the Respondents in view of the on going dispute between the employees and the Respondents and the decision made to revised the pay. Therefore, it is a specific case of the Petitioner that the revised pay will have a bearing on the quantum of provident fund. It is the further case of the Petitioner that he has kept the amount in a locker. The above said explanation of the Petitioner has not at all looked into either by the Enquiry Officer or by the first Respondent. This Court cannot go into the merits of the explanation given by the Petitioner but when an explanation is given, it is incumbent on the Enquiry Officer as well as disciplinary authority to consider the same. In departmental proceedings, charges have to be proved against the Delinquent Officer and such an Officer cannot be forced to substantiate his case as against the charges. The evidence of MW1 who has not been shown as a witness merely reiterates the admitted facts to the effect that the Petitioner has received the amount from the employees to be payable towards the provident fund but not remitted the same within a reasonable time. The said fact has not been disputed or denied by the Petitioner. Therefore, when the Petitioner has given his explanation, the first Respondent or the Enquiry Officer ought to have considered the same even while rejecting it.

11. Before the first Respondent the Petitioner gave a detailed explanation putting forth all his contentions. None of the explanations have been considered by the first Respondent. When the first Respondent is acting as a quasi judicial authority, he has to give sufficient reasons for arriving to the conclusion. It is a well settled principle of law, that reasoning is the heart beat and soul of any

order having civil consequences and much more for an order which is quasi judicial in nature. What made the first Respondent in coming to the conclusion will have to be expressly exhibited in writing in his decision. A perusal of the order impugned would show that not only the Enquiry Officer but even the first Respondent has proceeded to deal with the issue by putting the entire onus on the Petitioner.

12. A perusal of the charges framed would show that it only pertains to the temporary misappropriation of a sum of Rs. 630.60. It is an admitted fact that the Petitioner has remitted the said amount belatedly but voluntarily. The charge itself is to the effect of belated payment. It is not the case of the Respondents that the said amount has been paid after the non payment was brought to the knowledge of the Respondents. In such a situation the first Respondent ought to have considered the instances of the past conduct of the Petitioner before imposing the punishment. A perusal of the show cause notice would show that it merely states the past conduct of the Petitioner is not satisfactorily. A further perusal of the order impugned would also show that the same has been taken into account. Therefore, this Court is of the opinion that a mere indication that the Petitioner's past conduct would be taken into consideration and it was also taken into consideration while imposing the punishment cannot be a proper compliance of principles of natural justice. Even in the show cause notice it is incumbent on the first Respondent to indicate the instance of the past conduct vis-a-vis the punishment sought to be imposed. Thereafter an opportunity should be given to the Petitioner to explain before the first Respondent under what circumstances those punishments have been imposed and as to why they should not be taken into account. It is further seen that the proposed punishment was in fact imposed in the order impugned. Therefore in a case where the proposed punishment is fully implemented in the order impugned, the reliance upon the past conduct without affording an opportunity to the Petitioner cannot be sustained. The first Respondent having relied upon the materials by way of past conduct of the Petitioner behind his back, the order impugned is vitiated by the violation of the principles of natural justice.

13. In the judgment reported in *Roop Singh Negi Vs. Punjab National Bank and Others*, the Hon'ble Apex Court has held as follows:

Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges leveled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence.

Furthermore, the order of the disciplinary authority as also the appellate authority is not supported by any reason. As the orders passed by them have severe civil consequences, appropriate reasons should have been assigned. If the enquiry officer had relied upon the confession made by the Appellant, there was no reason as to why the order of discharge passed by the Criminal Court on the basis of selfsame evidence should not have been taken into consideration. The materials brought on record pointing out the guilt are required to be proved. A decision must be arrived at on some evidence, which is legally admissible. The provisions of the Evidence Act may not be applicable in a departmental proceeding but the principles of natural justice are. As the report of the enquiry officer was based on merely ipse dixit as also surmises and conjectures, the same could not have been sustained. The inferences drawn by the enquiry officer apparently were not supported by any evidence. Suspicion, as is well known, however high may be, can under no circumstances be held to be a substitute for legal proof.

For the aforementioned reasons, the judgment of the High Court is set aside. The appeal is allowed with costs and the Appellant is directed to be reinstated with full back wages. Counsel's fee assessed at Rs. 25,000/-.

14. Thus the Hon'ble Apex Court was pleased to hold that the departmental enquiry is a quasi judicial one and therefore reasons will have to be recorded for coming to the conclusion. Applying the ratio laid down by the Hon'ble Apex Court and for the reason stated above, this Court is of the opinion that the order impugned cannot be sustained for not indicating sufficient reasons. In (2010) 6 MLJ 603 (Insu Bhushan Dwivedi v. State of Jharkhand and Anr.) the Hon'ble Apex Court while considering the consideration of past adverse record of a delinquent is concerned has held as follows:

In State of U.P. v. Harish Chandra Singh (supra), a three-Judge Bench of this Court considered a somewhat similar question in the backdrop of the fact that even though in the show cause notice, the competent authority had proposed dismissal of the Respondent, after considering his reply, a lesser punishment i.e. Removal from service was imposed upon him. The Respondent in that case had joined Police Department in 1947. He was dismissed from service on 21.06.1951 but was reinstated in January, 1952. He was finally removed from service in 1956. In the year 1951 itself, punishment of reduction to the lowest scale of the post for a period of three years was imposed on the Respondent. In 1955, his pay was reduced for a period of two years. In the course of service, the Respondent had earned fifteen rewards and commendations. In the departmental inquiry which led to his removal from service in 1956, the Respondent was found guilty of three charges of gross negligence in the performance of his duty of investigating the cases registered under various sections of the Indian Penal Code. The trial Court dismissed the suit filed by the Respondent. On appeal, Additional District Judge, Varanasi decreed the same. The High Court confirmed the appellate judgment and dismissed the second appeal preferred by the State

by observing that the Respondent had not been given opportunity to explain the past punishments which were considered by the Deputy Inspector General of Police in arriving at his decision to remove the Respondent from service. While considering the question whether it was necessary for the concerned authority to give notice to the Respondent as a condition precedent for consideration of his past punishments, this Court referred to the factual matrix of the case and held that when the final punishment was lesser than the proposed punishment, consideration of the past adverse record was inconsequential. The Court referred to the arguments urged on behalf of the State and observed:

The learned Counsel for the State contends that on the facts of this case it is clear that the Plaintiff had notice that his record would be taken into consideration because the Superintendent of Police had mentioned it towards the end of his order, a copy of which was supplied to the Plaintiff. In the alternative he contends that if the record is taken into consideration for the purpose of imposing a lesser punishment and not for the purpose of increasing the quantum or nature of punishment, then it is not necessary that it should be stated in the show-cause notice that his past record would be taken into consideration.

It seems to us that the learned Counsel is right on both the points. The concluding para of the report of the Superintendent of Police, which we have set out above, clearly gave an indication to the Plaintiff that his record would be considered by the Deputy Inspector General of Police and we are unable to appreciate what more notice was required. There is also force in the second point urged by the learned Counsel. In *State of Mysore Vs. K. Manche Gowda*, the facts were that the Government servant was misled by the show-cause notice issued by the Government, and but for the previous record of the Government servant the Government might not have imposed the penalty of dismissal on him. This is borne out by the following observations of Subba Rao, J., as he then was:

In the present case, the second show cause notice does not mention that the Government intended to take his previous punishments into consideration in proposing to dismiss him from service. On the contrary the said notice put him on the wrong scent, for it told him that it was proposed to dismiss him from service as the charges proved against him were grave. But, comparison of paragraphs 3 and 4 of the order of dismissal shows that but for the previous record of the Government servant, the Government might not have imposed the penalty of dismissal on him and might have accepted the recommendations of the Enquiry Officer and the Public Service Commission. This order, therefore, indicates that the show cause notice did not give the only reason which influenced the Government to dismiss the Respondent from service.

An analysis of the two judgments shows that while recommending or imposing punishment on an employee, who is found guilty of misconduct, the disciplinary / competent authority cannot consider his past adverse record or punishment without giving him an opportunity to explain his position and considering his

explanation. However, such an opportunity is not required to be given if the final punishment is lesser than the proposed punishment.

Therefore considering the above said ratio, this Court finds that the reliance made by the first Respondent on the past records of the Petitioner behind his back cannot be sustained.

15. The Petitioner has been fighting a prolonged battle from the year 1984 onwards. It is seen from the records that the earlier proceedings initiated against the Petitioner got terminated only in pursuant to the orders of the Hon"ble Apex Court in the year 2001. The criminal case filed against the Petitioner was also ended in acquittal in the year 2006. The Petitioner was forced to file subsequent writ petition for his continuation and its monitory benefits. The Petitioner's termination order was set aside and was taken to the Supreme Court which ended in favor of the Petitioner in the year 1998. The present proceedings stopped with the show cause notice in the year 1984 and thereafter reopened in the year 2001 resulting in the order impugned. The Petitioner has retired on 07.11.2007. Even though it was ordered in the earlier litigation which was ended on 04.05.2001 by the decision of the Hon"ble Supreme Court directing the Respondents to pay all the benefits, the Petitioner is yet to get those benefits till now. As discussed above, the Petitioner was not in service from 1983 onwards till the age of superannuation. All the proceedings initiated against the Petitioner except the present writ petition ended in his favor.

16. The above said facts would indicate that the Petitioner is entitled to all the benefits he has sought for. Any amount of monetary benefit given to the Petitioner cannot be a compensation for the mental agony suffered and it will not also remove the stigma caused to him. Therefore, further it is to be seen that the benefits given by this Hon"ble Court earlier as confirmed by the Hon"ble Apex Court would create a vested right to the Petitioner. Hence, while setting aside the order impugned the Respondents are directed to give all the benefits due to the Petitioner within a period of three months from the date of receipt of a copy of this order. While paying the said account the amount paid to the Petitioner in pursuant to the order passed in contempt application from the year 2001 will have to be deducted. The writ petition is allowed accordingly. No costs.