

(1998) 08 MAD CK 0072
In the Madras High Court
Case No : W.P.No. 13309 of 1989

The Tamil Nadu Electricity Board

APPELLANT

Vs

The Superintending Engineer, Anna Electricity Distribution
Circle, Tamil Nadu Electricity Board, Dindigul

RESPONDENT

Date of Decision : 21-08-1998

Acts Referred:

Constitution of India, 1950 — Article 311(2)

Citation : (1998) 3 CTC 208

Hon'ble Judges : T. Meenakumari, J

Bench : Single Bench

Advocate : Mr. P.M. Baskaran, for the Appellant; Mr. A.N. Sivaprakasam
Advocate, for the Respondent

Final Decision : Allowed

Judgement

1. The writ petition is for the issue of a writ of certiorarified mandamus to quash the orders of compulsory retirement passed against the petitioner and for reinstatement with backwages and other attendant benefits.

2. The brief facts arising in this case are follows:

The petitioner has joined the respondent Corporation as Junior Engineer in the year 1971. In the year 1979, he was promoted as Assistant Divisional Engineer. In the year 1982, he had been transferred to the sub-station of Sempatty within the Distribution Jurisdiction of Divisional Engineer, Dindigul (South). It is averred in the writ petition that due to ill- health of the petitioner and on account of multiplicity of complications and mental agony, he has applied for leave from 27.10.1983 to 10.11.1983 for a period of fifteen days. The petitioner has applied for extension of leave for 15 days from 11.11.1983 for which the Divisional Engineer by his proceedings dated 14.11.1983 referred the matter for second medical opinion to the District Medical Officer at Dindigul. The District Medical Officer has admitted the petitioner in the hospital as inpatient for investigation

upto 2.12.1983 and also recommended the leave upto 16.12.1983. Since there was no improvement in the petitioner's health, he approached the specialist at Madurai who after further investigation has recommended leave upto 14.2.1984. The petitioner was constrained to extend the leave from 15.2.1984 as unearned leave on private affairs by submitting the leave application in time. The petitioner has also annexed the statement showing the dates on which he applied for leave. It is the case of the petitioner that the Divisional Engineer did not recommend his leave after 14.2.1984 to the competent authority namely the Superintending Engineer Madurai (North). By proceedings dated 26.7.1984, the Divisional Engineer issued a charge memo to the petitioner for taking leave. By memo dated 12.1.1985, the Superintending Engineer has dropped the proceedings. From 13.8.1984, the petitioner submitted his further leave application to the Superintending Engineer. There was no rejection or refusal of leave application of the petitioner by the Superintending Engineer. By letter dated 21.2.1986, the Divisional Engineer asked the petitioner about an acknowledgment for a memo dated 7.1.1986 of the Superintending Engineer, which was said to have been sent by the Divisional Engineer in his covering letter dated 31.1.1986, enclosing two leave applications for the period from 8.8.1985. On receipt of the said communication, by his letter dated 26.2.1986, the petitioner informed the Divisional Engineer that he did not receive any such memo with enclosures. In turn, the Divisional Engineer by memo dated 17.3.1986 furnished a copy of the letter of the Superintending Engineer dated 7.1.1986 to the petitioner. In the said memo the Divisional Engineer has stated that the earlier memo of the Superintending Engineer with two leave applications were sent by registered post acknowledgment due. On 25.3.1986, the petitioner has intimated the Divisional Engineer that he has not received the communication dated 7.1.1986 along with two leave applications. The petitioner requested to send a copy of the prescribed form for leave application for submitting the leave applications from 8.8.1985. He has further intimated that the leave applied for by the petitioner expires on 4.5.1986 and he shall join duty on 5.5.1986 after producing medical certificates. The Divisional Engineer through his memo dated 31.3.1986 has forwarded the above application dated 25.3.1986 to the Superintending Engineer for further action. It is averred by the petitioner that there was no reply from the respondents to his leave letters. Therefore he submitted his joining report with a medical fitness certificate to the Chief Engineer, (personnel) Madras, through the Superintending Engineer, with a request for early posting orders. The aforesaid letter was acknowledged by the Superintending Engineer on 7.5.1986. On 30.5.1986 the Superintending Engineer has issued a charge memo that he has not expressed his willingness to join duty in the Board before 18.1.1986. To the said charge memo, the petitioner has submitted his explanation on 12.6.1986. It is alleged by the Petitioner that the Superintending Engineer is not the competent authority to issue a charge memo against him, the disciplinary authority being the Chief Engineer. The Superintending Engineer has appointed an enquiry officer for proceeding further, in his memo dated 30.5.1986. The petitioner has attended the enquiry before the enquiry officer- Divisional

Engineer and gave his written statement to the said enquiry officer for the above charge. It is averred by the petitioner that the enquiry officer has given a report with a finding that the said charge was not proved against him. On 21.8.1986, the Chief Engineer (Personnel) has issued an order of suspension purported to be one under Regulation 9 of the Tamil Nadu Electricity Board Discipline and Appeal Regulations, suspending the petitioner with immediate effect. The same has been communicated to the petitioner on 23.8.1986. In the said order, the Headquarters of the petitioner was fixed at Sembatti eventhough he was residing at Sri Krishna Mills, Y.M.R. Patti, Dindigul. On 26.8.1986 on receipt of the suspension order, the petitioner requested the Superintending Engineer to allow him to reside at Dindigul. The Superintending Engineer has negatived his request by his letter which was received by the petitioner on 8.10.1986. The petitioner seems to have made a representation to the Chief Engineer for seeking permission to allow him to remain at Dindigul. On 16.10.1986 the petitioner made specific request that the allowances which will be applicable at Sempatty may be paid for his stay at Dindigul. There was no reply from the Chief Engineer. However on 23.6.1987 the first respondent issued a charge memo for the very same charge which has been dropped at the first instance and held not proved in the second instance. In the abovesaid charge memo it was alleged that the leave of absence was treated as misconduct. On 8.7.1987 the petitioner has submitted his explanation. On 16.12.1987, he has attended the enquiry before the enquiry officer and submitted his written explanation in the said enquiry. Eventhough the enquiry was over by 16.12.1987, the first respondent did not pass any orders till January 1989. Nearly after 13 months from the date of enquiry, the impugned order of compulsory retirement was directed to be passed by the Board in the Board's proceedings No.3 dated 19.1.1989, which is impugned in this writ petition. The petitioner was relieved from the services of the Board on 31.1.1989. It is also stated that the petitioner has filed a review petition on 20.2.1989 to the first respondent. The said review petition was rejected by order dated 13.7.1989. It is further alleged that the Superintending Engineer has passed orders on 22.6.1989 regularising the period of suspension from 26.8.1986 till 31.1.1989 granting 109 days as earned leave from 26.8.1986 to 12.12.1986, extraordinary leave without pay and allowance from 13.12.1986 to 31.1.1989. There seems to be no order for payment of subsistence allowance by the first respondent.

3. It is argued on behalf of the petitioner that the unauthorised absence continuously and disobeying the orders of superiors were treated as misconduct by the respondents. It has also been argued that no documentary evidence in support of these charges were furnished to the petitioner, or any witness was cited to prove the charges. The petitioner has been punished only on the basis of vague charges. The respondents at no point of time have rejected the leave applications of the petitioner. The leave upto 16.12.1983 was not in controversy. The leave from 17.12.1983 upto 12.8.1984 was the subject matter of disciplinary action by the Divisional Engineer in the charge memo dated 26.7.1984 and the

said proceedings were dropped by the Superintending Engineer on 12.1.1985. In respect of leave from 13.8.1984 no complaint or direction was issued by the Superintending Engineer. But so far as the leave applications of the petitioner dated 6.8.1985 and 6.11.1985 are concerned, for the period from 8.8.1985, the Superintending Engineer has returned those two applications with a direction to resubmit the same in the prescribed new form in the disputed memo dated 7.1.1986. It is argued on behalf of the petitioner that the said memo was not received by the petitioner and it was further argued that the said memo was not despatched upto 31.1.1986. The contention of the respondents that the petitioner has disobeyed the orders of the superiors is not tenable as the time given for replying the above letter was upto 18.1.1986. It is further argued that the petitioner has written a letter to the concerned Post Master to ascertain whether any such registered letter under Receipt No.5439 dated 31.1.1986 was addressed to the petitioner. However, by letter dated 13.2.1989 the Post Master has replied stating that no such letter under the said Receipt No.5439 was received in their office for delivery. It is argued that the enquiry officer did not verify the documentary evidence to this effect. The petitioner was willing to join duty on 5.5.1986. The petitioner has expressed his willingness to join duty by his letter dated 26.3.1986. Neither the Divisional Engineer nor the Superintending Engineer passed any orders on that application. Even after the joining report, the authorities have not passed any orders. It is contended that the enquiry officer has not dealt with any evidence for ascertaining the genuineness of his ill-health. It is also contended that the enquiry officer was not correct in stating that the petitioner has not got the prior approval for leave as the leave was not sanctioned promptly and applications were also returned on the ground that prior leave was not sanctioned. It is further contended that the petitioner never disobeyed the orders of the superiors, as alleged in the charge memo as the charges framed by the Superintending Engineer were held not proved in the previous enquiry. It is also argued that the memo dated 7.1.1986 has not been received by the petitioner as evident from the letter of the postmaster. It is further argued that the report of the enquiry officer was not supported by legal or acceptable evidence to warrant punishment of compulsory retirement. It is also contended that the petitioner has not been paid the subsistence allowance for the period of suspension. He had only sought permission to reside at Dindigul but never expressed his mind to forego the subsistence allowance. It is also argued that the respondents have enclosed a copy of the findings of the enquiry officer with the impugned order dated 19.1.1989 which is in violation of Regulation 8(b) of the Tamil Nadu Electricity Board Employees Discipline and Appeal Regulations. The above provision reads that after the enquiry has been completed, the person charged shall be entitled to put in if he so desires a further written statement of his defence. Whether or not person charged desired or had an oral enquiry, he shall be heard in person at any stage if he so desires before passing of final orders. Learned counsel for the petitioner has vehemently argued that the impugned order has to be set aside as the petitioner was not given an opportunity to submit his written statement of his defence which was

evident from the fact that the enquiry report was enclosed with the impugned order. Hence the action of the respondents is violative of Regulation 8(b). Learned counsel also relied upon the decision of this court in W.A.No.1033 of 1990 dated 20.3.1991 wherein the Division Bench of this court has interpreted regulation 8(b). The Division Bench has rejected the plea of the Electricity Board that no opportunity need be given to the delinquent officer after receipt of the report submitted behind his back but before either agreeing or disagreeing with the findings recorded or arrived at by the enquiry officer and finding the delinquent officer guilty of the charges or condemning him. The Bench has also held that the fact that the findings recorded or conclusions arrived at by the enquiry officer are not per se blinding upon the disciplinary authority has no relevance or impact upon the decision of the question before us for our consideration. The report is a material which comes into the hands of the disciplinary authority and the conclusions and findings recorded play a vital role in condemning or exoneration the delinquent officer and that being the real position, the giving of an opportunity as prayed for becomes all the more important and necessary. Viewed either on the basis of the Regulation or on the basis of the principles of natural justice, the conclusions become inevitable and inescapable. The writ appeal filed by the Electricity Board was dismissed for non-compliance of the regulation 8(b). Hence it is argued by the learned counsel for the petitioner in the present case that the entire proceedings of the respondents are vitiated for non- payment of the subsistence allowance.

4. In W.M.P.NO. 15329 of 1998, the petitioner sought permission to raise the additional grounds and the petition was ordered. In the above petition, the petitioner has alleged that the charges framed on 26.7.1984 having dropped on 12.1.1985, framing of the very same charge once again on 30.5.1986 and after conducting enquiry, it was dropped and for the third time, the very same charges were framed on 23.6.1987 and the successive framing of charges shows mala fide intention. It is also alleged that eventhough the petitioner has produced certificate from the postal authorities regarding non-receipt of the alleged registered tapal in Post office, the finding given by the enquiry officer that the notice was served is based on no evidence and it shows the non-application of mind on the part of the respondents. The impugned order is against the Regulation contained in Regulation 8(b) of the Regulations framed u/s 79(c) of the Electricity Act and hence it is liable to be quashed.

5. Learned counsel for the petitioner has relied upon the following judgments in support of his contention: In State of Maharashtra Vs. Chandrabhan Tale, , the Supreme Court has held that if the civil servant under suspension, pending a departmental enquiry or a criminal trial started against him, is entitled to subsistence allowance at the normal rate which is a bare minimum required for the maintenance of the civil servant and his family, he should undoubtedly get it even pending his appeal filed against his conviction by the trial court, and his right to get the normal subsistence allowance pending consideration of his appeal against his conviction should not depend upon the chance of his being released

on bail and not being lodged in prison on conviction by the trial court. Whether he is lodged in prison or released on bail on his conviction pending consideration of his appeal, his family requires the bare minimum by way of subsistence allowance. The Supreme Court has further held that any departmental enquiry made without payment of subsistence allowance contrary to the provision of its payment, is violative of Article 311(2) of the Constitution. Similarly, any criminal trial of a civil servant under suspension without payment of the normal subsistence allowance payable to him under the rule would be violative of that article. Payment of subsistence allowance at the normal rate pending the appeal filed against the conviction of a civil servant under suspension is a step that makes the right of appeal fruitful and it is therefore obligatory. The same view was expressed by another Bench of the Supreme court in *Fakirbhai Fulabhai Solanki Vs. Presiding Officer and Another*, .

In *Union of India and others v. Mohd. Ramzan Khan*, 1991 (1) SLR 159, the Supreme Court has held as follows:

"We may make it clear that whenever there has been an inquiry officer and he has furnished a report to the disciplinary authority at the conclusion of the inquiry holding the delinquent guilty of all or any of the charges with proposal for any particular punishment or not, the delinquent is entitled to a copy of such report and will also be entitled to make a representation against it, if he so desires, and non-furnishing of the report would amount to violation of rules of natural justice and make the final order liable to challenge hereafter."

In *K. Venkateswara Rao v. Primary Agricultural Co-Operative Credit Society*, 1997 (6) Ald 312, the Andhra Pradesh High Court has followed the decision of the Supreme Court in *Mohd. Ramzan Khan*'s case 1991 (1) SLR 159.

6. It was argued on behalf of the respondent Board basing on the counter affidavit that the petitioner herein was continuously went on applying leave namely medical leave and also leave on private affairs from time to time. It is also contended that the action of the petitioner having sent his leave application from 13.8.1984 onwards direct to the Superintending Engineer without submitting through his immediate superior was not in order. The petitioner was asked to submit the leave applications in the prescribed form by the letter of the Superintending Engineer dated 7.1.1986. It is argued that as the petitioner has intimated the respondents that he was not in receipt of the said letter dated 7.1.1986, a copy of the same, has been sent to him and on receipt of the same, the petitioner has expressed his willingness to join duty on 5.5.1986. It is argued that the petitioner was not sincere in reporting to duty. It is also contended that as leave was not sanctioned, the petitioner should have approached his immediate superior. It is also stated that the disciplinary proceedings at the first instance have been dropped as the same was initiated by the Superintending Engineer who is not competent. It is submitted that for imposition of major punishments, Superintending Engineer or the Chief Engineer is not the competent authority. As the Board is the authority competent to impose major

punishments on Assistant Executive Engineer for the continued unauthorised absence, fresh charges were framed against the petitioner by the Chairman of the Board. The petitioner has applied for posting orders on 8.5.1986. It is also contended that the petitioner has not expressed his willingness to join the duty as evident from the fact that he has denied the receipt of the memo dated 7.1.1986 and he has expressed his willingness to join duty only from 5.5.1986. It is also stated that as the period of Unauthorised absence exceeded six months, he was not allowed to join duty on 5.5.1986 and he was sanctioned leave upto 16.12.1983. During the time of suspension, the petitioner desired to stay at Dindigul instead of Sembatti where his Headquarters was fixed. By his letter dated 16.10.1986 the delinquent officer has requested the Chief Engineer to permit him to stay at Dindigul and he requested to pay the subsistence allowance as eligible at Sembatti alone and he will not claim subsistence allowance eligible for Dindigul. Basing on the above letter, learned counsel for the respondents tried to argue that the petitioner himself has foregone the payment of subsistence allowance.

7. It is also argued on behalf of the respondents that the petitioner was continuously on unauthorised absence and leave was sanctioned upto 16.12.1983 and he disobeyed the orders of the superiors as he did not appear before the District Medical Officer for the second opinion. Hence the charges were framed and they are sustainable. It is clearly stated in the counter that the subsistence allowance was negated by the Superintending Engineer as he did not stay at the Headquarters. .

8. It is evidently clear from the above that the suspension of the petitioner took place on 5.5.1986 and from which date, the petitioner was not paid the subsistence allowance. It could also be seen that the respondents have enclosed a copy of the enquiry report along with the final orders of compulsory retirement dated 19.1.1989. Here the action of the respondents is in flagrant violation of regulation 8(b) of the Regulations of the Board which says that after the enquiry has been completed, the person charged shall be entitled to put in, if he so desires, a further written statement of his defence. Whether or not the person charged desired or had an oral enquiry, he shall be heard in person at any stage if he so desires before passing of final orders. In this case, it could be seen that the delinquent officer was not given opportunity to submit a further written statement of his defence, even though after the inquiry has been completed, he shall be entitled for the same.

9. considering the above facts and circumstances and the principles of law laid down by the Supreme Court in the decisions cited supra and also the judgment of this court in W.A.Nos.1033 and 1142 of 1990 dated 20.3.1991, it is held that the impugned order passed by the first respondent in Permanent B.P.(PB) No.3, Adm Branch dated 19.1.1989 is illegal as it violates the principles of natural justice and it is in violation of the provisions of regulation 8(b) of the Tamil Nadu Electricity Board Employees' Discipline and Appeal Regulations. The impugned

order is quashed. The petitioner is entitled to be reinstated in service. The respondents must sanction the leave to which the petitioner is entitled to the extent of his eligibility and the rest of the leave period may be treated as loss of pay. With the above observations, the writ petition is allowed. No costs. Consequently, W.M.P.No.19163 of 1989 is closed.