

(2011) 06 MAD CK 0218

In the Madras High Court

Case No : Writ Petition No's. 35918 and 35919 of 2003

V. Sathiyamurthy

APPELLANT

Vs

Tamil Nadu Water Supply and Drainage Board
K.
Chandran Vs Tamil Nadu Water Supply and Drainage Board

RESPONDENT

Date of Decision : 06-06-2011

Acts Referred:

Tamil Nadu State and Subordinate Services Rules, 1955 — Rule 39
Tamil Nadu Water Supply and Drainage Board Employees (Discipline and Appeal)
Regulations, 1972 — Regulation 19

Citation : (2011) 06 MAD CK 0218

Hon'ble Judges : P. Jyothimani, J

Bench : Single Bench

Advocate : A.L. Gandhimathi, Adv, in W.P.35918/03, Kandavadivel Doraisamy, in W.P. 35919/03, 17400 and 17401/04 and P. Gopiraja, in W.P. 5275/07, for the Appellant; K. Balasubramanian in W.P. 5275/07, Spl. Govt. Pleader for R2 in W.P. 35918/03, Sudarsana Sundar in W.P. 35919/03 and for R1 in W.P. 35918/03 and V.P. Raju in W.Ps. 17400 and 17401/04, for the Respondent

Final Decision : Dismissed

Judgement

P. Jyothimani, J.—W.P. No. 35918 of 2003 challenges the Board Proceedings of the second Respondent, Tamil Nadu Water Supply and

Drainage (TWAD) Board dated 7.2.2002 and the order of the first Respondent dated 18.8.2003, confirming the order of the second Respondent,

in which for certain irregularities stated to have been committed by the Petitioner while working as an Assistant Executive Engineer, the punishment

of stoppage of increments for three years with cumulative effect was imposed apart from a direction for recovery of a sum of Rs. 60,263/- towards

the loss caused.

2. The Petitioner joined as an Assistant Engineer in the Respondent Board on

1.8.1977 in Vellore and thereafter, was promoted as Assistant

Executive Engineer and joined in the Office of the Executive Engineer, Hill Area Development Programme (HADP) Ooty on 3.6.1986 and served

up to 22.6.1987. In respect of execution of Ooty Water Supply Scheme, a charge memo was issued against the Petitioner on 9.11.1987 and

during the period covering the majority of charges, he was not working and the Petitioner gave explanation on 9.12.1987. However, suspension

continued for a long period and the Petitioner filed W.P. No. 12192 of 1991, challenging the prolonged suspension and that was allowed by this

Court on 7.11.1991 with direction to reinstate the Petitioner and post him in a non-sensitive post. Since the water scheme had to be immediately

completed as per the directions of the Special Commissioner dated 27.1.1987, usual procedure for getting sanction of estimate was not followed

and unfortunately, HDPE pipes were not procured, which are essential for completion of the project, that resulted in the Executive Engineer

directly procuring HDPE pipes from various agencies and by splitting up the purchase orders, tenders were called for and agreements were

entered into. The work order was issued by the Division Head viz., the Executive Engineer. As Assistant Executive Engineer, the Petitioner was

checking and measuring the materials received. The Petitioner was placed under suspension on 30.7.1994 and Vigilance Enquiry was initiated.

Again, as per the order of this Court dated 28.3.2003, the order of suspension was revoked and the Petitioner was posted at Vellore on

30.5.2003. The charges framed against the Petitioner on 21.11.1997 are as follows:

Charge-I: That he is responsible for the non-provision of Air Valves and Water Hammer Devices, change of class of pipes and failure of segment-

wise Hydraulic pressure test resulting in the burst of pipes and failure of the scheme and caused a loss of Rs. 1,66,654.39 to the Board.

Charge-II: That he made false and improper claims from temporary advance by manipulating written understanding as if surplus earth was

transported from one place to another place and earth was transported from elsewhere to refill the trenches along the alignment and thereby

caused huge loss to the Board.

a) The said charges are similar to the charges framed on 9.11.1987. When that

was brought to the notice of the second Respondent, the original charge memo dated 9.11.1987 was dropped and the Petitioner submitted his explanation on 19.9.2000 and 27.6.2001 for the second charge memo dated 21.11.1997.

b) It is stated that Ooty Water Supply Scheme was formulated for conveying water from Parsn Valley Dam (source point) to Ooty by pipeline in

an uneven, hilly terrain for a distance about 13.92 km. and since major portion of the scheme had to pass through forest area, clearance from the

Forest Department was obtained in the month of September, 1986 and hence, the Scheme could be taken up for active implementation only after

September, 1986.

c) The Managing Director of the Board, directed that the Scheme to be implemented as Pilot Water Supply Project and tenders were called for

separately. The work of fixing valves was allotted to Sewerage Division and the Petitioner had no role in respect of fixing of air valves and fixing of

water hammer devices. As far as the second charge relating to conveyance of surplus earth is concerned, the case of the Petitioner is that due

sanction of estimate was obtained from the competent authority for conveyance of surplus earth.

d) It is stated that after explanation was submitted, the second Respondent appointed six different Enquiry Officers between 23.2.1998 and

30.3.2000 in respect of the incident that took place 15 years ago. For the period between 23.2.1998 and 21.7.1998, Thiru V. Kandasamy was

appointed as Enquiry Officer and on his retirement, Thiru A.R. Nachiappan was appointed as Enquiry Officer for a short period of four months

and thereafter, Thiru C. Subramaniam was appointed as third Enquiry Officer, who was originally included as delinquent officer as per 1997

charge memo, against whom a censure was issued and subsequent to his promotion as Superintending Engineer, the 4th Enquiry Officer viz., Thiru

G. Gopalakrishnan was appointed on 1.4.1999 and he was having the enquiry for 17 sittings, but did not conclude the enquiry and ultimately, the

5th Enquiry Officer Thiru S. Sellappa was appointed on 21.6.2000 and the 6th Enquiry Officer Thiru D. Chakravarthy was appointed on

30.11.2000.

e) Therefore, according to the Petitioner, there was no co-ordination between the

Enquiry Officers and 18 persons who were facing allegations

and the Enquiry Officers found that in respect of eight persons, they were responsible for first charge and filed a report. The 6th Enquiry Officer

found the second charge also proved against the Petitioner and submitted the enquiry report and after receiving the objections from the Petitioner,

the second Respondent passed the order imposing the punishment of stoppage of increments for three years with cumulative effect with recovery,

in the proceedings dated 7.2.2002 and the said order is challenged in the writ petition.

3. In W.P. No. 35919 of 2003, the Petitioner was working as an Assistant Engineer in the Office of the Executive Engineer, HADP, Ooty, under

the supervision of the Executive Engineer and the Assistant Executive Engineer. He was placed under suspension on 3.7.1994 and Vigilance and

Anti-Corruption Enquiry was initiated and the writ petition filed by Petitioner in WP. No. 7791 of 2000 was allowed on 19.3.2003 with a

direction that the Petitioner be posted in a non-sensitive post and accordingly, the Petitioner was reinstated and posted at Tiruvannamalai.

a) Charges similar to the one in W.P. No. 35918 of 2003 were framed against the Petitioner herein on 21.11.1997, for which a detailed

explanation was furnished on 9.3.1998 on the same line as it was given by the Petitioner in W.P. No. 35918 of 2003. The Petitioner was made

incharge of 7th reach of the pumping main line, for which, originally, one Rajagopal was finalised as the contractor. Since the said contractor has

not cope up with the speed of completing the project before the Ooty Summer Flower Show, the tender was cancelled and it was decided by the

authorities to execute the work departmentally, and it was, in that regard, the Petitioner being the Assistant Engineer was made in charge of laying

pipeline for the 7th reach only, which approximately comes to one kilometer and he had no role in fixing the air valves.

b) Again, in respect of removal and conveyance of surplus earth, he gave explanation to the effect that he had no role in the same. According to the

Petitioner, different Enquiry Officers were appointed, as stated above, and the defence of the Petitioner was that the transactions alleged against

the Petitioner were regarding disposal of surplus earth which was duly authorized by the competent authority and the temporary off-take

arrangement, winch and trolley arrangement was provided in such a way with the motor installed in the winch and trolley had to be either lowered or

highered according to the availability of water level in dam site, which necessarily imply removal of huge quantity of earth for proper installation of

winch and trolley as per the gradation level, apart from raising many other defences.

c) It was also stated that there was frequent rain fall and that has resulted in hampering of the work. The Enquiry Officer gave his report to the

effect that the charges were proved and ultimately, the disciplinary authority imposed the punishment of stoppage of increments for three years with

cumulative effect and directed for the recovery of Rs. 30,701/-.

4. In W.P. No. 17400 of 2004, the Petitioner was appointed as an Assistant Engineer and posted in Hill Area Development Programme (HADP),

Ooty. He was working under the control of the Executive Engineer and the Assistant Executive Engineer and against him also, similar to the above

said charges were framed and ultimately it was found that the Petitioner was guilty of the charges and punishment of stoppage of increments for

three years with cumulative effect was imposed on 7.2.2002 and recovery of Rs. 18,215/- was also ordered. The appeal filed before the first

Respondent was also dismissed on 18.8.2003.

5. In W.P. No. 17401 of 2004 also, the Petitioner was the Assistant Engineer and similar charges were framed against him and punishment of

stoppage of increments for three years with cumulative effect with recovery of Rs. 55,485/- was imposed on 7.2.2002.

6. The writ Petitioner in W.P. No. 13918 of 2003, who has challenged the penalty imposed on him has also filed W.P. No. 5275 of 2007 for a

direction against the Respondent Managing Director, TWAD Board to consider his name for promotion to the post of Executive Engineer above

the names of his juniors.

a) It is stated that he was originally appointed as an Assistant Engineer and subsequently promoted as Assistant Executive Engineer and posted in

the Hill Area Development Programme and charges were framed against him, in respect of which punishment of stoppage of increments for three

years with cumulative effect was imposed along with recovery of amount.

b) According to the Petitioner, in spite of the fact that the Enquiry Officer had

stated that the charges were partially proved, recovery was made without reference to the fact that four persons who were working were to share the responsibility. Therefore, according to him, his liability would be much less and not Rs. 60,263/- and it would be around Rs. 20,000/-.

c) It is stated that challenging the order of the original authority as well as the appellate authority, he filed W.P. No. 35918 of 2003 and also

application for stay and there was an order passed by this Court on 09.12.2003 and that was communicated to the Board and in spite of it, when

the panel of Assistant Executive Engineer for the promotion to the post of Executive Engineer for the year 2004 was drawn, his name was not

included for the reason that charge sheet was filed before the Chief Judicial Magistrate's Court, Chennai and that the criminal case is pending.

d) It is stated that from 1994 for 100 hearings, the Petitioner appeared before the Criminal Court, however, the criminal case has not been

concluded. When his name was not included in the promotion list for the year 2004, he approached this Court by filing W.P. No. 33132 of 2004,

which was admitted and there was no interim order passed. In the meantime, the Board approved the promotion list and issued subsequent panel

for the year 2005-06 and therefore, W.P. No. 33132 of 2004 was dismissed with liberty to the Petitioner to file a fresh petition.

e) It is stated that the Petitioner has been waiting for more than three years and he has given a representation on 10.1.2007 and in spite of it, the

promotion has not been given to him. It is stated that pendency of criminal case is not a bar for the purpose of giving temporary promotion under

Rule 39(d) of the Tamil Nadu State and Subordinate Service Rules and therefore, the Petitioner filed the above said writ petition.

7. All the above writ petitions have been filed challenging the penalty imposed mainly on the ground that the Petitioners are not responsible for the

charges and the orders have been passed without giving sufficient opportunity to the Petitioners, particularly on the ground that in the span of two

years, six different Enquiry Officers were appointed and there was delay at every stage and the undue delay has resulted in hampering further

promotion to the Petitioners.

8. In the counter affidavit filed by the Respondent Board, it is stated that the charges framed against the Petitioners are in respect of irregularities

committed by them in the execution of work of Udhagamandalam Water Supply Improvement Scheme and the charges were found proved in the enquiry conducted and final orders were passed, withholding the increments and for recovery of amount since loss has been caused to the Board by the conduct of the Petitioners.

a) It is stated that the execution of work was not done in accordance with the design and the discreet enquiry revealed that huge amounts were

spent on the ground that the surplus earth along with the conveyance main and GLSR site were transported and disposed off at far off places.

Therefore, the matter was referred to the Director of Vigilance and Anti-Corruption through Government for a detailed probe.

b) There was an investigation by the Vigilance and a report was submitted and sanction to prosecute the accused officers was requested and

sanction was granted and charge sheet was filed in the Court of Chief Judicial Magistrate, Chennai, on 23.9.1994 and the case is now under trial

and the Enquiry Officer found that the charges were proved, based on which penalty was imposed.

c) While it is true that various Enquiry Officers were appointed, the enquiry was in continuation and the officers were directly involved in the

project. It is stated that by the conduct of the Petitioners, as per the report of Vigilance and Anti-Corruption Department, loss was caused to the

extent of Rs. 14,77,962/- and therefore, the penalty was imposed in accordance with law.

9. In respect of W.P. No. 5272 of 2007 asking for further promotion, it is stated by the Respondent Board that the exercise of powers under Rule

39(d) is discretionary, when the charges of corruption and misconduct are pending. It is stated that since Vigilance and Anti-Corruption charges

are pending in criminal Court, the promotion has to be withheld and as per Regulation No. 19, TWAD Board Service Regulations, 1972, the post

of Executive Engineer is a selection post and promotion is based on the ground of merit and ability, and seniority will be considered where merit

and ability are equal. It is stated that since criminal case is still pending, the Petitioner may not be entitled for promotion.

10. In all these cases, it is seen that the Enquiry Officer, in his report, has found that the charges are partly proved. Without taking the same into

consideration, both the disciplinary authority and the appellate authority have passed the impugned orders, which can only be treated as having

been passed without application of mind. Apart from the above said lacuna, in the decision making process, there is delay.

11. Admittedly, in all these cases, originally charges were framed in respect of the same issue on 9.11.1987, for which explanations were

submitted, the Petitioners were kept under suspension and on filing writ petitions, they were directed to be reinstated and thereafter, another

charge memo was issued on 21.11.1997, in respect of the same issue, for which also the Petitioners submitted their explanation. It was, after the

Respondents were informed that there were two charge memos in respect of same issue, one on 9.11.1987 and another on 21.11.1997, by order

dated 9.1.1999, the second Respondent chose to withdraw the earlier charge memo dated 9.11.1987 and decided to proceed with the

subsequent charge memo dated 21.11.1997. Therefore, the charge memo dated 21.11.1997 relates to certain incidents which took place in the

year 1986-87 and for such a long delay, there is no proper explanation forthcoming from the Respondents.

12. Even in criminal case, the charge sheet was filed on 23.9.1994 in respect of the incident that took place in 1986-87 and the criminal case is still

pending. The pendency of criminal case is certainly not a bar for continuation of disciplinary proceedings. Therefore, the Respondents cannot take

refuge of the pendency of criminal case for the delay in passing final orders in the disciplinary proceedings. Even in respect of the second charge

memo dated 21.11.1997, the second Respondent has passed the impugned order in February, 2002 and the appeal was dismissed by the first

Respondent on 18.3.2003, there has been a delay of more than five years and that has also not been explained by the Respondents.

13. It is stated that only after the Government wrote a letter on 4.12.1996, the disciplinary authority of the Respondent Board woke up for the first

time and took action for disciplinary action. In respect of the same charges framed against one Thiru Somakumaran, who was an Assistant

Executive Engineer in the same project, I had an occasion to consider the same in W.P. No. 33140 of 2004 and by order dated 22.12.2010, I set

aside the impugned orders on the ground of delay by relying upon plethora of judgments of Supreme Court starting from The State of Madhya

Pradesh Vs. Bani Singh and another, and P.V. Mahadevan v. M.D. Tamil Nadu Housing Board 2005 (4) CTC 403 (SC) and the operative

portion of the said order is as follows:

7. Apart from the above said basic lacuna in the decision making process by the disciplinary authority and the appellate authority, the vital issue

that has to be considered is about the long delay. In respect of the occurrence stated to have taken place in 1986-1987, the Respondent/ Board

has framed charges only on 21.11.1997. There is no proper explanation for such delay of eleven years. In the criminal case itself the charge sheet

was filed only on 23.9.1994 and admittedly, the criminal trial is till pending as on date, which is more than 16 years from the date of filing of the

charge, while the complaint was given in the year 1988 by way of registration of the first information report. Pendency of criminal case or criminal

investigation was certainly not a bar for the disciplinary proceedings to commence. Strangely, the counter affidavit gives a reason for framing the

charge in the year 1997 only as per the government's direction in the letter dated 4.12.1996. The Board has woken up for the first time to think of

taking disciplinary action against the Petitioner and others only afterwards. The reason given in the counter affidavit in this regard, which is

clinching, is as follows:

Further, the Government in their Lr.(D) No. 743/MA&WS/ME.IV Department, dated 4.12.1996 and in Lr. No. 36191/ME.IV(2)/95-6, dated

3.12.1996 remitted a case against 21 Tamilnadu Water Supply and Drainage Board officials for the irregularities committed in the execution of

works related to Udahamandalam Water Supply Improvement Scheme (UWSIS) and directed the Board to initiate departmental disciplinary

action and also to recover the pecuniary loss caused to the Board from the persons responsible. The loss incurred to the Board, as per the

Government Report is Rs. 14,77,962/-.

Therefore, there is absolutely no reason adduced for such a long delay of eleven years for framing the charges in the disciplinary proceeding against

the Petitioner.

8. It has been a well settled legal proposition in series of judgments of the Supreme Court from The State of Madhya Pradesh Vs. Bani Singh and

another, , State of Andhra Pradesh Vs. N. Radhakishan, , and P.V. Mahadevan v.

M.D., Tamil Nadu Housing Board (2005) 4 CTC 403 (SC)

that the unexplained delay in initiating disciplinary action would cause prejudice to the delinquent/Government servant not only due to the reason

that after such a long lapse of time it would be humanly impracticable for a person to remember the minute details about the incident that took

place much earlier so as to defend himself in an appropriate manner, but also on the ground that conducting of the disciplinary proceedings after

such long lapse of time would demoralize the government servant and their functioning and therefore, it involves public interest.

9. While considering the delay of eleven years in issuing of charge memo, which was not explained by the authority, I have held in G. Adavan v.

The Government of Tamil Nadu and Anr. 2010 (2) CLT 689 that such delay has a tendency of causing disrepute to public service and prejudice

to the delinquent. I have also taken a similar view in M. Elangovan v. The Trichy District Central Cooperative Bank Ltd. 2006 (2) CTC 635.

14. In view of the same and following the said judgment, the writ petitions, viz., W.P. Nos. 35918 & 35919 of 2003, 17400 & 17401 of 2004

stand ordered and the impugned orders of punishment as well as penalty by way of recovery are set aside. Consequently, the writ petition in W.P.

No. 5272 of 2007 is ordered directing the Respondents to consider the representation of the Petitioner for the post of Executive Engineer by

exercising his discretion under Rule 39(d) of the Tamil Nadu State and Subordinate Service Rules. It is no doubt true that the exercise of such

power to give temporary promotion is purely discretionary and the same has to be exercised in accordance with law. Even assuming that the

orders of punishment are not set aside, in the passage of time, the minor punishment of postponement of increments for three years with cumulative

effect need not be an impediment for considering the case of Petitioner for promotion. In any event, the departmental punishment having been set

aside in this order, there is absolutely no impediment for the Respondents to exercise the discretion under Rule 39(d) of the said Rules.

Accordingly, the writ petitions stand ordered and the impugned punishments in all these cases stand set aside and in W.P. No. 5275 of 2007, a

direction is issued to the Managing Director of TWAD Board to consider the claim of the Petitioner for the exercise of discretionary powers under

Rule 39(d) of the Tamil Nadu State and Subordinate Service Rules and pass appropriate orders if he is otherwise eligible, within a period of 12

weeks from the date of receipt of copy of the order. No costs. Connected miscellaneous petitions are closed.