In the High Court of Judicature at Madras

Dated: 06.03.2015

Coram:

The Hon'ble Mr.Justice SATISH K. AGNIHOTRI
and
The Hon'ble Mr.Justice M.VENUGOPAL

W.A.No.129 of 2015

Novilla Yadavendran ..Appellant/ Petitioner

Vs.

1. The Secretary to Government,
Finance Department,
Government of Tamilnadu,
Fort. St.George.
Chennai - 600 0009

2. The Special Commissioner &
Commissioner of Treasuries,
Accounts Department,
Saidapet, Chennai - 600 0015

3. The Joint Director of Treasuries,
Accounts (Admn)
Chennai - 600 0015 ..Respondents/Respondents

Prayer: Writ Appeal filed under Clause 15 of the Letter Patent Appeal against the order of this Court dated 08.08.2014 made in W.P.No. 8359 of 2013.

Petition under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus to call for the records pertaining to the Government Order issued by the first respondent in (2D) No. 87-Finance (Treasury Accounts-2) Department dated 18.07.2012 and quash the same and consequently direct the respondents to pay all monetary benefits, notional promotion to the petitioner.

For Appellant : Mr.E.Sampthkumar

For Respondents : Mr.N.Sakthivel
Government Advocate

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JUDGMENT

[Judgment of the Court was delivered by
M.VENUGOPAL, J.]

The Appellant / Petitioner has preferred the instant intra Court, Writ Appeal as against the impugned order dated 08.08.2014 in W.P.No.8359 of 2013 passed by the Writ Court.

2.The Writ Court while passing the impugned order dated 08.08.2014 in W.P.No.8359 of 2014 (filed by the Appellant/Petitioner) in Paragraph No.13 had observed to the effect that long absence like the present one, though the reasons may be correct for short spells, but not genuine for continuous absence of 28 months, will derail the administration. When there are persons, who are willing to work like an Ox, employing persons like the petitioner who was continuously absent will send a wrong signal to those who are working and resultantly dismissed the writ petition without cost.

3.Assailing the correctness of the order passed by the Writ Court in W.P.No.8359 of 2013 dated 08.08.2014, the learned counsel for the Appellant/Petitioner urges before this Court that the Writ Court had failed to take into account the impugned order passed by the 2nd Respondent/Special Commissioner & Commissioner of Treasuries, Accounts Department, Chennai is a unilateral one, besides the same being in violation of Principles of Natural Justice because of the reason that there was inordinate un-explained delay for more than 10 years for disposing the statutory appeal preferred by the Appellant.

4.The Learned counsel for the Appellant contends that the Appellant availed leave from 10.04.1995 to 01.08.1997 on a very valid ground namely, she was elder daughter-in-law and have to take care of her hailing father-in-law during that period. As a matter of fact, her father-in-law expired on 01.06.1997 after prolonged bed-ridden illness.

5.However, the Inquiry Officer had not rendered any findings in regard to these facts and merely passed an order of removal from service, which cannot be countenanced in the eye of law. Added further, even the Writ Court had failed to take into consideration of the aforesaid facts in a proper real prospective.

6.The Learned Counsel for the Appellant brings it to the notice of this Court that the Appellant as against the removal order passed, immediately preferred a statutory appeal on

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03.08.1999 and this was not at all disposed of by the 2nd Respondent for more than seven years and as a result of which, the Appellant filed W.P.No.20254 of 2006 before this Court and this Court on 03.07.2006 directed the 2nd Respondent to dispose of the appeal within a period of two months.

7.That apart, the Appellant once again approached this Court in W.P.No.35401 of 2006 because of the reason that the 2nd Respondent passed a non-speaking order and ultimately this Court on 07.07.2008 remanded the appeal to the 2nd Respondent for fresh disposal.

8.Apart from the above, the Learned Counsel for the Appellant invites the attention of this Court that the 2nd Respondent once more passed a non-speaking order against which the Appellant filed W.P.No.12848 of 2009 and this Court while setting aside the order passed by the 2nd Respondent and directed him to disposed of the appeal finally and the appeal in question was disposed of by the 2nd Respondent on 20.10.2009.

9.The Learned Counsel for the Appellant strenuously contends that Appellant was removed from service when she was only 44 years of age and put in more than 12 years of service. Whereas the 2nd Respondent took more than 10 years for disposing her appeal for unauthorised absence from service. In this regard, the delay that had occurred is unreasonable one and the Writ Court had failed to consider the inordinate delay committed by the Respondents in disposing of the appeal filed by the Appellant.

10. The Learned Counsel for the Appellant submits that the Writ Court had failed to consider that the punishment of removal from service imposed on the Appellant is shockingly disproportionate and that the Principles of Proportionality was failed to be considered and cites the following decisions:-

1. Kailashnath Gupta Vs.Enquiry Officer, Allahabad Bank & others, 2003 SCC 1377

2.New Delhi Municipal Council Vs. State of Punjab and others, (1997) 7 SCC 339 at 423

3.Chairman cum Managing Director, Coal India Limited & another Vs. Mukul Kumar Choudhuri & others, (2009) 8 MLJ 460

4.Krishnasamy Reddiar Education Trust Vs. Member Secretary, National Council for Teachers Education and another, (2005) 3 MLJ 11.

5. Punjab School Education Board Vs. Dalip Chand & Others, (2013) 10 SCC 208

6.Government of Tamilnadu & others Vs. M.Ananchu Asari & others, (2003) 10 SCC 503

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7.Calcutta Gujarati Education Society and Another Vs. Calcutta Municipal Corporation & Others, (2003) 10 SCC 539
8.Maharashtra State Electricity Distribution Company Limited & another Vs. Datar Smithgear Limited & others, (2010) 10 SCC 479 at 497
9.Ramanuj Pandey Vs.State of Madhyapradesh & Others, (2009) 7 SCC 248
placed before the Writ Court were not considered at the time of passing of the impugned order in the Writ Petition.

11.Finally, the Learned Counsel for the Appellant projects an argument that the Writ Court had failed to consider Rule 23 of the Tamilnadu Civil Services Rule which was not followed by the Respondents while imposing the punishment to the Appellant.

12.At the outset it is to be pointed out that the ' Concept of Leave' in service Jurisprudence seems to be in the nature of a grant and it is not a right of servant. Further, whenever there is an unauthorised absence on the part of the employee, two options are open to an Employer, viz., 1. To condone the unauthorised absence by accepting his/her explanation and sanctioning leave for the period of unauthorised absence in which event, the misconduct shall stand condoned. 2. To treat the unauthorised absence as a misconduct, conduct an inquiry and impose punishment for the misconduct.

13.There is no dispute of the fact that employee, who is unauthorisedly absent for some period or who overstays the period of leave on reporting back to duty, may apply for consideration of absence by offering explanation for such unauthorised absence and pray for grant of leave for that period. If an employer is subjectively satisfied that there was sufficient cause or justification for unauthorised absence, the act of indiscipline may be condoned and sanction leave post facto. However, where the employee who is unauthorisedly absent does not report back to duty and not offer any satisfactory explanation, then, the Disciplinary Action as regards the unauthorised absence can be taken.

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14.In reality, the extent of penalty to be awarded upon delinquent will depend upon the factors like, nature of service, position held by the employee, period of absence and cause or explanation for the absence in question. If punishment is either dismissal or removal, then, it may not be necessary to pass any consequential orders relating to the period unauthorised absence.

15.As far as the present case is concerned, the Appellant was absent from 10.04.1995 to 01.08.1997, ie., nearly 28 months and in fact, the unauthorised absence had exceeded the period eligibility under Rule 23(a)(ii) of the Tamil Nadu Leave Rules and a memo was issued to her wherein it was clearly mentioned that if she failed to rejoin duty, action would be taken immediately against her in terms of G.O.Ms.No.1046 P&AR Department dated 13.11.1987. Even thereafter, she had failed to rejoin duty but remained absent. Although the charge memo dated 21.06.1996 levelling four charges against the appellant was served on her, she had failed to project her explanation for the same. In fact, the inquiry officer had allowed her to place her explanations before him on the date of oral inquiry. Moreover, she had attended verbatim proceeding of the inquiry which took place on 17.07.1997 and in such a situation, the Appellant / Writ Petitioner is estopped from contending that an inquiry was held in her absence and as such, the said plea is outrightly rejected by this Court.

16.It comes to be known that on 17.07.1997, the inquiry officer conducted an inquiry against the Appellant and after a lapse of two years, she expressed her willingness to rejoin duty on 21.07.1997, as averred by the 2nd Respondent in his counter.

17.Indeed, her willingness was accepted as per letter of the Government bearing No.8699/P&AR FR III/91-5 Department dated 08.08.1991 and she was issued with a conditional posting order on 01.08.1997, wherein it was clearly mentioned that she was allowed to rejoin duty pending finalisation of the disciplinary proceedings initiated against her.

18.In the meanwhile, the inquiry officer found all the four charges levelled against her stood proved. Although the inquiry officer's report was sent to the Appellant, she had not submitted her further 'Defence Statement' and subsequently, she was provided with an opportunity of personal hearing but she failed to bring home any relevant material facts to defend her act of 'unauthorised absence'. Finally the Disciplinary Authority had issued an order of removal from service against the Appellant on 31.05.1999 in Proceedings No.83185/M1/95 after following the procedure.

19. In this connection, this Court very relevantly points out the Appellant had preferred an appeal dated 03.08.1999 after the expiry of the statutory period of two months as prescribed in Rule 27 (iii) of Tamilnadu Civil Services (Discipline and Appeal) Rules and only after considering the same, necessary orders were passed on 30.12.2000. It is also to be remembered that the disciplinary proceedings initiated against the Appellant came to an end on 31.05.1999 and an order of removal was passed on 31.05.1999 as per then G.O.Ms.No.1046 P&AR Department dated 13.11.1987.

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20. It cannot be denied that an unauthorised absence of a certain employee as a misconduct / violation of discipline. At this stage, this Court worth recalls and recollects the decision of the Hon'ble Supreme Court in New India Assurance Company India Vs. Vipin Behari Lal Srivastava reported in (2008) 3 SCC at page 446 special page 447 where the facts are that a workman was unauthorisedly absent for over 600 days and during the period of absence leave application was sent to an employer on which no order was passed, the tribunal directed reinstatement with full back wages on the ground that Respondent was suffering from tuberculosis. Since the management did not pass any order on his leave application, the workman was not absent unauthorisedly. In appeal, the High Court took the view that leave was impliedly sanctioned by a letter issued by the Appellant company, by which the Respondent was called back to work and also the management had not passed any order on the leave application, and it was observed that in the letter sent by the Appellant company, it was clearly indicated that no leave was due and even leave without pay could not be granted and direction was given to join back immediately, failing which, certain presumptions were to be drawn and further it was held by the Hon'ble Supreme Court that there was no condonation of the absence without leave as held by the High Court and it was a case of the Respondent was really not of abandonment but of unauthorised absence and the order passed by the High Court was set aside and consequently, the order passed by the Departmental Authorities directing removal of Respondent from service was maintained.

21.At this stage, this Court aptly points out the decision of the Hon'ble Supreme Court in (2004) 7 SCC at page 574 at special page 575 (Delhi Transport Corporation Vs. Sardar Singh), it is held as follows:-

> When an employee absents himself from duty, even without sanctioned leave for a very long period, it prima facie shows lack of interest in work. Para 19(h) of the Standing Orders issued under Regulation 15(1) of the Delhi Road Transport Authority (Conditions of Appointment and Service) Regulations, 1952 relates to habitual negligence of duties and lack of interest in the authority's work. When an employee absents himself from duty without sanctioned leave, the authority can, on the basis of the record, come to a conclusion about the employee being habitually negligent in duties and an exhibited lack of interest in the employer's work. Conclusions regarding negligence and lack of interest can be arrived at by looking into the period of absence, more particularly, when same is unauthorised. There cannot be any sweeping

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generalisation. But at the same time some telltale features can be noticed and pressed into service to arrive at conclusions in the departmental proceedings.

22.It is true that an authority, who imposed a penalty, performs a duty. In fact, he should muster all of his faculties in discharging his duty of awarding an appropriate punishment. He should not only be fair but shall also look to be fair and just. If the misconduct of an employee warrants an imposition of penalty, what should be, is the question he must address to himself. Of course, the punishment should not suffer from any bias, it shall not be retaliatory or expose any vindictive attitude towards the delinquent / deviant employee for his/her misdemeanor. Suffice it for this Court to point out that penalty, however, shall meet the misconduct in the manner that is just, proper and not an excessive one.

23.The power of punishment is within an employer's discretion and a Court of Law would not ordinarily interfere where there was no infirmity with the procedure adopted as per decision Union of India Vs. P. Chandira Mouli reported in 2003 (10) SCC at Page 196. Also that, a court of Law is not an Appellate Forum over the Departmental Authorities and as such, it is impermissible for it to reappraise the evidence to reach to a separate conclusion.

24.One cannot brush aside a very vital fact that 'Judicial Review' is not an 'Appeal' from a decision but the review of the manner in which the decision has been made. It is not directed to the decision, but, to the decision making process. After all, the powers of 'judicial review', is meant to ensure that an individual receives a fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eyes of the Court.

25.Moreover, a Court of Law is not concerned to determine whether the punishment awarded was just and proper, provided it is justified by the rules and is considered to be appropriate having regard to the proved misconduct. To put it precisely, a Court of Law cannot direct the imposition of any substitution of penalty other than the one taken by the Department Authorities, unless the same is capricious, per-verse and not legally sustainable in the eye of Law. In fact if the inquiry has been properly held, the question of adequacy or reliability of evidence cannot be canvassed before this Court.

26.In short, the judicial review will be competent when the punishment awarded by the authorities concerned is totally

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irrational, ie., in outrageous defiance of logic, as opined by this Court.

27.In the upshot of detailed qualitative and quantitative discussions and also this Court, on going through the entire facts and attendant circumstances of the present case in an encircling fashion, comes to an inevitable conclusion that the detailed inquiry was conducted relating to an un-authorised absence of the appellant and both the Inquiry Officers, viz., the Disciplinary Authority and the Reviewing Authority found the reasons of the Appeal were unsatisfactory and ultimately imposed the punishment of removal from service, which in the considered opinion of this Court, is not an irrational, illogical and unreasonable one. Per contra, the same is just, proper and perfectly valid in the eye of Law. Viewed in that perspective, the Writ Appeal sans merits.

28.In the result, the Writ Appeal is dismissed, leaving the parties to bear their own costs. Resultantly, the order passed by the learned Single Judge in W.P.No.8359 of 2013 dated 08.08.2014 is affirmed by this Court for the reasons assigned in this Appeal.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

ssd

To

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1 cc to Government Pleader,Sr.No13109

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