

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 9.3.2015

CORAM:

THE HONOURABLE MR.JUSTICE K.K.SASIDHARAN

W.P.No.33208 of 2013

M.Kamaraj

... Petitioner

versus

1. The Principal Secretary to Government,
Highways & Minor ports (HL1) Department,
Fort St.George, Chennai 600 009.
2. The Chief Engineer (General) Highways,
Chepauk, Chennai 5. ... Respondents

Writ Petition filed under Art.226 of the Constitution of India praying for a Writ of Certiorari calling for the records of the 1st respondent in connection with the impugned order passed by him in GO (D) No.216, Highways & Minor Ports (HL1) Department dated 25.10.2013 and quash the same.

For petitioner Mr.K.Venkataramani, Senior Counsel,
for Mr.M.Muthappan

For respondents Mr.M.S.Ramesh, Addl. Government Pleader

ORDER

This Writ Petition is directed against the order in G.O.(D) No.216 Highways & Minor Ports (HL1) Department dated 25 October 2013 whereby and whereunder the first respondent was pleased to impose punishment of stoppage of increment for a period of three months on the petitioner.

Brief facts :-

2. The petitioner entered Government service as Assistant Engineer in Highways Department on 25 September 1981. He was promoted as Assistant Divisional Engineer and later as Divisional Engineer.

3. While so, the second respondent issued a charge memo to the petitioner containing as many as four charges. Similarly, four other employees were also proceeded departmentally. The Enquiry Officer submitted a report to the effect charges 1 and 2 have not been proved. With respect to charge No.3, the Enquiry Officer reported that it was partly proved. Since charge no.3 was partly proved, the Enquiry Officer opined that charge no.4 was also proved. The Enquiry Officer arrived at a finding that the petitioner executed work by using the required quantity of bitumen and emulsion and that there was no loss to the Government. According to the Enquiry Officer, there was a procedural lapse in accounting materials at section level. The Disciplinary Authority issued second show cause notice to the petitioner and thereafter, imposed the punishment of stoppage of increment for a period of three months without cumulative effect. The said order is challenged in this petition on the ground that there were no materials to arrive at a finding that the petitioner committed procedural lapse. The petitioner has taken up a further contention that there was undue delay in initiating and concluding the disciplinary proceedings.

4. The first respondent has filed a counter affidavit justifying the impugned order. According to the first respondent, the petitioner has committed procedural lapses and as such, the punishment was rightly imposed. The first respondent further contended that the Government have examined the charges framed against the petitioner, his explanation, the findings of the Enquiry Officer and further representation given by the petitioner on the findings recorded by the Enquiry Officer and thereafter, imposed the punishment. The impugned order is therefore unassailable.

Submissions :-

5. The learned senior counsel for the petitioner made the following contentions:-

(i) The respondent proceeded as if the petitioner has colluded with other officers. The charges relating to laying the road works were all not proved. Such being the case, the Disciplinary Authority was not correct in punishing the petitioner on the ground that there was a procedural lapse;

(ii) The proceedings against other officers were all dropped subsequently. The petitioner is similarly situated and as such, he should have been shown the very same indulgence.

(iii) Proceedings relate to the work undertaken between the year 1995 and 2001. The charge memo was issued in the year 2009, after a period of ten years. The enquiry

proceedings took three years. In view of this delay, substantial prejudice was caused to the petitioner.

(iv) The petitioner submitted his explanation to the second show cause notice. However, there was no attempt made by the first respondent to consider the explanation submitted to the second show cause notice before passing the impugned order. The first respondent therefore violated the mandatory provisions of Rule 17(b) of Tamil Nadu Civil Services (Discipline and Appeal) Rules.

6. The learned Government Additional Government Pleader justified the impugned order.

Discussion :-

7. The petitioner was subjected to disciplinary proceeding initiated by the first respondent. The charge memo dated 14 May 2009 contains the following charges :-

Charge 1 :

While Thiru.M.Kamaraj was working as Assistant Engineer (Highways), Chidambaram during the period from 2.7.1997 to 26.1.2000, the following works were executed in Chidambaram (Highways) Section:-

1. Keerapalayam - Sethiyathope Road KM: 0/0 - 12/4
2. Trichy - Chidambaram Road KM: 141/6 - 142/4
3. South Car Street KM: 0/0-0236

Thiru M.Kamaraj, formerly Assistant Engineer (Highways) Chidambaram to execute the above three works as per the specification approved and recorded false measurements for these works and thus caused financial loss of Rs.30,82,365/- Rs.74,417 and Rs.24,564/- respectively to the Government.

Charge 2 :

Thiru M.Kamaraj, formerly Assistant Engineer (Highways) Chidambaram, in collusion with other officials and with the connivance of one Thiru.P.Krishnamoorthy, during the period from 8.2.99 to 10.2.99, created records as if 12 immediate restoration of Rain Damage repair works were executed in Chidambaram (Highways) Section without actually executing those works and swindled Rs.2,84,642/- and caused loss to the Government.

Charge 3 :

While Thiru M.Kamaraj, was working as Assistant Engineer (Highways) Chidambaram, during the period from 2.7.97 to 26.1.2000, in collusion with his higher officers and Junior Engineer (Highways) Chidambaram during the period from

1.12.97 to 14.6.2001 committed irregularities in the commission of records without actually receiving, lending or borrowing of bulk bitumen and emulsion bitumen and made false entries resulting in financial loss of Rs.5,97,271 to the Government.

Charge 4 :

By the above said acts Thiru.M.Kamaraj, formerly Assistant Engineer (Highways) Chidambaram has failed to maintain absolute integrity and devotion to duty and thereby he has violated the rule 20(1) of Tamil Nadu Government Servants Conduct Rules, 1972.

8. The petitioner submitted his explanation to the charge memo. The Enquiry Officer appointed by the first respondent, in his report, has specifically stated that there was no defect or deficit found in the work executed by the petitioner by using bitumen and emulsion and there was no loss to the Government. The petitioner was exonerated in respect of charges 1 and 2. The Enquiry Officer, with respect to charge 3, has stated that the said charge was partly proved as there was a procedural lapse in accounting the materials at section level. The Enquiry Officer opined that the petitioner should have scrutinized the work done by the Assistant Engineer. In view of the finding on Charge No.3, charge no.4 was held proved.

9. The first respondent issued second show cause notice to the petitioner along with a copy of the enquiry report. The petitioner submitted further representation on 28 December 2012. The Disciplinary Authority without considering the explanation, passed the impugned order dated 25 October 2013, imposing the punishment of stoppage of increment for a period of three months without cumulative effect.

10. The petitioner has taken up three substantial contentions, the first being delay in initiating and concluding the proceedings; the second being finding with regard to procedural lapse without any material and the third being violation of sub clause (ii) of Rule 17 (b) of the Tamil Nadu Civil Service (Discipline and Appeal) Rules, which provides that before imposing the punishment, representation submitted by the delinquent to the second show cause notice shall be taken into consideration.

Delay in initiating and concluding proceedings :

11. The charge memo issued to the petitioner dated 14 May 2009 shows that the misconduct in question relates to the year 1997-2000. However, the charge memo was issued only on 14 May 2009. The

petitioner is perfectly correct in his contention that it would not be possible for him to prove his defence after a period of 9 years and that too long after his transfer to a different place. Even after issuing charge memo, the Disciplinary Authority took four years to complete the proceedings. Even though the Government have taken a decision to initiate disciplinary proceedings against the petitioner by order in G.O.(D) No.192, Highways & Minor Ports (HL1) Department, dated 13 October 2008, the fact remains that charge memo was issued only after a period of 7 months. The first respondent therefore delayed the matter right from the date of initiation of proceedings.

12. The Supreme Court in M.V.Bijlani vs. Union of India and others, 2006(5) SCC 88, considered an identical case in which disciplinary proceedings were initiated five years after the appellant handed over charge and the Enquiry Officer took 7 years to complete the enquiry. The Supreme Court ultimately set aside the punishment on account of delay and directed the appellant to be reinstated into service.

13. The petitioner is therefore justified in his contention that on account of initiation of proceedings after a period of nine years, he was denied a fair opportunity to prove his case.

Procedural lapse - no valid material :

14. The first respondent alleged that the petitioner in collusion with other employees, recorded false measurements and caused financial loss to the Government. The Enquiry Officer scanned the materials and arrived at a finding that the work was executed as per the agreement, using standard materials and as such, there was no loss to the Government. Charges 1 and 2 are closely connected to charges 3 and 4. The Disciplinary Authority alleged that the petitioner committed irregularities in the matter of maintaining records, without actually receiving, lending or borrowing bulk bitumen and emulsion bitumen and made false entries. The Enquiry Officer reported that the petitioner failed to make entries, notwithstanding the fact that the transactions have taken place between R.R.Chidambaram, Bhuvanagiri Town Panchayat and Keerapalayam Panchayat Union. The Enquiry Officer admitted that the work was completed in accordance with the contract. It is also a matter of record that the petitioner was in charge of the division from where materials were taken on loan. His failure to record loan transactions was taken as a misconduct. The materials on record would show that the petitioner was holding charge of Assistant Engineer (H) Chidambaram and full additional charge of Nabard section of Chidambaram and he was incharge of Nabard work. In fact, the Enquiry Officer agreed that in view of the petitioner holding the post of

both Assistant Engineer of Chidambaram and full additional charge of Nabard Section of Chidambaram, the question of acknowledgment for receiving material does not arise. Such being the position, the Enquiry Officer was not correct in concluding that the petitioner committed a procedural lapse. The question of making an entry would arise only in case the petitioner has taken up a contention that he has received bitumen from another division and used it for laying road. Here in this case, the Enquiry Officer on the basis of available materials very clearly arrived at a finding that the road work was undertaken using bitumen and there was no financial loss to the Government. Since the petitioner was in charge of both the divisions, there was no requirement to record the transaction regarding temporary loan of bitumen. It was a short term loan transaction. Since the bitumen was not readily available to undertake the work, it was taken as loan from the other division, which was also under the control of the petitioner. In fact, the Department should appreciate the swift action taken by the petitioner to complete the work by taking bitumen on loan. In view of the finding with regard to charges 1 and 2, there is no justification for arriving at a different finding with respect to charge no.3, to the effect that the petitioner committed a procedural lapse. I am therefore of the view that the Enquiry Officer and that matter, the Disciplinary Authority, erred in arriving at a finding that the petitioner committed a procedural lapse.

Violation of Rule 17(b):-

15. Sub clause (ii) of Rule 17(b) deals with second show cause notice and consideration of the same by Disciplinary Authority before passing final orders. The said provision reads thus :

"(ii) After the enquiry or personal hearing referred to in clause (i) has been completed and if the authority competent to impose the penalty specified in that clause, is of the opinion, on the basis of the evidence adduced during the inquiry, that any of the penalties specified therein should be imposed on the person charged it shall, before making an order imposing such penalty, furnish to him a copy of the report of the inquiry or personal hearing or both, as the case may be, and call upon him to submit his further representation, if any, within a reasonable time, not exceeding fifteen days. Any representation received in this behalf within the period shall be taken into consideration before making any order imposing the penalty provided that such representation shall be based on the evidence adduced during the inquiry only. It

shall not be necessary to give the person charged any opportunity of making representation on the penalty proposed to be imposed".
(emphasis supplied)

16. In the subject case, the petitioner submitted further representation pursuant to the 2nd show cause notice on 28 December 2012. In view of sub clause (ii) of Rule 17(b), the Disciplinary Authority was expected to consider the further representation before passing final orders. The first respondent omitted to consider the detailed explanation submitted by the petitioner. The impugned order contains the details of charges and findings given by the Enquiry Officer. The further representation given by the petitioner is found at page 30 of the order. The first respondent without considering the further explanation, passed the final order, punishing the petitioner. The last two paragraphs of the order would very clearly show that further representation sent by the petitioner was not at all considered.

The delinquent officer in his further representation has stated that out of the 60.85 MT of bulk bitumen and 15.3 MT of emulsion bitumen, which were said to be loan transaction, as charged, the Enquiry Officer, on verification of records, found that only 43.30 MT of bulk bitumen and 10.5 MT of emulsion only were loan transactions. This quantity of materials is a part of the materials of the total quantity used for the works noted in charge nos.1 and 2 and these materials were used for these works only, and it was concluded as the works are executed as per specification. Therefore, the Enquiry Officer decided as "even though there is neither substandard work nor loss to Government, it is found procedural lapse in maintenance of materials account.

In this aspect, he has submitted that the nature of the works in question are rain damage repair works which are to be executed expeditiously and to be completed as scheduled in order to avoid hindrance to traffic and to avoid public criticism. The progress of the rain damage repair works are periodically reviewed by the superior officers, besides instructions were issued by the Divisional Engineer (H) Cuddalore, to complete the repair works in time. But, in sometimes, because of delay in supply of bitumen by the oil companies as intended, the execution

of repair works were obstructed and leads to stop the execution temporarily till the receipt of materials from oil companies.

Therefore, as per the oral instruction of the Divisional Engineer (H), Cuddalore, the Assistant Engineers of other sections were approached to get some materials on loan basis. In such a circumstances, the contractors express their position as if at all the supply of bitumen got delayed, the ought to have stop the work and move their machineries to execute the works other sections, besides they are also came forward to execute the work continuously without any break by using the materials which were supplied by other sections for the work entrusted by that wing and thereafter on completion of the highways sections works they could started the works of other sections by using the materials to be issued later by highways section. They also told that in case the execution of work was temporarily stopped for want of bitumen even for some days, they would be met with some loss. Therefore, the materials brought by the contractor to execute the work continuously. The materials were brought into godown log book as if loan received from the sections from where the contract said to be received by him for the works of that sections and thereafter on receipt of materials from oil companies later, it was issued to the contractor and entered in the godown log book as if loan returned.

In this connection, he further submitted that in case he kept quiet until the receipt of materials from the oil companies and disallow the contractor to execute the work by using the bitumen said to be received by him from other sections for the works of that sections, he ought to move their machineries and labourers to other location and the execution of the above said rain damage works would be delayed.

The main object is to execute the works as per specification with good quality. When the object was achieved by executing the works as per specification and without loss to Government, then there would be willful intention or motive to maintain the materials account in such a manner.

He has, therefore, submitted that the contractors were allowed to execute the said works by using the bitumen said to be received by them from other sections only in the interest of early completion of the restoration works and in the interest of public and not in the intention of committing malpractices in any manner and suppose if such might be his intention the quality of work could not be ensured.

Further representation of the Delinquent officer:-

In regards to charge no.4 he submitted that this charge is consequential to the charges 1 to 3 and hence his explanation furnished by him in his statement of defence dated 16.7.2009 and 3.5.2012 is hold good fro this charge. He has, therefore, requested that this charge may please be dropped.

3. The Government have examined the charges framed against the delinquent officer, his explanation, the findings of the Inquiry Officer and the further representation of the delinquent officer on the findings of the inquiry officer, carefully and independently along with the connected records and held the charges 1 and 2 as not proved, charge 3 as partly proved and charge 4 as fully proved. For the proven/partly proven charges, the Government has decided to impose the punishment of stoppage of increment for a period of three months without cumulative effect on the delinquent officer. Accordingly, the Government Order that the punishment of stoppage of increment for a period of three months without cumulative effect be imposed on Thiru.M.Kamaraj, formerly Assistant Engineer, now Divisional Engineer (Construction & Maintenance) for the partly proven/proven charges against him.

4. The said punishment is exclusive of leave period if any spent by the delinquent officer and it will not affect his pension".

17. The first respondent forwarded a copy of the enquiry report to the petitioner along with second show cause notice. The petitioner submitted a detailed explanation to the effect that the finding rendered by the Enquiry Officer has no basis. Statute mandates that further representation should be considered by the Disciplinary Authority before passing final orders. The Disciplinary Authority

just ignored the further representation. The petitioner is therefore perfectly correct in his contention that the Government have not followed the mandatory provisions of Rule 17(b).

Co delinquent - charges dropped :-

18. Similar proceedings were taken against Thiru.R.Shanmugam, Joint Chief Engineer and Thiru.H.Mohammed John, Divisional Accountant. The very same four charges were framed against them also. The Enquiry Officer reported that the charges were not proved. The Government have accepted the report and dropped further action against them by order in G.O. (D) No.214, Highways and Minor Ports (HL-1), Department and G.O. (D) No.215, both dated 25 October 2013. Though the very same charges were framed against the petitioner also, the Enquiry Officer took a different view, notwithstanding the fact that materials were one and the same in all the cases. The petitioner being similarly placed, should not have been treated differently.

19. There is no factual finding that procedural lapse was deliberate. The first respondent would be correct in his conclusion regarding procedural lapse in case, it was committed willfully to gain something. The Enquiry Officer has given a clean chit to the petitioner that there was no loss to the Government. In case procedural lapse was intentional and it was committed to do the acts made mentioned in the charges 1 and 2, the petitioner would be liable. However, that is not the case here. The petitioner was exonerated from serious charges. The alleged procedural lapse is not of such serious nature to award punishment. The materials were taken on loan and returned subsequently on receipt. Such being the case, I am of the view that it would not be proper to punish the petitioner.

20. It is true that scope of judicial review is very limited in disciplinary proceeding. The High Court is not expected to reassess the materials for the purpose of arriving at a different conclusion. However, that would not be the case, in case when there are no legal evidence to connect the delinquent with the alleged misconduct. In case the available materials taken in its entirety would not constitute an act of misconduct, it is open to the Court to interfere to render justice. There cannot be a straitjacket formula in such cases. The Court has to consider the peculiar facts of a given case and decide the issue within the parameters laid down for exercising the power of judicial review.

Conclusion :-

21. The petitioner has clearly proved that enquiry was initiated and concluded after a period of ten years. There were no materials before the Enquiry Officer to arrive at a conclusion that there was a procedural lapse on the part of the petitioner so as to give a

positive finding with respect to charge no.3. The Disciplinary Authority violated the mandatory provisions of law by not considering the further representation submitted by the petitioner. The petitioner must thereafter succeed in this Writ Petition.

22. The impugned order in in GO (D) No.216, Highways & Minor Ports (HL1) Department dated 25 October 2013 is set aside.

23. In the upshot, I allow the Writ Petition. No costs. Consequently, M.P.Nos.1 and 2 are closed.

Sd/-
Asst. Registrar

/true copy/

Sub Asst. Registrar.

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To

1. The Principal Secretary to Government,
Highways & Minor ports (HL1) Department,
Fort St.George,
Chennai 600 009.
2. The Chief Engineer (General) Highways,
Chepauk,
Chennai 5.

+1cc to Mr.M.Muthappan, Advocate, S.R.No.13145

+2cc's to the Government Pleader, S.R.No.12922 & 13275 respectively

W.P.No.33208 of 2013

RJ(CO)
CA(12/03/2015)

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