IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.09.2017

CORAM

THE HON'BLE Mr. JUSTICE V.PARTHIBAN

W.P.No.4768 of 2014 and
M.P.No.1 of 2014

R.Selvaraj ... Petitioner

Vs.

1.The Government of Tamil Nadu,
Rep.by its Secretary to Government,
Finance Department,
Fort St.George,
Chennai 600 009.

2.The Chief Internal Auditor and Chief
Auditor of Statutory Boards,
807, Chengalvarayan Buildings,
7th Floor, Anna Salai,
Chennai 600 002.

3.The Deputy Director,
Internal Audit,
Erode. ... Respondents

Prayer : Petition filed under Article 226 of The Constitution of India praying to issue a Writ of Certiorarified Mandamus, to call for the records pertaining to the proceedings bearing No.Se.Mu.Aa.No.6851/E2/2009 dated 27.09.2012, issued by the second respondent read with order in G.O.(Ms).No.364 dated 27.08.2013, issued by the first respondent, quash the same and consequently direct the respondents to allow the petitioner to retire with effect from 30.11.2010, with all other attendant benefits.

For Petitioner : Mr.S.Namasivayam for
M/s.R.Vaigai
For Respondents: Mr.A.Zakkir Hussain
Government Advocate

O R D E R

Heard Mr.S.Namasivayam, learned counsel appearing for the petitioner and Mr.A.Zakkir Hussain, learned Government Advocate appearing for the respondents.

2. The petitioner has approached this Court for seeking the following relief,

> "To issue a Writ of Certiorarified Mandamus, to call for the records pertaining to the proceedings bearing No.Se.Mu.Aa.No.6851/E2/2009 dated 27.09.2012, issued by the second respondent read with order in G.O.(Ms).No.364 dated 27.08.2013, issued by the first respondent, quash the same and consequently direct the respondents to allow the petitioner to retire with effect from 30.11.2010, with all other attendant benefits."

3. The case of the petitioner is as follows:

The petitioner joined as Typist in the Internal Audit Department in 1977 and was promoted as Assistant Inspector on 19.01.1987. Thereafter, he was promoted as Deputy Inspector on 03.07.2006. According to the petitioner, he had rendered more than 33 years of blemishless service. While the petitioner was working as Deputy Inspector, Internal Audit, he was issued with the charge memo dated 21.01.2010 under Rule 17(b) of the Tamil Nadu Civil Services (Discipline & Appeal) Rules, for the alleged charges.

4. However the petitioner had denied the charges and notwithstanding the same, an enquiry was conducted. The petitioner was placed under suspension by proceedings dated 24.11.2010. The petitioner was also due for retirement on attaining the age of superannuation on 30.11.2010. However, by proceedings dated 24.11.2010 of the second respondent, the petitioner was not allowed to retire and was retained in service and was paid subsistence allowance. Simultaneously, a Criminal Case also was filed against the petitioner in regard to the same allegations which formed the basis of the charge memo in C.C.No.780 of 2010. The criminal case however ended in acquittal on 16.08.2011.

5. On completion of the departmental enquiry, the charges were held to be proved. The second respondent who was the disciplinary authority, imposed a penalty of dismissal from service by proceedings dated 27.09.2012, against which an appeal was filed by the petitioner on 24.10.2012 to the first respondent. Since no order was passed in the appeal, the

petitioner filed a petition in W.P.No.6951 of 2013 and this Court by order dated 22.03.2013, disposed of the writ petition with a direction to the first respondent to consider his appeal on merits within a period of 12 weeks.

6. In pursuance of the direction passed by this Court, the first respondent passed the G.O.Ms.No.364, dated 27.08.2013, rejecting the appeal after obtaining advice from the Tamil Nadu Public Service Commission (TNPSC). The order passed by the disciplinary and appellate authorities dated 27.09.2012 and 27.08.2013, are put to challenge in the present writ petition.

7. The learned counsel appearing for the petitioner would submit that the misconduct which was alleged against the petitioner was minor in nature, since no personal motive was attributed to the petitioner while discharging his duties as Deputy Inspector. At best, the misconduct can only be an improper conduct and no loss caused to the Government and there was no wrongful gain by the petitioner. However the disciplinary authority without considering the long years of blemishless service put in by the petitioner, had mechanically accepted the findings of the Enquiry Officer and imposed a severest penalty of dismissal from service. The disciplinary authority has not considered the mitigating circumstances for taking a lenient view in the matter.

8. Further, the appellate authority viz., the first respondent has passed a cryptic order without proper consideration of the appeal preferred by the petitioner. As could be seen in the order passed in the appeal, the appellate authority merely incorporated the observations of the Tamil Nadu Public Service Commission and concluded against the petitioner. Therefore, he would submit that the order of the appellate authority is a non-speaking order and suffers from non application of mind.

9. The learned counsel for the petitioner would further submit that de-hors the above infirmities, the "doctrine of proportionality" has to be applied in the instant case, particularly in view of the fact that the petitioner had rendered 33 years of blemishless service and there was no black mark against him in his entire service career. Since both the disciplinary authority and the appellate authority have not considered the "doctrine of proportionality" in the case of the petitioner, the learned counsel would impress upon this Court to consider the "doctrine of proportionality" and interfere with the quantum of the penalty imposed on the petitioner.

10. The learned counsel appearing for the petitioner would

rely upon the decision passed by the Hon'ble Supreme Court, in the case of Management of Coimbatore District Central Co-operative Bank Vs. Secretary, Coimbatore District Central Co-operative Bank Employees Association and anr, reported in 2007 4SCC 669, the Hon'ble Supreme Court, in the said decision, had in extenso dealt with the "doctrine of proportionality" after adverting to Halsbury's Laws of England, the relevant paragraphs which elucidate the "doctrine of proportionality" in the Hon'ble Supreme Court order, are extracted below:-

> "12. So far as the doctrine of proportionality is concerned, there is no gainsaying that the said doctrine has not only arrived at in our legal system but has come to stay. With the rapid growth of Administrative Law and the need and necessity to control possible abuse of discretionary powers by various administrative authorities, certain principles have bee evolved by Courts. If an action taken by any authority is contrary to law, improper, unreasonable, irrational or otherwise unreasonable, a Court of Law can interfere with such action by exercising power of judicial review. One of such modes of exercising power, known to law is the 'doctrine of proportionality'.
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> 13. 'Proportionality' is a principle where the Court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a decision. The very essence of decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus steps in focus true nature of exercise-the elaboration of a rule of permissible priorities. De Smith states that 'Proportionality' involves 'balancing test' an 'necessity test'. Whereas the former ('balancing test') permits scrutiny of excessive onerous penalties or infringement of rights or interests and a manifest imbalance of relevant considerations, the latter ('necessity test') requires infringement of human rights to the least restrictive alternative. ['Judicial Review of Adminsitrative Action' (1995); pp. 601-605; para 13.085; see also Wade & Forsyth; 'Administrative Law'; (2005); p.366].
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> 14. In Halsbury's Laws of England, (4th edn.); Reissue, Vol.1(1); pp.144-45; para 78, it is stated,
> The Court will quash exercise of discretionary powers in which there is no reasonable relationship between the objective which is sought to be achieved and the means used to that end, or where punishments imposed by administrative bodies or inferior courts are wholly out of proportion to the relevant misconduct. The principle

of proportionality is well established in European law, and will be applied by English Courts where European law is enforceable in the domestic Courts. The principle of proportionality is still at a stage of development in English law; lack of proportionality is not usually treated as a separate ground for review in English law, but is regarded as one indication of manifest unreasonableness.

The doctrine has its genesis in the field of Administrative Law. The Government and its departments, in administering the affairs of the Country, are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without abuse of discretion. There can be no 'pick and choose', selective applicability of Government norms or unfairness, arbitrariness or unreasonableness. It is not permissible to use a 'sledge-hammer to crack a nut'. As has been said many a time; 'Where paring knife suffices, battle axe is precluded."

11. The learned counsel for the petitioner would further rely on the decision of the Hon'be Supreme Court, in the case of Dev Singh Vs. Punjab Tourism Development, reported in AIR 2003 SC 3712, particularly, he draws the attention of this Court to the portion as observed by the Hon'ble Supreme Court in the paragraph 7 of the order which is extracted below:-

"7.....Therefore, in our opinion, the disciplinary authority was guided by certain facts which were not on record, even otherwise, we are of the opinion that when the Service By-Laws applicable to the Corporation under Service By-Laws 17 provide various minor punishments, we fail to appreciate why only maximum punishment available under the said By-laws should be awarded on the facts of the present case. We think the punishment of dismissal for mere misplacement of a file without any ulterior motive is too harsh a punishment which is totally disproportionate to the misconduct alleged and the same certainly shocks our judicial conscience. Hence, having considered the basis on which the punishment of dismissal was imposed on the appellant and the facts and circumstances of this case, we think to avoid further prolonged litigation it would be appropriate if we modify the punishment ourselves. On the said basis, while upholding the finding of misconduct against the appellant, we think it appropriate that the appellant be imposed a punishment of withholding of one increment including stoppage at the efficiency bar in substitution of the punishment of dismissal awarded by the disciplinary authority. We further direct that the appellant will not be entitled to any back wages for the period of suspension. However, he will be entitled to the subsistence allowance payable upto the date of the dismissal order.”

12. The learned counsel appearing for the petitioner would further rely on yet another order passed by the Hon'ble Supreme Court of India in appeal (Civil) No.4779 of 2006, dated 10.11.2006, the last paragraph of the said judgment is stated as follows:-

> “In a case of this nature, doctrine of proportionality would also be applicable. Doctrine of irrationality is now giving way to doctrine of proportionality. [See Commissioner of Police and others Vs. Syed Hussain (2006) 3 SCC 173]. The Labour Court did not consider this aspect of the matter. If only a charge of negligence had been proved against him, we are of the opinion that the interest of justice would be subserved if he is directed to be reinstated in service with 25% back wages.”

13. Therefore, in the above circumstances, the learned counsel would submit that ”Doctrine of Proportionality” has to be applied in the instant case and a penalty which was imposed on the petitioner was too excessive than what is required with reference to the nature of charge which was framed against the petitioner.

14. Upon notice, learned Government Advocate entered appearance and filed a detailed counter affidavit. The learned counsel appearing for the respondents would submit that the charges were held to be proved in the departmental enquiry and therefore, the disciplinary authority after taking into consideration of all the aspects of the case, imposed a penalty of dismissal from service. Since there was no merit in the appeal, the appellate authority rejected the appeal and therefore, there was no scope for the petitioner to assail the orders passed against him.

15. This Court has given its anxious consideration to the rival submissions of the counsels and perused the materials and pleadings placed on record. First of all, it has to be seen that whether the orders passed by both the disciplinary authority and the appellate authority can be countenanced both in law and on facts. Although the disciplinary authority had accepted the findings of the departmental enquiry, while imposing a penalty, the authority had not taken into consideration the mitigating

circumstances in favour of the petitioner for adopting a lenient approach in the matter of ordering penalty to the petitioner. The award of penalty of dismissal from service by the disciplinary authority does not stand the test of "doctrine of proportionality". It appears that the penalty of dismissal from service has been mechanically passed without proper application of mind.

16. Further, it has to be seen that the appellate authority who was vested with the power of considering every legitimate objections put forth by the employee concerned in the appeal has shirked his statutory responsibility and merely guided by the advice /opinion given by the Tamil Nadu Public service Commission. From the appellate order, it could be seen that there was no independent application of mind by the appellate authority and therefore, the order passed by the appellate authority affirming the penalty is contrary to the rules and also cannot stand the test of settled legal principles on the subject matter. It is needless to mention that the appellate authority who was exercising quasi judicial power, is expected to apply his mind thoroughly to all the aspects of the matter and he cannot allow himself to be completely influenced by the advice/opinion given by the external agency like the Tamil Nadu public Service Commission.

17. Therefore, to that extent, this Court finds that the appellate authority has abdicated his statutory role to the external agency viz., Tamil Nadu Public Service Commission, while discharging his duties in the matter of disposing of the appeal preferred to him under the statute by the petitioner. Although this Court finds that the order passed by the both disciplinary authority and the appellate authority are contrary to law as stated above but still this Court is of the opinion that in respect of the proved charge, the petitioner has to suffer some penalty. Since the petitioner had attained the age of superannuation in 2010 itself and nearly seven years have gone by, it is not fair for this Court to remit the matter back to the authorities for fresh consideration.

18. Therefore, this Court is of the considered view that the punishment of dismissal from service imposed on the petitioner is excessive and harsh in the circumstances of the case. The impugned punishment cannot stand the test of "doctrine of proportionality" as propounded by the Hon'ble Supreme Court of India and such the penalty has to be necessarily interfered with. While doing so, this Court is also concious of the fact that the employee cannot be left let off the hook in view of the proved charges against him.

19. Therefore, in the fitness of the case, this Court is of the view that the penalty of compulsory retirement which is one of the major penalties enumerated in the service rules shall be imposed on the petitioner from the date while he was dismissed from service. In the above circumstances, the impugned orders dated 27.09.2012 and 27.08.2013 are set aside and the employee shall be imposed with the penalty of compulsory retirement from service from the date of imposition of penalty of dismissal from service and he shall be paid all retirement benefits with arrears and pension as admissible to him. The said direction shall be complied with by the respondents within a period of two months from the date of receipt of a copy of this order.

20. With the above direction, the writ petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

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To

1.The Secretary to Government,
The Government of Tamil Nadu,
Finance Department,
Fort St.George,
Chennai 600 009.

2.The Chief Internal Auditor and Chief
Auditor of Statutory Boards,
807, Chengalvarayan Buildings,
7th Floor, Anna Salai,
Chennai 600 002.

3.The Deputy Director,
Internal Audit,
Erode.

+1cc to Mr.S.Namasivayam, Advocate, S.R.No.67455
+1cc to the Government Pleader, S.R.No.68356

W.P.No.4768 of 2014

RS(13/10/2017)