IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.10.2018

PRONOUNCED ON : 20.11.2018

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.37592 of 2007

C.S.Dillikumar .. Petitioner

vs

Poompuhar Shipping Corporation Ltd.,
Rep. by its Chairman & Managing Director,
692, Anna Salai, MHU Complex,
4th Floor, Nandanam,
Chennai 600 035. .. Respondent

Prayer : Writ Petition is filed under Article 226 of the Constitution of India, for issuance of a Writ of Certiorari calling for the records relating to the order of the respondent in Proceedings No.PA/001/CSD/DA.06 dated 14.08.2007 and to quash the same.

For petitioner : Mr.R.Parthiban

For respondent : Mr.T.S.Baskaran

O R D E R

The above writ petition has been filed for issuance of a Writ of Mandamus to call for the records of the first respondent in Proceedings No.PA/001/CSD/DA.06 dated 14.08.2007 and to quash the same.

2.The petitioner has challenged the impugned order of the respondent dated 14.08.2007, who has held that the charge against the petitioner was of serious nature and therefore they were justified awarding punishment under Service Rules of the Corporation.

3.In the impugned order, it has been observed that however, taking a lenient view, the petitioner has been imposed punishment of stoppage of annual increment with a cumulative effect for a period of six months under Clause 4.3(3) of the Service Rules of the Corporation, which falls due on 01.10.2007. In the impugned order, the respondent has accepted the finding of the enquiry officer that the petitioner was guilty of serious charge therefore imposed punishment of stoppage of annual increment with cumulative effect under clause 4.3 (3) of the Services of the Corporation for a period of 6 (six) months which falls due on 01.10.2007.

4.It is the case of the petitioner that the Charge Memo dated 8.12.2006 which culminated in the impugned order was issued in respect of the alleged misconduct of the year 1994 and there is a delay of 12 - 1/2 year in framing of charges and there is no explanation as to why the charge was framed belatedly.

5.Out of six charges covered in the said charge memo, the first five charges were covered by earlier two show cause notices dated 30.10.1998 and 10.05.1999. The first show cause notice was issued to the petitioner on 30.10.1998 contained three charges.

6.The petitioner was therafter suspended from service with effect from 10.03.1999. During the period of suspension, a second show cause notice dated 10.05.1999 was issued to the petitioner containing two more charges. The petitioner gave his reply by way of representation dated 25.06.1999 to the Enquiry Officer.

7.The Enquiry Officer later submitted an enquiry report dated 27.11.2003. The enquiry report was not given to the petitioner. However, based on the Enquiry Report, the order of suspension was revoked by the respondent on 18.03.2004.

8.Thus, between 10.3.1999 and 18.3.2004 the petitioner was under suspension and was drawing subsistance salary. The copy of Enquiry Report was filed at the time of hearing of the writ petition i.e. 23.10.2018. The Enquiry Report found the petitioner not guilty of any of the five charges in the two show cause notices.

9.After the order of suspension was revoked on 27.11.2003 in respect of the two show cause notices dated 30.10.1998 and 10.05.1999, the 3rd show cause notice dated 08.12.2006 was issued to the petitioner after a lapse of 12-1/2 years for the alleged misconduct during 1995-96. It contained six charges. It reiterated 5 charges from the 1st and 2nd show cause notices. The 3rd show cause notice added one more as 6th charge, which is extracted as under:

> "(i)You have failed to bring to the notice of the Managing Director the excess payment of Rs.19.00 lakhs to the owners of mv APJ Ahil on 4.5.94 which amounts to suppression of facts.
>
> Similarly, you have failed to bring to the notice of the Managing Director the serious

irregularities of excess payment of the 19.00 lakhs immediately after it was pointed out during special check which again amounts to suppression of facts.

(ii)After the excess payment made by you on 04.05.'94 to vessel mv APJ Akhil which was not actually due had been pointed out as a serious financial irregularity, you had arranged to adjust the excess amount of Rs.19.00 lakhs as a routine deduction after a lapse of more than 20 months in the charter hire note dt.1.3.96 and have also failed to give any reason whatsoever for the adjustment in that note which is in violation of all canons of financial propriety.

(iii)If this has not been detected by special check this excess payment of 19.00 lakhs would have been lost to the company, since the Annual Accounts for the financial year 1994-95 had been completed.

(iv)Because of your fraudulent acts, the interest loss to the company on the excess payment of Rs.19.00 lakhs for the period from 4.5.94 to 21.12.95 i.e. Rs.7,04,583/- at the cash credit interest rate of 20.25%."

10.On 14.12.2006, the petitioner submitted a reply to the third show cause notice/charge memo and thereafter an enquiry was conducted on 15.03.2007.

11.In the enquiry report dated 28.03.2007 the petitioner was found guilty of 6th charge for payment of Rs.19 lakhs to M/s.Surrendra Overseas Ltd., vide Bank voucher No.103, dated 04.05.1994 against the hire charges for MY APJ Akhil.

12.This excess payment was also allegedly detected during the special reconciliation made and recovered from the charter party during the period from 21.11.1995 to 21.12.1995.

13.In the enquiry report, it is further stated that if the serious financial irregularity had not been detected during the special check of yearly voyage accounts, the respondent's company would have been put to a permanent loss of Rs.19 lakhs for the year 1994-95.

14.The petitioner has denied the liability on the ground that he was on causal leave from 02.05.1994 to 06.05.1994 and he was not connected with the preparation of voucher for payment to MV APJ Akhil charter hire note. According to the Enquiry Officer, the petitioner was guilty of misconduct under Clause 4.2(c) of the Company's Service Rules in view of the evidence of the departmental witnesses who gave evidence against the petitioner.

15.The respondent confirmed the Enquiry Officer's report and has imposed punishment of stoppage of an annual increment with cumulative effect under clause 4.3.(3) of the Service Rules of the Corporation for a period of 6 (six) months which falls due on 01.10.2007.

16.Aggrieved by the same, the petitioner has preferred the present writ petition instead of filing an appeal before the Appellate Authority.

17.The petitioner has also separately challenged the order dated 08.12.2006 bearing reference No.P.A/001/CSD/DA 07 and order dated 21.04.2008 bearing reference P.A./001/CSD/DA/08 treating the subsistence allowance already paid as the pay, allowance and entitltement as per the provisions of clause 4.6.1. and 4.6.2 of the Service Rules to deny the salary for the period of suepsnson as according to them petitioner was not honourably acquitted in the first two show cause notices. The petitioner has filed separate petition by WP No. 15304 of 2008. The said writ petition was partially heard together. It was delinked for being heard separately. Separate order has been passed baed on the present decision.

18.It is submitted that the disciplinary proceeding was prejudicial and deprived the petitioner of a reasonable opportunity to defend himself as the Department rested its case on the oral evidence. According to the petitioner there was a gross violation of the principles of natural justice as reasonable opportunity to defend him was denied.

19.The charge memo appears to have been issued based on the recommendation of the Directorate of Vigilance and Anti-corruption who in their report have reportedly stated that as per the statement of the cashier the cheque was prepared under the instruction of the petitioner.

20.The petitioner submits that cheques are prepared on receipt of payment advice and not based on instructions as has been made out. The petitioner also requested for a copy of the payment voucher/advice during the course of enquiry. However, same was denied to mke petitioner guilty for the mistakes committed by the officers in charge during his absence.

21.Further it was submitted that petitioner was a junior level officer and it was the Joint Manager (Accounts), General Manager (Finance) and the Managing Director who were responsible for issuing the cheque and therefore responsibility was wrongly fastened on the petitioner. It was further submitted that in absence of any advice voucher for the release of the payment, the petitioner cannot be liable as a junior officer of the Corporation.

22.According to the petitioner the disciplinary authority has victimised petitioner as the previous charges framed against the petitioner were not proved and therefore impugned proceedings came to be initiated to punish the petitioner with an vindictive attitude.

23.The petitioner further submitted that similarly placed persons have been exonerated while the petitioner has been imposed with the punishment and therefore the respondents have acted in an vindictive manner.

24.The respondent has filed a counter. According to the respondent , the petitioner was aware of his right of appeal against the impugned order as per the Service Rule 4.7 within a period of 60 days from the date of receipt of a copy that order. The petitioner has instead however challenged the same in the present writ petition. It is stated that the present writ petition should be therefore dismissed as the petitioner had an alternative remedy before the Appellate Authority but has wrongly approached this Court under Art. 226 of the Constitution of India.

25.It is specifically submitted that the scope of writ court under Article 226 of the Constitution of India being limited, submissions on the merits of the dispute cannot be looked into in the writ proceeding. It is submitted that there was no irregularity in the disciplinary proceeding before the respondents and therefore the petition should be dismissed.

26.It is further submitted that the punishment was proportionate to the with the misconduct committed by the petitioner and therefore the writ petition was liable to be dismissed even on merits.

27.Heard, Mr.R.Parthiban the learned counsel for the petitioner and Mr.T.S.Baskaran the learned counsel for the respondent.

28.The Learned counsel for the petitioner submitted that for the identical and same charge memo lessor punishment were imposed on the other delinquent officers namely Mr MG Sivasubramaniam, GM (Finance) , Y Sivalinga Prasad , Joint Manager (Accounts) and S. Mohan (Senior Accountant). The respondents have also admitted in their counter that for identical charges different punishments have been awarded and thus there is discrimination.

29.In this connection the Learned counsel for the petitioner relied upon the decision of the Honourable Supreme Court in Sengara Singh Vs. State of Punjab reported in (1983)4 SCC 225. This view has been followed by this High Court in T.R.Venkatachary V. The Special Officer reported in 2002 W.L.R 449 and in N. Nandan Gopalan Versus Sec to the Government reported in 2007 W.L.R 52. In the above mentioned cases the court held that if the employees were involved in the same incident, the department should either proceed against all or should not proceed against any one. There is no discretion to proceed against only some of the employees and not to proceed against other employees when they are identically placed.

30.The Learned counsel further submitted that the delay in framing the charges for 12-1/2 years is itself fatal and under similar circumstances the court had quash the charges by its order in unreported decision in V.Ramasamy Vs. The Secretary made in WP.No. 8699 of 2006 dated 19.09.2014. It was submitted that there is no reasonable excuse for the delay in issue of the show cause notice.

31.The Learned counsel further submitted that during the enquiry petitioner had requested for furnishing a copy of the payment voucher dated 04.05.1994. However, same was not furnished and therefore, the domestic enquiry was conducted in violation of the principles of natural justice. He relied on the decision of the Supreme Court in State of Uttar Pradesh versus Saroj Kumar Sinha reported in (2010) 2 SCC 772 wherein the Honourable Supreme Court held that non-disclosure of documents having potential to cause prejudice to a government servant would be a denial of reasonable opportunity to submit a possible and effective rebuttal to the charges being enquired into against the government servant.

32.The above case of the Honourable Supreme Court relied upon its earlier decision in State of Punjab versus Bharat Ram (1975) 1 SCC 155 wherein it was held that it is unjust and unfair to deny the government servant copies of the statement of witnesses during investigation and relied at the enquiry in support of the charges levelled against a government servant.

33.The Learned counsel submitted that as the voucher was also not produced before the domestic enquiry nor furnished to the petitioner there was gross violation of principles of natural justice.
The learned counsel for the respondent relied on the decision of Hon'ble Supreme Court in Nivedita Sharma Vs. Cellular Operators Association of India and others (2011) 14 SCC 337 wherein it was reaffirmed as follows:-

> "It can, thus, be said that this Court has recognised some exceptions to the rule of alternative remedy. However, the proposition laid down in Thansingh Nathmal v. Supt. of Taxes [AIR 1964 SC 1419] and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field.

34.In para-4 of the reply affidavit, the petitioner has extracted a portion from the Directorate of Vigilance And Anti-Corruption's report dated 12.9.2005 wherein it was stated that according to Tmt.RC Bai, the cashier, the payment voucher was prepared as per the instruction of the petitioner for payment to M.V. APJ Akhil, Charter Hirer due on 30.1.1994. It is stated that the cashier also placed the payment voucher before the Accountant, Joint Manager (Accounts) for the scrutiny.

35.After scrutiny, the Joint Manager (Accounts) placed the payment voucher before the General Manager (Finance) and The Managing Director for the signature and thereafter the cheque was handed over to shipowner of Surendra Overseas Ltd. Thus, the above process is sequential and therefore, checks at each stage.

36.Failure to furnish the payment voucher during disciplinary proceeding is fatal as the petitioner was denied a reasonable opportunity to rebut the case made out against him in the charge memo/show cause notice.

37.Countering the submision, the Learned Counsel for the resondent relied upon the decision of the Honourable Supreme Court in Krishan Lal versus Food Corporation of India reported in (2010) 2 SCC 722 to say that writ petition cannot be dismissed after having admitted 10 years back. There the court held that the High Court had entertained the writ petition as early as in the year 2002 and the appeal was pending before it for the past 10 years or so. Relegating the parties to the arbitration proceeding was held not feasible at that stage especially when the proceedings before the arbitrator may drag on.

38.The Learned counsel also relied upon the decision of this court in M Saravanan versus The District Prohibition Officer 2007 Writ Law Reporter 490. In Kuldeep Singh Vs. Commissioner of Police - (1999) 2 Supreme Court Cases 10, the Hon'ble Supreme Court has held as follows:

> "A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse, But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be the conclusions would not be treated as perverse and the findings would not be interfered with."

39.In view of the above the learned counsel therefore prayed for dismissal of the above writ petition.

40.Before dealing with the merits of the case, it would be appropriate to deal with the preliminary objection raised on behalf of the respondent. The Service Rules of the Poompuhar Shipping Corporation Ltd., contemplates appeal against an order of the disciplinary authority. As per Clause 4.7 of Service Rules, in case, the Managing Director is the disciplinary authority, an appeal shall lie before the Board. As per clause 1.3. (b) "Board" means Board of Directors of Poompuhar Shipping Corporation Ltd.

41.The Managing Director of the respondent is a part of the Board of the respondent. In the hiararchy, all the other directors are subordinate to the Managing Director.

42.Therefore, even if the Managing Director rescuses himself, there is an element of bias. In fact, in the orders dated 05.12.2007 and 21.04.2008 impugned in W.P.No.15304 of 2008, it was noticed that the respondent ordered to robe of the disciplinary authority and appellate authority. Justice should not only be done but should be seen to the done. Therefore, it cannot be construed that the appeal before the Board would be an efficacious remedy available to the petitioner. Further, having entertained the writ petition in the year 2008, it would be unfair to relegate the petitioner to work out the remedy at this distant point of time.

43.Under these circumstances, I am of the view that the present writ petition can be entertained against the order of the Managing Director who acted as a disciplinary authority. The hierarchy provided for appeal before the Board is not not efficacious under these circumstances.

44.Therefore, in the facts and circumstances of the case the issue for consideration is whether the respondent was justified in imposing the punishment on the petitioner based on a charge memo issued long after the alleged date of misconduct and whether the enquiry that was conducted by the enquiry officer was carried out in a fair manner giving petitioner the opportunity to rebut the charges framed against the petitioner and whether the impugned order is substainable on the facts of the case.

45.Though six different charges were framed against the petitioner, he has been found guilty of charge No.6 namely payment of Rs.19 lakhs to measures M.V. APJ Akhil on 04.05.1994.

46.Admittedly , the petitioner was on casual leave between 2.5. 1994 and 6.5.1994. Therefore, prima facie it would be incorrect to hold that petitioner guilty of misconduct for the payments made during his absence.

47.Further, in the charge memo itself, there is contradiction. On one hand, it is alleged that the petitioner failed to bring to the notice of excess payment of Rs.19.00 lakhs to Managing Director immediately after it was pointed out which amount to suppression of fact and at the same time makes it seem as if the petitioner had made payment on 04.05.1994. From the facts, it is evident that payments were made in his absence. Thus, the petitioner cannot be guilty of payment.

48.That apart, the decision to issue a Charge Memo/show cause notice dated 08.12.2006 after a lapse of 12-1/2 years of the alleged misconduct at the fag end of the career of a retiring officer after closure of the two show cause notices proceeding and incorporating the same charge once again smacks of bias.

49.The fact that 5 charges in the earlier to show cause notices were tagged along once again in the third show cause notice/charge memo despite the charges being dropped in an earlier enquiry vide Enquiry Report dated 27.11.2003 itself shows that the third charge memo/show cause notice dated 08.12.2006 to initiate disciplinary proceeding were intended to victimise an officer and deny him of retirement benefit.

50.It is evident that as an accountant, the petitioner is not solely responsible for taking decisions to make payments. The payments have to be authorised by his higher-ups and the concerned officers who had indeed authorised to make payment in his absence. Therefore, the petitioner in his capacity as an accountant and as a junior officer of the respondent cannot be held responsible even if it is assumed the payment voucher was prepared by the Cashier on his instruction, when he was on casual leave on the said date. Under these circumstances I am of the view that the finding of the enquiry officer in his report dated 28.2.2007 finding the petitionr guilty is not sustainable.

51.Further, the respondent ought not to have accepted the enquiry officer's conclusion without discussion. The respondent has merely stated that after perusing the reply and submissions made by the petitioner, he is still of the view that the charge was proved against the petitioner which are of serious nature and that respondent was justified in awarding major punishment under the service rules of the Corporation. Even if the respondent was of the view that the petitioner was guilty of the charge, the respondent ought to have given his reasoning in the order. The order of the respondent is also very cryptic. It merely states that the enquiry officer has given his finding and the charge No. 6 against the petitioner has been proved.

52.In the impugned order, the respondent has merely stated that however taking a lenient view that petitioner was nearing retirement imposed a punishment of stoppage of an annual increment cumulative effect under clause 4.3. (3) of the Service Rules of the Corporation for a period of months false due on 1.10.2007.

53.As there is no discussion in the impugned order as to why the finding of the enquiry officer as far as charge No. 6 was held sustainable after a lapse of 12-1/2 yers of the alleged miconduct and without giving an opportunity to let in evidence on the payment voucher. I am of the view that the impugned order has been passed mechanically by the respondent as a disciplinary officer.

54.Accordingly, with the above observtion, the impugned order is quashed and the writ petition is allowed with consequential relief to the petitioner. Respondent shall also pay the amount withheld together with interest from the dte of withholding till the date of payment, within a period of 8 weeks. No costs.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

Arul

Poompuhar Shipping Corporation Ltd.,
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W.P.No.37592 of 2008

ASK(14/12/2018)