

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.01.2018

CORAM:

THE HONOURABLE MR. JUSTICE SATRUGHANA PUJAHARI

W.P.No.19178 of 2014

and

MP.No.1 of 2014

S.Kennady

..Petitioner

Versus

1.The Superintendent of Police,
Kancheepuram District.

2.The Inspector of Police,
Melmaruvathur Police Station,
Kancheepuram District.

..Respondents

Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus calling for the records relating to the order passed by the first respondent in Tha.Pa.No.08/2014 dated 13.06.2014 dated 13.06.2014, quash the same and consequently issue direction directing the first respondent herein to reinstate the petitioner herein in his service as Head Constable with all monetary and attendance benefits.

For Petitioner : Mr. G.Magesh Kumar

For Respondents: Mrs.R.Janaki,
Additional Government Pleader for R1 & R2

ORDER

In this writ petition, the petitioner in this writ petition has challenged the finding of guilty as well as the punishment imposed on him in a disciplinary proceedings, to be illegal and arbitrary, inasmuch as according to him, his absence from service was neither intentional nor unauthorized as he had informed the Sub-Inspector of Police attached to the respondent no.2 that for health reasons, he is proceeding on leave on 23.12.2013 and thereafter due to Cardiology problem and advice of the treating physician, he had remained absent for 20 days and on his joining, he had furnished application on 13.01.2014 to the respondent no.2, which was not forwarded and he was declared as a Deserter. Consequently, disciplinary proceeding was initiated against him. So also, according to him, the

disciplinary proceeding was conducted in violation of the principles of natural justice, inasmuch as no show-cause notice was issued to him to submit his explanation/objection. Therefore, he prayed in this writ petition to quash the impugned order passed by the Disciplinary Authority and to issue writ of mandamus to reinstate him.

2. Controverting the aforesaid submission, the respondent no.1 has filed the counter affidavit indicating therein that since the petitioner remained on unauthorized absence from 23.12.2013, inasmuch as there was neither any leave nor any permission for the same which is for over 21 days, he was considered as Deserter and under Rule 3(b) of Tamil Nadu Special Police Subordinate Service Rules in PR.No.08/2014, charges were framed against him. An Enquiry Officer was also appointed. The petitioner was given due opportunity to defend him in the said enquiry and on conclusion of the enquiry, the Enquiry Officer has found him guilty of charge of misconduct. The petitioner was imposed with the punishment after giving him the due opportunity to show-cause against such finding of the Enquiry Officer. Therefore, the unauthorized absence of the petitioner being intentional and also there being no violation of the principle of natural justice, in conducting the disciplinary proceedings the writ petition is devoid of merit. It is also contended that since, the statutory appeal provision is available against the impugned order, but the writ petitioner without availing of the same, he has filed this writ petition the same should not be entertained and should be dismissed.

3. It is contended by the learned counsel appearing for the writ petitioner that there was violation of the principle of natural justice, inasmuch as the petitioner was never given due opportunity to defend him in the case and also the authority without taking into consideration the compelling reasons for which the petitioner remained absent from duty, has recorded the finding of guilt of unauthorized absence, hence the same cannot be sustained, more so, for the reason that the petitioner's absence is not intentional but for his self-illness, i.e., Cardiology problem. Otherwise also, punishment imposed appears to be certainly disproportionate and, as such, the same is liable to be quashed and the same may be modified with any other lesser punishment, particularly considering the mitigating circumstances, i.e., the family of the petitioner is dependent on him. In support of his submission, he has relied upon the decisions of the Hon'ble Apex Court in the case of Krushnakant B. Parmar vrs. Union of India and another, reported in 2012 (3) SCC 178 and in the case of Shri Bhagwan Lal Arya vrs. Commissioner of Police, Delhi and others, reported in 2004 (4) SCC 560.

4. Furthermore, it is also submitted by the learned counsel appearing for the writ petitioner that so far as the maintainability of the writ petition in view of the alternative remedy is concerned, no doubt, an alternative remedy is available to the petitioner and the petitioner has also filed an appeal against the same but as there is delay in disposal of the appeal, there is no impediment on the part of this Court to exercise its plenary jurisdiction under Article 226 of the Constitution of India, more so when the disciplinary proceeding was conducted in violation of the principle of natural justice.

5. In response, the learned counsel appearing for the respondent no.1 submits that there is no reproach that existence of an alternative remedy is not a bar to entertain the writ petition, but the settled position of law is that when such remedy is speedy and efficacious, the Court should be loathe in exercising the writ jurisdiction, more so when the writ petitioner has already approached the statutory authority by filing an appeal against the impugned order. Otherwise also, the writ petitioner is not entitled to any relief, inasmuch as absolutely there is no violation of principle of natural justice in conducting the disciplinary proceeding as the writ petitioner was given ample opportunity to defend his case in every stage of the disciplinary proceeding and the punishment cannot be said to be disproportionate, for the reason that the petitioner, was working in a discipline force, and as such could not have remained absent without intimating the authority. The punishment appears to be commensurate one as such he does not deserve to remain in such a post, therefore, the writ petition is liable to be dismissed, submits the learned counsel for the respondents.

6. To appreciate the contention of the learned counsel for the parties with regard to maintainability of the writ petition when alternative primary remedy is statutorily available to the writ petitioner, it would be apposite to have a look in the ratio a decision of the Apex Court in the case of Thansingh Nathmal vs. Superintendent of Taxes, reported in AIR 1964 SC 1419. The apex Court in the aforesaid case in Paragraph no.7 have held as follows:

"The jurisdiction of the High Court under Article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restriction... But the exercise of the jurisdiction is discretionary; it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain well imposed limitations. Resort to that jurisdiction is not intended as an alternative remedy of relief which may be obtained in a suit or other mode prescribed by the

statute. Ordinarily, the Court will not entertain a petition for a writ under Article 226 where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy... The High Court does not therefore act as a Court of appeal against the decision of a Court or Tribunal to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by a statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal or even itself in another jurisdiction for obtaining redress in the matter provided by a Statute, the High Court normally will not permit by entertaining under Article 226 of the Constitution the machinery created by the Statute to be bypassed and leave the party applying to it to seek resort to that machinery so set up"

7. However, certain exception to the aforesaid has also been well recognised in the case of Baburam V. Zila Parishad, reported in AIR 1969 SC 556. The Hon'ble Supreme Court stated by referring to its earlier decisions that there were at least two well recognised exceptions to the doctrine of exhaustion of statutory remedies. In the first place, it is well settled that where proceedings are taken before Tribunal under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent, without a party being obliged to wait until those proceedings run their full course, as held in Carl Still V. State of Bihar, AIR 1961 SC 1615 and Bengal Immunity V. State of Bihar, AIR 1965 SC 661. In the second place, in the case of Bengal Immunity Vs. State of Bihar reported in AIR 1965 SC 661, the doctrine has no application where the impugned order has been made in violation of the principles of natural justice vide State of U.P. V. Mohd. Nooh reported in AIR 1958 SC 86.

8. So also in the case of Himmatlal V. State of M.P., reported in AIR 1954 SC 403, it is held that in the case of allegation of infringement of fundamental rights, the bar of alternative remedy does not apply. Furthermore, in the case of A.V.Venkatswaran V. R.S.Wadhwasmi reported in AIR 1961 SC 1506, it was stated that "complete lack of jurisdiction in any officer or authority to take the impugned action would be a good ground not to insist on the exhaustion of statutory remedies. It was further pointed out that this exception along with the one where an order is passed in violation of the principles of natural justice cannot be regarded as exhaustive of the exceptions, and even beyond them a discretion vests with the High Court to entertain a petition notwithstanding the existence of an

alternative remedy. It was observed that the application of the general principles to the facts of each case must necessarily be dependant on a variety of individual factors which must govern proper exercise of the discretion of the Court and that in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before Court''.

9. In view of the aforesaid, even though the availability of the statutory remedy is no bar to entertain this writ petition, on considering the fact that the statutory remedy available is speedy and efficacious and also the appellate authority is in seisin over the matter, this Court is of the view that it would be inappropriate to exercise the writ jurisdiction under Article 226 of the Constitution of India in this case filed challenging the disciplinary proceedings and the punishment imposed.

10. Hence, this writ petition stands disposed of with a direction to the appellate authority to conclude the appeal challenging the impugned order within a period of two months from the date of production / receipt of the copy of this order by taking note of the contentions, ground taken by the writ petitioner and also the mitigating circumstances as well as the writ petitioner's contention that the unauthorized absence was not intentional, but for compelling reasons. No costs.

Sd/-

Assistant Registrar(CCC)

//True copy//

Sub Assistant Registrar

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To

1.The Superintendent of Police,
Kancheepuram District.

2.The Inspector of Police,
Melmaruvathur Police Station,
Kancheepuram District.

+1cc to Government Pleader SR.No.12485

W.P.No.19178 of 2014

AK(CO)
GN(06/04/2018)