

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 08.03.2019

CORAM

THE HONOURABLE MR. JUSTICE V.PARTHIBAN

W.P. NO. 17563 OF 2011

AND

M.P. NO. 2 OF 2011

A.Muthukumarasamy

.. Petitioner

- Vs -

1. The Managing Director
Tamil Nadu Tourism Development
Corporation Ltd.
Chennai - 2.

2. The General Manager
Tamil Nadu Tourism Development
Corporation Ltd.
Chennai - 2.

.. Respondents

Writ Petition filed under Article 226 of the Constitution of India praying this Court to issue a writ of certiorarified mandamus to call for the records of the 2nd respondent in connection with the impugned order passed by him in Proc. No.4756/A1/06 dated 25.08.2010 and quash the same and direct the respondents to pass orders on the enquiry officer's report dated 15.12.2009.

For Petitioner : Mr. K.Venkataramani, SC, for
M/s. M.Muthappan

For Respondents: Mr. L.N.Praghasam

ORDER

The petitioner, aggrieved by the impugned proceedings of the 1st respondent in ordering fresh enquiry, is before this Court by filing the present petition.

2. The petitioner was originally appointed as Assistant Engineer in the respondent/Corporation. He was promoted to the post of Assistant Executive Engineer during the year 1987. On attaining the age of superannuation, the petitioner retired from service on 31.1.2010. The petitioner was allowed to retire on 31.1.10 without prejudice to the pending disciplinary proceedings initiated against him by the orders of the 2nd respondent.

3. The petitioner was issued with a charge memorandum dated 29.9.08 framing two articles of charges, which are extracted hereunder :-

"Charge No.1

That Thiru A.Muthukumarasamy, Asst. Executive Engineer (Electrical) who is the only person having the Technical knowledge among the Committee members colluded with the Committee members of Thiru. Dinakarkumar, Asst. Chief Manager (Hotels) Retd., Thiru S.Uppiliappan, Deputy Chief Manager (Retd.), Thiru G.Renganathan, Manager (Purchase) Retd., and recommended for the purchase of three Dish Antenna for Rs.12,96,315 from M/s.Super duper without verifying the rates of the dish antenna with other companies for genuine of rates which is misconduct as per Service Rules, 1988 under clause 5.1.2 (k).

Charge No.2

That Thiru A.Muthukumarasamy, Asst. Executive Engineer (Electrical) colluded with the Committee members and also colluded with the higher official Thiru V.Gunalan, I.A.S. (Retd.), Managing Director, Thiru D.C.Madhusudhanan, General Manager (Retd.) for placing order with M/s.Super Duper for the supply of 3 Dish Antenna for Rs.12,96,315 and caused loss of Rs.6,85,894/- as stated in the statement of imputation of charge which is misconduct as per the S.R. under clause 5.1.2 (c)."

4. In response to the charge memo, the petitioner submitted a detailed explanation on 13.1.09 denying the charges. According to the petitioner, the basis of the charge memo was in relation to the purchase of dish antennae during the year 1994-1995 for which a charge memo was issued only in 2008. Moreover, according to the petitioner, he was only a technical member of the committee, as the committee consisted of the Managing Director, General manager, Assistant Chief Manager, Chief Manager and Manager (Purchase). Except the petitioner, all the other members of the Committee were allowed to retire on their attaining the age of superannuation without initiating any disciplinary proceedings against them. However, in respect of the petitioner alone, disciplinary proceeding was initiated. Subsequent to the charge memo, the petitioner had given a detailed explanation. However, not being satisfied with the explanation, the 2nd respondent ordered enquiry into the charges. In the enquiry, no witness was examined on behalf of the respondents, but only documents were marked. On conclusion of the enquiry, a

report was submitted by the enquiry officer on 24.12.09 holding the first charge as partly proved, in that the petitioner failed to observe due diligence while discharging his duties and responsibilities as Asst. Executive Engineer (Electrical). As regards the second charge, the same was held not proved. Thereafter, the petitioner has represented to the 2nd respondent requesting to overrule the findings in respect of the first charge and also requesting for his retirement, which was due on 31.1.10. Eventually, vide proceedings dated 30.1.10, the 2nd respondent issued proceedings permitting the petitioner to retire from service on 31.1.10 without prejudice to the disciplinary proceeding pending against him.

5. While the matter stood thus, to the shock and dismay of the petitioner, the 1st respondent has, by his proceedings dated 25.8.10, has ordered fresh enquiry into the charges on the ground that the enquiry was not conducted as per the procedure contemplated in terms of the DVAC manual. The said proceedings of the 1st respondent is put to challenge in the present writ petition.

6. Mr.Venkataramani, learned senior counsel appearing for the petitioner submits that the impugned proceedings by which the 1st respondent has ordered re-enquiry is impermissible in law as the same is not envisaged in any service rules, including the disciplinary rules governing the subject matter. Learned senior counsel submitted that once an enquiry has been concluded and the report filed, unless the same is found to be completely defective, the disciplinary authority has no power to order re-enquiry just because member of the investigation team was not present at the enquiry. Once the enquiry was conducted in consonance with the rules, it is not open to the disciplinary authority to order fresh enquiry only on the ground that the report was not satisfactory to him. Such a course adopted by the disciplinary authority is opposed to all canons of justice and cannot be countenanced either in law or on facts.

7. Learned senior counsel for the petitioner further submits that in case the disciplinary authority has a different view from the view taken by the enquiry officer, it is always open to the disciplinary authority to disagree with the findings and the disciplinary authority could proceed further against the petitioner by seeking his explanation on his disagreement. However, having failed to adopt such a course of action, it is certainly not open to the disciplinary authority to order fresh enquiry on the ground that the procedure contemplated under the DVAC manual was not followed. Nowhere it is stated or insisted that the investigating officer must be present during the conduct of departmental enquiry and such requirement cannot

be insisted upon with the departmental enquiry has been done in terms of the disciplinary rules, otherwise.

8. Learned senior counsel for the petitioner further submits that the charge memo itself was issued after a period of 14 years for which there was no explanation and on that ground alone, the disciplinary action ought to have been interfered with. Learned senior counsel further emphasised the fact that all other members of the Committee, which finalised the purchase, which was the subject matter of charge memo against the petitioner, were allowed to retire peacefully without any disciplinary action initiated against them. Therefore, the action initiated against the petitioner amounts to selective discrimination and, therefore, the same is hit by Article 14 of the Constitution of India. On the whole, the procedure adopted by the disciplinary authority is alien to service jurisprudence and, hence, the impugned proceedings of the 1st respondent has to be set aside as being not maintainable in law.

9. A detailed counter affidavit has been filed on behalf of the respondents. Mr. Pragasam, learned standing counsel appearing for the respondents submits that it is always within the power of the disciplinary authority to order fresh enquiry if the procedure was not followed by the enquiry officer. In this case, the disciplinary authority felt that the procedure was not followed by the enquiry officer and, therefore, the 1st respondent ordered fresh enquiry and not re-enquiry. A detailed counter has been filed resisting the relief sought for by the petitioner in this writ petitioner. The sum and substance of the resistance put up by the respondents is found in paras 13 to 15 of the counter, which are extracted hereunder for reference :-

"13. The averments raised in ground of the writ petition are denied as the act of this respondent is not contrary to any Rules. The averment raised in Ground-B is denied because the order dated : 25.8.2010 issued by 2nd respondent is very much maintainable in law and on facts. The averments contained in Ground-C are denied. It is an admitted fact that the enquiry was conducted but it was not completed. The petitioner's explanation was called for and the same was received by the management. At the final stage before concluding the enquiry processes it was brought to the knowledge of the Management that the Investigation Officer was not present at the time of enquiry which is against the procedure laid down by the Corporation. Hence, it was

decided by the Management to conduct a fresh enquiry. Hence, there is no misuse of processes of law as stated by the petitioner.

14. The averments contained in Ground-D are denied. The petitioner has failed to understand the difference between conduct of an enquiry and completion of enquiry. In the case of the petitioner, the enquiry was conducted but not completed. In the final stage of enquiry, the Management came to know that the enquiry was conducted without the presence of officials from Directorate of Vigilance and anti-Corruption and hence it was decided to conduct a re-enquiry in the presence of the officer. Having failed to understand the difference between a re-enquiry and 2nd enquiry, the petitioner has filed his writ petition which is liable to be dismissed.

15. The averments contained in Ground-E are strongly denied. The petitioner has no authority to question the procedure followed by the respondent as required in Para 109 of DVAC Manual in conducting the re-enquiry. The petitioner himself in the beginning of Ground-E has accepted that the Enquiry Officer has taken two different stand. Hence, it was decided by the Management to conduct a re-enquiry. The procedure followed by the respondent Corporation contemplates that the presence of DVAC official is a must at the time of enquiry. The earlier proceedings of the 1st enquiry was not cancelled, it was only reconsidered. The petitioner has failed to appreciate this in a proper aspect and has filed this petition which is liable to be dismissed."

10. Learned counsel for the respondents therefore submits that the petitioner cannot have a legitimate cause for complaint against the disciplinary authority's order for ordering fresh enquiry and it is always open to the petitioner to prove his innocence in the fresh enquiry and it is certainly not open to him to stall the enquiry proceedings at this stage by approaching this Court.

11. As regards the other submissions made on behalf of the petitioner about the retirement of other members of the Committee, there appears to be no acceptable answer in the counter affidavit. Even in regard to the delay in issuing the charge memo, there appears to be no reply except contesting it on the ground that the petitioner had not

questioned the charge memo when the same was issued in the year 2008.

12. Heard the learned senior counsel appearing for the petitioner and the learned standing counsel appearing for the respondents and perused the materials and the pleadings placed on record.

13. As regards the maintainability of the charges is concerned, no doubt, the petitioner has not chosen to challenge the charge memo as such when the same was issued on 29.9.08. However, the huge delay of over 14 years in issuing the charge memo is certainly a factor to be considered by this Court when the disciplinary action initiated against the petitioner is put to challenge before this Court. Just because the petitioner has not chosen to challenge the charge memo in 2008, that does not preclude him from raising the ground of delay when the disciplinary action is put to judicial review of this Court and the correctness of the action is being questioned in the present petition.

14. Except stating that the petitioner has not contested the maintainability of the charge memo on the ground of delay, there was no explanation forthcoming from the respondents for the undue delay in issuing the charge memo against the petitioner. The incident is said to have happened during 1994-1995 and the charge memo was issued only on 29.9.08 and the delay is not short and simple for this Court to take judicial notice of normal administrative delay, but the delay is very long and no explanation was forthcoming.

15. The Courts have repeatedly held that long and unexplained delay itself may constitute prejudice to the employee concerned in either initiating disciplinary action or protracting the disciplinary action. In this case, the delay in issuing the charge memo in 2008 has caused extreme prejudice to the right of the petitioner as it would have been very difficult for the petitioner to recall as to what transpired when the purchase was made in the year 1994-1995 by the committee, wherein the petitioner was only a technical member.

16. Further, the delay as such is fatal to the prosecution for the simple reason that only the petitioner has been chosen to be charge sheeted when the other members of the committee were admittedly allowed to retire peacefully without any disciplinary action taken against them. Therefore, per se, the action initiated by the respondent against the petitioner is blatantly discriminatory, unreasonable, arbitrary and unjust and the

same is liable to be interfered with on that ground alone.

17. Further, the hierarchy of members of the committee, which was involved in the subject purchase, the petitioner's role, prima facie, happens to be of technical assistance and, therefore, his role in the entire transaction could not be over magnified in order to implicate him for any lapse by the committee during the relevant time. Further, the articles of charges clearly reveal that the charges pertain to financial irregularity and the petitioner being a technical person, cannot alone be fastened with the liability. In any event, the delay and the selective approach of the respondents are two important factors which cannot be ignored to uphold the impugned action against the petitioner. Therefore, on these grounds as well, this Court is of the considered view that the disciplinary action is liable to go lock, stock and barrel.

18. Even otherwise, when the enquiry officer has submitted his report holding charge No.1 as partially proved and holding charge No.2 as not proved, it is certainly not open to the disciplinary authority to order fresh enquiry just because the conclusion by the enquiry officer is not to his satisfaction. As rightly contended by the learned senior counsel for the petitioner, it was always open to the disciplinary authority to record his disagreement and proceed against the petitioner as he deemed fit, but it is not for the disciplinary authority to order fresh enquiry in order to fill in any lacunae in the matter of findings rendered by the enquiry officer. Such a course adopted by the disciplinary authority is completely alien to the established procedures contemplated under the service rules. In fact, the Courts have consistently held that such fresh enquiry cannot be ordered till the findings are rendered to the satisfaction of the disciplinary authority concerned. सत्यमेव जयते

19. The reason stated by the respondents that the investigation officer was not present in the enquiry and, therefore, the same was in violation of the procedure contemplated under the DVAC manual is without any justification, since it was not the fault of the petitioner that the enquiry officer proceeded with the enquiry without the presence of the investigation officer. In any event, even assuming that the investigation officer was to be present during the course of the enquiry, it was only a procedural infraction, which could not have affected the enquiry proceedings, which was otherwise in order in terms of the service rules. In this case, it appears that the enquiry officer has conducted the enquiry in terms of the established procedure except the absence of the investigation officer. May be, there was a procedural

infraction, but the same cannot be the basis for ordering fresh enquiry, which is absolutely prejudicial to the right of the petitioner, who had retired as early as on 31.1.10.

20. Further, from the records, it appears that number of enquiry officers were appointed repeatedly in order to conduct fresh enquiry, but nothing has progressed ever since 2011. That being the case, this Court is unable to countenance a situation relating to the enquiry proceedings proceeding further against the petitioner after 19 years of his retirement. Such contingency is unacceptable under any legal parameters and it would amount to negation of the constitutional right to speedy conclusion of disciplinary proceedings. On the whole, this Court is of the view that the disciplinary proceedings are required to lapse for the reasons that there was huge delay of nearly 14 years in issuing the charge memo and the delay remains unexplained. Further, the main members of the committee were not proceeded against and allowed to retire peacefully without any disciplinary action initiated against them. The impugned action by the 1st respondent in ordering fresh enquiry cannot be countenanced in law as such course adopted by the 1st respondent is alien to the procedure established in the conduct of departmental enquiry against government servants. This is more so when the enquiry conducted by the enquiry officer has been done on the basis of the established procedure. Even otherwise, it was always open to the disciplinary authority to record his disagreement and proceed against the petitioner as he deemed fit, but the disciplinary authority cannot order fresh enquiry on the ground that the finding was not to his satisfaction. The impugned action as proceeded by the 1st respondent against the petitioner is violative of Article 14 of the Constitution of India for the reasons aforesaid. Therefore, this Court is of the considered view that the impugned order is liable to be interfered with.

21. For the reasons aforesaid, this Court is not hesitant to allow the writ petition. Accordingly, the writ petition is allowed and the impugned order dated 25.8.2010, passed by the 1st respondent in Proc. No.4756/A1/06 is set aside. The petitioner is entitled to all the benefits as admissible to him consequent upon the disciplinary action being set aside by this Court. Consequently, connected miscellaneous petition is closed. However, in the circumstances of the case, there shall be no order as to costs.

Sd/-

Assistant Registrar (CS)

//True Copy//

Sub Assistant Registrar

GLN

To

1. The Managing Director
Tamil Nadu Tourism Development
Corporation Ltd.
Chennai - 2.

2. The General Manager
Tamil Nadu Tourism Development
Corporation Ltd.
Chennai - 2.

+1cc to Mr.M.Muthappan, Advocate SR.No. 22333

+1cc to Mr.L.N.Praghasam , Advocate SR.No. 22002

W.P. NO.17563 OF 2011

A.SK(24/04/2019)



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