

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.02.2020

C O R A M

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

W.P.No.11404 of 2012
and
MP.No.1 of 2012

C.Balaji Babu ... Petitioner

Vs.

1.The Commissioner,
Chennai Corporation,
Chennai - 600 003.

2.The Secretary to Government,
Municipal Administration and
Water Supply Department,
Secretariat, Fort.St.George,
Chennai - 600 009. ... Respondents

Prayer: Writ petition filed under Article 226 of Constitution of India praying to issue a writ of certiorari calling for the records relating to the impugned order of the 1st respondent issued in MC(3)20 Na.Ka.No.R1/1536/07 dated Nil. (Signed on 18.06.2009) and the consequential order passed by the 2nd respondent in G.O(D).No.500 MAWS (MC3) Department dated 02.12.2011 and quash the same.

For Petitioner : Mr.T.Ranganathan

For Respondents

R1 : Mr.R.Gopinath

Senior Counsel

R2 : Mr.P.Chinnadurai

O R D E R

The petitioner was appointed as Office Assistant under the respondents on 23.03.1989 and promoted as typist in the year 1991, subsequently as Assistant in the year 1997. While, he was serving as Assistant, he was issued with the charge memo dated 23.07.2007. An Advocate was appointed as Enquiry Officer and on enquiry, the charges 2 and 5 were held proved. On the basis of the proven charges, the disciplinary authority imposed the punishment of removal of service and the same was confirmed by the Appellate authority also. Aggrieved

over the same, the petitioner is before this Court.

2. The learned counsel appearing for the petitioner would contend that at the outset appointment of an Advocate, who is the 3rd party, as an Enquiry Officer by itself is illegal. Secondly, the charge memo was issued against three other persons for the same misconduct, whereas those three persons were let off with stoppage of increment for three years without cumulative effect and the petitioner alone was imposed punishment for removal of service and the selective discrimination vitiates the order. Thirdly, the enquiry was conducted and violation of principle of natural justice that the witnesses were enquired in the absence of the delinquent. Therefore, the impugned order is liable to be set aside.

3. Per contra, the learned counsel appearing for the respondent would vehemently contend that the misconduct came to light by the internal audit report and the vigilance report dated 16.05.2007. The allegation was made only against the petitioner and therefore, enquiry proceedings were initiated against him. Appointment of independent Enquiry Officer is in conformity of principle of natural justice and the petitioner cannot have any grievance against the appointment of independent Enquiry Officer. Since the order has been passed in conformity of principle of natural justice on the basis of documentary evidence, the punishment need not be interfered and seeks dismissal of the petition.

4. Heard both sides.

5. Admitted facts are that a charge memo was issued for misappropriation of amounts with regard to booking of Kalyana Mandabam by three persons. The money was also quantified by the respondents to be recovered from individuals. Surprisingly, the predecessor of the petitioner who was also alleged to have been involved in the practice of booking Kalyana Mandabam belonging to the corporation by receiving temporary advance and used to refund the money, whenever it is cancelled. The said predecessor in office of the petitioner by name Yesuraj, Selection Grade Assistant was left out of the disciplinary proceedings, but, surprisingly was appointed as the presenting officer on the side of the prosecution. When a specific ground raised by the petitioner, the respondents even in the counter affidavit have not come out with a clear answer as to what were the dealings of the said presenting officer during his tenure. The materials produced before the Court reveals that the said Yesuraj was abruptly relieved and transferred to some other department. The post held by the said Yesuraj was handed over to the petitioner as additional charge. In such circumstances, it is incumbent on the respondents to clarify as to how the said persons, who were connected to the booking activities with the same modus operandi were let off the hook.

6. Be that as it may, it has to be seen as to whether the appointment of an Advocate as an Enquiry Officer is sustainable.

7. According to the petitioner as per Rule 9 of the Madras City Municipal Corporation and bye laws specify the procedure of imposing penalty. As per Clause (2) of the Rule, if a delinquent desires oral enquiry, it shall be held and the delinquent shall be given an opportunity to cross-examine. As per Clause 3 of the Rule, before imposing penalty, a personal hearing should be given against the provisional conclusion reached by the disciplinary authority. This Rules does not contemplate any power to appoint an independent Enquiry Officer by the disciplinary authority. In the instant case, the disciplinary authority appointed an advocate as an independent Enquiry Officer. Jharkhand High Court in the case of Kailash Vihari Vs. Birla Institute of Technology reported in 2002 (93) FLR 452 following the judgment of Patna High Court in Bidyapati Prasad Singh V. State of Bihar reported in 1996 (1) PLJR 435 has held that appointment of the outsider without any power under Rules and Regulation is not sustainable. The Hon'ble Mr. Justice S. Mukhopadhyaya, a former Judge of this Court who has observed as under:-

"20. In the present case, one Mr. Satish Bakshi, Advocate, a legally trained person and an outsider has been appointed as an Enquiry Officer in the departmental proceeding though there is no such power vested to any of the authority under the rules / regulations. It will render the petitioner handicapped to defend himself of his own. For the said reason, the letter dated 8th October, 1990 by which an Advocate has been appointed as an Enquiry Officer cannot be upheld, the said letter dated 8th October, 1999 is accordingly, set aside."

Therefore, the contention of the petitioner that the appointment of outsider, who is also an advocate, as an Enquiry Officer is bad in sustainable. In the absence of any power conferred on the disciplinary authority it has to be held not sustainable. The petitioner shall not be deprived of a fair opportunity on technicalities, more so, at the risk of facing a legally trained person.

8. The second contention of the petitioner is selective discrimination. Materials placed before the Court reveal that M. Shankar, M. Gopal and the petitioner were issued with a charge memo for the same misconduct. In the cases of other two employees, they were originally imposed with a punishment of removal from service. On appeal it was reduced to one of stoppage of increment for three years without cumulative effect.

9. The respondent in their counter would aver as under:-

"17. I Submit that the name of Th.Yesuraj was not mentioned in the list who have misappropriated the public money. The Tax Collectors Th.M.Gopal & Th.A.Sankar mentioned by the petitioner were also dismissed from service on appeal preferred by them their punishments were reduced by the Appellate Authority since they have remitted the misappropriated amount into Corporation accounts."

10. It is stated that the name of Yesuraj was not mentioned in the list of persons misappropriated the money and that the other two individuals have remitted the misappropriate amount to the Corporation and therefore, minor punishment was imposed.

11. It was submitted before this Court that even though, the petitioner has not misappropriated any amount, he has remitted the amount as demanded by the respondents. Be that as it may, it is clear that for the same set of offence, two types of punishments were imposed. When one particular misconduct is alleged against a group of individuals, there shall be a common enquiry and if found proved equal punishment shall be imposed. There cannot be different punishments for the same misconduct, if so it will amount to selective discrimination. The reason here stated is those, persons who remitted back the money to the Corporation were given lesser punishment. There is no answer to the contention raised by the petitioner that he had also remitted the money demanded by the respondents and as such similarly placed. Hence, it is clear that the disciplinary authority imposed different types of punishment for the same conduct discriminating the petitioner.

12. This Court in the judgment of N.Nandagopal Vs. Secretary to Government, Personnel and Administration Reforms (Q) Department, Chennai - 9 reported in 2006 (3) MLJ 191 held as under:-

"9. It is well settled in law that if employees are involved in the same incident, the Department should proceed against all or should not proceed against none. There is no discretion to proceed against some of employees and no action against the other employees, since they are identically placed and their involvement being identical. In the instruction submitted by the Government Advocate, it is not stated as to how the petitioner's involvement is not similar to other 28 persons. In the absence of such distinct feature, the proceedings conducted by the respondent against the petitioner and imposing punishment on the basis of the charge is illegal and hence the impugned order is set aside."

13. Therefore, in the light of the above judgment, imposing different punishments to the employees involved in the same misconduct amounts to selective discrimination. Such

an order is liable to be set aside. The impugned order is one such example for selective discrimination.

14. Thirdly, it is submitted that the witnesses were examined by the Enquiry Officer in the absence of the delinquent. Even though a ground has been raised on this aspect, there is no specific denial to the factual allegation of improper and irregular conduct of enquiry by a legally trained person, in the counter affidavit other than saying that ample opportunity was given to the petitioner. Obviously, when a person connected with the said misconduct is appointed as Presenting Officer, it goes without saying, that he will try to hasten the conclusion of the enquiry, by passing fair procedure.

15. Further, the entire charge memo came to be filed only on the basis of the audit report and vigilance report. The basis for the allegations shall be the practice followed by the concerned officials over a period of time. If that be so, it is incumbent on the respondents to prove as to what is the procedure as laid down by the bye laws or rules to be followed. More so, what were the instructions or action taken against the officials for not following the procedure. When charge memo issued to the petitioner and two other persons, the reason for not indulging the predecessor of the petitioner shall also be recorded. In order to prove irregularity, temporary misappropriation, independent witnesses, who have booked and cancelled the Kalyana Mandapam shall be examined, but the details should have been furnished.

16. I do not find the independent witnesses who have paid the money to the petitioner were examined. In the absence of independent witnesses to substantiate the evidence, it can be held that the enquiry conducted was not in conformity with the principles of natural justice.

17. A perusal of the punishment order passed by the disciplinary authority reveals that it extracted the charges, explanation given by the petitioner, documents relied by the respondents, findings of the Enquiry Officer and without recording reasons abruptly imposed the punishment of removal from service. The disciplinary authority has failed to apply his mind to the objection submitted by the delinquent against the Enquiry Officer's report. None of the grounds raised by him was discussed. Without discussing and without assigning any reason, the disciplinary authority abruptly arrived at a conclusion, and passed a cryptic order of punishment. Not only the disciplinary authority, the authorities who have dealt with appeal and revision also mechanically rejected the same by way of cryptic orders. It is well settled that passing any order without assigning reasons is violative of principles of natural justice. In the instant case also the punishment had been imposed without assigning any reasons by a non-speaking order. On the face of it, the impugned order is liable to be

set aside.

18. It is seen from the materials that similarly placed persons who were charged along with the petitioner for the same misconduct were imposed with a punishment of stoppage of increment for three years without cumulative effect. Considering the fact that punishment in respect of those similarly placed persons have become final, it is equitable, in the interest of justice to impose the same punishment to the petitioner also. Accordingly, this Court is also inclined to modify the punishment of removal from service to one of withholding of increment without cumulative effect for three years. The impugned order is set aside to the extent indicated above and modified imposing lesser punishment.

Accordingly, the writ petition is partly allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar (CS-I)

//True copy//

Sub Assistant Registrar

bri

To

- 1.The Commissioner,
Chennai Corporation,
Chennai - 600 003.
 - 2.The Secretary to Government,
Municipal Administration and
Water Supply Department,
Secretariat, Fort.St.George,
Chennai - 600 009.
- +1cc to Mr.T.Ranganathan, Advocate SR.No.15962
+1cc to Mr.R.Gopinath, Advocate SR.No.15545
+1cc to Government Pleader SR.No.15962

W.P.No.11404 of 2012
and
MP.No.1 of 2012

VSN II (CO)
GMY (03/08/2020)