

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 12.08.2020

CORAM

THE HONOURABLE MR. JUSTICE M.DHANDAPANI

W.P. NO. 8374 OF 2013

M.Rajarathinam

.. Petitioner

- Vs -

1. The Secretary to Government
Municipal Administration & Water
Supply Department
Secretariat, Chennai-9.
2. The Commissioner of Municipal
Administration
Ezhilagam Annexe Building
VI floor, Chepauk, Chennai-5. ... Respondents

Prayer: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 relating to the impugned order of the First Respondent in G.O.(1D) No.591 Municipal Administration & Water Supply Department dated 04.12.2007 and quash the same and direct the Respondents to refund the amount deducted from the Petitioner's pension and grant him all consequential benefits.

For Petitioner : Mr. P.Manojkumar

For Respondents: Mr. A.N.Thambidurai, Spl. G.P

ORDER

It is the case of the petitioner that he was working as a Revenue Inspector in Kumbakonam Municipality. Whileso, he was visited with a charge memo issued by the Commissioner of Municipal Administration, Chepauk, Chennai/the second respondent herein, dated 15.11.2000, under Rule 8(2) of the Tamil Nadu Municipal Services (Discipline and Appeal) Rules 1970 (hereinafter called as 'the Rules') to which the petitioner submitted his explanations on 5.1.2001, denying all the charges . The respondent had relied upon the documents enclosed

as Form 2-A, 2-B and 2-C to substantiate the charges against the petitioner and in the said Forms, the names of the persons who have been delinquent in making the tax assessment had been mentioned. However in that Form the petitioner's name does not find place. Later, the second respondent by proceedings dated 28.3.2002, permitted the petitioner to retire from service w.e.f. 31.3.2002, without prejudice to the pending disciplinary on his attaining the age of superannuation. Immediately after the retirement, the second respondent appointed enquiry officer on 30.9.2002 and the petitioner appeared before the enquiry officer and made his oral submissions and subsequently submitted documentary evidence. On conclusion of the enquiry, report was submitted holding the charges not proved. The retirement benefits were withheld on account of pendency of the above said disciplinary proceedings. Aggrieved by the same, the petitioner filed WP.No.6888 of 2006, praying for a direction to the respondents to pass final orders on the charge memo and this Court by its order dated 10.3.2006 disposed the said writ petition, directing the disciplinary authority/the respondent therein, to pass final orders on the charge memo within a period of six weeks from the date of receipt of copy of the order. In compliance of the said order, however, the Secretary to Government/1st respondent herein issued a showcause notice on 18.4.2007 seeking petitioner's explanations for proposed punishment of cut in pension of Rs.200/- per month for a period of one year. In the said notice, the 1st respondent has stated that though the enquiry officer has held the charges not proved, however, the 1st respondent, not being in agreement with the said finding, has issued the show cause notice dated 20.3.2006, seeking the petitioner's explanation. The petitioner submitted his explanation on 23.5.2007. The grievance of the petitioner is that neither the enquiry report nor the show cause notice dated 20.3.2006 were served on him and without furnishing the same, the punishment has been imposed on him, which is wholly unsustainable. Hence, the petitioner has filed the present petition challenging the impugned order.

2. Learned counsel appearing for the petitioner, while reiterating the contentions raised in the grounds submitted that the punishment imposed is wholly unsustainable as the enquiry report as also the show cause notice has not been served on him. The further submission of the learned counsel for the petitioner is that for the same set of charges, the respondent had dropped the charges in respect of the then Commissioner and imposing the punishment on the petitioner alone is wholly arbitrary and unreasonable and, accordingly, the said order deserves to be set aside.

3. Per contra, learned Special Government Pleader while reiterating the stand taken by the respondent in the counter affidavit filed in support of the petition, further contented that the punishment imposed on the petitioner is only recovery of the meager sum of Rs.200/- per month from his pension for a period of 12 months, which cannot be said to be shocking or disproportionate and, further the petitioner has filed the present position after a huge delay of more than six years and no reason has been given for the said delay. Therefore, this Court, shall not interfere with the punishment, more so, when the same is found to be just and reasonable.

4. This Court heard the submissions advanced by the learned counsel appearing on either side and also perused the materials available on record.

5. The facts in the present case are not in dispute. Charge memo was issued to the petitioner and after obtaining explanation, enquiry was initiated against the petitioner, which culminated in the enquiry officer submitting a report exonerating the petitioner. Thereafter, the 1st respondent, being not satisfied with the findings recorded by the enquiry officer, has issued a fresh show cause notice to the petitioner calling upon him to explain as to why punishment should not be imposed on him and after obtaining explanation of the petitioner, the above punishment has been imposed.

6. Though contentions and counter contentions, as detailed above were advanced on behalf of the parties to the lis, it is evident from the record the charge memo was issued to the petitioner by the 2nd respondent, who is the disciplinary authority. The enquiry officer has submitted his report exonerating the petitioner. Curiously, no orders were passed on the said report by the disciplinary authority. However, the petitioner was permitted to retire from service without prejudice to the disciplinary proceedings pending against him.

7. Since no orders were passed by the disciplinary authority, the petitioner filed W.P. No.6888 of 2006, seeking a direction to pass final orders on the disciplinary proceedings and this Court, by order dated 1.03.2006, directed the disciplinary authority, to pass final orders, whereinafter, the 1st respondent issued a show cause notice and on explanation being submitted by the petitioner, imposed the punishment on the petitioner.

8. It is not in dispute that the 2nd respondent is the disciplinary authority and the 1st respondent is the appellate

authority. The earlier direction by this Court was to the 2nd respondent to pass orders on the charges against the petitioner and it is even evident from the impugned order of the 1st respondent that no orders were passed by the 2nd respondent.

9. In the show cause notice issued by the 1st respondent, who is the appellate authority, the 1st respondent has categorically stated that on going through the materials placed before him, the 1st respondent is not inclined to accept the findings recorded by the enquiry officer and, in turn, differs from the said findings and, therefore, the show cause notice has been issued stating that on an independent analysis the case against the petitioner stands proved and, therefore, calling upon the petitioner as to why punishment of Rs.200/- from the pension for a period of one year should not be imposed.

10. The Hon'ble Supreme Court, in M/s. Siemens Ltd. - Vs - State of Maharashtra & Ors. (SLP (C) No.15691 of 2005 - Dated 1.12.2006), has held as under :-

"10. The said principle has been followed by this Court in V.C., Banaras Hindu University v. Shrikant [(2006) 11 SCC 42 : (2006) 6 Scale 66] , stating: (SCC p. 60, paras 48-49)

"48. The Vice-Chancellor appears to have made up his mind to impose the punishment of dismissal on the respondent herein. A post-decisional hearing given by the High Court was illusory in this case.

49. In K.I. Shephard v. Union of India [(1987) 4 SCC 431 : 1987 SCC (L&S) 438 : AIR 1988 SC 686] this Court held: (SCC p. 449, para 16)

'It is common experience that once a decision has been taken, there is a tendency to uphold it and a representation may not really yield any fruitful purpose.' "

(See also Shekhar Ghosh v. Union of India [(2007) 1 SCC 331 : (2006) 11 Scale 363] and Rajesh Kumar v. D.C.I.T. [(2007) 2 SCC 181 : (2006) 11 Scale 409])

11. A bare perusal of the order impugned before the High Court as also the statements made before us in the counter-affidavit filed by the respondents, we are satisfied that the statutory authority has already applied its mind and has formed an opinion as regards the liability or otherwise of the appellant. If in passing the order the respondent has already determined the

liability of the appellant and the only question which remains for its consideration is quantification thereof, the same does not remain in the realm of a show-cause notice. The writ petition, in our opinion, was maintainable.

11. From the above, it is clear that the 1st respondent, while issuing the show cause notice, had already made up his mind to impose punishment, but has further stated the likely punishment that is to be imposed on the petitioner and, in such circumstances, there exists no occasion/necessity for the petitioner to submit any explanation, as submission of any explanation would only be an empty formality, as punishment has already been decided in the said show cause notice itself. The above act of the 1st respondent in codifying the punishment in the show cause notice without hearing the petitioner is wholly unsustainable and goes against the ratio laid down by the Courts in a catena of decisions. On this ground, the punishment deserves to be set aside.

12. But aside from the above, even a much more glaring illegality has been committed in the case on hand by the respondents, which warrants interference at the hands of this Court. As already stated above, the 2nd respondent is the disciplinary authority, who has issued the charge memo and to whom the enquiry report was submitted. However, no action has been taken by the 2nd respondent on the same, which necessitated the petitioner to approach this Court and this Court directed the disciplinary authority to pass orders on the charges levelled against the petitioner. However, curiously, no order has been passed by the disciplinary authority even thereafter, which finds reference in the impugned order, wherein the 1st respondent has stated that the order of this Court was taken to the notice of the Government. This Court is at a loss to understand as to the reason for the matter being placed before the 1st respondent, as the 2nd respondent, being the disciplinary authority, who is vested with powers to pass orders and to whom direction was issued by this Court to pass orders in accordance with law. It is evident from the records that no order has been passed by the 2nd respondent, who is the disciplinary authority. However, the 1st respondent, who is the appellate authority has passed the impugned order.

13. The Hon'ble Supreme Court, in Surjit Ghosh - Vs - United Commercial Bank, (1995) 2 SCC 474, had occasion to consider an issue where the punishment has been imposed by the appellate authority instead of the disciplinary authority and in the said context, held as under :-

"5. Some grievances have been made by the appellant in the present appeal touching upon the illegalities in the conduct of the proceedings such as that (a) the disciplinary proceedings were initiated by an incompetent disciplinary authority in breach of Regulation 8 (2)(iii) read with Regulation 3(g) of the Regulations; (b) the statement of witnesses recorded earlier were not supplied to him in breach of Regulation 8(10)(b)(iii) and (c) he was denied opportunity to explain circumstances appearing against him in evidence in breach of Regulation 6(17) of the Regulations. However, it is not necessary to go into the merits of the said grievances since we are of the view that one of the objections taken by the appellant to the dismissal, viz., that the appellant was deprived of an opportunity to prefer an appeal provided under the Regulations, goes to the root of the dismissal order. The undisputed facts relating to the said grievance of the appellant are that the disciplinary action was taken against him by the Deputy General Manager. As the Regulations stood then, the disciplinary authority for officers in Grades E, D, C and B (excepting Divisional Managers in Grade B) was the Divisional Manager/AGM (Personnel) and the appeal against their order lay to the Deputy General Manager or any other officer of the same rank. Against the order of the Deputy General Manager, the review lay to the General Manager. It is not disputed that the appellant was an officer in Grade D. Hence in his case, as per the said Regulations, the disciplinary authority was either the Divisional Manager or the AGM (Personnel) and if the action was taken by either of them, he had an opportunity to appeal to the Deputy General Manager or any other officer of the same rank, and thereafter he had a further right of review to the General Manager. However, since the action against him was taken by the Deputy General Manager although the Divisional Manager and AGM (Personnel) were available for taking the action, the appellant was denied the right of an appeal and also the right of a review which lay only against the appellate order. The impugned order of dismissal passed by the Bank, therefore, suffers from an

inherent defect.

6. The respondent-Bank in its submission contended that although it is true that the Deputy General Manager had acted as the disciplinary authority when he was in fact named under the Regulations as an appellate authority, no prejudice is caused to the appellant because the Deputy General Manager is higher in rank than the disciplinary authority, viz., the Divisional Manager/AGM (Personnel). According to the Bank, it should be held that when the order of punishment is passed by a higher authority, no appeal is available under the Regulations as it is not necessary to provide for the same. It was also contended that there is no right to appeal unless it is provided under the Rules or Regulations. Although the argument looks attractive at first sight, its weakness lies in the fact that it tries to place the Rules/Regulations which provide no appeal on par with the Rules/Regulations where appeal is provided. It is true that when an authority higher than the disciplinary authority itself imposes the punishment, the order of punishment suffers from no illegality when no appeal is provided to such authority. However, when an appeal is provided to the higher authority concerned against the order of the disciplinary authority or of a lower authority and the higher authority passes an order of punishment, the employee concerned is deprived of the remedy of appeal which is a substantive right given to him by the Rules/Regulations. An employee cannot be deprived of his substantive right. What is further, when there is a provision of appeal against the order of the disciplinary authority and when the appellate or the higher authority against whose order there is no appeal, exercises the powers of the disciplinary authority in a given case, it results in discrimination against the employee concerned. This is particularly so when there are no guidelines in the Rules/Regulations as to when the higher authority or the appellate authority should exercise the powers of the disciplinary authority. The higher or appellate authority may choose to exercise the power of the disciplinary authority in some cases while not doing so in

other cases. In such cases, the right of the employee depends upon the choice of the higher/appellate authority which patently results in discrimination between an employee and employee. Surely, such a situation cannot savour of legality. Hence we are of the view that the contention advanced on behalf of the respondent-Bank that when an appellate authority chooses to exercise the power of disciplinary authority, it should be held that there is no right of appeal provided under the Regulations cannot be accepted."

14. In this backdrop, the counter affidavit filed by the respondent assumes significance, which reveals that the order has been passed by the 1st respondent., who is the appellate authority. It is more apt to extract the relevant portion of the counter affidavit, wherein averment has been made by the 1st respondent to the above effect, which is as under :-

"2. The impugned proceedings of the first respondent dated 4.12.2007 is perfectly valid in law and there are no illegalities or infirmities in the same. The proceedings of the first respondent is a punishment awarded to the petitioner in exercise of the powers exercised by the appropriate disciplinary authority. As against the said orders there is a remedy of review the punishment awarded before the first respondent. Without exercising such remedy already available in the said rules, the petitioner is not entitled to avail extraordinary remedy invoking under Article 226 of the Constitution of India."

15. While the decision of the Hon'ble Supreme Court in Surjit Ghosh case (supra) is directly attracted to the case on hand, as the order impugned herein, has been passed by the appellate authority, thereby, depriving the petitioner of a right to appeal, the counter, as extracted supra, reveals a more pathetic situation, as the counter proceeds on the footing that the petitioner has not exhausted his right of review and, therefore, the petition is not maintainable. This Court is at a loss of words to express the inherent fallacy in the stand taken by the 1st respondent in the counter, as the order of the 1st respondents, which is impugned herein, is asked to be taken up to the same authority by way of review. To put it more bluntly, the doctor and the patient being one and the same, i.e., the authority, who passed the order, himself being projected as the

reviewing authority, the review, if at all filed, would be nothing but an exercise in futility. Further, it is to be pointed out that the respondents have not averred that the Rules permit the appellate authority to act as a disciplinary authority. As held by the Hon'ble Supreme Court in Surjit Ghosh's case (supra), an employee cannot be deprived of his substantive right. What is further, when there is a provision of appeal against the order of the disciplinary authority and when the appellate or the higher authority against whose order there is no appeal, exercises the powers of the disciplinary authority in a given case, it results in discrimination against the employee concerned. What has actually happened in the present case is what has been visualized by the Hon'ble Supreme Court in the abovesaid decision.

16. In the case on hand, the disciplinary authority having not passed any order, usurping the power of the disciplinary authority, the 1st respondent, who is the appellate authority, has passed the impugned order, which cannot be sustained in the eye of law, as the petitioner is deprived of his right to appeal and the said inherent defect in the whole process, renders the whole disciplinary proceeding illegal and irregular. Further, the appellate authority having acted illegally as the disciplinary authority, the stand taken by the 1st respondent that review is available before the very same authority, viz., the 1st respondent is nothing but an empty formality and in the absence of remedy of appeal made available to the petitioner, this Court is of the considered view that the impugned order deserves to be set aside. Further, the petitioner having retired from service, this Court cannot remand the matter back to the respondents and it is for the respondents to proceed against the petitioner, in a manner known to law, if so advised.

17. For the reasons aforesaid, the impugned order dated 4.12.2007 passed by the 1st respondent in G.O. (D) No.591, Municipal Administration & Water Supply Department, is set aside and this petition is allowed. The respondents are at liberty to proceed in the matter in accordance with law. In the circumstances of the case, there shall be no order as to costs.

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Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To

1. The Secretary to Government
Municipal Administration & Water
Supply Department
Secretariat, Chennai-9.

2. The Commissioner of Municipal
Administration
Ezhilagam Annexe Building
VI floor, Chepauk, Chennai-5.

+1 cc to Government Pleader High Court, Madras
sr 26571

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