

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 09.01.2020
CORAM
THE HON'BLE MR.JUSTICE N.ANAND VENKATESH
W.P.No.15360 of 2019

D.Sureshkumar

... Petitioner

.Vs.

- 1.The Principal Secretary,
Department of Municipal Administration
and Water Supply,
Secretariat,
Chennai-9.
- 2.The Commissioner of Municipal Administration,
Office of the Commissioner of Municipal Administration,
Chepauk,
Chennai-5.
- 3.The Commissioner,
Nagercoil Municipality,
Nagercoil,
Kanyakumari District.
- 4.The Commissioner,
Villupuram Municipality,
Villupuram,
Villupuram District.

... Respondents

Prayer:- Writ petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, calling for the records to the first respondent vide G.O(D) No.136. Municipal Administration and Water Supply [ME.4] Department, dated 22.3.2019 and to quash the same and consequently direct the respondents to reinstate the petitioner with all attendant benefits.

For Petitioner : Mr.S.Vijayakumar

For R 1 & R 2 : Mr.P.S.Sivashanmugasundaram
Special Government Pleader

For R 3 : Mr.A.S.Tambusamy
Mr.B.Anand

For R 4 : Mr.V.Jayaprakash Narayanan
Special Government Pleader

O R D E R

This Writ Petition has been filed challenging the order passed by the 1st respondent imposing the punishment of compulsory retirement against the petitioner.

2.The brief facts of the case is that the petitioner joined in the Municipal service as a Public Works Overseer in the year 1983. He was working as a Municipal Engineer Grade-II at Nagercoil during the period 2003 to 2005. At that point of time, the petitioner was served with a Charge Memo by the 2nd respondent on 24.10.2010, alleging serious misconduct in the execution of certain departmental works in Nagercoil Municipality. There were totally five Charges that were framed against the petitioner and the petitioner gave his explanation for each Charge. An Enquiry Officer was appointed and a detailed enquiry was conducted and the Enquiry Officer submitted a report on 31.07.2014, stating that none of the charges have been proved against the petitioner.

3.Inspite of the above report given by the Enquiry Officer, the disciplinary proceedings were not closed and therefore the petitioner approached this Court and filed W.P [MD].No.10346 of 2017, seeking for a direction to the respondents to pass final orders in the disciplinary proceedings. This Court by an order dated 05.06.2017, directed the 1st respondent to pass final orders within a period of four weeks.

4.Pursuant to the above order, the 1st respondent issued a letter on 06.12.2017, to the petitioner to the effect that the disciplinary authority is deferring from the report of the Enquiry Officer and therefore the petitioner was directed to give his further explanation. The petitioner therefore gave his further explanation on 11.01.2018, for every charge that was

framed against him. In the meantime, the 1st respondent approached this Court and sought for some more time to complete the proceedings and this Court by an order dated 29.10.2018, gave time up to 31.11.2018, to complete the proceedings.

5. After the extension of time that was granted by this Court, the 1st respondent has proceeded to pass the impugned order dated 22.03.2019, wherein, he has imposed the punishment of compulsory retirement against the petitioner. Aggrieved by the same, the present writ petition has been filed before this Court.

6. Mr. S. Vijayakumar, learned counsel appearing on behalf of the petitioner submitted that there was enormous delay in serving the Charge Memo in the present case. The learned counsel submitted that for an incident took place during the period 2003 to 2005 when the petitioner was serving as a Municipal Engineer, the Charge Memo itself came to be issued only in the year 2010. The learned counsel further submitted that the petitioner had clearly taken a stand that he had done his duty in accordance with the rules and the other decision regarding calling for tender was not within the job description of the petitioner and therefore, the petitioner cannot be mulcted with the responsibility that was not vested in him. The learned counsel further submitted that the Inquiry Officer had dealt with each and every Charge and the explanation given by the petitioner and had found that not a single charge was proved against the petitioner. Under such circumstances, where the disciplinary authority is in variance with those findings, it becomes the duty of the disciplinary authority to give his reasons as to why he is varying with the findings of the Inquiry Officer. The learned counsel submitted that in the entire impugned order, there are absolutely no reasons given by the 1st respondent for varying with the findings of the Inquiry Officer and the 1st respondent has straightaway imposed the punishment of compulsory retirement.

7. The learned counsel in order to substantiate his submission, relied upon a Division Bench judgment of this Court in Tamil Nadu Water Supply and Drainage Board .v. A. Abdul Wahab made in W.A.No.1178 of 2007, dated 16.04.2009.

8. Mr. A. S. Thambusamy, learned counsel appearing on behalf of the 3rd respondent Municipality, submitted that the Municipality had to carry out certain urgent works and at that point of time, the Contractors were on a strike and therefore, the Municipality did not find the time to invite tenders in view of the urgency work involved and therefore left with no other

option, the work was assigned to the concerned Contractors. The learned counsel submitted that there was absolutely no intention to favour any Contractor and the situation warranted such allotment of work without calling for tenders.

9. Mr. P. S. Sivashanmugasundaram, learned Special Government Pleader appearing on behalf of the respondents 1 and 2, submitted that by virtue of allotting the work to Contractors at a very high rate, the delinquent officers have caused a loss to the tune of a sum of Rs.19,38,658/- to the Municipality. The learned counsel submitted that the petitioner ought to have executed the work only after inviting tenders and petitioner not having adopted to the said process, has committed misconduct and therefore, it became necessary for the respondents to initiate departmental proceedings against the petitioner. The learned counsel further submitted that the disciplinary authority is not bound by the report of the Inquiry Officer and it is always open to the disciplinary authority to differ from the findings of the Inquiry Officer and come to his own conclusion with regard to the charges against the delinquent officer. The learned counsel submitted that the 1st respondent was not in agreement with the findings of the Inquiry Officer and after considering the further explanation given by the petitioner, the 1st respondent has found that all the charges have been proved against the petitioner and therefore the 1st respondent has imposed a punishment of compulsory retirement against the petitioner. The learned counsel submitted that there are absolutely no grounds to interfere with the impugned order passed by the 1st respondent.

10. This Court has carefully considered the submissions made on either side and the materials available on record.

11. The 2nd respondent had issued the Charge Memo against the petitioner by framing six charges. The sum and substance of the charge is that while the petitioner was working as a Municipal Engineer in the Nagercoil Municipality during the period 24.11.2003 to 02.08.2005, he in connivance with the Municipal Commissioner, Junior Engineer and Work Inspector have executed works without calling for tenders from contractors at exorbitant rates and thereby caused loss to the tune of Rs.19.38,658/- to the Municipality. The further charge is that the petitioner has permitted the Junior Engineer and the Work Inspector to obtain huge amounts as advance for the execution of the works and thereby has allowed them to misappropriate the amounts. The further charge against the petitioner is there were irregularities in the execution of the works and there were also procedural lapses and the petitioner as the head of the

technical wing failed to guide the Municipal commissioner in a proper manner and thereby, he has committed acts of misconduct.

12.The petitioner had given his explanation for each and every one of the charge that was framed against him. The primary defense that was taken by the petitioner is that the petitioner had nothing to do with the decision that was taken by the Municipality in not calling for the tenders. According to the petitioner, it is the responsibility of the Municipality Commissioner as the Executive head to take a decision on the same and that it was the Municipal Commissioner, who had entrusted the work to the Contractors. According to the petitioner, he had functioned well within his duties and responsibilities that has been assigned to him under the Municipal manual and therefore, he cannot be made responsible for a decision that was taken by the Municipal Commissioner. The petitioner has further taken a defense that the so called advance that was paid to the Junior Engineer and the Work Inspector was only received as a temporary imprest and the same was required in order to meet the immediate expenditure. These advances were made use for completing certain immediate works and it was never retained by the Junior Engineers or the Work Inspectors. The petitioner has also denied the other irregularities in the execution of the work and the procedural illegality pointed out in the charge.

13.The petitioner faced the enquiry and the Inquiry Officer after considering the entire explanation and the materials placed before him has come to a categorical conclusion the charges have not been proved against the petitioner. This report was placed before the 1st and 2nd respondents in the year 2014. Thereafter, there was absolutely no movement in the disciplinary proceedings and therefore, the petitioner was forced to approach this Court and file a writ petition in the year 2017, for a direction to complete the disciplinary proceedings. It is only thereafter, the files were again taken up by the 1st respondent and the 1st respondent came to a conclusion that he is not accepting the report of the Inquiry Officer and therefore a Show Cause Notice was issued to the petitioner on 06.12.2017, calling for his further explanation. The petitioner gave his further explanation and ultimately the 1st respondent has passed the impugned order.

14.Where a disciplinary authority disagrees with the report of an Inquiry Officer, he can independently call for an explanation and give an opportunity to the delinquent before imposing any punishment. The Hon'ble Supreme Court has

repeatedly held that such an opportunity must not become an empty formality and the disciplinary authority will have to necessarily consider the further explanation given by the delinquent officer and independently give his findings as to why he is not accepting the findings of the Enquiry Officer and only thereafter he can impose the punishment. Useful reference can be made to the judgments of the Hon'ble Supreme Court in P.G.Agrawal .v. State Bank of India and Others reported in [2006 8 SCC 440] and in Lav Nigam .v. Chaiman & MD, IIT Ltd, & Another reported in [2006 9 SCC 440]. A Division Bench of this Court also had an occasion to deal with the law on this subject and has elucidated the procedure to be followed by the disciplinary authority in such cases. Useful reference can be made to the judgment of the Division Bench of this Court in State of Tamil Nadu .vs. Dr.A.S.Radhakrishnan reported in [2016 1 CWC 499].

15.The learned counsel for the petitioner has raised yet another argument with regard to the delay in issuing the Charge Memo from the date of incident. The learned counsel had submitted that the Charge Memo was issued in the year 2010, for the incident that is said to have taken place during the period 2003 to 2005. In order to substantiate his submission, the learned counsel also relied upon the judgment of the Division Bench of this Court in Tamil Nadu Water Supply and Drainage Board, which has been referred supra. The relevant portions in the judgment is extracted hereunder:

"14.That apart, admittedly, in respect of the work, which was carried out in the year 1991, the charges came to be framed against the respondent in the year 1998, after the lapse of seven years and the Disciplinary Authority has taken another four years for the purpose of deciding, which was on 16.2.2001. Certainly, the delay and the protracted proceedings by the appellants have caused great prejudice to the delinquent Officer.

15.In departmental proceedings, the delay in initiating the same has a tendency of not only causing mental agony to the delinquent, but also it would put the delinquent in a delicate position, since after passage of many years it would not be possible for him give proper explanation to the various charges. Merely giving an opportunity in those cases to give explanation is not sufficient, because the principles of natural justice are certainly not to be taken as empty formality.

16.The concept of audi alteram partem, which is a celebrated concept of natural justice, by which nobody can be imposed with a punishment without being given sufficient opportunity, has a meaning that the sufficient opportunity must be considered in its proper perspective and not be mechanically giving time to submit explanation. By passage of time, the delinquent is in a disadvantageous position of not giving proper explanation, since it requires minute details and certainly, mere giving of time is not going to render proper justice in giving him an opportunity.

17.The respondent herein, in the writ petition, has clearly taken a ground that by long delay in framing charges and conducting enquiry it has resulted in miscarriage of justice. In the counter affidavit filed by the appellants in the writ petition, the only ground raised is that the matter was pending before the Government, which was remitted the case to the Board only on 23.12.1996, after detailed enquiry from Director of Vigilance and Anti Corruption and it was only thereafter, action was taken. The relevant portion read as follows:

"Even though, the irregularity occurred during 19990-91, the Government remitted the case to Board only on 23.12.1997 after the detailed enquiry conducted by Director of Vigilance and Anti Corruption. Action was initiated after the receipt of the Government Order and hence, there was no delay in the initiation of the departmental action against the petitioner."

18.Therefore, the appellants being a Governmental authority is only finding fault with the Government for the pendency. It is not the case of the appellants that the respondent was prosecuted for the alleged charges. In such view of the matter, the question to be decided is as to whether such a delay of nearly seven years in framing charges against the respondent would be prejudicial or detrimental to the interest of the delinquent officer.

19.In State of Madhya Pradesh v. Bani Singh, AIR 1990 SC 1308, while considering the delay of twelve years in initiating disciplinary

proceedings against the delinquent officer without offering any proper explanation, taking note of a similar defence by the Government that the investigation was going on, the Supreme Court has held that permitting such delay will be unfair, in the following terms:

"4.The appeal against the order dated 16.12.1987 has been filed on the ground that the Tribunal should not have quashed the proceedings merely on the ground of delay and laches and should have allowed the enquiry to go on to decide the matter on merits. We are unable to agree with this contention of the learned Counsel. The irregularities which were the subject-matter of the enquiry is said to have taken place between the year 1975-1977. It is not the case of the department that they were not aware of the said irregularities, if any, and came to know it only on 1987. According to them even in April, 1977 there was doubt about the involvement of the officer in the said irregularities and the investigations were going on since then. If that is so, it is unreasonable to think that they would have taken more than 12 years to initiate the disciplinary proceedings as stated by the Tribunal. There is no satisfactory explanation for the inordinate delay in issuing the charge memo and we are also of the view that it will be unfair to permit the departmental enquiry to be proceeded with at at this stage. In any case there are no grounds to interfere with the Tribunal's orders and accordingly we dismiss this appel."

(emphasis supplied)

20.Following the said judgment, in a later judgment rendered in P.V.Mahadevan v. The Managing Director, Tamil Nadu Housing Board, 2005(4) CTC 403, wherein in respect of an act alleged to have been committed in 1990, charge memo was issued in 2000, for which the explanation given by the Housing Board was that lapses came to limelight in the audit report of 1994-1995, and taking note of the fact that the employee concerned reached superannuation, the Supreme Court has held that such a protracted disciplinary proceeding, which would cause more mental agony and suffering to an employee, was more than the punishment. In fact, the Supreme

Court, in no uncertain terms, has held that such protracted disciplinary proceedings should be availed not only in the interest of the Government employee, but also in the public interest, for inspiring confidence in the minds of the Government employees. The portion of the judgment is as follows:

"13. Section 118 specifically provides for submission of the abstracts of the accounts at the end of every year and Section 119 relates to annual audit of accounts. These two statutory provisions have not been complied with at all. In the instant case the transaction took place in the year 1990. The expenditure ought to have been considered in the accounts of the succeeding year. In the instant case the audit report was ultimately released in 1994-1995. The explanation offered for the delay in finalising the audit report cannot stand scrutiny in view of the above two provisions of the Tamil Nadu Act, 17. It is now stated that the appellant has retired from service. There is also no acceptable explanation on the side of the respondent explaining the inordinate delay in initiating departmental disciplinary proceedings. Mr. R. Venkataramai, learned Senior Counsel is appearing for the respondent. His submission that the period from the date of commission of the irregularities by the appellant to the date on which it came to the knowledge of the Housing Board cannot be reckoned for the purpose of ascertaining whether there was any delay on the part of the Board in initiating disciplinary proceedings against the appellant has no merits and force. The stand now taken by the respondent in this Court in the counter affidavit is not convincing and is only an after thought to give some explanation for the delay.

14. Under the circumstances, we are of the opinion that allowing the respondent to proceed further with the departmental proceedings at this distance of time will be very prejudicial to the appellant. Keeping a higher Government official under charges of corruption and dispute integrity would cause unbearable mental agony and distress to the officer concerned. The protracted disciplinary

enquiry against a government employee should, therefore, be avoided not only in the interests of the government employee but in public interest and also in the interests of inspiring confidence in the minds of the government employees. At this stage, it is necessary to draw the curtain and to put an end to the enquiry. The appellant had already suffered enough and more on account of the disciplinary proceedings. As a matter of fact, the mental agony and sufferings of the appellant due to the protracted disciplinary proceedings would be much more than the punishment. For the mistakes committed by the department in the procedure for initiating the disciplinary proceedings, the appellant should not be made to suffer."

(emphasis supplied)

21. The above said issue was considered by one of us (P.Jyothimaji, J.) in the judgment rendered in *R.Tirupathy v. The District Collector, Madurai District*, 2006(2) CTC 571, wherein also in respect of the purchase of uniforms during the years 1994-95 and 1995-96, charge memo came to be framed in the year 2005 against the Panchayat Officials. The stand of the authority in that case was that the Vigilance and Anti-Corruption Department enquiry was pending and that was the reason for the delay. By relying upon the above said judgments of the Supreme Court, laying down the law on the subject relating to the laches in the initiating disciplinary proceedings, this Court held that unexplained delay and the explanation adduced for such long delay cannot be a ground for the purpose of proceeding with disciplinary proceedings against a delinquent officer.

22. In such view of the matter and taking into consideration the consistent judicial precedents on this issue, we have no hesitation to conclude that the appellants have not given any proper reason for such a long delay, especially in the absence of production of the relevant Rules and procedure. Therefore, there is no reason to interfere with the order of the learned Single Judge in this regard".

16. The above judgment reiterates the settled legal proposition that where, there is a considerable delay in issuing

a Charge Memo, the same necessarily causes prejudice and places the delinquent officer in a disadvantageous position. In some cases, passage of many years from the date of the incident, causes a disadvantageous position to the delinquent employee to give an explanation to the charges. Fortunately in this case, the petitioner was able to give sufficient explanation for each and every charge that was made against him.

17. The specific stand that has been taken by the 3rd respondent also assumes a lot of significance in this case. The 3rd respondent, who is Commissioner of the Municipality has taken a very specific stand that during the relevant point of time, the contractors were on strike and the Municipality had to complete certain works immediately and therefore, a decision was taken not to issue any tenders and to allot work to the available Contractors. In view of this specific stand taken by the 3rd respondent, this Court does not find any apparent moral turpitude involved on the part of the delinquent officers to have allotted the work to the Contractors. Merely because the contracts have been allotted at a higher rate, that by itself cannot be taken as a ground to initiate disciplinary proceedings unless there is a material to show that the concerned delinquent officers have acted beyond their powers and caused loss to the Municipality.

18. This Court further finds that the impugned order passed by the 1st respondent suffers from non-application of mind. The 1st respondent having decided to disagree with the Enquiry Report, was duty bound to have given his reasons as to why he finds the petitioner guilty of the charges. There is not even a single finding to that effect in the impugned order passed by the 1st respondent. The 1st respondent has merely extracted the charge and the explanation given by the petitioner and the further explanation that was given by the petitioner. Thereafter, at Para No.3 of the order he has straightaway come to the conclusion that the petitioner is guilty of misconduct and he has imposed the punishment of compulsory retirement against the petitioner. For proper appreciation, para 3 of the impugned order is extracted hereunder:

"3. The Government have examined the matter in detail with charge memo, connected records, findings of Inquiry Officer, Defence Statement and Further representation of the delinquent officer on the deviated views of the disciplinary authority from the findings of Inquiry Officer. The Delinquent Officer has not offered any considerable explanation on the view of the Disciplinary Authority but cited few case

laws which are not applicable to this case. Since there have been significant procedural lapses and the delinquent officer has failed in discharging of his duties, the Government have decided to hold all the charges framed against Thiru.D.Suresh Kumar, formerly Municipal Engineer, now Assistant Executive Engineer, Nagecoil Municipality as proved. Therefore, for the proven charges the Government hereby decide to impose the punishment of Compulsory Retirement against, Thiru.D.Suresh Kumar, formerly Municipal Engineer, now Assistant Executive Engineer, Nagercoil Municipality and order accordingly".

19. Apart from para 3 that has been extracted herein above this Court does not find any application of mind on the part of the 1st respondent or reasons assigned in order to come to such a conclusion. In cases of this nature, where the impugned order results in civil consequences to the delinquent employee, reasons will have to be necessarily assigned, failing which the order will suffer from non-compliance of the principles of natural justice. It is only these reasons which will reflect the application of mind and in the absence of such reasons, the order will have to be necessarily set aside on the ground of non compliance of the principles of natural justice.

20. Looking at the order passed by the 1st respondent from any angle, this Court is convinced that the order suffers from illegality and there is no hesitation for this Court to interfere with the same.

21. In the result, the impugned order passed by the 1st respondent dated 22.03.2019, is hereby quashed and there shall be a direction to the 1st and 2nd respondents to reinstate the petitioner into service with all attendant benefits. If at all, the 1st respondent wants to continue with the proceedings, he shall give sufficient opportunity to the petitioner and seek for explanation and thereafter, apply his mind by giving reasons and pass orders.

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Accordingly, this writ petition is allowed. There shall be no order as to costs.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

KP

To

- 1.The Principal Secretary,
Department of Municipal Administration
and Water Supply,
Secretariat,
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+2cc to Mr.S.Vijayakumar advocate sr2953,2642
+1cc to Mr.V.Jayaprakash Narayanan Advocate sr2643
+1cc to Government Pleader sr2774

W.P.No.15360 of 2019

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