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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.07.2021

CORAM:

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

W.P.No.32257 of 2013

B.Thirugnana Sambandam

... Petitioner

Vs.

1.Deputy Inspector General of Poice,
Tanjavur Range, (Incharge Trichy Range),
Trichy.

2.Superintendent of Police,
Nagapattinam,
Nagapattinam District.

... Respondents

PRAYER: Writ Petition filed under Article 226 of Constitution of India praying to issue a Writ of Certiorarified Mandamus, calling for the records pertaining to the proceedings in P.R.No.37/2010 u/r 3(b) dated 02.11.2011 and consequential proceedings in D.O.No.1110/2011/C.No.K1/P.R.37/2010 dated 15.11.2011 issued by the 2nd respondent and the proceedings in C.No.B2/789/2012 dated 15.09.2013 issued by the 1st respondent and quash the same and direct the respondents to reinstate the petitioner in service with all attendant benefits.

For Petitioner : Mr.R.Subramanian

For Respondents : Mr.C.Selvaraj
Govt.Advocate

O R D E R

It is not only holding a person guilty of misconduct or punishing him without hearing his side or even without putting him on notice is violation of principles of natural justice, but also refusing to receive the request or letter or notice or communication before framing charges against him is also violation of principles of natural justice.

2. In the instant case, even though, it is admitted and proved that the Superior officer of the delinquent had refused to receive the request for extension of the medical leave already granted, that too, on the instructions of the disciplinary authority, it was found by the enquiry officer that returning the letter without knowing the contents is not wrong to hold the charges proved. Besides this, the admission



of the prosecution witnesses (PW1), who had refused to receive the leave letter, who has not served the confirmation of desertion order as well as the notice requiring the petitioner to appear before the Medical Board, which were the very basis for framing the charge was also ignored. The above factual background leads this Court to infer that the enquiry officer is also not above board and appeared to have acted on the instructions of Higher Authorities. Even though, the petitioner was charged for one misconduct, he was punished for some other misconduct which was not framed as a charge. Further, the punishment of removal from service is disproportionate to the misconduct. The conduct of the disciplinary authority exposes his predetermined mind and the entire disciplinary proceedings is actuated with malafide to victimize the petitioner.

3. Thus this case is a classic example of malafide and arbitrary exercise of power, victimization, official bias and violation of principles of natural justice.

4. The brief facts of the case are as under.

The petitioner while working as a Head Constable applied for extension of unearned leave on medical grounds from 25.03.2008 to 21.08.2008 as he was taking treatment for Lumbago (Spinal Cord). The leave letter sent by him along with medical certificate was refused by the Inspector of Police, S.J. and H.R., Nagapattinam. He sent another leave letter along with Medical Certificate on 21.09.2008, which was also refused by the Inspector of Police. But to his shock, he received a desertion order dated 17.09.2008 to his hands on 09.10.2008. He is entitled to submit a reply within 60 days and accordingly, he submitted a reply on 17.10.2008. The said desertion order was confirmed on 21.10.2008 without considering his representation and the order of confirmation was not also served on him. Therefore, he filed a writ petition before this Court in W.P.No.27411 of 2008. This Court by its order dated 19.11.2008, directed the second respondent therein to consider the representation made by the petitioner and pass orders. Thereafter on 07.12.2008, it appears that a letter was issued by the respondents directing the petitioner to appear before the Medical Board. The letter was directed to be served on the petitioner through the very same Inspector, who had refused to receive the leave letter. The said communication was also not served on the petitioner. Since the petitioner was completely unaware of the direction to appear before Medical Board, he did not appear. Thereafter, on 30.11.2010, a charge memo was issued. The content of the charge is that the petitioner had obtained medical leave on 25.03.2008 and he was supposed to report for duty on 21.08.2008, after obtaining fitness certificate. But he extended the leave for a period of 30 days from 21.08.2008, which was refused by the Inspector of Police. On expiry of 30 days of medical leave granted on 25.03.2008, he failed to return to duty and voluntarily absented himself for 21 days,



which amounts to misconduct of desertion.

5. An Enquiry Officer was appointed and three witnesses were examined on the side of the prosecution namely Inspector of Police, Special Sub-Inspector of Police and the Speed Post postman. Thereafter, the petitioner submitted his objections to the Enquiry Report on 19.02.2011 and Disciplinary Authority imposed a punishment of removal from service by order in PR No.37/2010 under Rule 3(b) dated 02.11.2011 against which the petitioner preferred an appeal raising various grounds of objections on 12.09.2012. The first respondent on extraneous ground, confirmed the order of punishment by cryptic order and the said order is under challenge in the present writ petition.

6. Mr.C.Selvaraj, the learned Government Advocate, appearing on behalf of the respondents, defended the order of the respondents relying on the averments made on the counter affidavit. According to him, the proper procedure to get leave is that the petitioner shall get proper Sick passport from the Authorities concerned. But he extended the medical leave on his own accord and deserted the force. The desertion order was served on him on 09.10.2008 but he failed to appear before the second respondent within the stipulated time. Thus, he has committed the misconduct of desertion.

7. He would further submit that considering his representation dated 17.10.2008, pursuant to the order of the High Court in W.P.No.27411 of 2008, dated 19.11.2008 he was directed to appear before the Medical Board. In Memo C.No.L2/7821/2008 dated 07.12.2008, the said office letter was directed to be served through the Inspector of Police. But he failed to appear before the Medical Board. The Disciplinary Authority after considering all the materials, awarded the punishment of removal from service on 02.11.2011. The petitioner filed an appeal belatedly which was treated as time barred. Again on intervention of this Court in W.P.No.19644 of 2013 dated 19.07.2013, the appeal petition was considered and rejected for the reason that the petitioner himself has admitted that he had absented without getting proper sick passport from the authorities concerned. Hence, there is no violation of principles of natural justice as contended by the petitioner. Therefore, the writ petition merits no consideration and prayed for dismissal of the same.

8. I heard both sides.

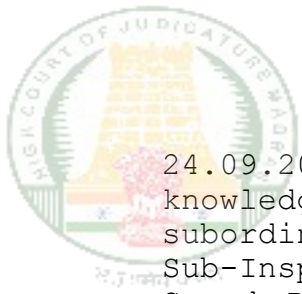
9. The charge issued to the petitioner is that he failed to report for duty after obtaining physical fitness certificate on expiry of medical leave on 21.08.2008 and absented himself for 21 days and thereby committed the misconduct of desertion. A perusal of the materials placed before this Court shows that the petitioner had sent a letter for extension of leave on medical grounds (back pain), dated



21.09.2008 with medical certificate obtained from Chief Medical Officer serving in the Government Hospital vide RLNo. SPET 447636229IN, Karaikal, dated 22.08.2008. The same was refused by the Inspector of Police, SJ and HR, Nagapattinam. On 17.09.2008, an order of desertion was issued and it was served on the petitioner on 09.10.2008. In the meanwhile, the petitioner had again sent a leave letter dated 21.09.2008 along with another medical certificate through speed post on 24.09.2008 which was also refused by the Inspector of Police vide RL No. ET876481088IN of Nagapattinam dated 24.09.2008. Thereafter, the petitioner submitted his explanation to the desertion order on 17.10.2008 and the copy of the same was sent to the higher authorities also through speed post.

10. The said desertion order was confirmed on 21.10.2008. Even though the respondents in their counter affidavit state that the confirmation order was directed to be served through the Inspector of Police, there is no answer as to whether it was actually served on the petitioner or not? The petitioner would affirm that the confirmation order was not served on him. As per the confirmation order, the petitioner shall submit his explanation within 60 days from 22.08.2008 before the Superintendent of Police and since he failed to appear, it was confirmed on 21.10.2008. The fact remains that he submitted his explanation on 17.10.2008 to the desertion order, which was not at all considered. Again on the intervention of this Court, in W.P.No.27411 of 2008, his explanation dated 17.10.2008 was directed to be considered by the respondents. Pursuant to the same on 07.12.2008, he was directed to appear before the Medical Board. Curiously this letter was also directed to be served through the very same Inspector, who refused to receive leave letter sent by the petitioner and not served the confirmation order. The Inspector of Police again not served the letter L2/7821/2008 dated 07.12.2008 requiring the petitioner to appear before the Medical Board. However, without considering the circumstances, the charge memo dated 30.11.2010 was issued to the petitioner, for the misconduct of desertion for 21 days.

11. It is imperative to look into the minutes of the enquiry which reveals that three witnesses were examined on the side of the prosecution and all the three witnesses are vital for deciding the present case. The Inspector of Police, who refused to receive the leave letter was examined as PW-1, who during his cross-examination, would depose that he had not received the leave letters sent by the petitioner dated 22.08.2008 and 21.09.2008. To a question as to who had returned the speed post, he would depose that he was not aware of the person who refused to receive the letter. Curiously, he would state that the factum of the refusal of the speed post dated 25.08.2008 and 24.09.2008 came to his knowledge only when the petitioner cross-examined him. Thus, it is the evidence of the Inspector that he was not aware of the speed post sent by the petitioner to his office on 25.08.2008 and



24.09.2008 and the same was refused and returned without his knowledge and that he has not enquired about it with his subordinates. Quite contrary to this evidence, the Special Sub-Inspector, who was examined as PW2 would depose that the Speed Post - post man brought the registered letter to his office. He has not received it because the Inspector of Police (PW1), instructed him not to receive the letter without his permission. Therefore, he has taken the post-man to the Inspector of Police, who asked the post man to wait for half-an-hour and thereafter instructed him to return the letter. PW-3 Speed post Postman would depose that as per the instructions of PW-1 he returned the articles. This evidence clearly establishes that the Inspector of Police had given specific instructions to his sub-ordinate not to receive the letter sent by the petitioner anticipating that such letter would come and had deliberately refused to received the letter sent by the petitioner on 25.08.2008 and 24.09.2008 and issued desertion orders

12. In this background it has to be seen as to whether the conduct of the petitioner amounts to "desertion".

13. As per "Blacks Law Dictionary" 10th Edition, "Desertion" means The wilful and unjustified abandonment of a persons duties or obligations "Deserter" means a member of the armed forces who leaves national military services with the intention of reneging on military obligations either permanently or for a duration of a military operation. Advanced Law Lexicon by A.Ramanatha Iyer (3rd Edition-2005) elucidates as under.

Desertion:- Any member of the armed forces who

1) without authority goes or remains absent from his unit, organization or place or duty with intent to remain away there from permanently.

2) Quits his unit, organization, or place of duty with an intent to avoid hazardous duty or to shirk important service.

3)

Desertion of Post:- The word "desertion" does not simply mean leaving the post or mere departure from the post without permission. It means something more and that something more is the intention never to return to the post or to go away with the idea of avoiding hazardous duty or shirking any important service.

14. From the above elucidations it can be understood that "animus deserendi" shall be there to charge a person for misconduct of desertion. The intention to avoid or go away permanently or to shirk away from the duties or obligations or responsibilities of the ordinary station or hazardous one for a particular duration are important ingredients to pin a servant within the ambit of "desertion". If the absence is



wilful, deliberate, without reasons and unjustified, one is liable for the misconduct of desertion. If the absence is justified, backed by reasons, it cannot be termed as desertion.

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15. In the instant case, the petitioner was granted unearned leave on medical grounds for 30 days. He wanted an extension with the support of a medical certificate, which means he was in continuous contact with his superiors or department. The extension is backed by reasons. If the authority was of the opinion that the request was not genuine, he must have proceeded against him for unauthorised absence and referred him to medical board as it was done after the intervention by this Court and not for desertion. Thus the charge itself is without any basis and not sustainable.

Violation of Rules:

16. As per Section 28 (ii) (2) of Tamil Nadu Police Subordinate Service Rules, unearned Leave can be taken on medical certificate, which reads as follows:

2. Leave on Medical Certificate:

(a) Leave on medical certificate may be granted to a full member of the service for one year in all. Such leave shall be given only on production of a certificate from such medical authority as the State Government may by general or special order prescribe and for a period not exceeding the amount of leave recommended in the certificate. It may be combined with special disability leave.

(b) When the period of one year prescribed in sub-clause (a) has been exhausted, further leave on certificate for a period not exceeding six months in all may be granted in exceptional cases on the recommendation of the medical authority referred to in the sub-clause.

17. From the reading of the above provision, it is very clear that any Police personnel is entitled to take medical leave for a maximum period of one year on medical certificate.

18. In the instant case, the reading of the charge clearly shows that on 23.07.2008 the petitioner was granted medical leave on medical certificate for a period of one month. On 25.08.2008, by leave letter dated 22.08.2008 along with medical certificate dated 22.08.2008, he applied leave for his treatment for back pain, in other words, he sought for extension of medical leave for a period of one month. It was followed by another letter dated 24.09.2008, but these letters were deliberately refused by the Inspector for the reasons best known to him and the charges framed are violation of the Statutory Rules.



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19. The action of Inspector of Police either it was done on his own or as instructed by his superiors is absolutely vindictive, deliberate, malafide and arbitrary. Therefore, the charge, as stated supra is baseless and without materials.

Malafide:

20. The oral evidence of prosecution witnesses disclose:

i) The Inspector of Police (PW1) gave instructions to his Sub-ordinates, to be specific to PW2, not to receive any letter sent by the petitioner without his permission. It clearly shows that he anticipated a leave letter from the petitioner. In that case, it is evident that the leave letter was not accepted when it was submitted in person. The action of PW1 as Superior is absolutely tainted with malafides presumably to victimize the petitioner.

ii) The enquiry officer would record that PW1 acted on the instructions of his superior without knowing its contents. This observation based on evidence clearly proves that PW1 not acted independently but on the instructions of the superior, the then Superintendent of Police- R2 herein. This means the second respondent with a malafide motive targeted the petitioner and created a circumstance to victimize him and given instructions to PW1.

iii) Even though the petitioner was charged for a misconduct of desertion of duty for 21 days, he was punished for a procedural lapse of not obtaining a sick passport for obtaining medical leave. It is not the case of the respondent that the petitioner was not suffering from Lumbago and the medical leave was sanctioned at the first instance. Admittedly the petitioner was granted medical leave, and what he wanted was only extension of medical leave. When medical leave was originally sanctioned, it would prove that the procedure might have been followed. The punishment for the so-called lapse after sanctioning the medical leave is baseless, arbitrary and malafide. Thereby, punishment imposed for the procedural lapse which is not framed as a charge is also malafide and illegal.

iv) Even assuming there was procedural lapse, the punishment shall be proportionate to the misconduct. Taking leave without obtaining a sick passport if wrong, the person who has sanctioned the leave also shall be proceeded with for the same lapse. But in this case the second respondent was responsible for such lapse. Therefore, he being the perpetrator shall not have acted as a Judge. But he has imposed the capital punishment of removal from service for the procedural lapse. Considering the clean record of service of the petitioner, the punishment is too harsh and disproportionate to the misconduct alleged.



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21. In Bhagwan Lal Arya vs Commissioner of Police Delhi and another, reported in AIR 2004 SC 2431, the Hon'ble Supreme Court has held thus:

".....The High Court also did not appreciate that after issuing sanction for leave for the period in question, the employee's legitimate expectation would be that no stern action would be taken against him with respect to the alleged act of misconduct which by no stretch of imagination can be considered act of gross misconduct or continued misconduct indicating incorrigibility and complete unfitness for police service. It is not the case of the respondents that the appellant is a habitual absentee. He had to proceed on leave under compulsion because of his grave condition of health and, therefore, the punishment of removal from service is excessive and disproportionate. We are of the view that the punishment of dismissal/removal from service can be awarded only for the acts of grave nature or as cumulative effect of continued misconduct proving incorrigibility of complete unfitness for police service. Merely one incident of absence and that too because of bad health and valid and justified grounds/reasons cannot become basis for awarding such a punishment. We are, therefore, of the opinion that the decision of the disciplinary authority inflicting a penalty of removal from service is ultra vires of Rule 8 (a) and 10 of the Delhi Police (Punishment & Appeals Rules, 1980) and is liable to be set aside."

The above judgement squarely applied to the case on hand, the impugned order suffers from malafide and it is disproportionate to the misconduct alleged.

Violation of Principles of natural justice:

22. In this case the petitioner was deprived of the opportunity to defend himself on several occasions. First instance is that his leave letter with medical certificate for extension of medical leave dated 25.08.2008 & 24.09.2008 were refused to be received and was returned by his superior on the instructions of his superior. The refusal to receive the letter has been amply proved through PW2 and PW3. It is not only service of notice but also refusal to receive the request or letter or notice or any communication for that matter of a government servant, but initiating disciplinary proceedings on that basis is violative of principles of natural justice. Further in the instant case the confirmation order of



desertion date 21.10.2008 was not served on the petitioner. Non service of the confirmation order is not the violation but also not considering the explanation to desertion order submitted by the petitioner dated 17.10.2008 is also violation of Principles of natural justice and suffers from non-application of mind.

23. Yet another repetition is that non-service of the letter requiring the petitioner to appear before the Medical Board. Curiously, the very same person, the Inspector of Police (PW1) was entrusted with the task of serving this letter to the petitioner. During enquiry he would depose that no such letter was sent to him from the office and he has not served it on the petitioner. This action of requiring the petitioner to appear before the medical board was taken after the issuance of a direction to the respondents by this Court in W.P.No.27411 of 2008 dated 19.11.2008. But, the respondents have failed to serve the notice on the petitioner, which, as contended, is absolutely malafide and vindictive. The contention of the learned counsel for petitioner that had the petitioner appeared before the medical board, his physical ailment would have been proved and he not have suffered the ordeal has some force.

24. Therefore, it is crystal clear that from the beginning till the end, the action of the respondents is vitiated by violation of principles of natural justice.

Official bias:

25. The enquiry officer is expected to be a neutral and impartial person. Even though it was categorically proved by PW2 and PW3 that the Inspector of Police (PW1) had deliberately returned the leave letters submitted by the delinquent, he held the charges proved. The non-service of confirmation of desertion order, non-service of letter requiring the petitioner before the Medical Board by the very same officer (PW1) must have been taken note of and charges ought to have been held baseless and not proved. But he would go the extent of justifying the action of PW1 by recording that PW1 had returned the letters on the instructions of his superior without knowing its contents is a clear case of official bias. He failed to act impartially, but might have acted either on the instructions of some Superior Officers, if not the second respondent, or he had acted with an element of bias in order to save officials of the department. Either way his findings of guilt is tainted with official bias.

26. In so far as the Inspector of Police (PW1) is concerned, it is the admitted case that he acted on the instructions of the Superior Officer. It is not only malafide and also amounts to official bias.



27. In so far as the disciplinary authority is concerned he must have been displeased by the conduct of the petitioner. Either it is disobedience or he was not amenable to his official or unofficial or personal requirements. Therefore, he lashed the whip on the petitioner. It also amounts to official bias.

Non-application of Mind:

28. The orders of the respondents not only suffer the vices of malafide, official bias, and violation of natural justice but also arbitrariness due to non-application of mind. The order passed by the disciplinary authority extracts the charge, findings of the enquiry officer and the punishment. In the process, the non-service of confirmation of desertion order, non-service of letter calling the petitioner to appear before Medical Board, refusal to receive the leave letter were all overlooked.

29. The disciplinary authority as well as the appellate authority shall record reasons after applying his mind to the charge, evidence during enquiry, enquiry report, objection submitted against enquiry report, his reasons for accepting the enquiry findings and especially the reasons for imposing the proportionate punishment. If the above mandatory requirements are not adhered to, it will deprive the charged official of knowing the exact, accurate and specific reasons as to why his objections, appeal grounds, precedents were not accepted and rejected. That will further deprive him of his opportunity to contest the case with precision. Such an unreasoned order is considered to be in violation of Principles of natural justice. If the order is not in conformity with doctrine of principles of natural justice of informing the condemned of the basis and reason for such punishments it amounts to non-application of mind and arbitrary exercise of power.

30. Likewise the order passed by the appellate authority also lacks reasons. It is also a cryptic order without discussing the grounds raised by the petitioner in his memorandum of appeal. It is true to state that the appellate authority need not pass an elaborate order as that of the original disciplinary authority. But still shall record reasons for accepting or not accepting the grounds and for confirming or for reversing or for modifying the same order challenged.

31. In the judgment of Chairman, Disciplinary Authority, Rani Lakshmi Bai Kshetriya Gramin Bank Vs. Jagadish Sharan Varshney & Others (2009 (4) SCC 240), the Hon'ble Supreme Court has held as under:

"5. In our opinion, an order of affirmation need not contain as elaborate reasons



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as an order of reversal, but that does not mean that the order of affirmation need not contain any reasons whatsoever. In fact, the said decision in Prabhu Dayal Grover Case has itself stated that the appellate order should disclose application of mind. Whether there was an application of mind or not can only be disclosed by some reasons, at least in brief, mentioned in the order of the appellate authority. Hence, we cannot accept the proposition that an order of affirmation need not contain any reasons at all. That order must contain some reasons, at least in brief, so that one can know whether the appellate authority has applied its mind while affirming the order of the disciplinary authority."

32. Thus the impugned orders of the disciplinary authority as well as the appellate authority as elaborated above suffer from the vices of non-application of mind, malafide, Violation of Principles of natural justice, Violation of statutory rules and the test of arbitrariness and hence do not stand the test of judicial scrutiny. Hence, the impugned orders passed by the second respondent in Proceedings in P.R.No.37/2010 u/r 3(b) dated 02.11.2011 and the first respondent in Proceedings in C.No.B2/789/2012 dated 15.09.2013 are set aside. In fine the writ petition stands allowed.

33. Consequent to the above decision the petitioner is entitled to be reinstated with all monetary and attendant benefits. It is submitted that during the pendency of this writ petition, the writ petitioner attained the age of superannuation. Therefore, a direction is given to respondents to pay all monetary and attendant benefits due to him from the date of his removal from service till he attained the age of his superannuation. A further direction is given to the respondents to disburse the same within a period of twelve weeks from the date of receipt of the order copy, failing which the petitioner will be entitled to interest at the rate of 6% per annum from the date of his removal till the date of the disbursement of the entire terminal benefits.

34. It is a fit case for imposing cost. However, I restrain to do so. In fine, the writ petition is allowed with the above direction. No costs.

Sd/-
Assistant Registrar (CS-VII)

//True copy//

Sub Assistant Registrar



To

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1. Deputy Inspector General of Police,
Tanjavur Range, (Incharge Trichy Range),
Trichy.

2. Superintendent of Police,
Nagapattinam,
Nagapattinam District.

+1cc to Mr.R.Subramanian, Advocate SR.No.34177

+1cc to Government Pleader SR.No.34347

W.P.No. 32257 of 2013

SR II (CO)
GMY (24/09/2021)