IN THE HIGH COURT OF JUDICATURE AT MADRAS
Dated : 14.03.2022

CORAM:

THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR

W.P.Nos.4168 and 4171 of 2022
and
W.M.P.Nos.4313 and 4315 of 2022

T.Thambidurai ... Petitioner in both petitions

Vs.

1.The Secretary to Government,
Commercial Taxes & Registration Department,
Fort St.George, Secretariat,
Chennai - 600 009.

2.Commissioner of Sales Tax,
Ezhilagam, Chepauk,
Chennai - 600 005.

3.Additional Commissioner
(Taxation) (ST),
Ezhilagam, Chepauk,
Chennai - 600 005.

4.Additional Commissioner
(Service Tax Cell) (ST)
Ezhilagam, Chepauk,
Chennai - 600 005. ... Respondents in both petitions

Prayer in W.P No.4168 of 2022: Writ petition filed under Article 226 of the Constitution of India seeking to issue a writ of Certiorari calling for the records of the first respondent in Letter No.12492/E2/2018-06, dated 07.10.2021 and quash the same.

Prayer in W.P No.4171 of 2022: Writ petition filed under Article 226 of the Constitution of India seeking to issue a writ of Certiorari calling for the records of the first respondent in Letter No.3975/A2/2020-07, dated 07.10.2021 and quash the same.

For Petitioner : MS.Adithy Reddy
in both petitions

For Respondents: Mr.R.Siddharth
in both petitions Government Advocate

COMMON ORDER

These two writ petitions have been filed for issuance of Writ of Certiorari to quash the proceedings of the first respondent in Letter No.12492/E2/2018-06, dated 07.10.2021 and Letter No.3975/A2/2020-07, dated 07.10.2021.

2. According to the writ petitioner, he was appointed as Assistant Commercial Tax Officer and he was retired from service on superannuation on 31.10.2014 as Joint Commissioner. He was suspended from service on the basis of charge memo framed under Rule 17(b) of the Tamil Nadu Civil Services (Discipline and Appeal) Rules. The 3rd respondent/Enquiry Officer has conducted an enquiry and submitted the enquiry report to the 1st respondent on 11.03.2016.. According to the petitioner, the vigilance enquiry was dropped against the petitioner by proceedings dated 28.09.2016, on the basis that there is no evidence. Therefore, the 1st respondent has framed a fresh charge memo on 14.07.2017, on the basis of alleged deficiencies in inspections conducted in the premises of 11 dealers by the petitioner's subordinates. The petitioner submitted his objection for the aforesaid charge memo on 11.08.2017 and he has also submitted his further objection on 23.10.2017. The 4th respondent, who is the enquiry officer has submitted his report to the 1st respondent on 02.12.2019. Thereafter, based on the enquiry report, the 1st respondent called for an explanation from the petitioner by his letter dated 30.09.2020. The petitioner has submitted a detailed explanation for the aforesaid notice issued by the 1st respondent. Thereafter, the petitioner has received the impugned order from the 1st respondent confirming the findings of the enquiry officers without discussing any of his objections. Hence the petitioner has filed this writ petition before this Court.

3. The learned counsel appearing for the petitioner would submit that in the light of the various decisions of the Hon'ble Supreme Court and this Court, the impugned order passed by the 1st respondent is liable to be quashed and the same will be remanded back to the 1st respondent.

4. The learned Government Advocate appearing for the respondents would submit that the respondents have considered the explanation of the petitioner and after having not satisfied with the said explanation, the aforesaid impugned order has been passed by imposing punishment of cut in pension for a period of one year.

5.Heard the learned counsel appearing for the petitioner and the learned Government Advocate appearing for the respondents and also perused the materials on record.

6. The crux of the issue involved in the present case on hand is, whether the 1st respondent has passed a reasoned order while considering the petitioner's explanation.

7. The Hon'ble Supreme Court and this Court on various decisions held that the Appellate Authority must not only give a hearing to the government servant concerned but also pass a reasoned order dealing with the contentions raised by him/her in the appeal. Following various decisions of the Hon'ble Supreme Court, this Court, in the case of N.Sivakumaran Vs. The State of Tamil Nadu, Rep. By the Secretary to Government, Chennai & Others, reported in (2009) 1 MLJ 701 had held as follows;

> " 32. In the case of an appeal against the order of imposing any penalty under Rules 8 or 9, the appellate authority shall consider as to whether (1) the facts on which the order was passed have been established, (2) the facts established offered sufficient ground for taking action and (3) the penalty is excessive, adequate or inadequate and passed orders confirming, enhancing, reducing or setting aside the penalty or committed remitting the case to the authority of which imposed the penalty, with such direction as it may be deemed fit in the circumstances of the case. Clause ii of Rule 23 (1) states that any error or defect in the procedural violation in imposing penalty may be disregarded by the appellate authority if such authority considers for the reason to be recorded in writing that the error or defect was not material and had neither caused injustice to the person concerned or affect the decision of the case. Powers of the appellate authority are circumscribed by a specific statutory provision which sets out the parameters to be examined by such authority. Unless the appellate authority examines the said aspects and assign brief reasons, mere extracting the views of the Tamil Nadu Public Service Commission does not satisfy the requirements of the statutory rule and that would not amount to giving of reasons. Besides looking into the factual aspects, the appellate authority is also enjoined with the duty to examine whether there is any procedural defect or violation or error in imposing the penalty and Clause (ii) of Rule 23(1) and discard any error or defect or procedural violation in imposing the penalty, if the authority finds that such error or defect or violation is not material or injustice to the person concerned or affect the decision. A penalty suffered by a government servant affects his service and monetary benefits and casts a stigma in his

career. It is well known that penalty suffered by a government servant is counted for promotion to higher posts. Right to consider for promotion has been recognized as a statutory right and therefore, when the authority is vested with the jurisdiction of testing the correctness of penalty, circumscribed by certain parameters , it is imperative that such authority has to scrupulously follow the parameters set out in the rule. All the more, if the government servant is inflicted with a major penalty of removal or dismissal or compulsory retirement, whereby he is deprived of his right to earn through employment, the protection given under Article 311(2) of the Constitution of India, supported by statutory rules, the procedure to be followed and the factors to be taken into account by the disciplinary and appellate authorities cannot be simply disregarded by such authorities to the detriment of the employee. The Supreme Court in Delhi Transport Corporation v. DTC. Mazdoor Congress reported in 1991 Supp. (1) SCC 609, held that, "The right to life includes right of livelihood. The right to livelihood therefore cannot hang on to the fancies of individuals in authority. The employment is not a bounty from them nor can its survival be at their mercy. Income is the foundation of many fundamental rights and when work is the sole source of income, the right of work becomes as much fundamental. Fundamental rights can ill-afford to be consigned to the limbo of undefined premises and uncertain applications. That will be a mockery of them.

The right to public employment and its concomitant right to livelihood receive their succour and nourishment under the canopy of the protective umbrella of Articles 14, 16(1), 19(1)(g) and 21. Different articles in the chapter on Fundamental Rights and the Directive Principles in Part IV of the Constitution must be read as an integral and incorporeal whole with possible overlapping with the subject matter of what is to be protected by its various provisions particularly the Fundamental Rights. When the provisions of an Act or Regulations or Rules are assailed as arbitrary, unjust,unreasonable, unconstitutional, public law element makes it incumbent to consider the validity thereof on the anvil of interplay of Articles 14, 16(1), 19(1)(g) and 21 and of the inevitable effect of the impugned provisions on the rights of a citizen and to find whether they are constitutionally valid. The right to a public employment is a constitutional right under Article 16(1). All matters relating to employment include the right to continue in service till the employee reaches superannuation or his service is duly terminated in accordance with just, fair and reasonable procedure prescribed under the provisions of the Constitution or the rules made under proviso to Article 309 of the Constitution or the statutory provision or the rules, regulations or instructions having statutory flavour made thereunder. But the relevant provisions must be conformable to the rights guaranteed in Parts III and IV of the Constitution. Article 21 guarantees the right to live which includes right to livelihood, the deprivation thereof must be in accordance with the procedure prescribed by law conformable to the mandates of Articles 14 and 21 as to be fair, just and reasonable but not fanciful, oppressive or at vagary."

33. When the appellate authority fails to exercise his statutory duty, which affects the fundamental right of a person and if such authority disposes of an appeal, disregard to the manner circumscribed under the rules and fails to assign brief reasons, indicating his mind, it amounts to denial of justice. Prejudice is per-se evident and therefore, even if the employee has not raised the question of non-consideration of his appeal in accordance with the statutory rules in the Writ Petition. Considering the deprivation of his right to livelihood, guaranteed under Article 21 of the Constitution of India, scuttling his right of his appeal being considered in the manner as provided in the statutory rules would be contrary to the spirit of the Constitutional Guarantee, viz., the right to life with dignity, which can be achieved through the income derived from his employment, the fundamental source. One should not forget that judiciary is the last resort of an aggrieved person and it is not enough that justice should be done and it must also be seen to be done. Useful reference can be made to a decision of the Supreme Court in State of W.B v. Anwar Ali Sarkar reported in AIR 1952 SC 75, and relevant portion in the judgment is extracted hereunder:

"It may be that justice would be fully done by following the new procedure. It may even be that it would be more truly done. But it would not be satisfactorily done, satisfactory that is to say, not from the point of view that the governments who prosecute, but satisfactory in the view of the ordinary reasonable man, the man in the street. It is not enough that justice should be done. Justice must also be seen to be done and a sense of satisfaction and confidence in it engendered."

34. Scrutiny of the appellate authority's order reveals that after extracting the summary of facts, at Paragraph 8 of the order, the appellate authority has merely stated that "the opinion of the Tamil Nadu Public Service Commission has been independently and carefully considered. The punishment of removal awarded by the Principal Commissioner and Commissioner for Revenue Administration is not excessive and therefore, the Government had decided to reject the appeal and accordingly, rejected the same." Thus it is manifestly clear that the appellate authority has passed a cryptic order and that there is a failure to consider the parameters set out in rule 23(1) of the said Rules. contention raised by the delinquent officer. In the interest of justice, the delinquent officer is entitled to know atleast the mind of the appellate authority in dismissing his appeal. No doubt, detailed reasons are not required to be given, but some brief reasons should be indicated in the order affirming the views of the disciplinary authority. As observed in Alexander Machinery (Dudley) Ltd., v. Crabtree [1974 ICR 120 (NIRC)], reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx, it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision.

35. The subjective satisfaction of the appellate authority is conspicuously absent regarding rule 23(1)(a) (b) of the Tamil Nadu Civil Service (Discipline and Appeal) Rules. The order does not reflect active application of the mind of the appellate authority and to put it in the words of the Apex Court, it is 'lifeless', except examining the quantum of penalty.

36. In view of the above, the impugned order of punishment is set aside and the Writ Petition is partly allowed. The matter is remitted back to the appellate authority to consider all the parameters in Rule 23 of the Tamil Nadu Civil Services (Classification, Control and Appeal) Rules and to pass an order on merits, within a period of four weeks from the date of receipt of a copy of this order. No costs."

8. In another case C.Devendhiran Vs. The Deputy Inspector General of Police, Villupuram Range (W.P.No. 150 of 2013) reported in 2020 (2) WLR 332, wherein I had an occasion to deal with the same issue in detail and held that the order passed by the appellate authority is a cryptic/non-speaking order, is unsustainable in law and the same is quashed. The relevant portion of the order is extracted hereunder;

"13. The Learned Senior Counsel for the Writ Petitioner has relied upon the decision reported in 1989 writ law reporter 274 considered rule 6(1) of TNPSS (D&A) Rules and it has been held as follows at para 3 and 4 of the said judgment.

"The rule enjoins the concerned authority to consider the three aspects set out therein specifically. Unless the appellate authority considers them it cannot be said that it has carried out its duties properly. The Supreme Court had occasion to discuss a similar question under R.27(2) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965. Dealing with the word 'consider' used in the said rule, the Supreme Court observed that the word 'consider' implies due application of mind-vide R.P.Bhatt v. Union of India. The following paragraph in the above judgment of the Supreme court can be usefully referred to with advantage-

"The word 'consider' in R.27(2) implies 'due application of mind'. It is clear upon the terms of R.27(2) that the appellate authority is required to consider (1) whether the procedure laid down in the Rules has been complied with; and if not, whether such non-compliance has resulted in violation of any provisions of the Constitution or in failure of justice; (2) Whether the findings of the disciplinary authority are warranted by the evidence on record; and (3) Whether the penalty imposed is adequate and thereafter pass orders confirming, enhancing etc, the penalty, or may remit back the case to the authority which imposed the same. R27(2) casts a duty on the appellate authority to consider the relevant factors set forth in clauses (a), (b) and (c) thereof.

There is no indication in the impugned order that the Director General was satisfied as to whether the procedure laid down in the Rules had been complied with and if not, whether such non-compliance had resulted in violation of any of the provisions of the Constitution or in failure of justice. We regret to find that the Director General has also not given any finding on the crucial question as to whether the findings of the disciplinary authority were unwarranted by the evidence on record. It seems that he only applied his mind to the requirement of clause (2) of R.27 (2) viz., whether the penalty imposed was adequate or justified in the facts and circumstances of the present case. There being non-compliance with the requirements of R.27(2) of the Rules the impugned order passed by the Director General is liable to be set aside."

14. In another judgment of this Court in the case of K.Kandasamy Vs. Deputy I.G. of police, reported in 2006 (4) MLJ 1382 in para 7, this Court has held as follows :-

"It is seen from the aforesaid portion of the impugned order that the Appellate Authority did not deal with any of the grounds of appeal raised by the petitioner. A departmental appeal is a continuation of the original proceedings. It is needless to point out that the last opportunity available for a delinquent, to canvass his case on merits, is at the appellate stage. After the appeal, a delinquent loses his right to challenge any disciplinary proceedings on merits, since the scope of interference on a revision or on a writ petition is very limited. Therefore, the rules themselves contemplate Appellate Authorities to go into the factual details and consider all the grounds of appeal before deciding an appeal. Unfortunately, the first respondent has chosen to dismiss the appeal by a non-speaking order and hence, the Appellate Authority's order is liable to be set aside."

15. It is also pertinent to refer the Judgment of the Hon'ble Supreme Court in Narinder Mohan Arya

Vs.United India Insurance Company Ltd, reported in 2006(4) SCC 713,wherein the Hon'ble Supreme Court has held that even when an Appellate Authority agrees with the findings of the Disciplinary Authority in a departmental enquiry, it should give reasons so as to enable the Writ Court to ascertain there was an application of the mind as required by the relevant rules. The relevant portion is extracted hereunder;

"33. An appellate order if it is in agreement with that of the disciplinary authority may not be a speaking order but the authority passing the same must show that there had been proper application of mind on his part as regard the compliance of the requirements of law while exercising his jurisdiction under Rule 37 of the Rules."

16. In view of the decisions cited supra and Rule 6(1) of Tamil Nadu Police Subordinate Service (Discipline & Appeal) Rules, it is clear that the appellate authority is the final fact finding authority and he is expected to assess the evidences available on record by due application of mind and also record the reasons even though not elaborately, but indicating as to how the appellate authority has satisfied himself with the reasons given by the disciplinary authority. When Rule 6 (1) of Tamil Nadu Police Subordinate Service (Discipline & Appeal) Rules mandates that the appellate authority should consider all those materials, in the instant case, no such finding has been given by the appellate authority except simply saying that he has perused some documents and came to the conclusion that the punishment awarded by the 1st respondent is not an excessive and rejected the same.

17. Considering the facts and circumstances of the case and also the decisions rendered by the Hon'ble Supreme Court and this Court cited supra, this Court with no hesitation, has come to the conclusion that the second respondent/ appellate authority has passed a cryptic order/non-speaking order without considering the issues that were raised by the petitioner in his Appeal. As rightly pointed out by the learned senior counsel for the petitioner, the order of the appellate authority/ 2nd respondent is not in conformity with the rule 6

(1) of TNPSS (D&A) Rules.

18. In fine, the impugned order in RC. No.047950/AP1(2)/2000, dated 03.07.2010 passed by the second respondent in respect of P.R. No. 67/ 2009 is quashed and the matter is remitted to second respondent to consider afresh and to pass orders thereon, on merits and in accordance with law, within a period of twelve (12) weeks from the date of receipt of the copy of this order.

19. With the above observations and directions, this writ petition is disposed of. No costs."

9. On a perusal of the impugned orders passed by the 1st respondent/enquiry officer, in para 5 and para 6 of the said impugned orders dated 07.10.2021, the 1st respondent neither discussed the explanation of the petitioner nor stated any reason. Following the various decisions of the Hon'ble Supreme Court, this Court had already elaborately considered and held that if the order passed by the Appellate Authority is cryptic and non-speaking order, the said order is liable to be set aside. Therefore, this Court is of the considered view, the authority concerned shall pass the reasoned orders, while imposing punishment, after following the rules.

10. Considering the above facts and circumstances of the case and in view of the decisions cited supra, this Court without any hesitation has come to the conclusion that the impugned order of punishment is liable to be quashed. Accordingly, this Court is inclined to pass the following order:

i) Both the impugned orders passed by the 1st respondent vide proceedings in Letter No.12492/E2/2018-6 & Letter No.3975/A2/2020-7, dated 07.10.2021, are quashed and the matter is remitted to the 1st respondent.

ii) After receipt of the same, the 1st respondent is directed to consider afresh the petitioner's explanation and pass reasoned orders on its own merits and in accordance with law, in the light of the aforesaid decision of this Court, as expeditiously as possible, more preferably, with a period of twelve weeks from the date of receipt of a copy of this order.

11. With the above direction, this Writ Petitions stand allowed. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

uma

To
1.The Secretary,
Commercial Taxes & Registration Department,
Fort St.George, Secretariat,
Chennai - 600 009.

2.Commissioner of Sales Tax,
Ezhilagam, Chepauk,
Chennai - 600 005.

3.Additional Commissioner (Taxation) (ST),
Ezhilagam, Chepauk,
Chennai - 600 005.

4.Additional Commissioner (Service Tax Cell) (ST),
Ezhilagam, Chepauk,
Chennai - 600 005.

+1 cc to Mr.Aditya Reddy, Advocate Sr.NO.16944
+1 cc to Government Pleader Sr.NO. 17534

W.P.Nos.4168 & 4171 of 2022
and W.M.P Nos.4313 & 4315 of 2022

SKM(CO)
A.SK(23/05/2022)