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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.04.2022

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THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR

W.P.No.4853 of 2020
W.M.P.Nos.5732 & 5733 of 2020

R.Rajagopal

... Petitioner

Vs.

1.The Managing Director,

The Tamilnadu State Marketing Corporation Limited,
Head Quarters, 4th Floor, CMDA Tower - 2, Egmore,
Chennai - 600 008.

2.The Senior Zonal Manger,

The Tamil Nadu State Marketing Corporation Limited,
Trichy, TASMAL Limited, Trichy District.

3.The District Manager,

The Tamil Nadu State Marketing Corporation Limited,
Thiruvaur District.

... Respondents

PRAYER: This Writ Petition has been filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorari, to call for the records of the third respondent in proceeding in Na.Ka.No.51/2020/A1, dated 13.02.2020 and quash the same and to pass any further order or direction as this Court may deem fit and proper in the circumstances of the case.

For Petitioner : M/s.K.Bharathi

For Respondents : Mr.N.Damodaran

O R D E R

The relief sought for in the writ petition to call for the records of the third respondent in proceeding in Na.Ka.No.51/2020/A1, dated 13.02.2020 and quash the same and to pass any further order or direction.

2.Brief facts of the case:

(a).On 23.01.2004, the petitioner was joined as a supervisor in the respondents' Corporation in Shop No.9847. While so, the third respondent has issued a show cause notice on 31.12.2019 to the salesman D.Kannan and the copy was served to



the petitioner, wherein, it was stated that in the raid conducted by the District Manager, Tanjavur on 15.12.2019, it was found that in Shop No.9847, the salesman D.Kannan sold 10,000 super strong beer (650 ml) for additional amount of Rs.10/- and it was further stated that he admitted the charge and was ordered to pay the fine to the said salesman and gave seven days time to deposit the said amount, before the third respondent in default, disciplinary proceedings will be initiated against the said Kannan.

(b).The petitioner has given a reply to the said show cause notice by stating that from 12.12.2019 to 15.12.2019, he was on leave and the same was also informed to the third respondent. Thereafter, the petitioner has made a request to the third respondent to accept his explanation and to relieve him from the charges by enclosing the attendance register, salary register, medical bills and prescription and further, the same has been sent to the second respondent also. Further on 27.01.2020, the second respondent has sent a notice by stating that in the circular dated 21.04.2019, if any shop is liable for the amount of selling additional charges within six months, for the second time, the supervisor can be transferred to other shop. Based on that reason, the petitioner's application was rejected and further stated that the petitioner is responsible for the charge of lack of supervisor.

(c).Further, the petitioner has given a letter dated 05.02.2020 to the third respondent to withdraw charges and not to initiate further proceedings against him. Thereafter, the third respondent has issued impugned order of transfer by his proceedings in Na.Ka.No.51/2020/A1, dated 13.02.2020 without considering the petitioner's explanation dated 21.01.2020 and 05.02.2020 and the same is null and void. Hence, the writ petition.

3.The learned counsel appearing for the petitioner would submit that the petitioner was working as a supervisor in the respondents' Corporation in Shop No.9847, Thiruvarur District. The petitioner was absent from 12.12.2019 to 15.12.2019 and during that time there was an inspection conducted by the respondent in the aforesaid shop and it was found that the petitioner was absent during the said period. By relying upon the circular dated 21.01.2019, disciplinary action has been taken against the petitioner and impugned transfer order has been passed and the same is contrary to the law settled by this Court as well as Hon'ble Supreme Court. Further, the learned counsel for the petitioner reiterate the above said facts and seeks indulgence of this Court to issue the writ of certiorari as prayed for.



4. In the counter filed by the learned counsel for the third respondent it is stated that the petitioner has been working as shop supervisor in TASMAL Shop No.9847 at Avur Road, Govindagudi, Valangaman Taluk, Tiruvarur District. In the said shop inspection was conducted by the Senior Regional Manager and it was found that the Shop personnel viz., D.Kannan was involved in selling of Beer for an additional amount of Rs.10/-. At the time of inspection, a written affidavit was obtained from the shop personnel. Thereafter, the District Manager, Tamil Nadu State Marketing Corporation Ltd., Thanjavur, has submitted an inspection report to the second and third respondents herein and based on the same, said Kannan was transferred to Shop.No.9862, Valangaiman, but no punishment was awarded to the petitioner since the said incident was the first of it in the said shop. Again, on 15.12.2019, second time inspection was conducted at Shop No.9847 within a period of six months from the date of the first inspection, during which the MRP violation was found.

5. It is further stated that without informing to the District Manager Officer, the petitioner has availed leave and also entrusted the regular shop works to the shop salesmen in violation of the corporation rules. Due to which, no alternative arrangement was made by the District Officer to monitor/supervise the shop. Further, the petitioner has submitted a false report to the District Manager Officer, by stating that he has attended duty for 31 days. However, the petitioner has mentioned that he was sick from 12.12.2019 to 15.12.2019 and he went to a private hospital on 14.12.2019 for treatment. In this regard it is submitted that as per the Government Servant Rules, any Government Servant should take treatment in a Government Hospital only, on the contrary, the petitioner had availed treatment in a private nursing home and in support of the same he has not produced any relevant documents. In this regard, the petitioner were transferred and the said transfer proceedings were obtained from the second respondent herein and issued by the third respondent herein. Hence, he has been transferred to shop No.9747, Mannargudi and since, he was present at the time of inspection i.e., on 15.12.2019, no fine amount has been imposed on him.

6. Further, it is stated that the petitioner had not signed in the attendance register from 12.12.2019 to 15.12.2019 and the inspection was conducted on 15.12.2019 and also no leave application was submitted by the petitioner herein, the inspection officer had marked the petitioner as absent. It is pertinent to note that if any shop supervisor intending to take a leave, the said employee has to hand over the shop key to the incharge supervisor and has to sign in the TOC form, but the petitioner has not followed the same. For the said reason, the petitioner is the responsible and answerable for the above lapse.



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7. In view of the above, this Court finds that without giving any opportunity to the petitioner to submit his explanation for the aforesaid alleged charges, the respondents have passed impugned order of transfer, which is punitive in nature.

8. At this juncture, it is pertinent to refer the decision of this Court made in W.P.(MD) Nos.10759 & etc., batch, dated 28.10.2021, wherein this Court by relying upon the various decisions of the Hon'ble Division Bench of this Court and following the decision of the Hon'ble Supreme Court, has held as follows;

"19. In K.M.Elumalai vs. The Superintendent of Prisons, Central Prison-II and another [CDJ 2009 MHC 4819], this Court, by taking note of catena of decisions of the Honourable Apex Court, has held as follows:

"12. The above said principles of law evolved by the English Courts would clearly lead to the conclusion that while acting upon a fact the person who exercises the power treating the said fact as conclusive will have to satisfy himself about the due proof of the same before taking any action based upon the same. In other words when a power is vested upon an authority the said authority will have to exercise the said power only in the manner known to law which is by giving a sufficient opportunity to the person against whom the action is proposed. The basic requirement of the said principle is to inform the person concerned about the charges levelled against him and thereafter affording an opportunity to put forth his case followed by a further opportunity to peruse the materials placed against him and cross-examine the witnesses who deposed against him.

13. It is no doubt true that an order of transfer is incidental to the service but the question for consideration is as to whether such an order can be passed in total violation of principles of the natural justice and by dispensing with the enquiry.

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20. Therefore this Court is of the opinion that the impugned orders passed by the respondents will have to be set aside being punitive in nature and therefore bad in law in not following the principles of natural justice, by affording an opportunity to the petitioner and by conducting an enquiry.

21. The proceedings are also liable to be set aside since the respondents have come to the conclusion based upon a discreet enquiry which is again based upon the statement obtained from persons behind the back of the petitioner. Even in an enquiry a statement obtained in a preliminary enquiry prior to a full-fledged enquiry cannot be relied upon. Therefore in such a case an order passed based upon such an enquiry cannot be sustained. In the judgment reported in (2006) 2 MLJ 202 [T. PITCHAI vs. DEPUTY INSPECTOR GENERAL OF POLICE, TIRUNELVELI RANGE, TIRUNELVELI AND ANOTHER] the Hon'ble High Court after considering the

judgment of the Hon'ble Apex Court and the Division Bench judgment of the Hon'ble High Court was pleased to hold that the punishment based upon a statement given a preliminary enquiry cannot be sustained. The Hon'ble High Court has observed as follows:

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22. The learned Government Advocate made strong reliance upon the judgment of the Hon'ble Apex Court reported in (2004) 4 SCC 245 [UNION OF INDIA AND OTHERS vs. JANARDHAN DEBANATH AND ANOTHER] and submitted that under Fundamental Rules 15 an order of transfer can be passed even in a case of misbehaviour or misconduct by the employee concerned. It is a well settled principle of law that a judgment will have to be applied to the facts of each case, in the said case the Hon'ble Apex Court was dealing with the case where based upon certain allegation an order of transfer was made by exercising the power under the Fundamental Rules. Therefore, the Hon'ble Supreme Court was considering the powers of the authorities under the said Rules. Moreover a reading

of the said judgment would show that it was clearly observed that the question of misbehaviour can be gone into departmental proceedings whereas in the present case it has



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been clearly stated by the respondents that they have no intention to go with the departmental proceedings since they know very well that it is not possible to prove the factum of the alleged misconduct by the petitioner.

23. Moreover the interpretation of Fundamental Rules 15 is not in question in the present case since the power has been exercised by the first respondent under the Tamil Nadu Jail Subordinate Rules. Further a reading of the Fundamental Rules would show that the power has to be exercised by the Government whereas in the present case on hand the said power has been exercised under the Tamil Nadu Jail Subordinate Rules by the first respondent herein. In this connection, it is useful to refer the judgment of the Division Bench reported in 2009(3) CTC 97 [D.Sivakumar v. The Government of Tamil Nadu] wherein the Hon'ble Division Bench has observed as follows:

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24. Similarly in the judgment reported in 2009 AIR SCW 942 [COMMISSIONER OF CENTRAL EXCISE, BANGALORE v. SRIKUMAR AGENCIES] the Hon'ble Supreme Court has observed as follows:

"4. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgements. They interpret words of statutes; their words are not to be interpreted as statutes. In *London Graving Dock Co. Ltd. v. Horton* (1951 Apex Court 737 at p.761), Lord Mac Dermot observed:



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"The matter cannot, of course, be settled merely by treating the *ipsissima verba* of Willes, J. as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge." In *Home Office v. Dorset Yacht Co.* (1970(2) All ER 294) Lord Reid said, "Lord Atkin's speech.... is not to be treated as if it was a statute definition. It will required qualification in new circumstances." Megarry, J. in (1971) 1 WLR 1062 observed: One must not, of course, construe even a reserved judgment of Russell L.J. as if it were an Act of Parliament." And, in *Herrington v. British Railways Board* (1972(2) WLR 537) Lord Morris said:

"There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case."

5. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper. The following words of Lord Denning in the matter of applying precedents have become *locus classicus*:

"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.

"25. Therefore on a reading of the said judgments, this Court is of the opinion that the judgments relied upon by the learned Government Advocate do not apply to the present case on hand.

26. Thus on a consideration of the facts and



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circumstances and also on a consideration of the legal issues involved, this Court is of the considered view that the impugned orders passed by the respondents are liable to be set aside. Accordingly they are set aside and the writ petitions are allowed. No costs. Consequently, connected miscellaneous petitions are closed."

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23. In Somesh Tiwari's case (supra), the Honourable Apex Court has held as follows:

"19. Indisputably an order of transfer is an administrative order. There cannot be any doubt whatsoever that transfer, which is ordinarily an incident of service should not be interfered with, save in cases where inter alia mala fide on the part of the authority is proved. Mala fide is of two kinds - one malice in fact and the second malice in law.

20. The order in question would attract the principle of malice in law as it was not based on any factor germane for passing an order of transfer and based on an irrelevant ground i.e. on the allegations made against the appellant in the anonymous complaint. It is one thing to say that the employer is entitled to pass an order of transfer in administrative exigencies but it is another thing to say that the order of transfer is passed by way of or in lieu of punishment. When an order of transfer is passed in lieu of punishment, the same is liable to be set aside being wholly illegal.

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25. No vigilance enquiry was initiated against him. The order of transfer was passed on material which was not existent. The order, therefore, not only suffers from total non application of mind on the part of authorities of respondent No.1, but also suffers from malice in law.

26. The High Court while exercising its jurisdiction under Article 226 of the Constitution of India must consider the fact of each case. Mechanical application of the normal rule "no work no pay" may in a case of this



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nature, be found to be wholly unjust. No absolute proposition of law in this behalf can be laid down."

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28. In view of the above settled legal position, this Court is of the opinion that when transfers are effected after preliminary enquiry on the complaints / allegations, it should necessarily be followed up by a detailed investigation and disciplinary proceedings initiated on the allegations resultantly found to be substantiated. However, in the present case, prima facie it is found that disciplinary proceedings were initiated and charge memos were issued only when the matter was taken up for hearing that too after the matter was being adjourned on several occasions, which is contrary to the aforesaid G.O.Ms.No.10, dated 07.01.1994 and the clarificatory letter dated 09.08.1994. Even on perusal of the impugned transfer orders, it is seen that the same were passed on the administrative grounds, however, in the counter affidavit filed by the respondents, it is stated that based on the discreet enquiry report, the impugned transfer orders were passed. Further, according to the respondents, the impugned transfer orders were passed to avoid more complications in the prison administration. That apart, the respondents have not initiated disciplinary proceedings immediately after the incident had taken place and only in the month of September, 2021, by way of filing additional counter affidavit, it was brought to the notice of this Court that disciplinary proceedings have been initiated against the petitioner for the incident alleged to have been taken place in the month of April, 2021 and in the counter affidavit filed in the month of August, 2021, there is no whisper about the disciplinary proceedings against the petitioners and only after the matter was taken up for hearing, disciplinary proceedings were initiated and charge memos were issued to the petitioner. Hence, this Court comes to a conclusion that the impugned transfer orders are punitive in nature and there is violation of the principles of natural justice on the part of the respondents and therefore, the respondents have not followed the clarification order issued by the Government and the decision in the case of



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Elumalai's case (supra) would therefore squarely apply to the facts and circumstances of the present case. Hence, the respondents have violated the principles of natural justice as observed in the aforesaid decision. Hence, for all these reasons, the impugned transfer orders are liable to be set aside.

9. Considering the above facts and circumstances of the case, in the light of the Judgments passed by the Hon'ble Supreme Court as well as the Hon'ble Madurai Bench of this Court, and based on the allegation, the impugned order is perused. Therefore, this Court comes to the conclusion that the impugned order passed by the respondents is in punitive nature. In view of the above, this Court is inclined to quash the impugned transfer order passed by the third respondent in Na.Ka.No.51/2020/A1, dated 13.02.2020 and direct the respondents to issue revised transfer orders within a period of two weeks from the date of receipt of a copy of this order. Liberty is given to the respondents to issue fresh order in accordance with guidelines.

10. According this writ petition stands allowed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar(CS-IX)

//True Copy//

Sub Assistant Registrar

Dua

To

1. The Managing Director,
The Tamilnadu State Marketing Corporation Limited,
Head Quarters, 4th Floor,
CMDA Tower - 2, Egmore,
Chennai - 600 008.
2. The Senior Zonal Manger,
The Tamil Nadu State Marketing Corporation Limited,
Trichy, TASMAL Limited,
Trichy District.



3.The District Manager,
The Tamil Nadu State Marketing Corporation Limited,
Thiruvaur District.

+1cc to Mr.K.Bharathi, Advocate, S.R.No.22905

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EV(CO)
SB(23/06/2022)