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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on :: 11.04.2022
Orders Pronounced on :: 29.04.2022

CORAM:

THE HON'BLE MR.JUSTICE D.KRISHNAKUMAR

W.P.No. 9766 of 2020
WMP.Nos. 11889 & 11891 of 2020

S.Sathiyaraj ..Petitioner

Vs

1.The State of Tamil Nadu rep. By its
Secretary to Government,
Municipal Administration and Water Supply (ME-1)
Department,
Fort St.George, Chennai - 600 009.

2.The Commissioner of Municipal Administration,
No.78, Urban Administrative Building,
Santhome High Road,
Chennai -66028.

3.The Commissioner,
Avadi City Municipal Corporation,
Avadi, Chennai-600054.

4.The Commissioner,
Tindivanam Municipality,
Tindivanam.

..Respondents.

Prayer : Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, calling for the records relating to the impugned Government order in G.O.(D) No.221 dated 26/06/2020 of the 1st respondent herein and the relieving order of the 3rd respondent herein dated 26/06/2020 in Na.Ka.No.33129/2020 /C1 and quash the same.

For Petitioner : Mrs. A.L.Gandhimathi

For Respondents : Mrs. P.Rajarajeshwari, GA

O R D E R

The case of the petitioner is that the petitioner joined service as Revenue Assistant in the Avadi Municipality on 10.10.2017 on compassionate appointment. The Avadi Municipality



was upgraded as Avadi Corporation vide Avadi City Municipal Corporation Act, 2019. The petitioner by letter dated 01.10.2019 gave his consent to continue his service in Avadi City Municipal Corporation. Pursuant to the same, no further orders have been passed re-designating the petitioner in his post. Subsequently, the 1st respondent has passed the impugned order in G.O.(D) No. 221 dated 26.06.2020 transferring the petitioner to Tindivanam Municipality. Challenging the same, the present writ petition is filed.

2. The learned counsel for the petitioner has submitted that since the Avadi Municipality was upgraded by proceedings dated 23.09.2019, the Commissioner of Municipal Administration has issued a letter to the 3rd respondent herein to obtain consent from all the employees of Avadi Municipality and submit the same to the Commissioner in order to proceed further in deciding the status of the employees. The petitioner has submitted his consent by letter dated 01.10.2019 to continue his service in Avadi City Municipal Corporation. Without considering the same, the 1st respondent issued orders, transferring the petitioner and 5 other staff members from the Avadi Municipal Corporation, stating reason that disciplinary proceedings are pending and the 3rd respondent has passed order on the same day, relieving the petitioner from the 3rd respondent corporation.

3. The contention of the learned counsel for the petitioner is that though the 1st respondent issued impugned transfer order alleging disciplinary proceedings, the petitioner has not received any notice or proceedings with regard to the alleged disciplinary proceedings. The impugned order of transfer is by way of punishment and without any notice, which itself shows that the impugned order of transfer is punitive in nature and the same is liable to be set aside.

4. On the other hand, the learned Government Advocate appearing for the respondent has submitted that the employees working in the erstwhile Avadi Municipality had been requested to submit their option either to continue in the Avadi Municipal Corporation or to retain them in the Municipal services. The petitioner has also submitted his option to continue in the Avadi Municipal Corporation and the same is subject to the powers of the Government under Section 116 of the Tamil Nadu Act 25 of 1981.

5. The learned Government Advocate has further submitted that the 3rd respondent/Commissioner of Municipal Administration has received the complaint against the Revenue Assistants including the petitioner that the petitioner has received the amounts for the new assessments from the public and has not issued the assessment orders to them and has been delaying the



official processes and also functioning beyond the control of administration. Hence the Commissioner of Municipal Administration has recommended the Government to transfer the petitioner and 5 other Revenue Assistants of Avadi Municipal Corporation to various Municipalities in view of administrative reasons as per Section 116(c) of the Coimbatore City Municipal Corporation Act 1981. Accordingly, the Government has passed the impugned order transferring the petitioner and 5 other Revenue Assistants to various municipalities. According to learned Government Advocate, impugned order passed by the 1st respondent is proper and does not require any interference by this Court.

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

7. The contention of the learned counsel for the petitioner is that in the impugned order passed by the 1st respondent, it has been stated due to pending disciplinary proceedings and based on the recommendation of the Commissioner of Municipal Administration, the petitioner has been transferred to Tindivam Municipality on administrative reasons. But the petitioner has not received any notice or proceedings with regard to any disciplinary proceedings or the petitioner was not directed to submit any explanation with regard to the alleged complaints. Therefore, the order of transfer on administrative reasons is totally arbitrary and 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



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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



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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 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



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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:

"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 require 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,



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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 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.

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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 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



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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 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. On facts of the case on hand, the respondent in the counter affidavit has specifically contended that only due to pending disciplinary proceedings and based on the complaints received from the residents of Avadi Municipality with regard to irregularities committed by the petitioner, he was transferred to Tindivam Municipality on administrative reasons. But on perusal of entire records, no documents are produced on behalf of the respondents to substantiate the said allegations.

10. It has been submitted by the learned Government Advocate that the transfer of a public servant, made on administrative grounds or on public interest, should not be interfered with unless there are strong and compelling grounds rendering the transfer order improper and unjustified.

11. There could not be no doubt that a transfer order shall not be, ordinarily, interfered with in the absence of strong and compelling grounds. When, however, an order of transfer is found penal or stigmatic in nature, such a transfer order ought to be interfered with if no opportunity of hearing has preceded such an order of transfer before the transfer order was made.

12. No doubt, a transfer, if made, as a measure of penalty, sticks as stigma on the transferred employee. In such circumstances, the transfer order would be illegal if no opportunity was given to the employee concerned to have his say in the matter before the transfer was made. In the present case, the impugned transfer order, had admittedly, not been preceded by any enquiry nor was the petitioner given an opportunity to have his say in the matter before the transfer order was made.

13. The Patna High Court, in the case of Md. Abu Muzaffar Nawaz v. Uttar Bihar Gramin Bank [2013(1) PLJR 626], has held as under:



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"26. The law is well settled that although transfer even if it appears on the face of it innocent but in fact it was affected by way of punishment has to be quashed by courts and there is ample evidence to show that the impugned order has been passed more as a punishment than for administrative necessity. This court has arrived at the aforesaid finding only after considering the various circumstances which have been brought on record in the writ petition, its counter affidavit and petitioner's reply to the counter affidavit and the said affidavits along with its annexures fortify the conclusion that the impugned order also suffers from the vice of mala fide exercise of power. The impugned order clearly shows that through it the authority sought to achieve something which they could not have otherwise achieved if an enquiry/proceeding had been initiated against the petitioner. Hence the petitioner was quite justified in seeking help of this court in his unequal contest with the respondents as a transfer can uproot a family, cause irreparable harm to an employee and drive him into desperation."

14. From the narration of facts and the proposition of law, which is discussed above, this Court comes to the conclusion that the impugned order of transfer, dated 26.06.2020 issued as against the petitioner on administrative reasons is liable to be quashed as the same is punitive in nature.

15. Accordingly the impugned order dated 26.06.2020 passed by the 1st respondent is quashed. The writ petition is allowed to the above extent. No costs. Consequently, connected Miscellaneous Petitions are closed. It is also open to the respondents to proceed with the disciplinary proceedings against the petitioner based on the complaint, if the petitioner really desires.

Sd/-

Assistant Registrar (CS-II)

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Sub Assistant Registrar

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To

1. The Secretary to Government,
Municipal Administration and Water Supply (ME-1)
Department,
Fort St. George, Chennai - 600 009.



2.The Commissioner of Municipal Administration,
No.78, Urban Administrative Building,
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Chennai -66028.

3.The Commissioner,
Avadi City Municipal Corporation,
Avadi, Chennai-600054.

4.The Commissioner,
Tindivanam Municipality,
Tindivanam.

+1cc to M/s.A.L.Ganthimathi, Advocate, S.R.No.30201

W.P.No. 9766 of 2020
and
WMP.Nos. 11889 & 11891 of 2020

SR(CO)
SB(26/05/2022)