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W.P.No.25098 of 2009

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.03.2023

CORAM :

THE HONOURABLE MR. JUSTICE J.SATHYA NARAYANA PRASAD

W.P.No.25098 of 2009
and M.P.No.2 of 2009

J.Kalyanasundaram

... Petitioner

Vs.

1.The Government of Tamil Nadu,
Represented by its Principal Secretary,
Health and Family Welfare (D1) Department,
Fort St.George, Chennai – 9.

2. The Director of Public Health
and Preventive Medicine,
Chennai – 600 006.

Respondents

...

PRAYER: This Writ Petition has been filed for issuance of Writ of Certiorarified Mandamus calling for the records relating to the second respondent herein in Proc.R.No.53975/DA/2004-S1 dated 15.02.2008 and the consequential order passed in appeal by the first respondent herein in G.O.(D) No.106 Health and Family Welfare (D1) Department dated 06.02.2009 and quash the same and consequently direct the respondents to confer the promotion post of Superintendent with due regards to the petitioner seniority.

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For Petitioner : Mr.R.S.Anandan
for M/s.A.Baskaran

For Respondents : Mr.S.Ravikumar,
Special Government Pleader

ORDER

This writ petition has been filed to call for the records relating to the second respondent herein in Proc.R.No.53975/DA/2004-S1 dated 15.02.2008 and the consequential order passed in appeal by the first respondent herein in G.O.(D) No.106 Health and Family Welfare (D1) Department dated 06.02.2009 and quash the same and consequently direct the respondents to confer the promotion post of Superintendent with due regards to the petitioner seniority.

2. The facts of the case in a nutshell:-

The petitioner has joined the services as a Junior Assistant on 08.12.1975 on compassionate ground and was promoted to the post of Assistant in the year 1993, then promoted as Superintendent in the year 1998 and in the year 2003 he was reverted to the post of Assistant because of the re-fixation of the seniority based on the fresh order of the regularisation in the



post of Junior Assistant. He was served with a notice by the Financial Advisor & Chief Accounts Officer as per memo in R.No.190753/APV/S5/2003 dated 05.02.2004 calling for his explanation for certain omission in audit works along with a Superintendent. He also submitted his explanation to the same and subsequently he was served with a charge memo under rule 17(b) of TNCS (D&A) rules on 30.06.2004 by the second respondent by memo R.No.53975/DA/04/S 1-2 dated 11-06-2004 and the charge is extracted as below:-

“That Thiru.J.Kalyanasundaram, Assistant of this office has failed to take up effective audit on the schemes at the office of the Deputy Director of Health Services, Ramanathapuram disobeying the instructions issued in this Office R.No.190753/APV/S5/2002 dated 27.11.2003 thereby derelicted from his duties”.

3. The petitioner also submitted an explanation dated 06.07.2004 and the same was not accepted and the Disciplinary Authority appointed an enquiry officer to proceed with the enquiry. The enquiry report was furnished to the petitioner and he also submitted his representation on the enquiry report and the same was not accepted and the Disciplinary Authority/second respondent has awarded the punishment of stoppage of increment for two



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years without cumulative effect as per the proceedings in R.No.53975/DA/2004-S1 dated 15.02.2008. The petitioner submitted an appeal against the punishment awarded by the Disciplinary Authority to the first respondent on 30.04.2008. The first respondent without considering the appeal properly rejected the same by stating that the appellant has not put forth any valid points to reconsider the punishment imposed on him as per the order in G.O. (D).No.106 Health and Family Welfare (D1) Department dated 06.02.2009 and because of this punishment his promotion to the post of Superintendent has been overlooked. Aggrieved by the above order passed by the second respondent dated 06.02.2009 the petitioner has come forward with the present writ petition.

4. The learned counsel appearing for the petitioner submitted that in the enquiry no one was examined to prove the guilt of the charge but the charge was held as proved by the enquiry officer. No documents were filed, no witnesses were examined but the enquiry officer proceeded with the enquiry and submitted the report that the charges against the petitioner were proved. The petitioner nor the officer were examined during the course of enquiry. The Officer who is responsible for auditing is the Superintendent and the



petitioner is only an Assistant working under him. The issue taken up for determination during the enquiry is whether the quality of audit at first was poor or not. The enquiry officer relied on the statement of the Financial Advisor & Chief Accounts Officer who is an auditing authority for the Director of Public Health and Preventive Medicine and that the quality of work was very poor and the attitude is condemnable and attracted disciplinary action, though when the statement of the Financial Advisor & Chief Accounts Officer was relied he was not examined in the enquiry in the presence of the petitioner. The enquiry officer accepted the statement of the Financial Advisor & Chief Accounts Officer without examining him.

5. The learned counsel further submitted that the statement taken behind the back of the petitioner by the enquiry officer to hold the charge as proved would clearly amounts to denial of reasonable opportunity to defend the charges effectively and it is against the principles of natural justice. Further only for a misconduct disciplinary action can be initiated not for poor quality of work and he was posted for the first time in the audit and his superior officer being the Superintendent was the head of the audit party and he has not properly guided him but subsequently on the direction of the audit



authority a fresh report was submitted properly. Further more the superior officer the Superintendent Thiru.K.Devendran expired on 20.11.2004, therefore the petitioner should not be penalised alone for poor quality of work. In the absence of any misconduct and when there is no intentional mistake there is no loss caused to the department and no disciplinary action can be initiated. The learned counsel further submitted that in the appeal the Appellate Authority has to consider whether the procedure laid down in the rules have been complied with or not and whether any non-compliance has resulted in violation of provisions of constitution of India. The learned counsel for the petitioner relied upon the judgment of the Apex Court reported in 2009 (2) SCC 570 in the case of **Roop Singh Negi Vs Punjab National Bank and others** and the relevant portion is extracted as below:-

“ C. Service Law – Departmental enquiry – Documentary evidence – Manner in which required to be proved – Held, mere production of documents is not enough – Contents of documentary evidence has to be proved by examining witnesses – Further held, FIR in itself is not an evidence without actual proof of facts stated therein – Criminal Procedure Code, 1973, S.154.

14. Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been



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proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence.

Further the learned counsel also relied upon the judgement of the Apex Court in *M.V.Bijlani Vs. Union of India in SCC P.No.95* and the relevant portion is extracted as below:-

25..... Although the charges in a departmental proceeding are not required to be proved like a criminal trial i.e., beyond all reasonable doubt, we cannot lose sight of the fact that the enquiry officer performs a quasi-judicial function, who upon analysing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the cahrges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with.”

6. Whether the findings of the disciplinary authority is supported by



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evidence on record or not and in the case of the petitioner the appellate authority failed to consider the same and failed to pass a speaking order by considering all the points. The Superintendent is the head of the Audit party and the petitioner being new to the audit wing cannot be independently held responsible and in this case the Superintendent died on 20.11.2004 before the enquiry and therefore cannot be held responsible and in absence of any evidence that he has committed the mistake independently and is responsible for the collective action the disciplinary authority cannot impose the punishment against the petitioner. Hence he prays to quash the order passed by the appellate authority/second respondent dated 06.02.2009 and to allow the writ petition.

7. Per contra the learned Special Government Pleader appearing for the respondents filed a counter affidavit on behalf of the respondents. The learned Special Government Pleader submitted that the petitioner failed to take up effective audit on the various Government Schemes as instructed which involved an expenditure of more than Rs.25 lakhs for three years (6 rounds of Pulse Polio Immunisation and other schemes) and give a separate audit report. The audit authority competent to review the Department's Audit



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Reports who scrutinized the petitioner's audit report called for his explanation for his negligence and complacency to take up effective scheme audit as directed. **Since the petitioner failed to state the reasons for his complacency and failure to take up the scheme audit in the first instance itself and thereby failed to discharge his duties and responsibilities the second respondent initiated disciplinary action under rule 17 (b) of the Tamil Nadu Civil Services (Discipline and Appeal) Rules against the petitioner and charges were framed in R.No.53975/DA/04/S1-2 dated 11.06.2004. The petitioner subsequently gave a complete audit report as required and the same was accepted by the respondents.** Further the learned Special Government Pleader drew the attention of this Court to the paragraph No.5 of the counter affidavit in which it is stated that since the petitioner had varying experience in the department and only based on his experience he was posted to the Audit Wing of the Directorate. In his defence statement and further representation, the petitioner accepted the lapses and stated that the occurrence is for the first time. The second respondent taking into account the petitioner's submission and acceptance of lapse in the discharge of his official duties in his explanations dated 06.07.2004 and 04.10.2006 imposed a commensurate punishment of stoppage of increment



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for two years without cumulative effect on him for the gravity of charges vide proceedings R.No.53975/DA/2004/S1 dated 15.02.2008. He further submitted that the petitioner was promoted to the post of Superintendent on 21.09.2011 by the second respondent vide proceedings in R.No.021567/E4/S1/2013 dated 18.03.2013.

8. Heard both side and perused the materials available on record.

9. In this case the charge against the petitioner is that “he failed to take up effective audit on the schemes at the Office of the Deputy Director of Health Services, Ramanathapuram, disobeying the instructions issued in this office R.No.190753/APV/S5/02 dated 27.11.2003 thereby derelicted from his duties”. The explanation given by the petitioner dated 06.07.2004 was not satisfactory and the respondents decided to conduct an enquiry, an enquiry officer was appointed and an enquiry was conducted but the petitioner was not examined, no witnesses were examined, no documents were filed and the concerned officers were also not examined in the enquiry. In the absence of the above, the enquiry officer submitted his report and held that the charges were proved against the petitioner. The second respondent/Disciplinary



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Authority based on the enquiry officer's report has awarded the punishment of stoppage of increment for two years without cumulative effect. The main charge against the petitioner is that he has failed to take up an effective audit on the various Government schemes as instructed and has submitted a poor audit report and the poor quality of work. The petitioner has also stated that he is posted for the first time in the audit section and he was working only as an Assistant and his senior officer is the Superintendent. The superintendent during the course of enquiry died on 20.11.2004 subsequently a fresh report was submitted and the same was also accepted by the respondents. The Superintendent being the head of the Section died during the course of enquiry on 20.11.2004 and the respondents have filed the charges only against the petitioner who was working only as an Assistant in the section and subordinate to the Superintendent. If at all charges has to be framed for the poor audit and for poor quality of work in regard to Pulse Polio Programme it should have been charged against both the Superintendent and the petitioner for dereliction of their duties and not the petitioner alone. It is pertinent to note that in the punishment order passed by the second respondent/Disciplinary Authority dated 15.02.2008 wherein it has been stated **“on the enquiry report communicated to him have been examined**



carefully with reference to the materials available in the connected records". In this case it is crystal clear and evident that no documents were filed, no witnesses were examined and even the petitioner and the concerned officer were also not examined during the enquiry.

10. This Court is unable to understand how the enquiry officer has come to the conclusion that without conducting the enquiry properly and in the absence of the above, the charges were proved against the petitioner. The Disciplinary Authority has ordered punishment of "stoppage of increment for two years without cumulative effect on the petitioner for the proved charges on his part." Thereafter an appeal was preferred by the petitioner to the first respondent and that was also rejected by stating that the appellant has not put forth any valid points to reconsider the punishment imposed on him as per the order in G.O.(D).No.106 Health and Family Welfare (D1) Department dated 06.02.09. The petitioner was also not considered for the promotion to the post of Superintendent since the enquiry was pending. The petitioner was promoted as Superintendent on 21.09.2011 but whereas according to his original seniority he should have been promoted as Superintendent during the pendency of the enquiry i.e., in the year 2004 itself. When the enquiry itself



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was not conducted in a fair and proper manner, the punishment imposed on the basis of the enquiry report by the Disciplinary Authority/second respondent is unsustainable in law.

11. In view of the above factum of case, the order passed by the first respondent G.O.(D).No.106 Health and Family Welfare (D1) Department dated 06.02.2009 is liable to be quashed and the same is hereby quashed.

12. In the result, the writ petition is allowed with a direction to the respondents to confer the promotion post of Superintendent with due regard to the petitioner's seniority and also all the consequential benefits for which the petitioner is entitled to has to be settled / paid to him within a period of six weeks from the date of receipt of a copy of the order. No costs. Consequently connected miscellaneous petition is also closed.

16.03.2023

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Index : Yes/No
Speaking Order : Yes/No



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J. SATHYA NARAYANA PRASAD, J.

dpq

To:

- 1.The Government of Tamil Nadu,
Represented by its Principal Secretary,
Health and Family Welfare (D1) Department,
Fort St.George, Chennai – 9.
- 2.The Director of Public Health
and Preventive Medicine,
Chennai – 600 006.

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