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Court : Chennai

Decided On : Nov-15-2012

Reported in : 2013(1)MLJ136

Judge : K. Chandru

Appeal No. : W.P. No. 11114 of 2012 & M.P. Nos. 1 & 2 of 2012

Appellant : B. Balachandran

Respondent : The Government of Tamil Nadu, Rep.by Its Secretary, Municipal Administration and Water Supply Department, Secretariat and Another

Advocate for Pet/Ap. : For the Petitioner: R.S. Anandan, Advocate. For the Respondents: P.S. Shanmuga Sundaram, A.G.P.

Judgement :

(Prayer: Petition filed under Article 226 of the Constitution of India seeking for issue of writ of certiorarified mandamus to call for the records relating to the second respondent herein in Roc.No.22590/2007/OP3 dated 30.7.2007 and the consequent letter issued by the first respondent herein in Letter No.21075/Me.4/2001-4 dated 5.12.2011 and quash the same and consequently

direct the respondents herein to confer all the attendant and consequential benefits with due regards to the petitioner's seniority.)

1. The petitioner in this writ petition, who was formerly working as the Municipal Commissioner, Pollachi, and presently Commissioner of Trichy Corporation, challenges not only the notice asking his explanation on the enquiry, vide notice dated 5.12.2011, but also the earlier charge memo framed under Rule 17(b) of the Tamil Nadu Civil Services (Disciplinary and Appeal) Rules, dated 30.7.2007.

2. When the writ petition came up on 6.6.2012, this Court, while ordering notice of motion, granted interim injunction for a limited period. The interim order came to be extended from time to time.

3. It is seen from the records that the petitioner was issued with a charge memo under Rule 17(b) of the Act for the commission of offences committed by him, while he was functioning as Municipal Commissioner, Pollachi. The charges, as seen from the records are based upon the materials collected by the Vigilance Department and it is found that while in the discharge of his duty, the property taxes levied by the petitioner were very low in respect of vacant site and buildings in the municipal area and the petitioner had a pecuniary gain in fixing a low property tax, thereby causing a recurring loss to the municipality. The details of the statement of property tax fixed by him and the Revenue loss caused to the municipality are set out in the annexures to the charge memo.

4. The enquiry officer, after examining the witnesses, gave a prima facie opinion that the petitioner has fixed the property tax improperly and created a recurring loss of 71,850/- per year to the Pollachi Municipality since the year 2001-02. The charge memo contains the list of witness in annexure-3 and the list of documents to be relied upon in the enquiry, in annexure-IV.

5. The petitioner, in the meanwhile transferred to work as the Commissioner, Trichy Corporation, and he requested the copies of the documents for perusal. The enquiry was directed to be held by the Additional Director of Municipal Administration, Chennai.

6. The petitioner participated in the enquiry. When the preliminary statement was recorded, he denied the charges and also took time to submit additional explanation within one week in the enquiry held on 8.10.2009. Subsequently, the enquiry was held on seven different dates and the petitioner made a statement before the enquiry officer, vide his explanation dated 13.10.2009.

7. Thereafter, the findings of the enquiry officer was forwarded to the State Government and the State Government, as required under the law, by covering letter dated 5.12.2011, asked the petitioner to offer his explanation in respect of the findings of the enquiry officer. It is stated that the Government decided to deviate the findings of the enquiry officer and held that the charges were proved. Therefore, notice was given in respect of the findings of the enquiry officer and the opinion of the State Government. It is at this stage, the petitioner requested 15 days time to submit his explanation, vide his letter dated 28.12.2011, and moved this Court and obtained the interim order.

8. This Court is not inclined to allow the petitioner to challenge the charge memo at this stage, especially when the petitioner has submitted his explanation and participated in the enquiry. The question of challenging the impugned charge memo dated 30.7.2007 at this stage will not arise, after the petitioner's participation in the enquiry and in the stage of offering show cause notice on the findings submitted by the enquiry officer.

9. The only question arises for consideration is as to whether the notice of the State Government dated 5.12.2011 asking the petitioner to give his explanation on the findings of the enquiry officer as well as the deviated findings given by the State Government can be interfered with at this stage, or not.

10. It must be noted that after the 42nd amendment made to the Constitution, the opportunity of providing a second show cause notice was removed and the Service Rules framed under Article 309 of the Constitution were expected in conformity with the 42nd amendment. When the 42nd amendment, amending Article 311 of the Constitution came to be challenged, a Constitution Bench of the Supreme Court in *Union of India vs. Tulsiram Patel* reported in (1985) 3 SCC 398 had upheld the said amendment. The Supreme Court held that the grant of a

second show cause notice and hearing of a Government servant, are not part of known reasonable opportunities and such an opportunity cannot be raised to the level of constitutional right. Therefore, the Government has no obligation to issue a second show cause notice either on the question of the findings or on the question of penalty. The relevant Service Rules have also been brought in tune with the 42nd amendment.

11. However, the Supreme Court subsequent to the amendment, by its judgment in Union of India vs. Mohd.Ramzan Khan reported in (1991) 1 SCC 588 held that if the enquiry officer is different from that of the disciplinary authority, then an opportunity should be given to the charge sheeted Government servant to put forth his remarks on the enquiry officer's findings. The opportunity was held to be part of the principles of natural justice. Elaborately the effect of Md.Ramzan Khan's case, a larger bench of the Supreme Court in "Managing Director, ECIL, Hyderabad and others vs. B.Karunakar and others reported in (1993) 4 SCC 727 in paragraphs 27 and 28 held as follows:

"27. It will thus be seen that where the enquiry officer is other than the disciplinary authority, the disciplinary proceedings break into two stages. The first stage ends when the disciplinary authority arrives at its conclusions on the basis of the evidence, enquiry officer's report and the delinquent employee's reply to it. The second stage begins when the disciplinary authority decides to impose penalty on the basis of its conclusions. If the disciplinary authority decides to drop the disciplinary proceedings, the second stage is not even reached. The employee's right to receive the report is thus, a part of the reasonable opportunity of defending himself in the first stage of the inquiry. If this right is denied to him, he is in effect denied the right to defend himself and to prove his innocence in the disciplinary proceedings.

28. The position in law can also be looked at from a slightly different angle. Article 311(2) says that the employee shall be given a "reasonable opportunity of being heard in respect of the charges against him". The findings on the charges given by a third person like the enquiry officer, particularly when they are not borne out by the evidence or are arrived at by overlooking the evidence or misconstruing it,

could themselves constitute new unwarranted imputations. What is further, when the proviso to the said Article states that "where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed", it in effect accepts two successive stages of differing scope. Since the penalty is to be proposed after the inquiry, which inquiry in effect is to be carried out by the disciplinary authority (the enquiry officer being only his delegate appointed to hold the inquiry and to assist him), the employee's reply to the enquiry officer's report and consideration of such reply by the disciplinary authority also constitute an integral part of such inquiry. The second stage follows the inquiry so carried out and it consists of the issuance of the notice to the employee and deciding upon the penalty. What is dispensed with is the opportunity of making representation on the penalty proposed and not of opportunity of making representation on the report of the enquiry officer. The latter right was always there. But before the Forty-second Amendment of the Constitution, the point of time at which it was to be exercised had stood deferred till the second stage viz., the stage of considering the penalty. Till that time, the conclusions that the disciplinary authority might have arrived at both with regard to the guilt of the employee and the penalty to be imposed were only tentative. All that has happened after the Forty-second Amendment of the Constitution is to advance the point of time at which the representation of the employee against the enquiry officer's report would be considered. Now, the disciplinary authority has to consider the representation of the employee against the report before it arrives at its conclusion with regard to his guilt or innocence of the charges."

12. It is only in consonance with such orders of the Supreme Court, the state Government had given the impugned notice. Instead of replying to the said show cause notice and bringing all his contentions before the State Government, the petitioner has filed the present writ petition.

13. Though the learned counsel for the petitioner strenuously argued that this Court has got discretion to entertain such a Writ Petition, this Court is not inclined to exercise any such discretion especially when the State Government had obeyed

the law laid down by the Supreme Court and the State had given an opportunity of giving an explanation to the enquiry report. It is for the competent authority to go into the findings and thereafter taking into account the explanation if any offered by the charge sheeted Government servant, come to a conclusion one way or the other. In case of agreeing with the findings of proved misconduct, they can impose appropriate punishment on such Government servant. The Standing Rules also provide for an appeal in case of an adverse order passed by the authority. If the order is passed by the State Government itself, then the Rules also provide for a review. Therefore, there is time enough to correct if a wrong order is passed by the Government. Certainly, this Court will not interdict a notice at the stage of calling for remarks on the enquiry report as it would amount to usurping the powers of the competent authority. To go into the findings of the enquiry officer's report, this Court's judicial power is very limited.

14. In the result, the writ petition is dismissed. However, there is no order as to costs. Consequently, connected miscellaneous petitions are dismissed.

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