Case relating to Departmental Promotion:

Parties : R. Mahalingam Versus The Chairman Tamil Nadu Public Service Commission Chennai & Another

Court : High Court of Judicature at Madras

Case No : W.A. NO.796 of 2001

Judges: THE HONOURABLE MRS. JUSTICE R. BANUMATHI & THE HONOURABLE MR. JUSTICE M.M. SUNDRESH

Appearing Advocates : For the Appellant: S. Parthasarathy Senior Counsel for N. Damodaran, Advocate. For the Respondents: C.N.G.Niraimathi TNPSC.

Date of Judgment : 03-02-2010

Head Note :-

Constitution of India - Article 226 -

Comparative Citation:

2010 (2) MLJ 1048

Judgment :-

(Prayer: Writ Appeal filed under Clause 15 of the Letters Patent to set aside the order of the learned single Judge dated 01.10.1997 in W.P.No.19251 of 1992.)

M.M. SUNDRESH, J

The writ appeal has been filed challenging the order passed by the learned single Judge in W.P.No.19251 of 1992 wherein the writ petition filed by the appellant was dismissed, thereby confirming the order of dismissal passed by the respondents 1 and 2.

2. The brief facts of the case in a nutshell are as follows:

(i) The appellant joined the respondents as Junior Assistant in the year 1973. Further promotions were granted to the appellant as Assistant and thereafter as Assistant (Selection Grade) in the year 1975 and 1988 respectively. While working as an Assistant (Special Grade), the appellant went on an unearned leave on private affairs. The leave was sanctioned by the respondents between 12.02.1990 to 25.02.1990.

(ii) The respondents issued a notification dated 08.08.1989 for conducting competitive examination for direct recruitment to the post of Assistant Surgeons in the Tamil Nadu Medical Services for the year 1989-1990. The examination was conducted on 17.02.1990 and 18.02.1990. The appellant went to the Examination Hall at Bharathiyar Women Arts College, Chennai and acted as an Invigilator while he was on leave. Proceedings have been initiated against the appellant by framing charges that the appellant had unauthorisedly acted as an Invigilator during unearned leave period without authority and prevented the Chief Invigilator from sending a report to the Controller of Examinations about the distribution of afternoon question paper in the forenoon resulting in the leakage of the said question paper.

(iii) In pursuant to the said charges an oral enquiry was conducted and the Enquiry Officer held that the charges are proved. The disciplinary authority namely, the second respondent had accepted the findings of the Enquiry Officer and dismissed the appellant. The appeal filed by the appellant before the first respondent was also confirmed against the appellant and the writ petition in W.P.No.19251 of 1992 challenging the said order of the respondents was also dismissed and hence the present writ appeal.

3. The case of the respondents are as follows:

(i) It is the case of the respondents that the appellant without any permission and based upon fabricated documents acted as an Invigilator while he was on leave. The further charge against the appellant is that he had prevented the Chief Invigilator from sending the report about the leakage of question paper. It is the specific case of the Department that no authorisation was given to the appellant to act as an Invigilator and no such letter was given on 16.02.1990 authorising the appellant to attend the work as an Invigilator. The said letter dated 16.02.1990 has been fabricated. Further the leave of the appellant has not been cancelled and the appellant has not met the competent authority seeking permission before attending to the work and that is a reason why no claim was made by the appellant towards the dearness allowance. It is the further case of the respondents that the list of Invigilators given to the Chief Invigilator does not include the name of the appellant and his name has been included by adding the same by way of hand-written manuscript.

4. The case of the appellant is as follows:

(i) It is the case of the appellant that he went to the Head Office on 16.02.1990 in order to find out as to whether he had any letter. At that point of time, a letter dated 16.02.1990 was handed over to him by an official with a direction to act as an Invigilator assisting the Chief Invigilator at Bharathiyar Women Arts College, Chennai. After the receipt of the said letter, the appellant handed over the same to the Chief Invigilator and thereafter acted as an Invigilator assisting the Chief Invigilator.

5. The contentions of the appellant are as follows:

(i) Shri.S.Parthasarathy, learned senior counsel appearing for the appellant submitted that the charges framed against the appellant are solely based upon the report of the Chief Invigilator. The appellant was not given the copy of the report and he was also not allowed to cross-examine the Chief Invigilator. Therefore the entire proceedings are liable to be set aside, since the principles of natural justice have been violated. The learned senior counsel further submitted that there is no charge levelled against the appellant regarding the fabrication of the document and the appellant after receiving the order dated 16.02.1990 has performed his duty of attending to his work by assisting the Chief Invigilator at the Examination Hall. The learned senior counsel also submitted that the other persons whose names were also found in the fabricated document have not been proceeded with.

(ii) It is further submitted by the learned senior counsel that the statement given by the Chief Invigilator before the Investigating Agency would clearly establish the fact that the Chief Invigilator had received the letter dated 16.02.1990 from the office of the respondents. It is the further submission of the learned senior counsel that the respondents as well as the Enquiry Officer has placed the entire onus on the appellant instead of proving the charges against the appellant by sufficient evidence both oral and documentary. In support of his contention, the learned senior counsel made strong reliance upon the judgment of the Apex Court reported in (2009) 2 SUPREME COURT Cases 570 [Roop Singh Negi V. Punjab National Bank and Others] and submitted that the departmental proceedings being quasi-judicial in nature onus is on the department to substantiate its charges against the delinquent officer.

6. The submissions of the learned counsel for the respondents:

(i) Ms.C.N.G.Niraimathi, learned counsel for the respondents submitted that the contents of the report of the Chief Invigilator has been incorporated in the charge memo itself and the appellant did not reply to the questionnaire given to the appellant requiring the appellant to indicate copies of the documents and records relied on by him. The learned counsel further submitted that the appellant agreed for the oral enquiry and has expressed satisfaction for the said enquiry and that is a reason why he has specifically stated that he did not want a personal enquiry. The learned counsel further added that the documents sought for by the appellant after the enquiry have in fact been given at the time of making representation to the second respondent. Further the appellant has not established his case as he alone would be in a position to prove, since admittedly he attended the work on a day when he was on unearned leave.

(ii) It is also submitted by the learned counsel for the respondents that the document dated 16.02.1990 was forged and fabricated and the appellant has not given any reason for not intimating the authorities before attending the work during unearned leave period and the fact that he has not claimed any expenses for the work also clearly substantiate the charges levelled against the appellant. The learned counsel further stated that the statement of the Chief Invigilator given before the Investigating Officer does not have any evidentiary value. According to the learned counsel, the respondents have considered the evidence available on record and came to the conclusion that the charges against the appellant have been proved. Hence the said decision based upon the consideration of the facts and confirmed by the learned single Judge does not warrant any interference.

7. We have heard the arguments of Shri.S.Parthasarathy, learned senior counsel appearing for the appellant and Ms.C.N.G.Niraimathi, learned counsel appearing for the respondents.

8. It is seen from the records that the charges have been framed against the appellant for acting as an Invigilator while he was on unearned leave unauthorisedly and further preventing the Chief Invigilator from discharging his duties. The charges as framed against the appellant are extracted hereunder:

"i. That, Thiru.R.Mahalingam, Assistant had gone to the Examination hall unauthorisedly, on the pretext of assisting the Chief Invigilator while he was on unearned leave on private affairs.

ii. That, he had gone to the examination hall and taken up the official work and acted as Invigilator while he was on leave.

iii. That, he had prevented the Chief Invigilator from sending a report to the Controller of Examinations about the distribution of afternoon question paper in the forenoon and the resultant leakage of question paper."

9. It is the specific case of the respondents that the appellant was not issued with anyorder on 16.02.1990 authorising him to attend the work of assisting the Chief Invigilator. On the contrary, the case of the appellant is that he went to the Head Office to inquire as to whether any letter was sent to him. Admittedly on 16.02.1990 the appellant was on unearned leave. If the statement of the appellant is true then the onus is on him to prove his statement by letting in sufficient evidence. Admittedly, the leave sanctioned to the appellant has not been cancelled. When the appellant specifically states that he was issued the order dated 16.02.1990 then he has to prove from whom he received the said order. The appellant was silent about the officer from whom he received the order. There is no explanation from the appellant as to why he has not sought for the dearness and travelling allowance, if according to him the letter dated 16.02.1990 is true and genuine.

10. The contention of the learned senior counsel Shri.S.Parthasarathy, that merely based upon the Chief Invigilator's report, the charges cannot be framed and sustained cannot be countenanced. As submitted by the Ms.C.N.G.Niraimathi, learned counsel for the respondents by way of questionnaire the appellant was specifically asked about the documents he was in need of. He was also asked about the witnesses to be cross-examined. The appellant for the reasons known to him has neither sought for the documents nor made any request for either examination or cross-examination of any witness. On the contrary, the appellant stated before the Enquiry Officer that he was satisfied with the oral enquiry and he did not want any other enquiry.

11. The above said facts would clearly show that there is no violation of principles of natural justice. The violation of principles of natural justice would arise only when a request was made by the affected party and the same is rejected or when no offer is made by an authority which is required under law. As observed earlier in the present case on hand, an offer was made by the authorities and the said offer was not accepted by the appellant. The appellant after waiving his right to cross-examine the witness cannot thereafter turn around and contend that the principles of natural justice have been violated in not allowing him to cross-examine the concerned witness. The Hon'ble Supreme Court in the judgment reported in 2009 AIR SCW 5779 [Biecco Lawrie Limited And Another V. State Of West Bengal And Another] has observed as follows:

"16.Fair hearing also calls for a right to rebut any evidence that necessarily involves essentially two factors namely - (a) cross examination; and (b) legal representation (State of J. & K. vs. Bakshi Ghulam Mohammed [AIR 1967 SC 122]. In S.C.Girotra vs. United Commercial Bank [(1996) 2 LLJ 10], the Bank obtained certain reports prepared on which the charges were based and these reports were submitted by bank officers who were examined by the Enquiry Officer. On the basis of the report an employee was dismissed and the court held that there was violation of the principles of natural justice as the employee was not allowed to cross-examine the officers who deposed orally before the Inquiry Officer. In the present case, the Inquiry Officer had sent due notice and postponed the date of hearing various times with an intention to permit the respondent to present his case, nevertheless the respondent did not present himself except on three days and ultimately the Enquiry Officer conducted the inquiry ex parte. Therefore, this was not a case where the respondent was not afforded a chance to cross-examine the witnesses done by the prosecution witnesses rather it seems to be a case where the respondent, had waived his right to cross-examine by absenting himself from the inquiry on the grounds that he was not permitted legal representation nor was furnished with the documents or list of evidences upon which the management was relying. In Kalindi & Ors. v. Tata Locomotive & Engg. Co.Ltd. [AIR 1960 SC 914], this court held that a representation through a lawyer in any administrative proceeding is not considered as an indispensable part of natural justice as oral hearing is not included in the minima of fair hearing. To what extent it is allowed depends upon the provisions of the statute, like the Factories Law does not permit it whilst Industrial Disputes Act allows it with the permission of the Tribunal. In Crescent Dyes and Chemicals Ltd. v. Ram Naresh Tripathi [(1993) 2 SCC 115], this Court held that right to legal representation through a lawyer or agent of choice may be restricted by a standing order also and it would amount to denial of natural justice. Further more in the case of Harinarayan Srivastava v. United Commercial Bank and another [(1997) LLR 497 (SC)], this Court again held that refusal of Inquiry Officer to permit representation by an advocate even when the management was being represented by a law graduate will not be violative of the principles of natural justice if the charges are simple and not complicated. In this case, the respondent had based his case firmly on the fact that he was denied legal representation but nonetheless he could have resorted the help of a friend who could have presented his case or the registered Union could have very well taken up the matter of the concerned workman. The High Court had decided on the fact that the management was represented by a person who was a commerce graduate and passed the diploma course of social welfare who even though was not a lawyer, yet was a legally trained person and thus there was violation of the principles of natural justice, which this Court believes is untenable as the respondent would have sought permission from the Tribunal or would have asked help from the registered Trade Union. We are, therefore, of the opinion that the charges were specific and simple and not difficult to comprehend. Assuming but not admitting that there has been a denial of the principles of natural justice to the respondent to the extent that he did not know the specifications of the charges levelled, was denied a right to engage a lawyer and not furnished with the copies of the documents and list of witnesses to be relied upon by the management, even then, we are of the

firm opinion that observance of the principles of natural justice to the respondent would be a useless formality which is an exception to the rationale underlying the principles of natural justice. In S.L.Kapoor vs. Jagmohan & Ors. [(1980) 4 SCC 379], this Court under similar circumstances dealing with the denial of the principles of natural justice held that -

"it is yet another exception to the application of the principles of natural justice. Where on the admitted or undisputed facts only one conclusion is possible and under the law only one penalty is permissible, the court may not insist on the observance of the principles of natural justice because it would be futile to order its observance."

12. Therefore on a consideration of the facts and also on a consideration of the dictum laid down by the Apex Court, we are of the considered opinion that the contention of the learned senior counsel regarding the violation of principles of natural justice cannot be accepted.

13. The contention of the learned senior counsel appearing for the appellant that being a quasi-judicial proceedings the respondents have committed an error in fixing the onus on the appellant to substantiate that the charges levelled against him are not true also cannot be accepted. As observed earlier, the onus is also on the appellant to prove his case especially when it is an admitted fact that he was on unearned leave on 16.02.1990.

14. Therefore the appellant ought to have proved his case that he went to the Head Office on 16.02.1990 after obtaining the unearned leave on private affairs to go to Nagapattinam and Salem and that the order was received from the competent authority. Since the appellant has not proved the above said facts, the respondents have rightly come to the conclusion that the charges 1 and 2 against the appellant have been proved. In so far as the charge No.3 is concerned, the Chief Invigilator has given a report and statement in support of the same and the appellant has not been able to disprove the same. The appellant ought to have taken the opportunity to cross-examine the Chief Invigilator.

15. The judgment relied upon by the learned senior counsel Shri.S.Parthasarathy reported in (2009) 2 SUPREME COURT Cases 570 [Roop Singh Negi V. Punjab National Bank And Others] is not applicable to the present case on hand. It is a well settled principle of law that a judgment should not be read like a statute and the same has to be applied to the facts of the each case. Since in the present case on hand, the appellant has not utilised the opportunities given to him. He cannot contend that inspite of waiver of cross-examining the witness and asking for documents the onus is still on the Department to prove to a point of fact that raised by the appellant.

16. In so far as the contention of the learned senior counsel based upon the statement given by the Chief Invigilator before the Investigating Agency, the same also cannot be countenanced. The said statement admittedly was given on 26.02.1990 whereas the report and the statement before the Enquiry Officer have been given earlier. In fact the statement was given by the Chief Invigilator before the Investigating Officer on 22.02.1990. It is further seen that the said

subsequent statement was also not marked by the appellant neither before the Enquiry Officer nor before the respondents. Moreover a statement given by a person before the Investigating Agency does not have any evidentiary value.

17. Even in the judgment relied on by the learned senior counsel reported in (2009) 2 SUPREME COURT Cases 570 [Roop Singh Negi V. Punjab National Bank And Others] the Hon'ble Apex Court was pleased to observe that a statement given before the police cannot be a sufficient evidence for the purpose of the departmental proceedings. Therefore the contention of the learned senior counsel that in view of the subsequent statement given by the Chief Invigilator before the Investigating Officer, the impugned orders cannot be sustained cannot be accepted.

18. The learned senior counsel also submitted that what was given to the appellant was only a typed copy of the order dated 16.02.1990. According to the learned counsel, when it is a case of the respondents that certain additions have been made by tampering with the records and as a result the appellant's name was included in the list of Invigilator, the respondents ought to have given the copy of the original order along with the additions made by way of hand-written manuscript. The said contention, in our considered view will not hold good, since no where the appellant before the proceedings has sought for the copy of the original order. Hence the said contention also fails.

19. After reserving the orders, the learned senior counsel appearing for the appellant filed written arguments. In view of the said written arguments given by the learned senior counsel relying upon the various judgments, we are constrained to consider the same as well. It has been stated in the written arguments that if no proper domestic enquiry is conducted, then the Tribunal has got the power to ignore the findings of the enquiry and grant the relief to the Delinquent Officer. It is further stated that if the Enquiry Officer adopted a procedure of violative of principles of natural justice, then the decision based upon the report of the Enquiry Officer is liable to be set aside. In a case where the delinquent was not given opportunity to cross-examine the witnesses and to have access to the documents relied upon by the authorities, the same would amount to denial of fair hearing.

20. It is further stated that if the copies of the documents relied upon in support of the charges are not supplied to the Delinquent Officer, the enquiry proceedings would get vitiated. Further a witness cannot be examined behind the back of a party and if reliance is made based upon such materials then such a decision is also liable to be quashed. The enquiry should not be an empty formality and in a departmental proceedings onus is on the department to prove the charges instead of shifting the same on the delinquent officer. The proceedings are quasi-judicial in nature and therefore all the principles of natural justice will have to be strictly followed. In support of the above said submissions, the learned senior counsel has relied upon the judgments reported in AIR 1963 SC 1914 [Sur Enamel And Stamping Works (P) Ltd. V. Their Workmen];

1974 (1) SLR 427 [S.Parthasarathy V. State Of Andhra Pradesh]; AIR 1982 Cal 1 [Ram Narayan V. University Of Calcutta]; (1990) 4 Scc 464 [U.P.State Road Transport Corporation V. Muniruddin]; 1995 (1) SLR (SC) 31 [Committee Of Management, Kisan Degree College V. S.S.Pandey] And (2008) 8 SCC 236 [State Of Utharanchal and Others V. Kharata Singh].

21. A perusal of the above said judgments relied upon by the learned senior counsel would clearly show that they are not applicable to the present case on hand. As discussed earlier in the present case sufficient opportunities have been given and the appellant has expressed his satisfaction over the enquiry. The appellant was given a questionnaire asking his requirements in so far as the summoning, cross-examination of witnesses and the documents he would like to rely upon. The appellant has not replied to the said questionnaire, but however expressed his satisfaction over the enquiry. Therefore we are of the considered view that the contentions raised on behalf of the appellant are mere after thought. The appellant has not shown the prejudice that has been caused to him and in fact on a perusal of the materials available on record, we find that there is no error in the orders passed by the respondents as confirmed by the learned single Judge.

22. We have also perused the order of the learned single Judge. The learned Judge has considered the entire materials available on record. The learned Judge has in fact called for the records and satisfied himself while considering the various contentions raised by the appellant. The learned Judge has also observed that the appellant appeared for the oral enquiry and stated that he was satisfied with the said enquiry. The appellant also written a letter thanking the authorities for having supplied all the copies sought for by him. Therefore, we are of the opinion that the order passed by the learned single Judge affirming the orders of the respondents does not call for any interference.

23. It is a well settled principle of law that a finding of fact arrived at in a departmental enquiry cannot be reviewed by this Court by appreciating the same as an appellate authority. The judicial review against the decision of the authorities in a departmental enquiry is very limited. Such a review can only be made against the decision making process and not against the decision by itself. The said view has been affirmed by the Apex Court in a recent judgment reported in (2009) 8 SUPREME COURT Cases 310 [State Of Uttar Pradesh And Another V. Man Mohan Nath Sinha And Another] wherein it is observed as follows:

"14.The scope of judicial review in delaing with departmental enquiries came up for consideration before this Court in State of A.P. v. Chitra Venkata Rao and this Court held: (SCC pp.562-63, paras 21 and 23-24)

"21. ... The High Court is not a court of appeal under Article 226 over the decision of the authorities holding a departmental enquiry against a public servant. The Court is concerned to determine whether the enquiry is held by an authority competent in that behalf and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated.

Second, where there is some evidence which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court to review the evidence and to arrive at an independent finding on the evidence. The High Court may interfere where the departmental authorities have held the proceedings against the delinquent in a manner inconsistent with the rules of natural justice or in violation of the statutory rules prescribing the mode of enquiry or where the authorities have disabled themselves from reaching a fair decision by some considerations extraneous to the evidence and the merits of the case or by allowing themselves to be influenced by irrelevant considerations or where the conclusion on the very face of it is so wholly arbitrary and capricious that no reasonable person could ever have arrived at that conclusion. The departmental authorities are, if the enquiry is otherwise properly held, the sole judges of facts and if there is some legal evidence on which their findings can be based, the adequacy or reliability of that evidence is not a matter which can be permitted to be canvassed before the High Court in a proceeding for a writ under Article 226.

23. The jurisdiction to issue a writ of certiorari under Article 226 is a supervisory jurisdiction. The Court exercises it not as an appellate court. The findings of fact reached by an inferior court or tribunal as a result of the appreciation of evidence are not reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by a tribunal, a writ can be issued if it is shown that in recording the said finding, the tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Again if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. A finding of fact recorded by the Tribunal cannot be challenged on the ground that the relevant and material evidence adduced before the Tribunal is insufficient or inadequate to sustain a finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal. See Syed Yakooh v. K.S.Radhakrishnan.

24. The High Court in the present case assessed the entire evidence and came to its own conclusion. The High Court was not justified to do so. Apart from the aspect that the High Court does not correct a finding of fact on the ground that the evidence is not sufficient or adequate, the evidence in the present case which was considered by the Tribunal cannot be scanned by the High Court to justify the conclusion that there is no evidence which would justify the finding of the Tribunal that the respondent did not make the journey. The Tribunal gave reasons for its conclusions. It is not possible for the High Court to say that no reasonable person could have arrived at these conclusions. The High Court reviewed the evidence, reassessed the evidence and then rejected the evidence as no evidence. That is precisely, what the High Court in exercising jurisdiction to issue a writ of certiorari should not do."

24. The legal position is well settled that the power of judicial review is not directed against

the decision but is confined to the decision-making process. The court does not sit in judgment on merits of the decision. It is not open to the High Court to reappreciate and reappraise the evidence led before the inquiry officer and examine the findings recorded by the inquiry officer as a court of appeal and reach its own conclusions. In the instant case, the High Court fell into grave error in scanning the evidence as if it was a court of appeal. The approach of the High Court in consideration of the matter suffers from manifest error and, in our thoughtful consideration, the matter requires fresh consideration by the High Court in accordance with law. On this short ground, we send the matter back to the High Court."

25. Hence on a consideration of the entire materials available on record and also on a consideration of the legal position, we are of the considered view that no ground is made out for allowing the Writ Appeal and accordingly the Writ Appeal is dismissed. No costs.