

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated:-26-10-2005

Coram:

The Hon'ble Mr. Justice P. SATHASIVAM
and

The Hon'ble Mr. Justice S.K. KRISHNAN

Writ Petition Nos. 39642 and 41699 of 2002

and W.P.M.P.No. 59024 of 2002

The Special Commissioner and
Commissioner of Commercial Taxes,
Chepauk, Chennai-5.

.. Petitioner in W.P.No. 39642/2002.

The State of Tamil Nadu,
represented by the
Secretary to Government,
Commercial Taxes Department,
Foprt St. George,
Chennai-9.

.. Petitioner in W.P.No. 41699/2002.

Vs.

1. N. Sivasamy,
Commercial Tax Officer
(Under suspension),
C.6/66, Kendriya Vihar,
Velappanchavadi, Chennai-77.

2. The Registrar,
Tamil Nadu Administrative Tribunal,
Chennai-104.

.. Respondents in both W.Ps.

Writ Petitions have been filed under Article 226 of the Constitution of India (i) for issuance a writ of certiorari to call for records pertaining to order dated 10-8-2001 in Original Application No. 6284 of 97, on the file of Tamil Nadu Administrative Tribunal, Chennai/2nd respondent herein and to quash

the same; and (ii) for issuance of a writ of certiorari, to call for records pertaining to order dated 10-8-2001, in Original Application No. 6277 of 1997 on the file of same Tribunal, and to quash the same.

Mr. E. Sampathkumar, Government Advocate:- For petitioner in both W.Ps.

Mr. R. Muthukannu:- For 1st Respondent in both W.Ps.

COMMON ORDER

(Order of Court was delivered by P. Sathasivam, J.,)

Aggrieved by the common order of the Tamil Nadu Administrative Tribunal, Chennai dated 10-8-2001, made in O.A.Nos. 6277 and 6284 of 1997, Commercial Taxes Department and the Government have filed the above writ petitions.

2. One N. Sivasamy, applicant before the Tribunal and first respondent herein filed O.A.No. 6277/97 before the Tamil Nadu Administrative Tribunal for quashing the order of suspension made in G.O. (D) No. 319 Commercial Taxes and Religious Endowments Department dated 29-07-97 and the connected order in G.O (D) No.320 of the same Department dated 29-07-97 as well as for direction to the department to treat the applicant as having retired from service on 31-07-1997 with all service benefits. In O.A.No.6284/97, the very same applicant sought for quashing the charge memo dated 15-7-97 served on him on 23-7-97. For convenience, we shall refer the charges as arrayed before the Tribunal.

3. The case of the applicant is that he was serving as Commercial Tax Officer in the year 1992. He was to retire on 31-7-1997. Just 15 days prior to the date of his retirement, a charge memo dated 15-7-97 was served on him on 23-7-97. The charge is that during the period from 2-3-94 to 2-6-95, there were some defects in the exercise of his quasi judicial power as assessing authority. On 31-7-1997, he was served with an order of suspension and on the same day, he was served with another order retaining him in service. Questioning the suspension order as well as charge memo, the applicant has filed the above said applications.

4. It is the case of the Commercial Tax Department that as the charges against the applicant are grave, he was placed under suspension. He was also not allowed to retire. It is not improper as it is contended. Suspension has been ordered as charges were framed under rule 17(b) of the Tamil Nadu Civil Services

(Discipline and Appeal) Rules and enquiry was pending. The order of retention was served as per instructions issued in Fundamental Rule 56(1) (c). Although the order was issued on 15-7-1997, it could be served only on 31-7-97 on the applicant. Orders have been issued following the rules and there is no violation of any of the procedures and instructions issued by the Government.

5. The Tribunal, after finding that the allegations/charges levelled against the applicant fall under Fundamental Rule 56 (1) (c) (i), in the absence of an order of suspension prior to an order of retention and both having been passed on the same day, came to the conclusion that the order of retention is bad in law and unsustainable; consequently allowed both the applications. Questioning the same, the above writ petitions have been filed by the Commercial Tax Department.

6. Heard Mr. E. Sampathkumar, learned Government Advocate, for petitioners and Mr. R. Muthukannu, learned counsel for first respondent.

7. Before going into the aspect as to whether the charge memo was validly issued; and the ultimate order of the Tribunal quashing the same is correct?, let us consider whether the Tribunal is justified in setting aside the order of suspension on the ground that the suspension and retention orders were passed simultaneously.

8. It is not in dispute that the applicant was to retire on 31-7-97 and just 15 days prior to that date, a charge memo dated 15-7-97 was served on him on 23-7-97. We will consider the charge memo later. However, the charge is that during the period from 2-3-94 to 2-6-95, there were certain defects in the exercise of his quasi judicial powers as Assessing Authority. The suspension order has been passed by the Government in G.O (D) No.319, Commercial Taxes and Religious Endowments Department dated 29-7-97. The Government have also passed an order in G.O (D) No. 320, Commercial Taxes and Religious Endowments Department dated 29-7-97, retaining the applicant in service in order to proceed with the charges levelled against him. As said earlier, in view of Fundamental Rule 56 (1) (c), there must be an order of suspension prior to the order of retention. The Tribunal, in view of the fact that order of suspension and retention were issued by the Government on the same day, namely, on 29-7-97, arrived at a conclusion that the order of retention is invalid and the disciplinary proceedings against him will lapse, however, subject to proceedings to be taken under the Pension Rule. Fundamental Rule 56 (1) (c) (i) reads as under:

"Rule 56(1) (c) Retirement on Superannuation,-
" (a) xxx

- (b) xxx
- (c) Notwithstanding anything contained in clause (a), a Government servant-
- (i) who is already under suspension on a charge of misconduct; or....."

It is true, that F.R. 56 (1)(c) comes into operation only when there is an order of suspension prior to the order of retention. Both the orders of suspension and retention are available in the typed-set of papers filed by the Government Advocate. Though both the orders were passed by the Government on the same day i.e., on 29-7-1997, the verification of the same would clearly show that the order of suspension was passed prior to the order of retention. In other words, the order of suspension was passed by the Government in G.O (D) No.319 dated 29-7-97, whereas the order of retention retaining the applicant in service was passed by the Government in G.O (D) No. 320 dated 29-7-97. Though both the orders were passed on the same day, the fact remains that the order of suspension preceded to the order of retention which satisfies Rule 56 (1)(c) (i); hence we are unable to accept the reason given by the Tribunal in quashing O.A.No. 6277/97. It is also relevant to note that in G.O.Ms.No. 174, Personnel and Administrative Reforms (FR IV) Department dated 28-3-1996, the Government of Tamil Nadu brought an amendment to F.R. 56 (1) (c) (i). The amended clause reads as under:

"In the said Rules, in rule 56, in sub-rule (1), for clause (C) the following clause shall be substituted, namely:-

"(C) Notwithstanding anything contained in clause (a), a Government servant who is under suspension,-

(i) on a charge of misconduct;
or.... "

Even as per un-amended F.R. 56 (1)(c)(i) we are of the view that order of retention was passed only after the order of suspension, even otherwise, as per the amended provisions, which came into force prior to the filing of Original Applications before the Tribunal, the condition that Government servant who is "already under suspension" alone to be retained has been taken away. In the light of our discussion, more particularly the relevant rule which prevailed on the date, namely, F.R. 56 (1)(c)(i), we are unable to accept the conclusion arrived at by the Tribunal and the same is liable to be set aside.

9. Now we shall consider whether Department can be permitted to initiate proceedings against the applicant under Pension Rules, as he attained superannuation even on 31-7-97. The details regarding charge memo dated 15-7-97 are available in

Annexure-I (vide page 1 to 7 of typed set filed by Special Government Pleader). It contains 8 charges. They are:

Annexure-I

Statement of the substance of allegations, namely, imputations of misconduct based on which charges are proposed to be framed against Thiru N. Sivasamy, formerly Commercial Tax Officer, Harbour-I Assessment Circle.

Charge I:

That the said N. Sivasamy, while functioning as Commercial Tax Officer, Harbour I Assessment Circle during the period from 31-12-1992 to 19-6-1995 has failed to apply his mind independently to decide the case for levy of penalty of Rs.3,10,137/- under rule 10(b) of GST Act '36 for misuse of 'C' Forms by Tvl. Southern Gas Fittings (P) Limited, during the year 1989-90, and submitted an incorrect and misleading report in his Rc.No. 3512/92/A1 dated 24-4-1994 and in his letter dated 31-10-1994.

Charge II:

That during the aforesaid period and while functioning the aforesaid office, the said Thiru N. Sivasamy, Commercial Tax Officer, in his ref No. A4/1848/94 dated 7-11-94 has given false information that he along with the Deputy Commercial Tax Officer, verified the bill of entries in the Customs House whereas he had not gone personally but had deputed the Assistant Commercial Tax Officer and Deputy Commercial Tax Officer for verification of bill of entry in the case of Tvl. Adam & Co., and thus he has disobeyed the specific instructions of the Deputy Commissioner (CT) Chennai (North) and sent a false report without personally verifying the bill of lading also.

Charge III:

That during the aforesaid period and while functioning in the aforesaid office, the said Thiru N. Sivasamy, Commercial Tax Officer, has not rechecked the accounts of Tvl. Johnson Poder (P) Ltd., for the year 1991-92 under the TNGST Act '59 and verified the sale of damaged pieces at Incorrect rate as directed on the remand order of the Appellate Assistant Commissioner in Ap.No. 523/91-92 dated 29-11-93; but acting upon a letter from the dealer has allowed the claim of exemption in full on a turnover of Rs.3,70,332/-, and wrongly deducted the said amount from the reported Taxable turnover instead of from the taxable turnover.

Charge IV:

That during the aforesaid period and while functioning in the aforesaid office, the said Thiru N. Sivasamy, Commercial Tax Officer has verified and certified the availability of 'C' forms as per stock register as on 22-3-1993, whereas missing of 351 forms was deducted on 25-2-1994 and when he was asked to furnish the period of loss by the Assistant Commissioner (CT), Zone-I he refused to divulge the details, did not approve the draft complaint to Police and failed to take follow-up action to prevent misuse of those forms and loss of Revenue which cannot be quantified.

Charge V:

That during the aforesaid period and while functioning in the aforesaid office, the said Thiru N. Sivasamy, Commercial Tax Officer, implemented the D3 proposals sent by Deputy Commissioner (CT), Inter-State Investigation Cell, the letter No. 100/88-89 & 101/89-90 dated 29-12-1995 in respect of Tvl. Rowther Enterprises on 30-3-1995 as per entries in 'L' Register but the assessment files including copy of the order and acknowledgement for the receipt D3 proposals are not available and he has not taken action to get the dealer registered under both Acts, bring them to the net of taxation and collect the demand after expiry of notice time and thus he has colluded with the defaulters and allowed them to go scot-free by causing loss of records and revenue to the tune of Rs.9.75 lakhs.

Charge VI:

That during the aforesaid period and while functioning in the aforesaid office, Thiru N. Sivasamy, Commercial Tax Officer has failed to take demand of Rs.2,68,318/- to the 'L' Register as per final assessment order in CST 107/92-93 dated 2-6-95, in the case of Tvl. Kamakshi Colour Company. But for subsequent detection of the above omission, the demand would have remained uncollected.

Chapter VII:

That during the aforesaid period and while functioning in the aforesaid office, Thiru N. Sivasamy, Commercial Tax Officer has made short levy of penalty of Rs.1,51,632/- in the case of Tvl. Zenith International Suppliers under section 12/31, Section 12(5)(iii) and Section 16 of the TNGST Act 1959 for the assessment year 88-89 and 91-92.

Charge VIII:

That during the aforesaid period and while functioning in the aforesaid office, Thiru N. Sivasamy, Commercial Tax Officer has been careless and negligent in his work, disobeyed the instruction of his superiors, sent misleading and false reports and caused loss of record and revenue, thereby he has failed to discharge his duties with devotion and integrity and thus he has violated rule 20(1) of Tamil Nadu Government Servants' Conduct Rules, 1973."

10. A perusal of the above charges would show that incorrect report without personally verifying the bill of lading, wrong deduction of the amount from the taxable turn over, failure to take follow-up action to prevent mis-use of forms and loss of revenue, loss of records, failure to make payment in time, failure to make demand in time, short levy of penalty, wrong statement and false report causing loss, as rightly observed by the Tribunal and argued by the learned counsel for the applicant, in none of the charges there is allegation of mis-appropriation or any other offence of criminal nature. Though learned Government Advocate vehemently contended that the charges are all serious nature, on going through the same, we are unable to accept his contention, as the same cannot be construed as criminal allegations. At the most, he must be held responsible for negligence.

11. In UNION OF INDIA v. R.K. DESAI, reported in (1993) 2 Supreme Court Cases 49, after finding that there is deficiency in discharging quasi-judicial function, however that cannot be a basis for disciplinary action. The following conclusion of Their Lordships is relevant: (para 4)

"4. In our view, the allegations are merely to the effect that the refunds were granted to unauthorised persons and this was done in disregard to the instructions of the Central Board of Direct Taxes. There is no allegation, however, either express or implied that these actions were taken by the respondent actuated by any corrupt motive or to oblige any person on account of extraneous considerations. In these circumstances, merely because such orders of refunds were made, even assuming that they were erroneous or wrong, no disciplinary action could be taken as the respondent was discharging quasi-judicial function. If any erroneous order had been passed by him the correct remedy is by way of an appeal or revision to have such orders set aside."

12. In ZUNJARAO BHIKAJI NAGARKAR v. UNION OF INDIA, reported in AIR 1999 Supreme Court 2881, in similar circumstance, the Supreme Court, after finding that the applicant being a quasi-

judicial authority, he is always subject to judicial supervision in appeal, merely because penalty was not imposed, concluded that the charge of misconduct against the applicant was not proper and quashed the disciplinary proceedings initiated against him.

13. In the light of the above principles, let us consider whether the department would be justified to take action under pension rules by pursuing the above charges, on the ground that the applicant attained superannuation even on 31-7-1997. It is the definite case of the applicant that in his capacity as Commercial Tax Officer, Assessment Circle, he had been exercising the quasi-judicial power. As rightly pointed out, assuming that there was any error, the remedy would be by way of appeal or revision as provided in the Central Sales Tax Act or Tamil Nadu General Sales Tax Act. Further, there was inordinate delay in issuing charge memo. It is not in dispute that in respect of alleged occurrence in 1992-95, charge memo was issued on 15-7-97 and served on 23-7-97 when he was due to retire on the After Noon of 31-7-97.

14. Counsel appearing for the applicant has pointed out the following infirmities/features in the charges contained in the charge memo dated 15-7-97:

a) Charge 1 relates to the assessment year 1989-90 and report of the applicant is dated 31-10-1994. However, the charge was framed only on 15-7-1997, three years late after the date of the report.

b) Charge II relates to failure to personally verify the bill of entry and the bill of lading. Here again, it is pointed out on the side of the applicant that in respect of the said Charge the events relate to 7-11-1994 on the import of sugar by Adam and Company from 31-8-1994 to 11-9-1994 and the charge was framed three years later.

c) Charge III relates to the assessment of Johnson Pedder Private Limited for the assessment year 1991-92, and it was remanded by the Appellate Assistant Commissioner (CT) I. It is explained that since the appeal order was made on 29-11-1993 and by that time nearly two years have lapsed the breakages could not be verified. The applicant as the assessing authority, verified the documents and passed the order. It is pointed out that this is an order passed by exercising quasi-judicial power and if there is any mistake in the order, that could have been rectified under Section 34 of the TNGST Act which confers revisional powers on the Joint Commissioner of Commercial Taxes.

d) Charge IV relates to the loss of 'C' forms and inaction on the part of the applicant to make a report to the

police. It is the case of the applicant that since the Assistant Commissioner informed him that the applicant has no power to make police complaint and that there are similar loss of 'C' forms in other offices, the applicant should wait and subsequently the office was inspected by the Assistant Commissioner and no instructions were given to him to make police report. The post was vacant when the applicant assumed the charge. It is explained that the applicant was wholly dependent on the certificate furnished by the staff working under his control. It is also stated that Standing Order 86(d) does not require a report to the police and the loss of 'C' forms relates to the year 1993 and the charge was framed on 15-7-97 i.e., after a period of four years, just on the eve of retirement of the applicant.

(e) Charge V relates to the assessment year 1988-89 and 1989-90 and the charge against the applicant is that he did not take steps to collect the amount from the dealer Rowther Enterprises. It is the claim of the applicant that the charge itself states that demand was raised in the 'L' Register and orders were despatched on 30-3-1995, by registered post with acknowledgement due which was received by the Hongkong Bank by mistake. According to the applicant, he was not informed before 15-7-97 that records are not available and if the applicant had been informed well in time, he could have taken steps to trace out the file which will be available in the office.

f) Charge VI relates to the assessment year 1992-93 and the applicant has taken revisional proceedings on 2-6-1995. As rightly pointed out, the charge itself states that the amount has been collected.

g) Charge VII relates to the assessment year 1988-89 and 1991-92 in regard to short levy of penalty. As pointed out by the applicant, the charge is vague and there is no mention as to whether it was rectified and whether appeal proceedings have been taken.

As rightly pointed out by the applicant, all the charges relate to the exercise of the powers by the applicant as a quasi-judicial authority. We have already referred to the view of the Supreme Court that action taken by a judicial authority should not form the basis for disciplinary action. It is also brought to our notice that the enquiry officer was appointed after a lapse of 32 months from the date of issue of charge memo. Even after the appointment of the enquiry officer, the department has not taken steps to complete the enquiry. Even though there is no stay order by the Tribunal, the enquiry was not proceeded with. We are satisfied that the applicant had been exercising quasi-judicial power as Commercial Tax Officer and assuming that there was any error, the remedy would be by way of appeal or revision as provided in the

C.S.T Act and TNGST Act and hence they could not be the subject matter of the disciplinary proceedings. Further, there was inordinate delay in issuing the charge memo and the same was issued just 7 days before the date of superannuation. Though the alleged lapse occurred in the year 1995 and certain charges related to the period 1993-94, the charge memo was issued on 15-7-97 and served on 23-7-97, just 7 days before the date of retirement. The contention of the applicant that only with a view to cause hardship, agony and anguish, the charge memo was issued cannot be ignored. As rightly stated, if every error of law were to constitute a charge of misconduct, it would impinge upon the independent functioning of quasi-judicial officers and that misconduct is not coming within the purview of mere error in judgement, carelessness or negligence in performance of the duty. Likewise, wrong interpretation of law cannot be ground for misconduct. He may have wrongly exercised his jurisdiction, but that wrong can be corrected in appeal and the same cannot always form basis for initiating disciplinary proceedings for an officer while he is acting as quasi-judicial authority. We have already pointed out that though the applicant filed Original Application No.6284/97 challenging the charge memo dated 15-7-97, admittedly, no stay was granted. Despite the above fact that the department had not proceeded with disciplinary proceedings; there is an inordinate and unexplained delay on the part of the department. According to the applicant, he is 67 years of age as on date and had rendered 38 years of service in the department. He had undergone sufferings from mental worry, agony, anguish and hardship for all these years. We are satisfied that there is no need to pursue the charge memo dated 15-7-1997.

15. In the light of our discussion, while setting aside the order of the Tribunal dated 10-8-2001, for the reasons mentioned above, the Commercial Tax Department is not permitted to proceed with the charge memo dated 15-7-97 against the applicant even under Pension Rules and the applicant is deemed to have been retired on 31-7-1997 on attaining superannuation with entitlement of all retirement benefits. Both the writ petitions are disposed of accordingly. No costs. Connected WPMP is closed.

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Asst.Registrar

/true copy/

Sub Asst.Registrar

R.B.

To:

1. The Registrar,
Tamil Nadu Administrative Tribunal,
Chennai-104.

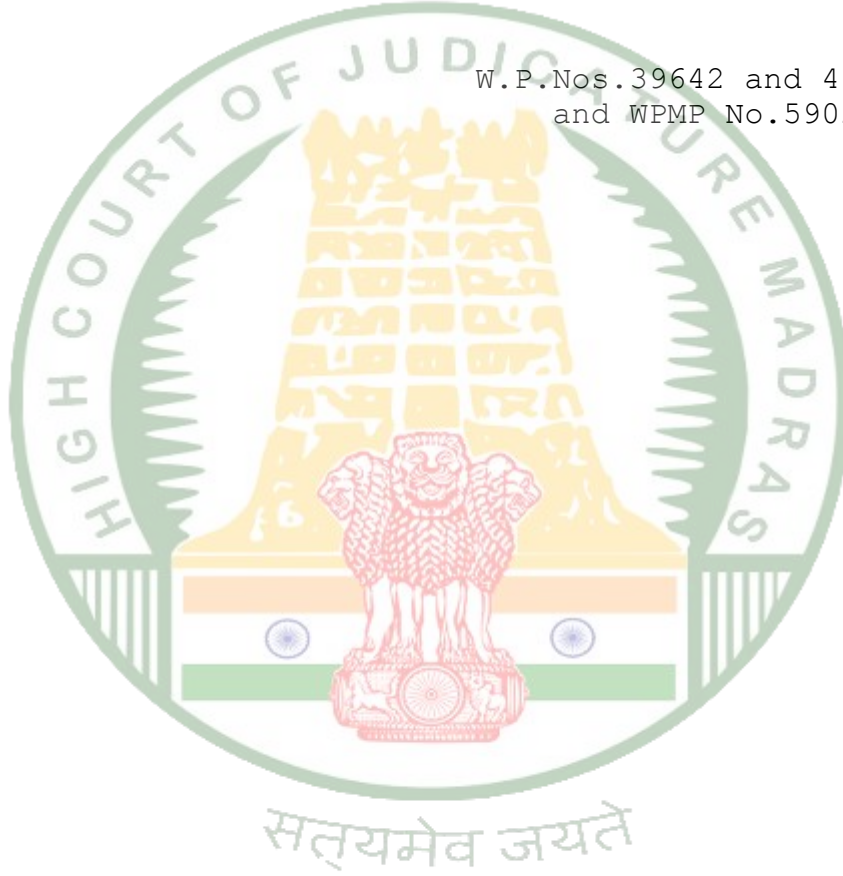
2. The Secretary to Govt. Commercial Tax Department,
Fort St. George, Chennai-9.

1 cc to the Government Pleader, SR. 43351

2 ccs to Mr.R. Muthukannu, Advocate, SR. 43302 & 43303

W.P.Nos.39642 and 41699/2002
and WPMP No.59024/2002.

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