

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.09.2009

CORAM

THE HONOURABLE MR.JUSTICE K.CHANDRU

W.P.NO.35110 OF 2006
(O.A.NO.4822 OF 1998)

K.Karunanidhi (deceased)

K.Kantha

(substituted as legal heir of
applicant/deceased vide order
dt.15.09.2009 in M.P.No.1/2009)

..Petitioner

Vs.

1.The Government of Tamil Nadu,
rep. By its Secretary
Ministry of Commercial Taxes,
Fort St. George,
Chennai-600 009.

2.The Special Commissioner and
Commissioner of Commercial Taxes,
Chepauk,
Chennai-600 005.

3.The Deputy Commissioner,
(Commercial Taxes) Chennai
(Central) Division,
Commercial Tax Building,
Greams Road,
Chennai-600 006.

4.The Assistant Commissioner,
Commercial Taxes Zone IV,
Greams Road,
Chennai-600 006.

..Respondents

This writ petition is preferred under Article 226 of the Constitution of India praying for the issue of a writ of certiorarified mandamus to call for the records of the third respondent culminating in the proceedings in Na.Ka.A3-4164/96 dated 26.12.1997, quash the same and to set aside the order of dismissal and to direct the reinstatement of the applicant in the post of

Assistant in the office of the respondents with all backwages with effect from 30.1.1992.

For Petitioner : Mr.C.A.Diwakar
For Respondents : Mr.R.Neelakantan, GA

ORDER

Heard both sides.

2.This writ petition arose out of O.A.No.4822 of 1998 filed by the original petitioner before the Tamil Nadu Administrative Tribunal. In view of the abolition of the Tribunal, it was transferred to this court and was renumbered as W.P.No.35110 of 2006.

3.The original petitioner sought for the issuance of a writ of certiorarified mandamus to call for the records of the third respondent culminating in the proceedings in Na.Ka.A3-4164/96 dated 26.12.1997, quash the same and to set aside the order of dismissal and to direct the reinstatement of the applicant in the post of Assistant in the office of the respondents with all backwages with effect from 30.1.1992.

4.The original petitioner, who was the husband, was dismissed from service by the fourth respondent, by an order, dated 29.2.96. The original petitioner filed an appeal, dated 21.3.96 before the third respondent and that was dismissed by an order, dated 26.12.97. It is against these two orders, he filed the original application. The ground for dismissal against the original petitioner was that he was initially in unauthorised absence from work from 4.3.89. When an enquiry was pending against the said charge memo, it was brought to the notice of the authorities that the original petitioner had participated in a political agitation conducted by the DMK political party and was kept in Cuddalore Central jail from 21.11.1986 to 22.1.1987. In that criminal case, the original petitioner was also convicted by the Sub Divisional Judicial Magistrate, Villupuram in CC case No.1529 of 86, dated 22.8.87 and the original petitioner never informed about the said conviction.

5.It was also stated that this conduct was violative of Rule 14 and 23 of Tamil Nadu Servant Conduct Rules. Though the original petitioner claimed that he had filed an appeal, it later transpired that the appeal filed by R.Palani and six others was dismissed by the District Sessions Judge in CA No.67/87. The applicant claimed that he was not punished by the Magistrate and he was unnecessarily implicated in the said case. But the records obtained by the respondents show that the original petitioner was part of burning of Constitution copy agitation against the imposition of Hindi as official language and the same was proved before the Trial court. He was awarded the punishment of imprisonment for two weeks under

Section 143 IPC and another two weeks under Section 2 of the Prevention of Insults to National Honour Act, 1971. Therefore, there was no impediment for the respondents to impose a punishment under Rule 17(c)(1)(1) of the Tamil Nadu Civil Service (Disciplinary and appeal) Rules r/w Article 311(2)(a) of the Constitution. The original petitioner initially claimed that he had nothing to do with the political party and he was wrongly implicated in the criminal case because of the name that he has and hence he should be exonerated.

6. In response to these allegations, in the reply affidavit, dated 28.7.2000, in para 23, it was averred as follows:

"23.... it is submitted that it is ascertained that the Applicant in his petition dated 19.7.89 to the Honourable Chief Minister's Special Cell, had stated among other things that he was a member of a political party since 1977 and he was a Secretary of that party in that locality that he had taken part in the picketing in support of Ceylon Tamils and Burning of 'Constitution Amendment Bill' in 1987 and 1988 organized by that political party and that the Applicant was imprisoned."

7. The counsel for the original petitioner raised two contentions. The first contention was that the conviction was in the year 1987 and for that charge memo was given in 1991 i.e. after a period of four years and therefore, in view of the long delay in framing the charges, the charges must be quashed. He relied upon the following three decision:

a) P.V. Mahadevan Vs. M.D., Tamil Nadu Housing Board (2005 (4) CTC 403),

(b) R. Thirupathy and others Vs. The District Collector, Madurai District, Collectorate, Madurai-2 and others (2006 (2) CTC 574), and

(c) D. Amaladoss Vs. The State of Tamil Nadu rep. By Secretary to Government, Home Department (Courts I.A.), Fort St. George, Chennai and another (2006 (5) CTC 141).

8. It must be noted that the original petitioner for his absence during the days while he was in Central Prison, Cuddalore applied for leave on unearned leave of private affairs for 55 days and EOL for 83 days from the 4th respondent without disclosing the real reason for his absence. These facts were brought to notice of the respondents only when the respondents have received copy of the judgment from the criminal court convicting him for the two offences. Further, when there is a conviction of a Government servant, the

respondents are at liberty to take action even without enquiry in terms of Article 311(2)(a) of the Constitution.

9. The second contention raised by the original petitioner was that even if he is convicted, the dismissal imposed on him was disproportionate and therefore, this Court having power under Article 226 to interfere with the said punishment. In this context, reliance was placed upon the judgment of the Supreme Court in *Union of India v. Parma Nanda* reported in (1989) 2 SCC 177. A reliance was placed on the following passage found in paragraph 29 of the said judgment, which is as follows:

29. We may however, carve out one exception to this proposition. There may be cases where the penalty is imposed under clause (a) of the second proviso to Article 311(2) of the Constitution. Where the person, without enquiry is dismissed, removed or reduced in rank solely on the basis of conviction by a criminal court, the Tribunal may examine the adequacy of the penalty imposed in the light of the conviction and sentence inflicted on the person. If the penalty impugned is apparently unreasonable or uncalled for, having regard to the nature of the criminal charge, the Tribunal may step in to render substantial justice. The Tribunal may remit the matter to the competent authority for reconsideration or by itself substitute one of the penalties provided under clause (a). This power has been conceded to the court in *Union of India v. Tulsiram Patel*¹⁰ where Madon, J., observed: (SCC pp. 501-02, para 127)

"[W]here a disciplinary authority comes to know that a government servant has been convicted on a criminal charge, it must consider whether his conduct which has led to his conviction was such as warrants the imposition of a penalty and, if so, what that penalty should be.... The disciplinary authority must, however, bear in mind that a conviction on a criminal charge does not automatically entail dismissal, removal or reduction in rank of the government servant concerned. Having decided which of these three penalties is required to be imposed, he has to pass the requisite order. A government servant who is aggrieved by the penalty imposed can agitate in appeal, revision or review, as the case may be, that the penalty was too severe or excessive and not warranted by the facts and circumstances of the case. If it is his case that he is not the government servant who has been in fact convicted,

he can also agitate this question in. appeal, revision or review. If he fails in the departmental remedies and still wants to pursue the matter, he can invoke the court's power of judicial review subject to the court permitting it. If the court finds that he was not in fact the person convicted, it will strike down the impugned order and order him to be reinstated in service. Where the court finds that the penalty imposed by the impugned order is arbitrary or grossly excessive or out of all proportion to the offence committed or not warranted by the facts and circumstances of the case or the requirements of that particular government service the court will also strike down the impugned order. Thus, in *Shankar Dass v. Union of India*¹¹ this Court set aside the impugned order of penalty on the ground that the penalty of dismissal from service imposed upon the appellant was whimsical and ordered his reinstatement in service with full back wages. It is, however, not necessary that the court should always order reinstatement. The court can instead substitute a penalty which in its opinion would be just and proper in the circumstances of the case."

10. Before going into the so-called disproportionality of the punishment, the relevant legal positions must be considered. The Government servants are governed by the Tamil Nadu Government Servant Conduct Rules. In this context, it is necessary to refer to Rules 20 (1) and 23 of the T.N. Govt. Conduct Discipline & Appeal Rules, which are as follows:

Rule 20. Integrity and devotion to duty-

(1) Every member of the service shall at all times maintain absolute integrity and devotion to duty and shall do nothing which is unbecoming of a member of the service.

....

Rule 23. Anti-secular or social disharmony activity and Demonstration- No Government servant shall engage himself or participate in any activity which is anti-secular or which tends to create disharmony in society or in any demonstration which is prejudicial to the interests of the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States, Public Order, decency or morality or which involves

contempt of court, defamation or incitement to an offence.

11. Apart from the conduct rules, a Government servant just like any other citizen of the country is bound by Article 51A imposing fundamental duties upon every citizen. It is necessary to refer to Article 51-A (a) and (j) of the Constitution of India, which will have a bearing in the present case and the same reads as follows:

51A. Fundamental duties.- It shall be the duty of every citizen of India -

(a) to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem;

.....

(j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.

12. Therefore, the original petitioner being a Government servant ought not to have participated in the agitation conducted by a political party and get himself arrested and convicted for burning a copy of the Constitution and also not informing the employer about his conviction. It is needless to state that violation of the provisions of the Prevention of Insults to National Honour Act, 1971 is a serious offence and burning a copy of the Constitution will be hit by Section 2 of the said Act. In this context, it is necessary to refer to a Division Bench judgment of this Court presided by M.N. Chandurker, C.J. Vide judgment in K. Anbazhagan Vs. The Secretary, The Tamil Nadu Legislative Assembly and others reported in 1987 Vol.4 WLR 568. The said judgment came to be rendered in the context of the challenge made to the decision of the Tamil Nadu Legislative Assembly in disqualifying 10 members of the House for committing the very same offence i.e. in respect of burning a copy of Part XVII of the Constitution pursuant to the decision taken by the Executive Committee Resolution dated 9.11.1986 passed by the DMK Party. It is necessary to refer to the following passage found in para 27 of the said judgment, which is as follows:

"27. Now the very fact that the Parliament was required to enact a legislation for the prevention of insults to the National Flag, the National Anthem and the Constitution which are essentially symbols of the sovereignty of the country itself shows that there were people in this country who notwithstanding the adoption of a

written Constitution were bent on creating discord by showing utter disrespect to the symbols of sovereignty of the country. The Parliament by enacting Explanation 1, expressly saved the democratic right to dissent in the exercise of which a citizen may express disapprobation or criticism of the Constitution or of the Indian National Flag or take recourse to democratic remedies to obtain an amendment of the Constitution or an alteration of the Indian National flag and such lawful means were by first Explanation expressly stated to be not constituting an offence under S.2. Reading the main part of S.2 and the Explanation and even otherwise, it is obvious that burning or defiling the Constitution or the National Flag or doing any act specified in S.2 in respect of the Indian National Flag or the Constitution of India, can be no stretch of imagination fall within Explanation 1, and if an act of a person falls within the four corners of S.2, it will obviously amount to an offence. ...

13.As to how far such a agitation is protected by the right to freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution which was also considered in the very same judgment. In the very same judgment paragraph 69 which is as follows:

69....Art.19(1)(a) merely guarantees to a citizen the freedom of speech and expression. However wide a meaning may be given to the expression 'freedom of speech and expression' it cannot certainly take in a conduct which is necessarily made penal by a statute. The conduct in the instant case consisted of burning the Constitution which is expressly punishable. It is nobody's case that the provision of the Prevention of Insults to National Honour Act which makes defiling the Constitution or burning the Constitution an offence, is invalid. It is this conduct which became the subject matter of the proceedings before the Assembly and so far as the facts of the present case are concerned, there is no question of any violation of Art.19(1)(a) of the Constitution of India arising.

14.The inter-link between the prevention of insults to National Honour Act, 1971 and Article 51A was also considered in the very same judgment and the following passage found in paragraph 86 will make clear the said legal position and it is necessary to reproduced the said paragraph which is as follows:

86....The act which is not only made penal by the provisions of the prevention of Insults to National Honour Act, 1971, but is expressly in derogation of one of the fundamental duties of a citizen incorporated in Art.51 A of the Constitution. Art 51-A Inter Alia provides that it shall be the duty of every citizen to abide by the Constitution and respect its ideals and institutions the National Flag and the National Anthem. It is another matter that the duty to abide by and respect the Constitution is made a fundamental duty, but even without such prescription made expressly by amendment of the Constitution, it is implicit in the adoption of a written Constitution, which is given by the people of India to themselves, that as long as the Constitution, which represents the will of the people and is the Supreme law of the land is in force, it is an imperative obligation of every citizen of the Indian Republic, including those who want to voice their dissent in respect of any particular provision, to abide by the provisions of the Constitution and notwithstanding their dissent in respect of some provisions, they are bound to respect it apart from the express provision made in Art.51-A."

15. Even with reference to prolonged absence of a Government servant, the Courts were forewarned from showing any indulgence when such cases are brought to court and need to apply the fundamental duty enshrined in Article 51A(j) of the Constitution by the Supreme Court vide its decision in Govt. of India v. George Philip reported in (2006) 13 SCC 1. It is necessary to refer to the following passage found in paragraph 18 of the said judgment, which is as follows:

18....Article 51-A(j) of the Constitution lays down that it shall be the duty of every citizen to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement. This cannot be achieved unless the employees maintain discipline and devotion to duty. Courts should not pass such orders which instead of achieving the underlying spirit and objects of Part IV-A of the Constitution have the tendency to negate or destroy the same.

16. In the light of the above clear legal pronouncements, the original original petitioner cannot be shown any indulgence even in the matter of punishment. The original original petitioner had not

only contravened the conduct rules making himself liable for disciplinary action, but also having got imprisonment by voluntarily participating in a political agitation, he has violated the Laws of the land and disobeyed the fundamental duties enshrined in the Constitution.

17. In the light of the above, the writ petition will stand dismissed. No costs.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

vvk

To

1. The Secretary
The Government of Tamil Nadu,
Ministry of Commercial Taxes,
Fort St. George,
Chennai-600 009.
 2. The Special Commissioner and
Commissioner of Commercial Taxes,
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 3. The Deputy Commissioner,
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(Central) Division,
Commercial Tax Building,
Greams Road, Chennai-600 006.
 4. The Assistant Commissioner,
Commercial Taxes Zone IV,
Greams Road,
Chennai-600 006.
- + 1 c.c. to Mr. C.A. Diwakar, Advocate. S.R.No.49407.

JP (CO)
GSK 14.10.2009.

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