

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE THE AG.CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE**

WEDNESDAY, THE 4TH DAY OF MARCH 2015/13TH PHALGUNA, 1936

WA.NO. 1863 OF 2014

AGAINST THE JUDGMENT IN W.P.(C).NO.30918/2012, DATED 20-10-2014

APPELLANT(S)/4TH RESPONDENT :

**SIBY MATHEWS, ADGP(RETD.),
KERALA POLICE, PRESENTLY WORKING AS CHIEF INFORMATION
COMMISSIONER, KERALA, PUNNEN ROAD,
NEAR SECRETARIAT, THIRUVANANTHAPURAM-695 001.**

**BY SRI.M.K.DAMODARAN (SENIOR ADVOCATE)
SRI.K.GOPALAKRISHNA KURUP (SENIOR ADVOCATE)
ADV. SRI.V.V.NANDAGOPAL NAMBIAR**

RESPONDENT(S)/PETITIONER AND RESPONDENTS 1 TO 3, 5 & 6 :

- 1. MR.S.NAMBI NARAYANAN,
SANGEETHA, T.C.NO.36/978, NSS LANE,
PERUMTHANNI, THIRUVANANTHAPURAM.**
- 2. STATE OF KERALA,
REPRESENTED BY CHIEF SECRETARY TO
GOVERNMENT OF KERALA-695 001.**
- 3. SECRETARY TO GOVERNMENT OF KERALA,
DEPARTMENT OF HOME, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM-695 001.**
- 4. THE CENTRAL BUREAU OF INVESTIGATION (CBI),
NEW DELHI, REPRESENTED BY ITS DIRECTOR-011.**
- 5. K.K.JOSHWA,
SUPERINTENDENT OF POLICE(RTD.), KERALA POLICE,
MARUTHOOR,MANNANTHALA P.O, THIRUVANANTHAPURAM- 011.**

WA.NO. 1863 OF 2014

**6. S.VIJAYAN,
SUPERINTENDENT OF POLICE (RTD.), KERALA POLICE, ATHIRA,
T.C.NO.6/2213, EDAVILAKOM LANE, VALIYAVILA,
THIRUVANANTHAPURAM-13.**

**R1 BY ADV. SRI.C.UNNIKRISHNAN (KOLLAM)
R2 & R3 BY SPL.GOVERNMENT PLEADER SRI.SUJITH MATHEW JOSE
R4 BY ADV. SRI.P.CHANDRASEKHARA PILLAI, S.C
R5 BY ADVS. SRI.P.C.SASIDHARAN
SRI.ARAVINDA KUMAR BABU T.K.
SRI.P.K.VARGHESE
R6 BY ADV. SRI.P.NANDAKUMAR**

**THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 05-02-2015,
ALONG WITH W.A.NO.1959 OF 2014, THE COURT ON 04-03-2015
DELIVERED THE FOLLOWING:**

Msd.

WA.NO. 1863 OF 2014

APPENDIX

PETITIONER(S)' ANNEXURES :

- ANNEXURE 1:** TELEPHONE BILL FOR THE PERIOD 01/08/1994 TO 30/09/1994 DATED 01.07.1994.
- ANNEXURE 2:** TRUE COPY OF THE APPLICATION SEEKING VOLUNTARY RETIREMENT DATED 01.11.1994 SUBMITTED BY THE 1ST RESPONDENT TO THE CHAIRMAN, ISRO.
- ANNEXURE 3:** TRUE COPY OF THE LETTER FROM M.L.SHARMA, JOINT DIRECTOR CBI, DATED 22.05.1995.
- ANNEXURE 4:** TRUE COPY OF AFFIDAVIT SUBMITTED BY DIRECTOR CBI IN W.A.NO.1676/1994 BEFORE THE HON'BLE HIGH COURT OF KERALA.

RESPONDENT(S)' ANNEXURES :

NIL

//TRUE COPY//

P.S.TO JUDGE.

Msd.

Ashok Bhushan, Ag. C.J & A.M. Shaffique, J.

=====

W.A. Nos. 1863 & 1959 of 2014

=====

Dated this, the 4th day of March, 2015.

J U D G M E N T

Shaffique, J.

These appeals have been filed by respondents 4 and 5 respectively in W.P (C) No. 30918 of 2012. The writ petition was filed by the 1st respondent in these appeals challenging Ext. P2 order dated 29.6.2011 by which the Government decided not to take any disciplinary action against respondents 4 to 6 in the writ petition, who were members of Special Investigation Team (for short SIT), in the matter relating to the lapses pointed out by the Central Bureau of Investigation (CBI) in Ext.P1 report.

2. The short facts as narrated in the pleadings disclose as follows. Parties are referred as shown in the writ petition:

Crime No.225/94 was registered at Vanchiyoor Police Station on 20.10.1994 against Mariam Rasheeda, a Maldivian National, under section 14 of the Foreigners Act and paragraph 7 of the Foreigners Order. She was arrested and sent to Judicial Custody on 21.10.1994. 6th respondent was the investigating officer. Police custody was obtained on 3.11.1994 and she was interrogated by Kerala Police and Intelligence Bureau (IB) officials. On the basis of the statements given by her, a report was submitted by the 6th

respondent and Crime No. 246/1994 was registered on 13.11.1994 at Vanchiyoor Police Station under Sections 3 and 4 of the Indian Official Secrets Acts, 1923, alleging that certain official secrets and documents of Indian Space Research Organization (ISRO) has been leaked out by scientists of ISRO. Another Maldivian National Fousiya Hasan was arrested on 13.11.1994 and on 14.11.1994 Mariam Rasheeda was also arrested in the crime. On 15.11.1994, the Government constituted a special team of Kerala Police under the leadership of the 4th respondent to investigate the crime. One of the scientists Sri.Sasikmar was arrested on 21.11.1994 and the petitioner was arrested on 30.11.1994 along with two other persons. The 4th respondent, on 30.11.1994 submitted a report to the Director General of Police (for short DGP), requesting to entrust the investigation to CBI. DGP recommended investigation by CBI and accordingly State Government issued notification dated 2.12.1994 to transfer the crimes to CBI. On the request of State of Kerala, Government of India directed investigation of both the crimes by CBI, who took over investigation on 4.12.1994. On 30.4.1996, the CBI filed its final report to the Chief Judicial Magistrate's Court, Ernakulam,

stating that the evidence collected indicates that the allegation of espionage was not proved and was found to be false, which was accepted by the Court and the matter has been referred. The CBI, under cover of letter dated 3.6.1996 (Ext.R1(b), noticing some omissions, lapses and irregularities on the part of respondents 4 to 6 in the matter relating to registration of crime and investigation conducted by them, submitted Ext.P1 report to the State Government. The State Government dissatisfied by the refer report of CBI, issued notification dated 27.6.1996, withdrawing the earlier notification issued to entrust the matter to CBI. A special investigation team headed by Sri.T.P.Senkumar was also constituted by the DGP for further investigation. The notification dated 27.6.1996, came to be challenged before this Court. Though this Court upheld the notification, the Supreme Court as per judgment in **K. Chandrasekhar v. State of Kerala and Others** (1998 (5) SCC 223), quashed the said notification. In the meantime, the Government considered Ext.P1 report of the CBI, but it was kept pending, awaiting orders of the Supreme Court in the matter relating to reinvestigation of the crime. Even after disposal of the case by the Supreme Court on

29.4.1998, nothing happened in the file relating to Ext. P1 report. W.P (C) No. 8080/2010 was filed before this Court by one Rajasekharan Nair seeking for a direction to pass appropriate orders pursuant to Ext. P1 report. In the meantime, Government by Ext,P2 order dated 29.6.2011 decided not to take disciplinary action against the members of the SIT.

3. In the writ petition, the petitioner contended that the reasons stated for not initiating any action against respondents 4 to 6 are untenable. The delay of 15 years was attributable only to the Government. There was no reason for the Government to have waited till a decision was taken by the Supreme Court in the matter relating to re-investigation of the case. The Supreme Court had quashed the notification issued by the Government for re-investigation of the crime and therefore the reasons stated in Ext. P2 was absolutely baseless. It is further contended that serious lapses had been pointed out by the CBI in their report which ought to have been considered by the Government and appropriate action should have been taken in accordance with the procedure prescribed. Allegations had been made that Ext. P2 Government Order is the product of mala fides and nepotism as the Government

has unduly favoured the 4th respondent, who is adorning office of Chief Information Commission. It is further contended that the Government ought to have conducted a proper investigation, regarding the circumstances under which such a false case had been cooked up and for whose benefit and whether there was a conspiracy involved in it.

4. Counter affidavits have been filed by the respondents refuting the allegations made and supporting the stand taken by the Government in Ext. P2.

5. In the counter affidavit filed by the 2nd respondent, it is stated that after the CBI had filed refer report before the CJM's Court, Ernakulam, the 3rd respondent submitted Ext. P1 report to the Government, wherein certain lapses on the part of the officials of the Kerala Police had been narrated. The matter was placed before the DGP, who obtained explanation from respondents 4 to 6 and had opined that no further action is to be taken against them. It is further contended that neither the Supreme Court nor the CJM has issued any direction to take any action against respondents 4 to 6. On a detailed examination of the matter, the Government decided not to take any

disciplinary action for the alleged lapses as mentioned in Ext. P1. It is further stated that by judgment dated 7.9.2012 in W.A. No 422/2007, a Division Bench of this Court held that further course of action in the matter is left open to be decided by the National Human Right Commission (NHRC). It is contended that the petitioner had already approached the NHRC seeking redressal of various grievance which is pending consideration and therefore there is no reason for agitating the issue before the Government.

6. In the Counter affidavit filed by the 4th respondent it is inter alia stated that four persons including the petitioner were arrested and produced before the Additional Chief Judicial Magistrate on 9.12.1994 and they did not make any complaint of ill treatment against the police officers, as evident from the order produced as Ext. R4(a). Hence it is contended that the allegation of torture by the officers of SIT is false. Further it is contended that the petitioner is attempting to rake up issues which have been concluded long back and therefore after 18 years, the claim for taking action against the respondents is totally baseless. It is contended that the matter was transferred to CBI for further investigation based on a

report dated 30.11.1994 submitted by the 4th respondent to the DGP. It is stated that investigation was conducted by the 4th respondent with all bona fides and in good faith. The CBI had submitted closure report on 30.4.1996, after 18 months from the date on which the matter was entrusted to CBI. The 4th respondent also denied the allegations made by the CBI in Ext. P1 report. Further it is contended that the petitioner had never approached the Government or any other authority for taking disciplinary action against the respondents.

7. Counter affidavit is filed by the 6th respondent relying on certain statements made by the accused during interrogation and attempted to submit that the findings of CBI was absolutely baseless.

8. Petitioner had filed reply to the counter affidavits as well.

9. Additional counter affidavit has been filed by respondents 1 and 2 further reiterating the contentions urged and submitting that Ext. P1 does not form part of the final report filed by the CBI before the CJM. They also narrated the manner in which withdrawal notification, Ext. R1(c) was issued by the Government as per notification dated 27.6.1996. It is also stated

that SIT headed by Sr.i. T.P. Senkumar was proposed to be constituted as per orders issued by the DGP dated 29.6.1996. Withdrawal notification Ext. R1(c) was challenged before this Court but the Division Bench upheld the same. The matter was taken up before the Supreme Court and the said notification was quashed on the ground that further investigation can be conducted by the CBI alone and not by the State Police. It is further submitted that though further investigation could not have been done, it does not mean that the Government was satisfied by the closure report submitted by the CBI. It is further stated that the unsigned report Ext. P1 was enquired into, explanations were called for and recommendation of DGP was placed before the Additional Chief Secretary. The Chief Minister made an endorsement on the file on 12.12,1997 to wait for the Apex Court decision in the pending matter. It is stated that the matter remained dormant for quite a long time and no action was taken in the matter. It is further stated that the SIT conducted investigation from 16.11.1994 to 3.12.1994 for 17 days and the CBI took over investigation on 4.12.1994 and continued with the investigation for more than one year and 4 months. It is further stated

that while the SIT was conducting investigation, it was only at a preliminary stage. The question of any lapse during investigation can arise only when the agency had completed the investigation.

10. Further, it is contended that revelation of CBI after 1 year and 4 months, that the petitioner was tortured without sufficient proof is only to be discarded. A Division Bench of this Court in **Niyamvedi v. Raman Srivastava**, 1995 (1) KLT 206 has viewed the video cassettes of the interrogation and rejected the version of the CBI, that the accused were subjected to torture. It is stated that the said finding is not overturned by the Apex Court while disposing the appeal against the said judgment in **Director, CBI v. Niyamavedi**, (1995) 3 SCC 601. The respondent also submits that the petitioner has approached the NHRC alleging violation of human rights and that he has also filed a suit as O.S. No. 370/2003 before the Sub Court, Thiruvananthapuram seeking damages to the tune of Rs. 1 crore from the Government of Kerala and the Police Officers. Human Rights Commission granted an interim compensation of Rs. 10 lakhs to the petitioner. The said amount was paid as per Government Order dated 25.10.2012. It is stated that the Human Rights

Commission has not rendered any finding regarding violation of human rights against any of the officers of the State Government. It is further stated that respondents 4 to 6 have already retired from service and they have proven track record and credible service career and they have been awarded with several rewards for their unblemished service rendered by them. It is stated that they have only discharged their official duties in accordance with law.

11. Additional counter affidavit has been filed by the 4th respondent further reiterating the contentions and also referring to the judgment dated 7.9.2012 in W.A. Nos. 2119 and 2128 of 2006, wherein the Division Bench has vacated the observation of the NHRC in regard to certain finding arrived by it, while directing grant of interim compensation. It is reiterated that Ext. P1 report was not authorized by the Investigating Officer. The respondent also denies various other averments made in the reply.

12. Having regard to the aforesaid pleadings, the matter was considered elaborately by the learned Single Judge, who, by the impugned judgment, allowed the writ petition quashing Ext. P2. The matter was remitted back to the 1st respondent for re-consideration

and for issuing further orders within 3 months. The course of action to be taken in the matter was left open to be decided by the Government. It was also mentioned that consideration of the matter should not be namesake, making administration of justice a mockery.

13. Heard the learned senior counsel Sri. M.K. Damodaran and the learned senior counsel Sri. K. Gopalakrishna Kurup, appearing on behalf of the 4th respondent/appellant, learned counsel Sri. P.C. Sasidharan and Sri. Aravinda Kumar Babu appearing for the 5th respondent/appellant, learned counsel Sri. C. Unnikrishnan (Kollam) appearing for the 1st respondent/petitioner, Sri. Sujith Mathew Jose, learned Special Government Pleader on behalf of the State and Sri. P.Chandrasekhara Pillai, learned standing counsel appearing for the CBI.

14. Learned counsel for the appellant in W.A.No.1863/2014 contended that Ext. P1 was never a report which could have been termed as an official document as it was unsigned and not prepared by the investigation officer. It seems to have been sent to the Government under cover of letter dated 3.6.1996 (Ext.R1(b)). It is argued that the said report was never

produced before the CJM's Court nor before any other Court, and perusal of the said report, by itself, does not indicate any misconduct which warrants any disciplinary action against the officers. It is pointed out that the main reason stated in the said report to falsify initial investigation conducted by the SIT was that the accused were tortured. This finding was absolutely baseless as evident from the findings recorded by this Court in **Niyamavedi's case** (supra). When the accused were produced before the Magistrate, they did not complain against any ill treatment, which further evidences the fact that they were never tortured. There were certain adverse findings against CBI in **Niyamavedi's case**. Hence, the matter was taken up before the Supreme Court by the CBI, which decision is reported in **Director, Central Bureau of Investigation & Others v. Niyamavedi, rep. by its Member K. Nandini, Advocate & Others**, (1995) 3 SCC 601. Paragraph 4 of the said judgment reads as under:

"4. The petitioners had, as directed by the Division Bench, produced for perusal of the Court case diaries of the Kerala State Police as well as of the CBI relating to the investigations carried out in respect of the said crimes including the statements recorded in the course of investigation and certain

video cassettes in that connection. These were perused by the Division Bench in chambers. However, a reference at some length has been made in the course of the judgment to the material disclosed in the course of investigation, presumably, in order to examine the contention relating to the alleged involvement of the first respondent in the crimes in question. Clearly, under the Code of Criminal Procedure, 1973, only a very limited use can be made of the statements to the police and police diaries, even in the course of the trial, as set out in Sections 162 and 172 of the Code of Criminal Procedure. The Division Bench, therefore, should have refrained from disclosing in its order, material contained in these diaries and statements, especially when the investigation in the very case was in progress. It should also have refrained from making any comments on the manner in which investigation was being conducted by the CBI, looking to the fact that the investigation was far from complete. Any observations which may amount to interference in the investigation, should not be made. Ordinarily the Court should refrain from interfering at a premature stage of the investigation as that may derail the investigation and demoralise the investigation. Of late, the tendency to interfere in the investigation is on the increase and courts should be wary of its possible consequences. We say no more. However, we clarify that certain directions given to the Director of CBI in regard to the investigation matters do not meet with our approval and may be ignored. In short the adverse comments against the CBI were, to say the least, premature and could have been avoided. Ignoring the innuendoes the court was, however, right in expressing a general view that the investigating agency is expected to act in an efficient and vigilant manner without being pressurised and in dismissing the appeal."

15. Therefore, it is argued that the basis on which Ext. P1 report has been prepared itself is incorrect and such reports could never be the basis of any action against the officers. It is further argued that as far as the Government is concerned, it has

decided not to accept the refer report of the CBI and has decided to conduct investigation on its own, pursuant to Government order dated 27.6.1996, by which the consent given to CBI to investigate the crime was withdrawn. The DGP constituted another Special Investigation Team as per order dated 29.6.1996. However, Supreme Court interfered in the matter and held that once the matter is entrusted to CBI, Kerala Police cannot further conduct any investigation in the matter. Therefore, it is contended that it is not a case where the Government is satisfied about the findings of CBI, whereas it is a case in which Government was unable to proceed with further investigation. The learned counsel argued that the material available on record clearly discloses that the SIT, which has conducted investigation only for a period of 17 days, has only arrived at a preliminary finding, which cannot be found to be wrong at that stage of proceedings. Learned counsel also referred to the initial judgment in **Chandrasekhar v. State of Kerala & Others**, 1996 (2) KLJ 736 the judgment dated 29.4.1998 of the Supreme Court in **K. Chandrasekhar v. State of Kerala and Others**, (supra) to contend that the Supreme Court had not accepted the CBI refer report

as correct, whereas the issue involved was only regarding the power of State Government to withdraw the notification by which CBI was entrusted with the investigation. The decision in **Surya Dev Rai v. Ram Chander Raj & Others**, (2003) 6 SCC 675 has been relied upon to contend that no writ can be issued against the acts or proceedings on a judicial or quasi-judicial body conferred with power to determine the questions affecting the rights of subjects and obliged to act judicially. Another judgment relied upon is **Union of India & Another v. Arulmozhi Iniarusy & Others**, (2011) 7 SCC 397, which deals with the power of High Courts to issue writ of mandamus. Learned senior counsel also relied on the judgment dated 31.8.2006, in O.P. No. 15272/2001 and also the judgment dated 7.9.2012 in W.A.No. 422 of 2007, **Nambinarayanan v. State of Kerala** (2012 (4) KLT 221), which had arisen in the matter relating to awarding interim compensation by the NHRC in favour of the petitioner. It is further argued that the learned Single Judge has committed serious error of law in taking note of matters which were not available on record and has made unwarranted remarks, which were not germane for consideration, when an

administrative order was being challenged.

16. Learned counsel appearing on behalf of the appellant in W.A. No. 1959/2014 contended that the said appellant, who is the 5th respondent in the writ petition, was not involved in the investigation. His duty was to prepare reports based on directions issued by the SIT. Allegations against him in Ext. P1 report does not warrant any disciplinary action. It is also argued that whether disciplinary action has to be taken or not is a matter purely within the realm of jurisdiction of the Government, which cannot be dictated by the petitioner.

17. The main argument pressed by the learned counsel for the appellants is that the finding of the learned Single Judge that Ext. P1 report has been accepted by the Supreme Court is absolutely baseless. In the refer report, there is only a passing reference to the fact that the crime is false and there is no evidence to substantiate the same. There is also a reference that report has been submitted to the Government in this regard. The said refer report was never subject matter of adjudication by the Supreme Court. The CJM Court did not feel it necessary to direct any action to be taken against the officers. The Supreme Court was only

considering the fact that whether a further investigation was possible after the refer report by the CBI, by another police team constituted by the Government. The Supreme Court had no occasion to consider the refer report or even Ext. P1 report. Under such circumstances, the learned Single Judge had committed serious error of law in arriving at a finding that the report had been accepted by the Supreme Court. It is argued that the learned Single Judge had proceeded on the basis that CBI report was sacrosanct when it was not even a report as envisaged under law. There is no procedure for the CBI giving such a report. At least it can only be an expression of opinion and cannot have a binding effect on the Government. The petitioner cannot therefore seek for enforcement of such a report and hence, the very basis of the writ petition was misconceived.

18. On the other hand, Sri. C. Unnikrishnan appearing on behalf of the petitioner contended that a reading of the interim order passed by the National Human Rights Commission by itself would indicate that the petitioner had been unduly harassed by the members of the SIT. In the report submitted by the CBI as Ext. P1, a clear case of lapse and

unprofessionalism has been stated. If the 4th respondent believed that a further investigation of CBI was required to ascertain whether a case of espionage has been made out or whether there is any truth in the allegations made, there was no reason for arresting the petitioner on 30.11.1994. The crime was entrusted to CBI on 3.12.1994, and they took over investigation on 4.12.1994. It was revealed from the investigation of CBI that the crime was falsely registered and there was no reason to implicate the scientists of ISRO. It is argued that on account of such an irresponsible act on the part of senior police officers of the State, apart from the loss of reputation suffered by them over a period of time, until CBI relieved them from the trauma, the Space Research Organization itself has suffered a set back, which is evident from an open letter issued by the senior scientists of ISRO and produced as Ext. P6. Learned counsel made a reference to Ext. P5 interim order passed by the NHRC to show the manner in which they have understood things. It is pointed out that unless appropriate decision is taken by the Government in a matter of such a serious nature, the rule of law will not prevail in the State. Persons who are responsible for registering a

false case and arresting the accused on such false allegations are to be dealt with in accordance with law and if CBI had recommended to take appropriate action, a responsible Government has to consider it and take appropriate decision in the matter, rather than discarding the same on frivolous grounds. It is argued that the reasons mentioned in Ext. P2 was totally baseless and there is no application of mind by the Government while taking such a decision. Learned counsel relied upon the judgment of the Supreme Court in **Joginder Kumar v. State of U.P. & Others**, (1994) 4 SCC 260, which narrates the guidelines to be followed while arresting a person. It is held that, it would be prudent for a Police officer, to arrest a person only after a reasonable satisfaction is arrived at regarding the genuineness and bona fides of the complaint. Another judgment relied upon is **State of M.P. v. Shyamsunder Trivedi & Others**, (1995) 4 SCC 262, wherein the Supreme Court made observation regarding taking strong measures to check custodial torture and the need to make appropriate law to punish such crimes, in order to uphold the majesty of law. In **State of Gujarat v. Krishnabhai & Others**, (2014) 5 SCC 108, the Supreme Court held that after

culmination of a criminal case in acquittal, there has to be a finding whether there was any lapse, which calls for any disciplinary action. The judgment dated 27.5.1996 in O.P. No. 5128/1996 is brought to the notice of this Court to indicate that a request for appointing a Commission of enquiry in this matter was declined by this Court.

19. Learned standing counsel appearing for the CBI supported the stand taken by the petitioner and submitted that they have given a genuine report to the Government and it is for the Government to take a proper decision in the matter.

20. The learned Government Pleader submitted that in so far as the direction issued by the learned Single Judge is only to reconsider the report and take a proper decision, Government is not aggrieved by the same.

21. Having regard to the aforesaid factual and legal issues argued by learned counsel appearing on either side, we have to consider whether the learned Single Judge was justified in quashing Ext.P2.

22. Before proceeding further, it will be useful to refer to the findings of the learned Single Judge on the facts and circumstances involved in the matter. The

learned Single Judge accepted the argument of the petitioner that Ext. P2 Government order is a mockery to the public and the victim which includes the petitioner. Further, it is found that the enquiry conducted by the superior officer in the same department leading to a decision not to take any action against respondents 4 to 6 was a farce. It is also observed that State should not have dealt with Ext. P1 report in a casual manner by conducting a namesake enquiry without giving an opportunity to the petitioner and other accused to participate in such enquiry. Reference is also made to the observations made by the Supreme Court in **Lucknow Development Authority v. M.K. Gupta**, (1994) 1 SCC 243 in a matter relating to midnight arrest or house breaking by the police. The learned single Judge did not accept the contention urged by respondents 4 to 6 on the finding that they were well tutored in the craft of investigation of crime. The SIT was unable to bring out the real unvarnished truth in the process of the alleged crime. It is found that the view taken by the learned Magistrate in accepting the refer report has gained acceptance by the Supreme Court in the appeals filed by the petitioner and other accused. Hence, it was

found that the commission and omission made in Ext. P1 should not have occurred during the course of a fair investigation. It is also found that the State Government has not taken Ext. P1 seriously as was expected of a welfare State and therefore it was decided that Ext. P2 decision has to be reconsidered and hence it has been quashed.

23. We do not think that we should consider the factual situation in its entirety which will only be a repetition of the pleadings involved in the matter. Apparently Ext. P1 report indicates certain lapses in the investigation of the crime. Whether relying on such a report any disciplinary action should be taken against the concerned Police officers is the only question. Hence we need only to consider the validity or otherwise of Ext. P2 which the learned Single Judge had quashed on the ground that no proper enquiry was conducted in the matter. We have to consider this issue based on the well settled principles under which an administrative order can be challenged in a writ petition under Article 226 of the Constitution of India.

24. Ext. P1 report, though unsigned as contended by the learned counsel for the petitioners, the Government thought it fit to conduct an enquiry on that

basis and Ext. P2 is the decision of the the Government. In Ext. P2, after referring to the factual situation involved in the matter, paragraphs 6 to 8 reads as under:

“6) In the meantime, Government examined the case with reference to the views obtained from the State Police Chief on the observation of the CBI along with the explanation of the officers concerned. After examination it was decided to await the decision of the Hon’ble Supreme Court. The Hon’ble Supreme Court allowed the prayer of the CBI and the accused discharged persons questioning the notification issued by the Government withdrawing the consent given to the CBI to investigate into the espionage case and also to “further investigate” the ISRO espionage case and also directed to give Rs. 1 Lakh each to the accused appellants as cost.

7) Government examined the matter with reference to the entire records of the case and in proper application of mind. It has been found that neither the Hon’ble Chief Judicial Magistrate Court who accepted the final report nor the Hon’ble Supreme Court had issued any direction to take action against the investigating officers viz. S. Vijayan, the then Inspector, Special Branch, Thiruvananthapuram City, K.K. Joshwa, the then Dy. SP, CB CID, Thiruvananthapuram, Siby Mahews, the then DIG (Crime) of the Special Investigation Team who investigated into the ISRO Espionage case.

8) In the circumstances, Government are of the view that it is not proper or legal to take disciplinary action against the officials for the

alleged lapses pointed out in the investigation report of the CBI at this juncture, after the lapse of 15 years and therefore Government decided that no disciplinary action need be taken against the above officials for their alleged lapses in the investigation of the ISRO Espionage case and it is ordered accordingly.”

25. The only question before the Government was whether any disciplinary action is to be taken against the officers involved in the registration of the crime and who were members of the SIT who conducted investigation for 17 days and reported that the matter requires to be investigated by the CBI. This is not a case where an officer challenges the action taken by the Government. This is a case where an accused in a crime, who was subsequently exonerated after investigation by CBI, had filed a writ petition challenging the action of the Government declining to take disciplinary action against such officers. There is no statutory provision which enables the State Government to rely on the report of CBI to take disciplinary action against its officers. It is purely within the discretion of the Government to take such action, in the event the officer involves himself in any misconduct. Whether the exercise of discretion by the Government is unreasonable or unfair is the only

question that arises for consideration in the writ petition. The factual finding or report submitted by the CBI in the matter, can only be treated as an opinion expressed by the CBI, which requires to be considered by the Government. The Government may consider or may not consider it for the purpose of taking disciplinary action. In this case the Government's decision is not to take action against such officers of the SIT and this is based on three specific findings. Firstly, Government has examined the case with reference to the views obtained from the State Police Chief on the observation of the CBI along with the explanation of the officers concerned. Secondly, absence of any direction by the Chief Judicial Magistrate who had accepted the final report or the Supreme Court to take action against the investigating officers. Third reason is that it is not proper or legal to take disciplinary action against the officers on the basis of Ext. P1 report after a lapse of 15 years.

26 The main reason stated by the Government in declining to take disciplinary action is the delay of 15 years. Apparently, all these officers have retired from Police Service. The 4th respondent is functioning as the Chief Information Commission. In **Balachandran**

Pillai v. State of Kerala (1994 (1) KLT 258), a learned single Judge of this Court held that enquiry into misconduct of a member of Police service can be initiated only when he is in service. Under Rule 6 of the Kerala Police Departmental Inquiries (Punishment and Appeal) Rules, 1958 disciplinary inquiry can be made against "member of the service" which necessarily means that person against whom enquiry is commenced must be in the service.

27. Further Rule 3, Part III, Chapter I of the Kerala Service Rules reads as under:

"3. The Government reserve to themselves the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period, and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government, if in a departmental or judicial proceeding, the pensioner is found guilty of grave misconduct or negligence during the period of his service, including service rendered upon re-employment after retirement.

Provided that -

(a) such departmental proceeding, if instituted while the employee was in service, whether before his retirement or during his re-employment, shall after the final retirement of the employee, be deemed to be a proceeding under this rule and shall be continued and concluded by the authority by which it was commenced the same manner as if the employee had continued in service;

(b) such departmental proceeding, if not instituted while the employee was in service, whether before his retirement or during his re-employment,

(i) shall not be instituted save with the sanction of the Government;

(ii) shall not be in respect of any event which took place more than four years before such institution; and

(iii) shall be conducted by such authority and in such place as the Government may direct and in accordance with the procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relation to the employee during his service.

(c) no such judicial proceeding, if not instituted while the employee was in service whether before his retirement or during his re-employment shall be instituted in respect of a cause of action which arose or an event which took place more than four years before such institution; and

..... "

Therefore as far as a retired employee of the Government is considered, disciplinary proceedings can be taken only for limited purposes and that too in respect of an event which took place within four years from the date of retirement. A Full Bench of this Court had occasion to consider this question in **Xavier v. Kerala State Electricity Board** (1979 KLT 80 (F.B.) held as under:

"The Rule does not authorise the continuance of

disciplinary proceedings as such, against a Government Servant after his retirement. Both on principle and on authority, such a position cannot be easily countenanced. It allows only a limited type of enquiry to be proceeded with, namely an enquiry in regard to withholding or withdrawing pension, or of ordering recovery from pension by reason of any misconduct or negligence during the period in service of the employee. Under clause (a) of the proviso to the Rule, the departmental proceeding, if instituted during the service of the employee is to be deemed to be a proceeding under the Rule and may be continued and completed even after his retirement. To this limited extent alone is provision made under the rule for continuance of a disciplinary enquiry beyond retirement. That too is by transmuting it by fiction to be an enquiry under the Rule. Beyond this, we cannot understand the rule as in any way permitting the authorities either to launch or to continue disciplinary proceedings after the retirement of the employee. That would be destructive of the concept of relationship of employer and employee which has come to an end by reason of the retirement of the employee, beyond which, disciplinary control cannot extend.xxxx

The law is not different in regard to officers, whose service conditions are regulated by the All India Services Act, 1951 and the Rules framed thereunder. Therefore delay in taking disciplinary proceedings is definitely a relevant factor to be considered to proceed further.

28. In fact the Government had called for the view of the State Police Chief, in regard to the lapses pointed

out by the CBI in Ext.P1 report and the explanation of the officers. A preliminary enquiry by the Department Head is a normal procedure adopted in service jurisprudence and especially in matters relating to the question whether any misconduct is committed by the officer concerned. The opinion of the State Police Chief who is the Head of the Department carries much weight and cannot be discarded. Learned single Judge proceeded on the basis that such an enquiry was nothing but farce. We do not think that such an approach is justifiable, especially in the absence of any material to indicate that the view of the Superior authority is tainted by arbitrariness or mala fides. We have to proceed on the basis that such reports are relevant facts to be considered by the Government, before forming an opinion in the matter.

29. The learned Single Judge formed an opinion that delay on the part of the Government to proceed further after disposal of the Supreme Court case on 29.4.1998, smacks malafides and favouratism. This finding is based on an assumption, which is not supported by any material. At any rate delay on the part of the Government in finalising the said proceedings immediately after disposal of the Supreme

Court case, cannot be a reason to initiate proceedings against officers of the Government after 15 years.

30. Another factor which weighed with the Government in not proceeding further is that, no direction was issued by the CJM's Court or the Supreme Court to take action against the investigation team. In fact the said conclusion is also a relevant factor, by which the Government has decided not to take any further action.

31. Therefore the three reasons mentioned in Ext. P2 clearly indicate that the Government has examined the relevant matters for arriving at the said decision. When a decision has been taken not to proceed further with any disciplinary action, after considering such relevant matters, the decision cannot be considered as unreasonable, unfair or arbitrary.

32. The learned Single Judge proceeded on the basis that the Government should have conducted an enquiry in this matter, based on Ext. P1 and the petitioner and other accused ought to have been heard. We do not think that an enquiry in that regard is required to enable the Government to exercise a discretion to proceed with the disciplinary action or not. As already indicated, discretion has to be

exercised by the Government based on relevant materials and when such materials are relied upon by the Government to arrive at a finding, it may not be proper for this Court exercising power under Article 226 to interfere with such decision making process and arrive at a different finding or to direct the Government to reconsider the same.

33. The learned Single Judge proceeded on the basis that the findings in Ext. P2 is a mockery and directions had been issued to reconsider the same. When already a decision has been taken by the Government based on the available materials, which are relevant for consideration, we do not think that there is any justification to quash Ext. P2 on the ground that proper enquiry was not conducted.

34. Chapter XXII of the Criminal Procedure Code relates to the powers of the police to investigate a crime. During that investigation process, police may have to encounter several issues. A complaint might be true or it might be false as well. Same situation can arise in a case of registration of FIR as well. Statute stipulates that based on certain information received and when it relates to cognizable offence, police is under obligation to investigate the same. In fact, SIT

did not conduct a complete enquiry in the matter. During their investigation it was thought fit that the case has to be investigated by an agency like CBI. Under such circumstances, the only question that arises would be whether the action of the SIT in conducting investigation and arresting the accused was bona fide or not.

35. The main contention urged by the learned counsel for the petitioner was that, the arrest of the petitioner was wrongful and statements were taken from the accused by torturing them, which is deprecated by the Supreme Court in the cases cited above and therefore appropriate action as contemplated under law has to be taken. In fact, whether the accused were tortured or not is a disputed question of fact. Though in Ext.P1 report CBI refers to the accused having given statements as a result of being tortured, in **Niyamavedi's** case (supra) a Division Bench of this Court found that the accused were not tortured. Following is the finding in Paragraph 15.

"15. When Fousiya, Chandrasekharan and Sashikumar were questioned by the Intelligence Bureau, the same was recorded in Video Cassettes. The three Video Cassettes produced before Court by the Intelligence Bureau were viewed by us by playing it in a Video Cassette Player,

belonging to this Court. From that, it is crystal clear that these three accused gave answers to the questions without any fear of torture. They were seen in very jovial and calm mood, free from any stress or strain. So, the answers given by these accused at the time of the questioning can never be considered as the result of any torture by the police or for that matter of any authority. So, the statement given by these accused when they were questioned by the Central Bureau of Investigation at a later stage that they were subjected to torture by police has no substance and it has only to be rejected."

Further no such complaint was raised by the accused, when they were produced before the CJM's Court on 9.12.1994. When the facts being so and since the petitioner having already approached the National Human Rights Commission and the Civil Court, it is for the said agencies to arrive at a proper finding regarding such disputed facts.

36. In the result, we are of the view that the learned single Judge has not appreciated the case in its proper perspective. What was required to be considered was whether the reasons stated by the Government, declining to take disciplinary action was justified or not. Having already found that no disciplinary action can be taken after a long lapse of time and that too after retirement of the police officers concerned, we are of the view that the reasons stated in Ext.P2 is sufficient to decline further action against

the officers. Hence the direction to remit the matter back to the Government will be a futile exercise and requires to be set aside. However we make it clear, that disposal of these appeals and finding rendered herein shall not affect the right of the petitioner to take any other proceeding as envisaged under law.

Accordingly, we allow the appeals, setting aside the judgment of the learned single Judge.

Sd/-

Ashok Bhushan, Ag. Chief Justice

Sd/-

A.M. Shaffique, Judge.

Tds/