

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SHAJI P. CHALY

TUESDAY, THE 22ND DAY OF DECEMBER 2015/1ST POUSHA, 1937

W.P.(C).No. 6589 of 2015 (W)

PETITIONER(S):

K.K. SURESH, AGED 54 YEARS,
S/O KRISHNANKUTTY, EXECUTIVE ENGINEER,
COCHIN DEVASWOM BOARD, THRISSUR.

BY ADVS. SRI.S.SREEKUMAR (SR.)
SRI.P.MARTIN JOSE
SRI.P.PRIJITH
SRI.THOMAS P.KURUVILLA

RESPONDENT(S):

1. COCHIN DEVASWOM BOARD,
REPRESENTED BY ITS SPECIAL COMMISSIONER,
OFFICE OF COCHIN DEVASWOM BOARD,
THRISSUR-680 001.
2. THE SPECIAL COMMISSIONER,
COCHIN DEVASWOM BOARD,
THRISSUR-680 001.

R1 & 2 BY ADV. SRI.KRISHNA MENON, SC, COCHIN DEVASWOM BOARD

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 18-12-2015, THE
COURT ON 22.12.2015 DELIVERED THE FOLLOWING:

P.T.O.

APPENDIX

PETITIONER(S)' EXHIBITS:

- EXHIBIT P1: TRUE COPY OF CHART OF DELEGATION OF POWERS TO BE EXERCISED BY THE OFFICERS UNDER VARIOUS CATEGORY DATED 1.3.2011.
- EXHIBIT P2: TRUE COPY OF COMPLAINT SUBMITTED BY SANTHOSH BEFORE THE GOVERNMENT.
- EXHIBIT P3: TRUE COPY OF FORWARDING ENDORSEMENT OF SUPERINTENDENT OF POLICE, VACB CENTRAL RANGE DATED 27.12.2005.
- EXHIBIT P4: TRUE COPY OF MEMO OF CHARGES DATED 17.5.2007 TO THE PETITIONER.
- EXHIBIT P5: TRUE COPY OF EXPLANATION DATED 21.7.2008 SUBMITTED BY THE PETITIONER TO THE MEMO OF CHARGES.
- EXHIBIT P6: TRUE COPY OF PROCEEDINGS OF THE 1ST RESPONDENT DATED 17.2.2011.
- EXHIBIT P7: TRUE COPY OF PROCEEDINGS OF THE 27.8.2013 OF THE 1ST RESPONDENT.
- EXHIBIT P8: TRUE COPY OF FINAL REPORT DATED 16.11.2013 FILED BY THE INVESTIGATING OFFICER OF VACB BEFORE THE ENQUIRY COMMISSIONER AND SPECIAL JUDGE.
- EXHIBIT P9: TRUE COPY OF LETTER DATED 11.12.2013 ADDRESSED TO 2ND RESPONDENT.
- EXHIBIT P10: TRUE COPY OF MEMO OF CHARGES DATED 19.2.2014.
- EXHIBIT P11: TRUE COPY OF EXPLANATION DATED 20.2.2014 SUBMITTED BY THE PETITIONER BEFORE THE RESPONDENTS.
- EXHIBIT P12: TRUE COPY OF ORDER NO.M-10953/06 DATED 17.3.2014.
- EXHIBIT P13: TRUE COPY OF ORDER DATED 8.5.2014 ISSUED BY THE RESPONDENTS.
- EXHIBIT P14: TRUE COPY OF REPRESENTATION DATED 4.9.2014 SUBMITTED BY THE PETITIONER BEFORE THE 3RD RESPONDENT.
- EXHIBIT P15: TRUE COPY OF G.O.(P)NO.566/VIG.DATED 8.4.1986.
- EXHIBIT P16: TRUE COPY OF OPINION DATED 23.9.2014 SUBMITTED BY THE EXPERT BEFORE THE 1ST RESPONDENT.
- EXHIBIT P17: TRUE COPY OF ORDER NO.M-10953/06 DATED 19.12.2014.

RESPONDENT(S)' EXHIBITS: NIL

//TRUE COPY//

P.S. TO JUDGE

St/-

SHAJI P. CHALY, J.

W.P.(C) No.6589 of 2015

Dated this the 22nd day of December, 2015

JUDGMENT

This writ petition is filed by the petitioner seeking to quash Exts.P12 and P17 orders issued by the Respondents dated 17.03.2014 and 19.12.2014, whereby the punishment of 'censure' was imposed and directed the petitioner to submit leave application between the period 17.02.2011 to 26.08.2013 respectively.

2. Facts required for the disposal of the writ petition are as follows:

3. While the petitioner was working with the Respondents as Assistant Engineer, the Engineering Section or Marameth Section of 1st Respondent was entrusted with construction, renovation, maintenance etc. of Devaswom buildings and other construction activities of the 1st Respondent. It is contended that the requirement or demand is usually forwarded by the 2nd Respondent to the Engineering/Marameth Wing. The Executive Engineer after verification, forwards the same to Assistant Executive Engineer

and then to Assistant Engineer who in turn actually inspects and prepares the estimate for the work. The Assistant Engineer has authority to grant technical and administrative sanction for work up to an estimate amount of Rs.10,000/- only. The delegation of powers for granting technical, administrative sanction and authority in granting work is evident from Ext.P1. It is contended that it is clear from Ext.P1 that the Assistant Engineer can give technical sanction up to Rs.75,000/- only.

4. It is further contended that in 2004, while the petitioner was working as Assistant Engineer, on the basis of complaints filed by one Santhosh, the then Minister for Devaswom ordered a Vigilance enquiry with respect to awarding of certain works by Cochin Devaswom Board. The enquiry was conducted by the Central Unit of Vigilance & Anti Corruption Bureau (in short, 'VACB') and enquiry was with respect to many allegations prevailing at that time besides the allegation against the construction activities. It is the further case of the petitioner that the allegation was mainly targeted against Dr. T.K. Vijayaraghavan, who was the President of the 1st Respondent during 2004, which is discernible from Ext.P2

complaint. In the enquiry conducted by the Vigilance, apart from Dr. T.K. Vijayaraghavan, there were 8 suspected officers and petitioner was the 8th one. Even though Ext.P3 forwarding endorsement dated 27.12.2005 was submitted by the Superintendent of Police, VACB Central Range, Kochi to the Government to register a crime under Prevention of Corruption Act, there were no prima facie allegations made against the petitioner, but an additional allegation was incorporated that petitioner who is suspect officer 8 along with suspect officer 7 connived with suspect officer 1 for carrying out various development works.

5. Pursuant to Ext.P3 report, the Director, VACB, Thiruvananthapuram opined no further action since there is a finding that no loss is sustained to 1st Respondent and recommended Vigilance Tribunal/Departmental enquiry against the petitioner alone, since he was the only person continuing in service and all other suspect officers were retired or not holding any post under the 1st Respondent. Thereupon, the Principal Secretary, Revenue Department (Devaswom), Government of Kerala by letter dated 21.11.2006 directed the 2nd Respondent to take departmental action against the

petitioner and submit report to Director, VACB. Thereafter, 1st Respondent vide its proceedings dated nil deputed Vigilance Officer, Cochin Devaswom Board to enquire into the allegations against the petitioner. Thereupon, the Vigilance Officer issued Ext.P4 memo of charges dated 17.05.2007 to the petitioner. To Ext.P4, petitioner submitted Ext.P5 explanation in which he has stated that as an Assistant Engineer, his duty was restricted to execution of work entrusted with him and settle the payment of completed works. That apart, he has stated that he has no role in inviting tender and awarding work. It was further stated by him that the charges in Ext.P4 were not coming within the authority and purview of the petitioner as an Assistant Engineer at that time.

6. The Government by letter dated 28.09.2010 addressed to the 2nd Respondent directed to take departmental action against the petitioner in the light of the report of the Vigilance. Thereafter, VACB by its letter dated 30.11.2010 informed the 2nd Respondent about the registration of Vigilance case against three accused persons, i.e. (1) Sri. T.K. Vijayaraghavan, (2) K.A.Chandran and (3) K.K. Suresh (petitioner). The allegation in the Vigilance case is that

accused Nos. 1 to 3 conspired together in awarding work to the contractor without complying with proper procedures and caused loss to the 1st Respondent to the tune of Rs.3,53,937/- in different construction works in the year 2004. Accordingly, by proceedings dated 17.02.2011, evident from Ext.P6, petitioner was kept under suspension, by the time petitioner was promoted as Assistant Executive Engineer. Petitioner was placed under suspension for more than two years. In the meanwhile, petitioner requested before Respondents 1 and 2 to reinstate him in service, but it did not evoke any response. Thereafter, after much deliberations, petitioner was reinstated in service by Ext.P7 order dated 27.08.2013 with a condition that petitioner shall not be involved in construction activities in Thriprayar Temple and Sivasakthi building under the 1st Respondent. Petitioner was kept under suspension for a period of 922 days without any reason and not due to any specific default of the petitioner.

7. The Investigating Officer of VACB filed his final report Ext.P8 dated 16.11.2013 before the Enquiry Commissioner and Special Judge, Thrissur, dropping all further actions since there was no evidence to prove the prosecution

allegation of conspiracy among accused persons and unlawful gain to contractor and corresponding loss to 1st Respondent. Subsequent to Ext.P8 final report, the Secretary to Revenue, (Devaswom), Government of Kerala by Ext.P9 letter dated 11.12.2013 addressed the 2nd Respondent to take immediate action against the officials of the Respondent. Consequent to which, petitioner was served with Ext.P10 memo of charges dated 19.02.2014, to which petitioner has offered Ext.P11 explanation dated 20.02.2014. By Ext.P11 reply, petitioner denied the allegations in Ext.P10 memo of charges and submitted that the allegations revealed in Ext.P10 are not coming within the purview of duty of Assistant Engineer, except the preparation of estimates. That apart, it was stated that the memo of charges are also vague as to the exact nature of allegations against the petitioner.

8. Thereafter, the 1st Respondent has passed Ext.P12 order imposing a punishment of censure to the petitioner and warning to the petitioner to comply with proper procedure in future while doing construction activities. Consequently, Ext.P13 order was passed by the 1st Respondent treating the suspension period of the petitioner as leave. By Ext.P13, the

period of suspension from 17.02.2011 to 26.08.2013 was treated as leave by granting 10 days commuted leave, 103 days earned leave and balance 809 days as leave without allowance. It is contended by the petitioner that Exts.P12 and P13 are illegal, arbitrary and violative of the principles of natural justice. Thereafter, petitioner submitted a representation dated 21.05.2014 to the 2nd Respondent seeking re-consideration of the punishment imposed and to grant all benefits during the period of suspension, treating the same as duty. But the same also did not evoke any response. Therefore, it is contended that petitioner submitted another representation dated 25.07.2014, seeking consideration of his request submitted earlier. Again, since there was no response, yet another representation dated 04.09.2014 to the 2nd Respondent for considering his previous representation and for treating his period of suspension as duty in the light of the Government Order mentioned therein, and which representation is evident from Ext.P14.

9. In pursuance to the representation, it is contended by the petitioner that though opinion was sought from Chief Technical Expert of the Respondents and obtained Ext.P16

report dated 23.09.2014, that in Ext.P16 report, it was opined that the allegation against the petitioner was in fact exonerated and suspension was unjustified and the allegations found in the enquiry report will not come within the purview of the Assistant Engineer's authority. Anyhow, thereafter, Ext.P17 order was issued by the Respondents, cancelling Ext.P13 order and directing the petitioner to submit leave application during the period of suspension. It is thus aggrieved by Exts.P12 and P17, this writ petition is filed by the petitioner.

10. Respondents have filed a counter affidavit refuting the allegations and statements and claims and demands made by the petitioner in the writ petition. In the counter affidavit, the action of suspension imposed to the petitioner is justified by contending that the petitioner was placed under suspension in view of the pendency of the enquiry by VACB as recommended by the State Government by its letter-dated 28.01.2011. The Board has also justified withdrawal of Ext.P13 by submitting that the procedure adopted by it was not in accordance with law and in view of the provisions of Kerala Service Rules, which have been made applicable to the

employees of the Board, the procedure prescribed under Rule 56-B Part-I, K.S.R. and Government Circular No.65/94/Fin. dated 26.11.1994 has to be strictly followed by the Board. Thus the Board could not have directed the manner in which the petitioner was entitled to treat the period of suspension without getting an application from him at the first instance. That apart, the Board has justified its stand to the fact, since the Vigilance has recommended the departmental proceedings, it was justified in imposing the punishment of 'censure', which is the minimum punishment in view of the procedural violation on the part of the petitioner while inviting and awarding tender.

11. Heard learned counsel for the petitioner and the learned Standing Counsel for the Respondents and perused the pleadings and evidence.

12. In my view, the whole issue raised by the petitioner centres around Ext.P10 charge memo issued against the petitioner. The allegations made in the said charge memo against the petitioner are that there were procedural lapses in the matter of conducting the construction work of the Comfort Station of Thriprayar Temple, Parking Ground, 'Q' system and

certain modification work of the Sivasakthi building. Thereupon, Cochin Devaswom Board has suffered financial loss, which was found out in the Vigilance Investigation. Therefore, the petitioner who was an Assistant Engineer, did not follow the procedure under the P.W.D Manual, and made arrangements to confirm the tender in favour of the contractor, Sri. Rajeev, was unearthed in the investigation. Apart from the same, certain general allegations were made against other officers of the Board. To this letter, petitioner has submitted Ext.P11, refuting the allegations made in the charge memo and also stating that inviting tender and finalizing tender was not within his power and further that in the Vigilance enquiry, it was found that there was no discrepancy in the quality and quantity of the work executed and no misappropriation of fund is also found out. It was stated by the petitioner that he is innocent in the matter. But without giving any further opportunity especially without providing an opportunity to the petitioner to prove that he was not responsible for the allegation made against him that the finalization of tender was done at his instance, Ext.P12 punishment of censure was imposed. In Ext.P12, it is

categorically stated that no loss was suffered to the Board consequent to issuance of tender and further that the petitioner has not made any profit out of the same or that the quality and quantity of work was not suffered. But the punishment was imposed on the allegation that the Vigilance has reported that rules and procedures were violated in the matter of awarding tender.

13. In my view, since the allegation in Ext.P10 charge memo was with regard to the involvement of the petitioner to finalise the tender overlooking the procedures and rules, the same is a factual aspect which ought to have been enquired by the Respondents by providing an opportunity to the petitioner, especially when the petitioner consistently contended that he was not vested with any power to award and finalize tender. To substantiate the contention, learned counsel for the petitioner has brought my attention to Ext.P1, which is a document concerning delegation of powers to be exercised by the Officers under various categories in the Devaswom Board. The third column of Ext.P1 sets up the power of the Assistant Engineer i.e. from the amount of Rs.25,001/- to Rs.75,000/- for technical sanction to which, the administrative sanction is

to be issued by the Special Devaswom Commissioner. It is discernible from Ext.P8 final report of the Vigilance that tender amount was more than Rs.3 lakhs. Therefore, the petitioner was not the appropriate person to invite or award tender. His only duty was to oversee the work with regard to the quality and quantity of the work, there is no dispute. Moreover, it is clearly found by the Respondents that petitioner has not made any illegal profit out of the said contract. That apart, Ext.P8 Vigilance Report reveals that the contractor has successfully completed the work and the quality and quantity was not suffered. The sole finding of the Vigilance was with regard to the award of the tender in violation of the procedure and rules, to which the petitioner cannot be held responsible for want of adequate evidence to justify his involvement.

14. Learned counsel for the petitioner invited my attention to Ext.P8, wherein, the procedural violation was mentioned by the Vigilance. Relying on the said findings, it is contended by the petitioner that by virtue of Ext.P1, petitioner was not vested with any powers in any of the matters with regard to the procedure and rules found out by the Vigilance. But the Vigilance, without the juncture of Ext.P1 delegation of

powers, has entered into a finding that the procedure and rules were neglected by A2 and A3 (petitioner). In view of such a finding, I find force in the contention of the petitioner that by virtue of Ext.P1, petitioner was not vested with any power to invite and award tender and the VACB has not dealt with the matter by taking into account Ext.P1. Therefore, all the more it was incumbent on the part of the Respondents to prove that overlooking the powers given to the petitioner, he illegally interfered with invitation of tender and finalization of the same. Apart from the mere allegation contained under Ext.P10 charge memo, there are no other documents produced even before this Court to establish that the petitioner without any power or authority interfered with the invitation and award of the work violating the rules and procedures. Therefore, in my view, the entire proceedings pursuant to Ext.P10 charge memo is violative of the principles of natural justice and therefore arbitrary and illegal. No opportunity was provided by the Respondents to the petitioner to prove his innocence. No document was produced even before this Court especially to prove that the petitioner was involved in the invitation and award of the tender disregarding the rules and procedures. I

am constrained to enter into such a finding in view of the powers conferred by the Devaswom on the petitioner at that point of time, as per Ext.P1 and there is no contrary evidence pressed into service by the Respondents to establish the involvement of the petitioner in that regard.

15. Learned counsel for the Respondents even though contended that the Vigilance has recommended departmental enquiry, that is not a passport for the Respondents to proceed against the petitioner without complying with the established procedures of law especially in violation of the principles of natural justice. This is more so, when Ext.P10 charge memo, the charge was raised against the petitioner on the basis of a factual aspect that it was at the instance of the petitioner that tender was invited and awarded. Moreover, I am justified in finding so in view of Ext.P1, powers conferred on the petitioner was limited to an amount of Rs.25,001/- to Rs.75,000/- and admittedly, the tender amount was exceeding Rs.3 lakhs, which is evident from Ext.P8 final Report of VACB.

16. I am not satisfied that the Respondents were legally correct in imposing Ext.P12 punishment of censure, without providing an opportunity to the petitioner to prove that he is

innocent of the charges levelled against him, and further for the reason that no evidence also is produced before this Court to establish that it was at the instance of the petitioner that the tender in question was invited and confirmed in favour of the contractor. Moreover, it is clearly found by the Vigilance that the quantity and quality of the work was not suffered and further that there was no misappropriation of money. If the petitioner is not liable for the invitation of tender and award of the work, he was not liable to be suspended. It is also seen that other officers of the Devaswom Board were not proceeded with. In view of these fact situations and circumstances, I am of the considered opinion that Ext.P12 order imposing punishment of censure lack fairness, *bonafides* and merit, rather it is arbitrary and violative of principles of natural justice and therefore the same is liable to be set aside. Consequently, Ext.P17 order directing the petitioner to submit leave application to regularize the period of suspension cannot also stand test of law. In that view of the matter, Ext.P17 order is also set aside. In view of the above findings, the period of suspension is to be regularised by the Respondents treating the same as duty.

17. Resultantly, this writ petition is allowed quashing Exts.P12 and P17, and further direct the Respondents to treat the suspension period from 17.02.2011 to 26.08.2013 as duty. Needless to say, the petitioner is entitled to get all the benefits during the period he was kept under suspension.

The writ petition is allowed accordingly.

Sd/-
SHAJI P. CHALY
JUDGE

//true copy//

P.S. to Judge

St/-
22.12.2015