IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

FRIDAY, THE 6TH DAY OF NOVEMBER 2015/15TH KARTHIKA, 1937

WP(C).No. 24508 of 2005 (P)

PETITIONER:

S.GOPAKUMAR, AGED 40 YEARS
PEON GRADE I,
KERALA LABOUR WELFARE FUND BOARD
THIRUVANANTHAPURAM [UNDER SUSPENSION]
S/O.SADANANDAN, KUZHALIKKONATHU VEEDU
MUTTADA P.O., THIRUVANANTHAPURAM.

BY ADVS.SRI.P.PUSHPARAJAN
SRI.MANJU ANTONEY

RESPONDENTS:
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1. **THE STATE OF KERALA**
   REPRESENTED BY THE SECRETARY TO GOVERNMENT
   LABOUR WELFARE DEPARTMENT, SECRETARIAT
   THIRUVANANTHAPURAM.

2. **THE CHAIRMAN**
   KERALA LABOUR WELFARE FUND BOARD
   THIRUVANANTHAPURAM.

3. **THE COMMISSIONER,**
   KERALA LABOUR WELFARE FUND BOARD
   THIRUVANANTHAPURAM.

BY ADVS. SRI.K.ANAND (A.201)
SMT.LATHA KRISHNAN
BY GOVERNMENT PLEADER SRI. S. JAMAL

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 28.10.2015, ALONG WITH WPC. 17384/2006, THE COURT ON 06.11.2015 DELIVERED THE FOLLOWING:

WP(C).No. 24508 of 2005 (P)

APPENDIX

PETITIONER'S EXHIBITS :-

EXT.P1	-	COPY OF THE ORDER NO.E.4855/2002 DATED 16.12.2004 OF THE 3RD RESPONDENT.
EXT.P2	-	COPY OF THE CHARGE MEMO NO.E.4855/2002 DATED 31.08.2004 OF THE 3RD RESPONDENT.
EXT.P3	-	COPY OF THE REPLY DATED 05.07.2004 BY THE PETITIONER TO THE 3RD RESPONDENT.
EXT.P4	-	COPY OF THE REQUEST OF THE PETITIONER FOR SUBSISTANCE ALLOWANCE DATED 03.09.2004.
EXT.P5	-	COPY OF THE 3RD RESPONDENT'S REPLY TO EXT.P4 VIDE LETTER NO.E.4855/2005 DATED 02.02.2005.
EXT.P6	-	COPY OF REPRESENTATION MADE BY THE PETITIONER TO THE CHIEF MINISTER OF KERALA.

RESPONDENTS' EXHIBITS:-

EXT.R1(A)	-	COPY OF THE APPOINTMENT ORDER.
EXT.R1(B)	-	COPY OF THE ORDER DATED 06.09.2005.
EXT.R3(A)	-	COPY OF APPOINTMENT ORDER DATED 26.11.1982 ISSUED TO THE PETITIONER.
EXT.R3(B)	-	COPY OF 'DETAILS OF LEAVE' TAKEN BY THE PETITIONER.
EXT.R3(C)	-	COPY OF REPLY DATED 12.07.2004 SUBMITTED BY THE PETITIONER TO THE SHOW CAUSE NOTICE.
EXT.R3(D)	-	COPY OF DISMISSAL ORDER ISSUED TO THE PETITIONER.

//TRUE COPY//

P.A. TO JUDGE

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K. VINOD CHANDRAN, J.

W.P(C). Nos.24508 of 2005-P

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W.P(C) No.17384 of 2006-T

Dated this the 6th day of November, 2015.

JUDGMENT

The two writ petitions are filed, one with the claim for subsistence allowance, during the period spent on suspension, pending enquiry and the other challenging the order of dismissal, as confirmed in appeal.

2. The petitioner, a Peon of the 2nd respondent Board, was dismissed on charges of misconduct proved in a domestic enquiry. The respondent Board raises a preliminary objection that the petitioner is a workman and hence he has to seek remedies under the Industrial Disputes Act, 1947. However, it is to be specifically noticed that the Board in its Counter Affidavit filed in WP(C) No.24508 of

2005 state so:

> *"The respondent Board is governed by the provisions of Kerala Service Rules, Part-I & II. It is a statutory body constituted under the provisions of Kerala Labour Welfare Fund Act, 1975".*

Further, it is to be noticed that the writ petition is of the year 2006 and has been pending before this Court for the last 8 years. Preliminary objection with respect to maintainability is hence rejected.

3. The charges levelled against the petitioner have been translated in precis form in the writ petition itself, which is as follows:

> *"(1) The petitioner was unauthorisedly absent on 01-07-2004, 02-07-2004 and 03-07-2004.*
>
> *(2) On 05-07-2004 and 06-07-2004 the petitioner did not carry out the work entrusted by the Senior Superintendent and quarreled with her. It is also alleged that the petitioner was unauthorisedly absent from 07-07-2004 to 15-07-2004, which affected the smooth functioning of the office.*
>
> *(3) The petitioner was earning money by driving autorickshaw during office hours.*

> *(4) The petitioner was not doing his duty regularly and on 17-04-2004 and 19-04-2004 he failed to deliver the communications issued from the office on the party.*
>
> *(5) On 16-12-2002, 09-01-2003, 12-01-2004 the delinquent came to the office after taking liquor and disturbed the functioning of the office.*
>
> *(6) He unauthorisedly taken possession a recovery notice issued against him from a co-operative bank from the section with a view to destroy it to prevent recovery.*
>
> *(7) He is indebted to different co-operative bank to the tune of Rs.1,21,661/- and the liability incurred by him made him an employee in debt."*

4. The petitioner was suspended by an order dated 16.12.2004 exhibited as Ext.P1 in WP(C) No.24508 of 2005 and charge memo issued by Ext.P1 dated 31.08.2004 produced in the other writ petition. The documents produced in WP(C) No.17384 of 2006 are hereinafter referred to, except when otherwise noticed. The petitioner is said to have made various representations to the 3rd respondent, who is the Disciplinary Authority for engaging a person to defend himself. Though the same has not been

produced, the learned counsel for the petitioner asserts that it was a specific request for engaging a lawyer, since the petitioner was only a Last Grade employee. The same was rejected by Ext.P2. The procedural irregularity is projected in so far as violation of principles of natural justice having occasioned by reason of the petitioner, the delinquent employee, having not been given an adequate opportunity to defend himself.

5. To answer the above contention, the learned Counsel for the respondent refers to the Kerala Labour Welfare Board Employees (Appointment and Service Conditions) Regulations, 2001, [for brevity, Regulations, 2001], specifically Clause 40(6) of Chapter IV, which is extracted here:

> "ജീവനക്കാരനു അയാളുടെ കേസ് അച്ചടക്ക നടപടി അധികാരസ്ഥാനം അംഗീകരിച്ചിട്ടുള്ള മറ്റേതെങ്കിലും ജീവനക്കാരൻെറ സഹായത്തോടുകൂടി വാദിക്കാവുന്നതും, എന്നാൽ ഒരു അഭിഭാഷകനെ ഏർപ്പെടുത്തുവാൻ പാടില്ലാത്തതുമാകുന്നു."

6. A delinquent employee under the Board, hence,

could only seek for assistance from a co-employee and cannot seek assistance from a lawyer or any other person outside the organisation, to defend his case. A reading of Ext.P2 also indicates that the rejection was in so far as permitting the petitioner to engage a person from outside the organisation. The petitioner does not have a claim that he has sought for assistance from any of the co-employees or requested the Disciplinary Authority or the Enquiry Officer to permit him assistance from such co-employee. The petitioner even in the writ petition does not have such a case. In such circumstance, the contention of the petitioner that he was not given an effective opportunity to defend, on the ground of denial of his request to engage a lawyer, cannot be countenanced.

7. The petitioner also refers to Ext.P3, wherein he had complained to the Enquiry Officer that he was not allowed to examine the documents and that he had not been permitted assistance in defending his case. A reading of proceedings of

enquiry would indicate otherwise. The same is available in page No.4 of the Enquiry Report produced at Ext.P8. Therein, specifically the request made by the delinquent employee on 15.09.2004, for examination of documents is referred to. The Disciplinary authority, the 2nd respondent, had by letter dated 25.09.2004, permitted such examination and on 28.09.2004, the delinquent employee is said to have examined the documents at 3pm. The enquiry then was posted to 27.01.2005 at 11 O'Clock.

8. The charges were read over on the said date and on the same being denied, the delinquent employee was asked if had any documents or witnesses. He answered in the negative. However, he also contended that he would not get any favourable evidence or witnesses from the organisation and hence asked for further time to defend his case. That was granted and the enquiry was posted to 08.02.2005. On 08.02.2005, the delinquent employee categorically submitted that, he had no evidence or witnesses to offer.

The examination of the management witnesses proceeded on 15.03.2005, 22.03.2005 an29.03.2005. The delinquent employee was present but has not cross-examined any of these witnesses. The delinquent employee also offered his explanation, after the enquiry. This Court does not find any procedural irregularity and the enquiry is seen to have been carried on giving adequate opportunity to the delinquent employee to defend the charges alleged.

9. It is pertinent that the charges in the vernacular language are quite elaborate and make also general allegations against the employee. It is trite that no vague allegations can form the basis of a disciplinary enquiry proceeding. Hence, the vague allegations have been eschewed and the specific allegations, which have been extracted above, as has been reduced in the writ petition itself, is only looked into.

10. The unauthorised absence from 01.07.2004 to 03.07.2004 and from 07.07.2004 to 15.07.2004 as also the

dereliction of duty on 05.07.2004 and 06.07.2004, which comprised charges Nos.1 and 2 were proved. The records and the deposition proved the unauthorised absence on the specific dates. The absence on 01.07.2004 and 02.07.2004, assumes a more serious character, since on the 2nd the reconstituted Board was meeting under the Chairmanship of the Minister. The petitioner, a Peon in the Office, had absented on the previous day and on that particular day. This was categorically spoken of by the witnesses. The petitioner had the explanation that he had called the Office over telephone to seek leave and that he was not aware of the Board meeting. The Enquiry Officer rightly found that it was very unlikely that a Peon of the Office was not aware of such an important meeting constituted, in which the Minister also participated.

11. Charge 3 was with respect to the delinquent employee having been engaged in running and driving an autorickshaw for hire. The regulations specifically by Clause

26 of Chapter IV contemplated such action of the employees of the Board, engaging in outside work, to be a misconduct. The witnesses had spoken about his coming to Office in an autorickshaw. It was also stated by the witnesses that the delinquent employee was absent during duty hours on many dates and he could have then been engaged in running the autorickshaw. The petitioner claimed that he did not even have a licence. The Enquiry Officer found that earlier the petitioner had been proceeded against by the Commissioner for driving the Office car. The statement of the witnesses that on many days the petitioner was absent from duty in the afternoons, was relied on to find that the petitioner would have utilised such time for earning money by running the autorickshaw. It is to be noticed that the said assumption is in the realm of a conjuncture. There is no evidence as such to indicate that the petitioner had been running the autorickshaw for hire. The mere fact that the petitioner used to come to the Office in an autorickshaw

would not indicate that he had also been hiring out the same. Further, all the witnesses spoke about the petitioner coming to the Office in an autorickshaw and even spoke about the name of the autorickshaw as also its registration number. In such circumstance, it would have been quite possible to get the registration certificate of the autorickshaw and obtain necessary documents to indicate the ownership. There is also nothing to indicate that the registration taken out, of the autorickshaw, whether was a private one or as a public transport. The mere fact that the petitioner was found driving a car would not also result in a conclusion that the petitioner could drive an autorickshaw. The said charge is found to have been not proved. The Enquiry Officer's findings are merely on an assumption and the Disciplinary Authority erred in so far as concurring with the said findings, without reliance on any other evidence.

12. The 2nd charge also related to the petitioner having not carried out a work entrusted by the Senior

Superintendent, which was deposed to by the Senior Superintendent and the petitioner admitted to the same. The petitioner's explanation was that he was engaged in some other work. The lack of diligence in doing his duty regularly on 17.04.2004 and 19.04.2004 was also proved. The staff in the Office had specifically deposed that it was the petitioner's duty to make local deliveries. The petitioner refused to do that and the daily wage employee engaged by the Board also deposed that she had to do the work, which was in fact assigned to the delinquent employee by the work order. The 4th charge also stood proved.

13. The 5th charge related to the petitioner coming to the Office in an inebriated state on 16.12.2002, 09.01.2003 and 20.01.2004. The instances were far in between and the incident of 2002 and 2003 could not have been charged at a later point of time. The charge levelled on such cause, which happened long back, cannot be sustained and this Court is

of the opinion that the findings on the same need to be eschewed in the consideration of the case of the delinquent employee.

14. The other two charges were with respect to the petitioner's loan transactions. One of the charges was that the petitioner had clandestinely taken away a recovery notice forwarded by a Co-operative Bank to the respondent Board for effecting recovery from the petitioner's salary. The petitioner's explanation is that, he had taken the same to verify the default; with the Co-operative Bank and had misplaced it while taking a photostat copy. The petitioner admits that he had taken away the recovery notice without the permission of the Office staff. The petitioner was also found to have been indebted to various Co-operative Banks, far in excess of his repayment capacity. The documents with respect to the recovery sought for from the petitioner's salary clearly proved the same. The regulations by Clause 33 of Chapter IV specifically makes "debt liability" beyond

means to be a misconduct of an employee of the Board. The said charges also stand proved.

15. What is clear from the above discussion is that, the petitioner was found to have been unauthorisedly absent on 12 days, such absence also being at a time when a crucial meeting was scheduled in the Office of the Board. The petitioner's conduct in the Office was found to be indisciplined and he was found to lack diligence in doing his duty. The petitioner had without authorisation, with malicious intend, removed unauthorisedly a document received by the Board from a creditor of the employee, to make deductions in the salary. The delinquent employee was also found to have been indebted beyond his means. Chapter IV of the regulations lists out the various misconducts. Unauthorised absence is a specific misconduct as per sub-rule (3) of Regulation 28. Obligation to be governed by the regulations and obey the superior Officer and to be diligent in work, failure in which would amount to

misconduct has been provided for in Regulation 24 and 25 of Chapter IV. The petitioner's general conduct and the specific instances of disobedience to his superior Officer, the Senior Superintendent, and the failure to carry out the local delivery, the specific work assigned; all fall under the above heads. The unauthorised removal of a recovery notice also is a proved misconduct under the said head. Indebtedness in excess of one's financial capacity is covered by Regulation 33 of Chapter IV. The petitioner has been clearly found to be guilty of the said charges in an enquiry held in compliance with the principles of natural justice.

16. The petitioner was issued with notice of the findings of the enquiry by Ext.P6, with a copy of the enquiry report. The petitioner's objections were considered and the 3rd respondent, Disciplinary Authority concurred with the findings of the Enquiry Officer. Except the findings with respect to engaging in other work for remuneration and the charge of having been inebriated during duty hours, all

other charges stand proved. This Court does not find any reason to interfere with Ext.P8 order of the Disciplinary Authority. The appeal also stands rejected.

17. Now the question arises as to the punishment to be awarded. This Court's hands are tied in so far as, this Court not being empowered to sit in judgment on the wisdom of the Disciplinary Authority. However, the established precedents enable this Court to interfere in the punishment in the context of a travesty being disclosed or the same being grossly disproportionate, when tested with the gravity of the offence.

18. The offences alleged as noticed were of unauthorised absence and dereliction of duty, which as such are quite serious in nature. It has been held by the Hon'ble Supreme Court that unauthorised absence amounts to gross indiscipline. ***State of Punjab v. P.L. Singla [(2008) 8 SCC 469], L&T Komatsu Ltd. v. N. Udayakumar [(2008) 1 SCC 224].*** Coupled with this is the fact the

petitioner had been disobedient and grossly lacking in diligence in carrying out his work. The petitioner also had been indebted beyond his means.

19. However, the unauthorised absence was only for 15 days, that too in two different periods. There also general allegations levelled, which this Court has refused to take into account. In considering the gravity of the offence, one has to look at the specific instances, which had led to the framing of charges. There definitely has been disobedience and lack of diligence in work, but it is also to be noticed that the petitioner had been working in the Board for more than 20 years, when he was dismissed from service. Considering the gravity of the offences, definitely a major punishment has to be imposed, as is found from the Regulations of 2001. The petitioner also cannot be continued in service. However, this Court is of the opinion that the dismissal order is grossly disproportionate and the petitioner could be imposed with the punishment of compulsory retirement.

Hence, Ext.P8 and P10 would stand modified, with the punishment imposed determined as compulsory retirement. The petitioner would be entitled to all retirement benefits.

20. WP(C) No.24508 of 2005 is with respect to the subsistence allowance. The two contentions raised are (i) the maintainability when alternative remedies are available and (ii) the petitioner having not complied with the requirements to produce a declaration of non-employment. The question of maintainability need not be gone into, especially since the writ petition was admitted and has been pending in this Court for long, from 2005 onwards.

21. The other contention is with respect to the absence of a declaration, which, according to the petitioner, has been submitted as per Ext.P4. The objection of the respondent Board is with respect to the proviso to Section 3 of the Kerala Payment of Subsistence Allowance Act, 1972, which reads as under:

> *"12. Provided further that an employee shall not be entitled to any*

> *subsistence allowances if he accepts employment during the period of suspension in any establishment other than the establishment where he had been working immediately before this suspension"*

22. The respondent Board also relies on Note 3 of Rule 55 of Part-I KSR (Chapter VII) to contend that the declaration at Ext.P4 is not sufficient. It is to be noticed that the stipulation in the above provision is only that the suspended employee should not have accepted any employment during the period of suspension, in any other establishment and that the declaration stipulated requires only a counter-signature of a Gazetted Officer. The declaration at Ext.P4 specifically indicates that the petitioner has absolutely no means of livelihood, and the same is also counter-signed by a Gazetted Officer. The respondent seeks to rely on the endorsement made by the Gazetted Officer that the declaration is only with respect to the petitioner having no salaried employment. The declaration spoken of in Note 3. Rule 55 is of the employee and not the Gazetted

Officer. The Gazetted Officer is only required to counter-sign the declaration.

23. If the respondent Board was of the opinion that the petitioner has been engaged in running an autorickshaw on hire, then it was incumbent upon the respondent Board to have substantiated the same. The Counter Affidavit in fact specifically indicates the registration Number of the autorickshaw as KL 01 B457. It is also stated that the said autorickshaw is said to be in Police custody, if that be so, the respondent Board ought to have produced documents to prove the ownership of the vehicle and the person, from whose custody, the Police had seized the vehicle. Nothing to that end have been produced. The respondent Board ought to have paid the subsistence allowance on Ext.P4 declaration. WP(C) No.24508 of 2005 is allowed, directing the respondent Board to pay the subsistence allowance, in accordance with law to the petitioner, during the period in which he was kept out of service, till Ext.P8 order was

passed.

WP(C) No.24508 of 2005 is allowed and WP(C) No.17384 of 2006 is partially allowed, modifying the punishment. Parties to suffer their respective costs.

K. VINOD CHANDRAN,
JUDGE.

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