

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

THURSDAY, THE 3RD DAY OF SEPTEMBER 2015/12TH BHADRA, 1937

W.P.(C).No.21976 of 2007 (R)

PETITIONER(S):-

R.V.GIRESH KUMAR,
UPPER DIVISION CLERK (HIGHER GRADE),
JUDICIAL FIRST CLASS MAGISTRATE'S COURT-I,
THAMERESSERY.

BY ADVS.SRI.S.P.ARAVINDAKSHAN PILLAY
SMT.N.SANTHA
SRI.S.A.ANAND
SMT.TISVY VINCENT.

RESPONDENT(S):-

1. HIGH COURT OF KERALA,
KOCHI-682 031,
REPRESENTED BY THE REGISTRAR (SUBORDINATE JUDICIARY).
2. THE CHIEF JUDICIAL MAGISTRATE,
KOZHIKODE.

R1 & R2 BY ADV. SRI.B.UNNIKRISHNA KAIMAL.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
03-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:-

APPENDIX

PETITIONER'S EXHIBITS:-

- EXT.P1. TRUE COPY OF THE MEMO OF CHARGES NO.A3-4430/04
DATED 6.5.2005.
- EXT.P2. TRUE COPY OF THE EXPLANATION SUBMITTED BY THE
PETITIONER TO THE 2ND RESPONDENT DATED 26.5.2005.
- EXT.P3. TRUE COPY OF THE STATEMENT OF DEFENCE FILED BY THE
PETITIONER BEFORE THE ENQUIRY OFFICER DATED 2.5.2006.
- EXT.P4. TRUE COPY OF THE ORDER NO.A3-4430/04 DATED 31.05.2006
OF THE 2ND RESPONDENT.
- EXT.P5. TRUE COPY OF THE ENQUIRY REPORT SENT TO THE
PETITIONER ALONG WITH EXT.P4.
- EXT.P6. TRUE COPY OF THE REPRESENTATION SUBMITTED BY THE
PETITIONER BEFORE THE 2ND RESPONDENT DATED 12.6.2006.
- EXT.P7. TRUE COPY OF THE ORDER NO.A3-4430/04 DATED 27.6.2006
OF THE 2ND RESPONDENT.
- EXT.P8. TRUE COPY OF THE APPEAL DATED 3.7.2006 FILED BY THE
PETITIONER BEFORE THIS HON'BLE COURT.
- EXT.P9. TRUE COPY OF THE HIGH COURT ORDER NO.II-53621/2006
DATED 7.6.2007.
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RESPONDENTS' EXHIBITS:-

NIL.

vku/-

(true copy)

K. Vinod Chandran, J

W.P.(C).No.21976 of 2007-R

Dated this the 03rd day of September, 2015

JUDGMENT

The petitioner, an Upper Division Clerk (Higher Grade) in the Judicial service of the State, assails the punishment imposed by Exhibit P7 and upheld by Exhibit P9.

2. The facts to be noticed are that, the petitioner had joined duty at the Judicial First Class Magistrate Court-I, Kozhikode on 14.07.2004 and on an inspection conducted by the Chief Judicial Magistrate on 19.07.2004, certain defects were noticed with respect to the maintenance of many records as also the disposal of ripe items of property, the latter of which was the responsibility of the petitioner who was the incumbent in charge of the property section. It is seen that very many reminders were issued to the petitioner to cure the defects and on such reminders having not met with any response, a show cause notice was issued by way of memo of charges, with statement of allegations, alleging disobedience and dereliction of duty.

3. The petitioner was proceeded with in a properly constituted enquiry, which ended in a finding of guilt, as is seen from Exhibit P5 report. The disciplinary authority, being the Chief Judicial Magistrate, issued Exhibit P4 show cause notice along with the enquiry report, Exhibit P5. Though the proposal in Exhibit P4 was to impose a punishment of barring one increment with cumulative effect, by Exhibit P7 the objection made by the petitioner was considered and the imposition of penalty was limited to temporary withholding of one increment for a period of six months.

4. The contention taken by the petitioner in the appeal filed, at Exhibit P8, and the writ petition, is that Exhibit P4 is only a show cause notice with respect to the penalty proposed and the concurrence of the disciplinary authority with the finding of guilt entered by the enquiry officer, is without considering the objections of the petitioner as also without supplying of the enquiry report and an opportunity being afforded to controvert the findings in the enquiry report.

5. The learned counsel for the petitioner relies on the decision in ***Managing Director, ECIL v. B. Karunakar*** [(1993) 4

SCC 727] to contend that what is contemplated after the 42nd amendment under Article 311 of the Constitution of India, is an opportunity to represent against the findings in the enquiry report and at the second stage only, the proposal for punishment was to be communicated, which provision available earlier was taken away. This, by accepted practise and binding precedents, has crystallized into an inviolable rule of natural justice.

6. The learned Standing Counsel for the respondents, however, would rely on the decision in ***Pushkaran v. State of Kerala* [2005 (3) KLT 657]** to contend that the issue would have to be examined with reference to any allegation of prejudice and the same being substantiated by the delinquent employee.

7. The principles with respect to the opportunity to be granted to a delinquent employee when disciplinary proceedings have been initiated are succinctly stated in **B.Karunakar** (*supra*). Explaining the decision of the Supreme Court in ***Union of India v. Mohd. Ramzan Khan* [(1991) 1 SCC 588]**, which was rendered in the wake of the 42nd Amendment, the Hon'ble Supreme Court was considering the issue as to whether the 42nd

Amendment took away the opportunity available to an employee for supply of enquiry report and consideration of the objections against the enquiry report as also an opportunity to represent against the punishment to be imposed. **B.Karunakar** (*supra*) found that earlier to the 42nd Amendment though there were two stage opportunity to the delinquent employee to represent against the enquiry report to prove his innocence as also to represent against the punishment proposed; the right to prove innocence before the Disciplinary Authority was always deferred to be exercised along with his right to show cause as to why no penalty or lesser penalty should be awarded. Hence, though in fact earlier to the 42nd Amendment there was only one opportunity granted to the delinquent employee to make representation, there was, in legal contemplation two stages of such opportunity. By the 42nd Amendment, the 2nd stage of enquiry, viz., enquiry into the nature of penalty, was abolished; but that does not in any way take away the opportunity of the delinquent to make representation against the enquiry report. It is that opportunity or rather the illegality or irregularity in not affording an opportunity to represent against the finding of the

enquiry officer that is projected in the instant case.

8. The issue has to be looked at from the above perspective. The operative portion of Exhibit P4, which is stated to be a show cause notice, reads as under:

“In the result, the Delinquent Government Servant is found guilty of the disobedience and dereliction of duty. Considering the entire facts and circumstances, I propose to impose the penalty of withholding of increment for a period of six months with cumulative effect. The Delinquent Government Servant may show-cause, if any, as to why the said penalty should not be imposed within a period of 10 days”.

The same would indicate that the delinquent employee was found guilty and the show cause notice is only with respect to the penalty to be imposed on the delinquent employee. It is an admitted fact that the enquiry report was supplied along with the show cause notice [Exhibit P4]. This, in fact, violates the established principles of natural justice.

9. The decision relied on by the learned Standing Counsel, **2005 (3) KLT 657**, was a case in which specifically the Court found that the petitioner had not contended before the

appellate authority or raised a ground in the writ petition that the non-supply of the enquiry report before entering a finding of guilt had prejudiced the appellant/petitioner therein. The facts otherwise, seems to be almost similar, where the enquiry resulted in imposition of withholding of two increments with cumulative effect. However, no such ground having been taken at any point of time, the Division Bench of this Court found that though the appellant had an opportunity to raise a ground of prejudice having been caused; the same having not been raised before the appellate authority or even in the writ petition, it cannot be said that any prejudice was actually caused to the petitioner.

10. In fact, another Division Bench in ***Radhakrishnan Nair v. State of Kerala* [2005 (3) KLT 1]** relied on the afore-cited decisions of the Hon'ble Supreme Court to find that supply of the enquiry report is a mandatory aspect regulating the compliance of the principles of natural justice. So was the finding also by another Division Bench, in ***K.S.R.T.C. v. Abdul Latheef* [2005 (3) KLT 955]**.

11. In the present case, it cannot be said that the petitioner had not, at any point of time, raised a contention that prejudice has not been caused to him. Exhibit P8 appeal memorandum and the writ petition specifically raises such ground. It can also be seen from Exhibit P4 show cause notice that even before the supply of the enquiry report the disciplinary authority had considered the entire gamut of evidence, which led to the finding by the enquiry officer and found the delinquent employee guilty of disobedience and dereliction of duty. There is also no explanation sought from the delinquent employee as to the findings in the enquiry report. The show cause notice, as is indicated in paragraph 4 of Exhibit P4, extracted above, deals only with the proposal for punishment.

12. Exhibit P7 final order is a reiteration of Exhibit P4 and it merely considered the objections with respect to the penalty proposed. In such circumstances, this Court is of the opinion that neither Exhibit P7 nor the appellate order at Exhibit P9 can be sustained. Exhibits P7 and P9 would stand set aside. However, the petitioner shall be issued with a fresh notice, without the enquiry report, within a month from the date of

receipt of a certified copy of this judgment, by the disciplinary authority. It is made clear that the non-supply of the enquiry report at this stage is directed only due to the fact that the petitioner was already served with an enquiry report. The petitioner shall be permitted to make submissions on the enquiry report and the same shall be considered by the disciplinary authority. The findings in Exhibits P4 and P9 shall have no effect, and the disciplinary authority shall consider the issue independently of such findings. It is made clear that the reversal of the punishment imposed shall be subject to the findings of the disciplinary authority, as directed herein above. It is also made clear that this Court has not made any observation on merits and has merely set aside the order on procedural irregularity.

The writ petition is disposed of as above. Parties are left to suffer their respective costs.

Sd/-
K.Vinod Chandran
Judge.

vku/-

[true copy]