

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

TUESDAY, THE 3RD DAY OF NOVEMBER 2015/12TH KARTHIKA, 1937

WP(C).No. 23006 of 2015 (A)

PETITIONER:

K.R.AJAYAKUMAR, S/O. RAMAKRISHNAN,
KURIYAKOTTU HOUSE, P.O.PERAMANGALAM,
THRISSUR DISTRICT.

BY ADVS.SRI.K.C.SANTHOSHKUMAR
SMT.K.K.CHANDRALEKHA

RESPONDENTS:

1. STATE OF KERALA REPRESENTED BY THE SECRETARY
TO GOVERNMENT, DEPARTMENT OF CO-OPERATIVE
SOCIETIES, GOVERNMENT OF KERALA,
THIRUVANANTHAPURAM-695 001.
2. THE REGISTRAR OF CO-OPERATIVE SOCIETIES (KERALA),
THIRUVANANTHAPURAM-695 001.
3. THE JOINT REGISTRAR OF CO-OPERATIVE SOCIETIES
(GENERAL), THRISSUR-680 001.
4. THE ADATTU FARMERS SERVICE CO-OPERATIVE BANK LTD.
NO.689, P.O.PURANATTUKARA, THRISSUR-680 551
REPRESENTED BY ITS SECRETARY.

R4 BY ADV. SRI.GEORGE POONTHOTTAM
R1 to R3 BY SR.GOV'T. PLEADER SRI.K.C.VINCENT

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON
03-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX IN WP(C).No. 23006 of 2015 (A)

PETITIONER'S EXHIBITS:

EXT. P1 : TRUE COPY OF THE INTIMATION DATED 30.12.2013.

EXT. P2 : TRUE COPY OF THE SHOW CAUSE NOTICE DATED 27.5.2014 ALONG WITH ENGLISH TRANSLATION.

EXT. P3 : TRUE COPY OF THE EXPLANATION DATED 21.6.2014 SUBMITTED BY THE PETITIONER.

EXT. P4 : TRUE COPY OF THE INTIMATION DATED 9.8.2014.

EXT. P5 : TRUE COPY OF THE COMPLAINT FILED BEFORE THE JUDICIAL FIRST CLASS MAGISTRATE COURT, KUNNAMKULAM.

EXT. P6 : TRUE COPY OF THE NOTICE DATED 12.8.2014 (POSTED ON 13.8.2014).

EXT. P7 : TRUE COPY OF THE NOTICE DATED 10.9.2014 (POSTED ON 11.9.2014)

EXT. P8 : TRUE COPY OF THE INFORMATION DATED 7.7.2015.

EXT. P9 : TRUE COPY OF THE COMMUNICATION DATED 23.6.2015.

EXT. P9(a): TRUE COPY OF THE ENQUIRY REPORT DATED 15.5.2015.

EXT. P10: TRUE COPY OF THE EXPLANATION DATED 10.7.2015 SUBMITTED BY THE PETITIONER.

EXT. P11: TRUE COPY OF THE COMMUNICATION DATED 13.7.2015 ALONG WITH ENGLISH TRANSLATION.

EXT. P12: TRUE COPY OF THE REQUEST DATED 17.7.2015.

EXT. P13: TRUE COPY OF THE AUDIT CERTIFICATE DATED 10.9.2013

EXT. P14: TRUE COPY OF THE ACKNOWLEDGEMENT CARD DATED 21.7.2015

EXT. P15: TRUE COPY OF THE REMINDER DATED 9.9.2015 AND THE COPY OF RETURNED POSTAL COVER

EXT. P16: TRUE COPY OF THE JUDGMENT DATED 6.11.2014 IN CC 433/2013 ON THE FILE OF THE JFCM COURT, KUNNAMKULAM

EXT. P17: THE COPY OF THE DEPOSITION OF THE DEFACTO COMPLAINT AND TRANSLATION

RESPONDENT'S EXHIBITS:

EXT. R4(a) TRUE COPY OF THE REPORT SUBMITTED BY THE CO-OPERATIVE VIGILANCE AND ITS TRUE ENGLISH TRNASLATION

EXT. R4(b) TRUE COPY OF THE COMMUNICATION ISSUED BY THE REGISTRAR OF CO-OPERATIVE SOCIETIES TO THE JOINT REGISTRAR OF CO-OPERATIVE SOCIETIES (G), THRISSUR DISTRICT NO.V(3)4092/13 DATED 06.12.2013 AND ITS TRUE ENGLISH TRANSLATION

EXT. R4(c) TRUE COPY OF THE MEMO NO.CRP8994/2013 DATED 26.12.2013 ISSUED BY THE JOINT REGISTRAR OF CO-OPERATIVES (G), THRISSUR AND ITS TRUE ENGLISH TRANSLATION

Dama Seshadri Naidu, J.

W.P.(C)No.23006 of 2015 A

Dated this the 3rd day of November, 2015

JUDGMENT

Facts:

The petitioner, a Peon in the service of the fourth respondent Society, has faced disciplinary proceedings and earned a dismissal through Exhibit P11 order. He has impugned Exhibit P11, inter alia, on the ground that it was passed by an incompetent authority and that the order of dismissal is non est.

Scope of Adjudication:

2. Though the petitioner has raised various other issues, they may not, however, be germane for our consideration. In a judicial review, as is well-settled, the power of the management to inflict appropriate punishment on a delinquent employee can neither be cribbed nor curbed, provided the power is exercised by a proper authority.

Without cavil, I may observe that the writ of certiorari can be exercised on certain well entrenched judicial parameters, such as ultra vires, disproportionality, perversity of finding, etc. In the present instance, the contention of the petitioner is that the capital punishment of removal from service was passed by an authority who is not clothed with any power. Simply stated, Exhibit P11 is ultra vires.

3. On the other hand, the respondent-Society has taken an objection against the maintainability of the writ petition on the ground that the petitioner has an efficacious alternative remedy.

4. The pleas raised by the rival parties to the lis obviate any reference to the merits of the matter on factual front, for both the issues are questions of law. If this Court is to accept the plea of either of the parties, it has to dispose of the writ petition on a technicality rather than on merit: That Exhibit P11 is ultra vires or that the writ

petition is not maintainable on the ground of alternative remedy. Now, I may, thus, confine my discussion only to these twin aspects.

Summary of Submissions:

Petitioner's:

5. On the issue of maintainability, the learned counsel for the petitioner would contend that, first, in Rule 198(3) of the Kerala Co-operative Societies Rules, 1969 ('the Rules' for brevity), the authorities who can impose the punishment have been tabulated. In furtherance of his submissions, he has also submitted that as regards the petitioner, a Peon, the competent authority to impose the capital punishment of termination is the President, whereas Exhibit P11 order was passed by the Chairman of the disciplinary sub-committee.

6. On the issue whether the petitioner could have taken recourse to the judicial remedies provided under

Section 69 of the Kerala Co-operative Societies Act, 1969 ('the Act' for brevity), the learned counsel would contend that in terms of sub-rule (4) of Rule 198, first, an appeal shall lie to the Board of Management against the order of imposing penalty, say, removal from service. Only thereafter, if still aggrieved, can the affected employee approach the Arbitration Court under Section 69 of the Act.

7. Succinctly stated, it is the singular contention of the learned counsel for the petitioner that once Exhibit P11 order of removal is ultra vires, in view of the fact that the Chairman of the disciplinary sub-committee has not been clothed with any power, the question of alternative remedy does not crop up. He has also underlined the fact that once the issue of vires has fallen for consideration, this Court can as well exercise its power of judicial review under Article 226 of the Constitution of India, the alternative remedy notwithstanding.

Respondent Society's:

8. Per contra, the learned counsel for the fourth respondent Society has strenuously opposed the claims and contentions of the petitioner. The learned counsel has submitted that it hardly makes any difference whether the order of punishment is passed by either the Chairman of the disciplinary sub-committee or the President of the Managing Committee. The learned counsel has also contended that both the expressions 'President' and 'Chairman' have been used interchangeably and nothing much turns upon the nomenclature.

9. The pivot of the submission is that the petitioner has not been deprived of an opportunity of assailing Exhibit P11 order, for the Managing Committee, excluding the three members that constituted the sub-committee, can as well hear the appeal.

10. In elaboration of his submissions, the learned counsel has contended that the Managing Committee has comprised thirteen members, three of whom constituted the disciplinary sub-committee. It is the sub-committee that decides, according to the learned counsel, the issue of punishment based on the report submitted by the Enquiry Officer, who is an outsider.

11. Since none of the three members of the sub-committee has not participated in the deliberations of appeal, it does not cause any prejudice to the delinquent employee. In this regard, the learned counsel has pressed into service the proposition of useless formality. Placing reliance on **Balbir Chand v. Food Corporation of India Ltd.**¹, and **Chairman, A.P. State Electricity Board v. M.Kurmi Naidu**², the learned counsel has strenuously contended that so long as the petitioner has not been

¹ (1997) 3 SCC 371

² (2006) 8 SCC 62

deprived of an opportunity to ventilate his grievance before an appropriate forum, the mere fact that a particular authority instead of another authority has passed the order of punishment does not vitiate the entire disciplinary proceedings.

12. Heard the learned counsel for the petitioner and the learned counsel for the fourth respondent, as well as the learned Government Pleader, apart from perusing the record.

Issues:

- I. Whether the petitioner has an efficacious alternative remedy, and he is, therefore, disentitled to writ remedy?
- II. Whether Exhibit P11 order of punishment is ultra vires?

Discussion:

Issue Nos.I & II:

13. Though both the issues do appear to be different and distinct, the answer to one resolves the other, too.

Simply put, if the court is to hold that Exhibit P11 is ultra vires, then the writ is maintainable, notwithstanding that the petitioner has an alternative remedy—efficacious or not—for an order that is ultra vires can also be impugned in judicial review. Accordingly, I have taken up both the issues together.

14. To appreciate the rival contentions on the legality of Exhibit P11 order of punishment, it may be appropriate to examine Rule 198 of the Rules, which, to the extent relevant, reads as follows:

“198. Disciplinary Action:- (1) Any member of the establishment of a Co-operative Society may, for good and sufficient reasons, be punished by imposing any of the following penalties, namely: -

- (a) Censure;
- (b) Fine (in the case of employees in the last grade);
- (c) Withholding of increments with or without cumulative effect;
- (d) Withholding of promotion;
- (e) Recovery from pay of the whole or part of any pecuniary loss caused to the society, by negligence or breach of orders or otherwise;
- (f) Reduction to a lower rank;
- (g) Compulsory retirement;
- (h) Dismissal from service.

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XXXXX

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(2A) The committee of a society shall constitute a disciplinary sub-committee consisting of not more than three of its members, of whom one shall be designated as Chairman, but the President of the committee of the Society shall not be a member in the disciplinary sub-committee."

15. Indeed, the major punishment of dismissal from service is shown under clause (h) of sub-rule (1) of Rule 198. In terms of sub-rule (2A), the Managing Committee of the Society shall constitute a disciplinary sub-committee consisting of not more than three of its members, of whom one will be designated as Chairman. Indeed, the President of the Managing Committee of the Society has been excluded to be the part of the disciplinary sub-committee.

16. If we examine further, under sub-rule (3) of Rule 198, the authorities and the types of punishment that can be inflicted by them have been tabulated. As regards the penalties under sub-clauses (a) to (c) of sub-rule (1) of Rule 198, it is either the President of the Managing Committee or

the Chairman of the disciplinary sub-committee that is competent to pass the necessary orders. As regards, the penalties under clauses (d) to (h), which comprise major penalties, the competent authority is the Sub-Committee/ Executive Committee. Concerning the employees that have been specified under the category 'all other employees', the residuary category, under which the petitioner falls, the minor penalties under clause (a) to (c) can be imposed by the Secretary/Manager/Chief Executive Officer; the major penalties under clauses (d) to (h), by the President.

17. In turn, under sub-rule (4) of Rule 198, the appellate authorities have been tabulated. Confining our discussion to the category of 'all other employees' who include the Peon as well, in so far as the minor penalties are concerned, the President of the Managing Committee himself is the appellate authority; whereas, concerning the penalties under clauses (d) to (h), it is the Executive Officer/

Board of Management.

18. The learned counsel for the fourth respondent Society has submitted that so long as the Managing Committee entertains an appeal against the order of punishment, the petitioner has not been put to any prejudice. He has also further submitted that the expressions 'Chairman' and 'President' on one hand and 'Executive Officer' and 'Board of Management' on the other have been employed interchangeably, if not indiscriminately.

19. In this regard, we may examine sub-rule (2A), which employs both the expressions: 'Chairman' and 'President'. It is trite to observe that once a statute—or for that matter, a particular provision—employs two different and distinct expressions in the same breath, it ought to be concluded that they have been used in their distinct semantic or statutory sense. Unless an expression is defined

in the very act to connote something different from what it actually denotes, thereby treating it as a word of art, the expression ought to be given its ordinary semantic sense.

20. In the result, I am constrained to hold that the expressions 'Chairman' and 'President' have been used in contra distinction with a specific objective. Exhibit P11 also makes it manifestly clear that the order was passed by the Chairman of the Disciplinary Sub-Committee. In elaboration, it can further be stated that in some instances the primary authority regarding certain punishments has been made the appellate authority regarding certain other punishments.

21. In *Balbir Chand* (supra), the Hon'ble Supreme Court has examined the issue whether an authority other than the one specified under the Rules or Regulations can impose the punishment. In that context, their Lordships have observed that so long as the authority that has passed

the order is superior to the one that ought to have passed, the order could not be interdicted. Indeed, as has been rightly contended by the learned counsel for the respondent Society, their Lordships have also observed that so long as the appellate authority, excluding the authority that has passed the very order, has entertained the appeal, no prejudice is said to have been caused to the delinquent employee, and it does not amount to any discrimination violating Article 14 of the Constitution of India.

22. The facts of the Balbir Chand (*supra*) reveal that the Managing Director, who is part of the appellate machinery has passed the order of punishment in the place of Divisional Manager. It is not in dispute that the Managing Director is the appointing authority and is superior to the Divisional Manager, the original authority. Indeed, in the context of the fact that the Managing Director is part of the appellate machinery, the Apex Court has observed that

when the Committee excluding the Managing Director considers the appeal, it does not amount to any discrimination. The same ratio has been followed in Kurmi Naidu (*supra*).

23. In the present instance, it is not in dispute that the Chairman of the disciplinary sub-committee is not the appointing authority; nor can he be said to be superior to the President of the Managing Committee, which has been empowered statutorily to pass the order of punishment.

24. The learned counsel for the fourth respondent Society has also strenuously contended that so long as there is a duly constituted appellate machinery to entertain an appeal against Exhibit P11 order, no prejudice is caused to the petitioner. And any cavil about who has actually passed Exhibit P11 order is only a hair-splitting technicality. According to him, any interdiction of Exhibit P11 will result in a useless formality in the name of following a technical

rigmarole.

25. In the first blush, the submissions of the learned counsel for the fourth respondent Society appear to be rather attractive; yet, on a closer scrutiny, they fail to pass the judicial muster. For ages, the Courts, beginning from **Taylor v. Taylor**³ to this day, have repeatedly held that once a statute mandates a particular procedure, it ought to be followed in the manner prescribed or not at all. In this regard one can with profit refer to **Nazir Ahmad v. King Emperor**⁴, **State of U.P. v. Singhara Singh**⁵, **Kuntesh Gupta v. Hindu Kanya Mahavidyalaya**⁶, **Ram Phal Kundu v. Kamal Sharma**⁷, and **M. P. Wakf Board v. Subhan Shah**⁸.

26. As regards the issue of prejudice, once there is substantial compliance with a particular statutory provision

³ 1876 (1) Ch D 426

⁴ AIR 1936 PC 253

⁵ AIR 1964 SC 358

⁶ (1987) 4 SCC 525

⁷ AIR 2004 SC 1657

⁸ (2006) 10 SCC 696

and an absolute compliance thereof has been rendered impossible, the Courts, under various justifiable circumstances, have accepted the theory of useless formality and have held that once the substantial procedure has been followed, insistence on an absolute compliance even under unjustifying circumstances is unconscionable.

27. In the present instance, the statute in sub-rules (3) and (4) of Rule 198 of the Rules has categorically specified the authorities that can inflict the punishments that have been specified therein. Even while accepting the recommendation of the disciplinary sub-committee, the President cannot be termed as a mere postman passing on the verdict of the disciplinary sub-committee to the delinquent employee.

28. In fact, as regards the offences under clauses (a) to (c), being minor in nature, the very President is the appellate authority. Concerning those offences that are

grave in nature, it is the appointing authority that can inflict the punishment. And, in the present instance, it is the President. Of course, once an order has been passed validly, it can be tested before an appropriate appellate forum. On the other hand, if the order has been vitiated and rendered non est, the question of availability of an alternative remedy is no solace.

29. I, however, hasten to add that just because there is an error in so far as the competence of an officer to pass an order is concerned, it does not mean that the whole proceedings have to be abandoned or the entire issue has to be rolled back.

30. I am, therefore, inclined to and accordingly observe that Exhibit P11 cannot be sustained since it has been passed by an incompetent authority. Nevertheless, once Exhibit P11 order is set aside, as has been done here, the competent authority, i.e., the President of the Managing

Committee can pass orders based on the enquiry report and the recommendation of the disciplinary sub-committee.

31. Once an order, thus, is passed, it is entirely open for the petitioner to take recourse to the appropriate remedial mechanism in the form of an appeal, as has been provided under sub-rule (4) of Rule 198 to ventilate his grievance on all counts.

With the above observation, the writ petition stands disposed of. No order as to costs.

Dama Seshadri Naidu, Judge

tkv

'C.R.'