

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM

WEDNESDAY, THE 7TH DAY OF JANUARY 2015/17TH POUSHA, 1936

WP(C).No. 30334 of 2009 (J)

PETITIONER:

**P.V.SUTHAKARAN, NATTUVETTY HOUSE
THANYAM PERINGOTTUKARA, THRISSUR DISTRICT
(RETIRED FINANCE OFFICER OF KANNUR UNIVERSITY)**

BY ADV. SRI.T.A.SHAJI

RESPONDENT(S):

- 1. THE STAT INFORMATION COMMISSION
KERALA, THIRUVANANTHAPURAM PIN-695039 REPRESENTED
BY ITS SECRETARY.**
- 2. THE PUBLIC INFORMATION OFFICER UNDER THE
RIGHT TO INFORMATION ACT & JOINT REGISTRAR
KANNUR UNIVERSITY, MANGATTUPARAMBA KANNUR
UNIVERSITY CAMPUS P.O., KANNUR-670567.**
- 3. BABU CHATHOTH, PRESIDENT KANNUR
UNIVERSITY STAFF ORGANISATION, KANNUR UNIVERSITY
CAMPUS.P.O., KANNUR-670567.**

**R1 BY ADV. SRI.M.AJAY, SC, STATE INFORMATION COMMISSION
R1 BY SRI.M.SASEENDRAN,SC,KANNUR UNIVERSITY
R2 BY ADV. SRI. V. A. MUHAMMED**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 07-01-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

APPENDIX

PETITIONERS EXHIBITS:

EXHIBIT-P1: COPY OF THE ORDER DATED 27.2.2009 OF THE 1ST RESPONDENT.

EXHIBIT P2: COPY OF THE COMMUNICATION DATED 13.4.2009 OF THE 1ST RESPONDENT.

EXHIBIT P3: COPY OF THE JUDGMENT DATED 16.7.2009 IN W.P.(C).13410/2009 OF THIS HON'BLE COURT.

EXHIBIT P4: COPY OF THE EXPLANATION DATED 11.8.2009 SUBMITTED BY THE PETITIONER.

EXHIBIT P5: COPY OF THE ORDER DATED 30.9.2009 ISSUED BY THE 1ST RESPONDENT.

RESPONDENTS EXHIBITS: NIL

/TRUE COPY/

P.A. TO JUDGE

SKV

C.K.ABDUL REHIM, J

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W.P.(C). No. 30334 OF 2009

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Dated this the 7th day of January, 2015

JUDGMENT

A brief narration of history of the case will be beneficial. The 3rd respondent herein submitted a request under Section 6(1) of the Right to Information Act, 2005 (the Act for short) before the State Public Information Officer (SPIO) of the Kannur University on 12.7.2007 seeking to furnish copies of two documents;

- (1) Counter affidavit filed by the Kannur University in W.P.(C). No.20469/2007 before this court and
- (2) Reply sent by the University to the Principal Secretary Higher Education Department dated 9.7.2007, in response to calling attention motion made by an MLA in the State Assembly.

2. The 3rd respondent approached the 1st respondent through a complaint dated 25.1.2008 alleging that the information provided by the SPIO on 24.8.2007 was

incomplete to the extent that copy of the 2nd item alone was furnished and with respect to the 1st item it was informed that legal opinion is required before it could be provided. The 1st respondent called for a report from the SPIO. In the report the SPIO submitted that copy of item No.2 was already provided on 22.8.2007 and copy of item No.1 was also provided on 15.2.2008, after consulting Standing Counsel of the University. It is stated that, legal opinion was sought for with respect to furnishing copy of item No.2 document on 22.8.2007. The opinion was received only on 5.9.2007. File containing the document was with the petitioner herein, who was holding additional charge of the Registrar of the University. The petitioner has not heeded to the request made by the SPIO for making available the files, for providing the information. Then the SPIO had contacted the Standing Counsel and received a copy of document No.2 on 12.2.2008. Thereafter the same was provided to the 3rd respondent on 15.2.2008.

3. On receipt of the report, the 1st respondent issued notice to the present incumbent in the office of the SPIO of

the University. He appeared before the 1st respondent and submitted that one Shri. K. Sudhakaran was the SPIO during the relevant time when the RTI application was received. It was also stated that the petitioner herein had failed in making available the files which contained copy of the counter affidavit. The 1st respondent thereupon issued Ext.P1 order finding that, the information sought for by the 3rd respondent was furnished only after the lapse of statutory period and therefore the then SPIO (Sri.K. Sudhakaran) as well as the petitioner herein are responsible for the delay caused, for the period from 12.7.2007 to 15.2.2009. The present SPIO was directed to furnish details of the former SPIO and the petitioner herein, for the purpose of proceedings against them under Section 20 of the Act. On the basis of the details provided, notices were issued to the petitioner and Sri. K. Sudhakaran, calling upon for submitting explanations. Ext.P2 is the notice issued by the 1st respondent against the petitioner requiring to show cause as to why penal proceedings should not be initiated under Section 20 of the Act for violation of Section

7(1) of the Act, treating him as deemed SPIO under Section 5(5) of the Act.

4. The petitioner challenged Exts.P1 and P2 in an earlier writ petition filed before this court, which was disposed of through Ext.P3 judgment. On behalf of the 1st respondent it was conceded before this court that the conclusions contained in Ext.P1 are only tentative and shall not be treated as final. Therefore this court permitted the petitioner to submit written explanations. This court made it clear that if the petitioner requires a personal hearing it shall be afforded, and that personal appearance of the petitioner need not be insisted unless required by the petitioner.

5. Pursuant to Ext.P3 judgment the matter was further proceeded before the 1st respondent. Ext.P4 is the explanation submitted by the petitioner. The then SPIO, who was arrayed as 1st respondent in the proceedings, submitted explanations on 8.5.2009 stating that it was due to non co-operation of the petitioner in parting with the information available under his custody that the delay in

furnishing copy of item No.1 document occurred. It is stated in detail that; on receipt of the RTI application the petitioner was requested to make available copy of the document. But the petitioner insisted upon for obtaining legal opinion in the matter. The SPIO had attempted to convince the petitioner that the request will not come within the exemptions provided in Section 8(1)(b) of the Act. But the petitioner still insisted on obtaining legal opinion. When the Standing Counsel for the University opined that copy of the document had to be provided, the petitioner informed that copy of the counter affidavit is not available with him. Then the Standing Counsel was contacted through office of the Registrar of the University and a copy of the counter affidavit was obtained. But the said copy was also not handed over to the SPIO, inspite of several requests. It was only on intervention of the Pro-Vice Chancellor that the petitioner had permitted the SPIO to contact the Standing Counsel. Then the Standing Counsel was contacted over phone and a copy of the document was received on 12.2.2008 and it was furnished to the 3rd respondent on

15.2.2008. The SPIO submitted that, under the above mentioned circumstances he was totally helpless in providing the information within the time limit.

6. In Ext.P4 explanations the petitioner submitted that; he had not caused any delay in furnishing the information. The copy of the document in question was not available with the University at the time when the request was received. The fact that later it was procured from the Standing Counsel would make it evident that the petitioner was not responsible for the delay. The SPIO could have very well obtained a copy from the Standing Counsel, for which no order was required from the petitioner. The allegation of the SPIO that the petitioner was responsible for the delay was emphatically denied. It was also specifically stated that, the allegation that the petitioner was in possession of the file containing the counter affidavit, is untrue and incorrect. It was categorically contended that the petitioner had never withheld any information or document, nor he had failed to endorse prompt orders on files that came before him.

7. The 1st respondent had summoned the then SPIO and his statement was recorded. But the petitioner was not summoned, presumably because of the observations contained in Ext.P3 judgment. The then SPIO gave oral statement that the usual practice followed in the University was to keep all documents relating to legal matters within the custody of the Registrar. Therefore specific orders were to be obtained from the Office of the Registrar for replying to the RTI request. He further stated that the counter affidavit in question was prepared on the laptop of the petitioner and it was filed personally by him on 9.7.2007, without taking help of any one in the University administration. It was also stated that, after receipt of the request under the RTI Act the petitioner was requested to provide copy of the counter affidavit, but repeated requests made in this regard went unheeded. The SPIO had produced copy of a 'U.O.Note' issued to the Personal Assistant of the petitioner in which it is stated that though a copy of the counter affidavit was received from the Standing Counsel it was not handed over to the SPIO for providing to

the RTI requester. Thereafter on the intervention of the Pro-Vice Chancellor the SPIO was permitted to contact the Standing Counsel and a copy was obtained on 12.2.2008.

8. After recording statement of the SPIO the 1st respondent proceeded further and passed Ext.P5 order, which is impugned herein. It was found that item No.2 document requested was provided after 40 days of receipt of the application. Conclusion was that, the petitioner being the authority of the University 'to sue and be sued' on its behalf, he himself had prepared and filed the counter affidavit. Therefore he could not have turned around and said that the copy of the counter affidavit was not available with him. Further it is found that, it was the bounden duty of the petitioner, being the head of administrative authority and the first Appellate Authority under the RTI Act, to see that the request was disposed of within the time limit prescribed under Section 7. The 1st respondent concluded that, instead of facilitating disposal of the request within the time limit, the petitioner had tried to scuttle the efforts of the SPIO in providing complete information within the time

limit allowed under the RTI Act. Finding that the petitioner can be presumed as deemed SPIO under Section 5(5) of the Act, it was held that the petitioner is responsible. The 1st respondent found that there occurred delay of 10 days in furnishing the document requested as item No.2. With respect to item No.1 it was found that there occurred a total delay of 217 days and after deducting the stipulated time limit of 30 days there occurred delay of 187 days. In the light of the findings, the 1st respondent fixed responsibility for the delay as follows:–

- “(i) Respondent 1 (the then SPIO) was responsible for the delay of 10 days caused in providing information to item No.2 of the RTI request.*
- ii) Respondent No.2 (the petitioner herein) being the deemed SPIO as per Section 5(5) of the RTI Act was responsible for the delay caused in providing information to the item No.1 of the RTI request.”*

9. Based on the conclusions as above, the 1st respondent ordered to impose the maximum penalty of Rs.25,000/– as contemplated under Section 21 of the Act. It was ordered that the penalty has to be shared by the

petitioner and the then SPIO in the following manner:-

“Shri K. Sudhakaran (Respondent No.1) is awarded a penalty of Rs.2,500/- (Rupees two thousand five hundred only) for the delay of 10 days caused in providing information to item 2 of the RTI request and Shri. P.V. Suthakaran (respondent 2) is awarded a penalty of Rs.22,500/- (Rupees twenty two thousand five hundred only) the delay of 187 days caused in providing information, as the deemed SPIO to item 1 and, they are directed to remit the above said amounts under the head of account “0070-60-800-36 receipts under Right to Information Act, 2005” within 30 days of the receipt of order, failing which the amount shall be recovered from the salary of the ensuing month in respect of Respondent 1 and shall be recovered by attachment and sale of the movable or immovable properties belonging to them.”

10. The petitioner is challenging Ext.P5 to the extent it found him responsible for causing delay in furnishing copy of the document requested as item No.1 in the RTI Application submitted by the 3rd respondent. He is also challenging the order to extent it imposed penalty on him to the tune of Rs.22,500/- for the delay of 187 days caused in providing information relating to item No.1. Specific contention is that the impugned order has no support or basis on any materials available. It is pointed out that, confronting the explanations submitted by the SPIO making

allegations against the petitioner, he had submitted detailed written explanations, emphatically denying those allegations. But the 1st respondent had recorded statement of the SPIO without giving the petitioner any opportunity to controvert the oral testimony. The un-controverted version of the then SPIO was accepted in toto by the 1st respondent, in a highly erroneous manner. Specific contention of the petitioner was that the document in question was not available with him. Therefore he cannot be found fault with for non-furnishing copy of the said document to the SPIO. But the 1st respondent had failed in making any enquiry as to whether the document in question was actually available in the custody of the petitioner. The 1st respondent had failed to take note of the failure on the part of the SPIO in acting on the basis of the RTI application, within the time limit stipulated. Findings arrived by the 1st respondent is that, the petitioner had turned around and said that the copy of the counter affidavit was not available with him, when he himself had prepared and filed the counter affidavit. Such a finding is totally baseless and erroneous, is

the contention.

11. According to the petitioner the counter affidavit in question was prepared by the Standing Counsel and a copy was available only with him. But without considering such specific contention the 1st respondent had fixed sole liability for the delay on the petitioner. Conclusions arrived are not based on any convincing materials to prove that any action on the part of the petitioner had caused delay. Hence it is vehemently contended that the order impugned is totally unsustainable.

12. Learned Standing Counsel appearing for the 1st respondent contended that, the petitioner will fall within the category of an officer whose assistance was sought for under Section 5(4), and that he was bound to render all assistance to the SPIO. It is pointed out that the petitioner had insisted for obtaining legal opinion for furnishing details and even after obtaining the legal opinion he had never informed the SPIO that the document was not available with him. Referring to Ext.P5 order it is pointed out that, in the oral testimony given by the SPIO before the

1st respondent it is stated that, in the 'U.O. Note' issued to the Personal Assistant of the petitioner it was mentioned that though a copy of the counter affidavit received from the Standing Counsel was shown to him by the petitioner, it was not handed over to him for providing to the RTI requester. Therefore it is contended that there is culpable omission on the part of the petitioner in furnishing copy of the affidavit or at least in informing the SPIO that the copy was not available with him. Hence the finding that the petitioner is responsible for causing the delay stands well established and supported and justified by materials available, is the contention.

13. While evaluating the rival contentions, this court takes note of the fact that the 3rd respondent had only approached the 1st respondent raising complaint about non-furnishing of full informations requested. Presumably, such a complaint was filed invoking powers vested on the 1st respondent under Section 18. Section 18(1)(c) confers powers on the 1st respondent to receive and to enquire into complaints received from any person who has not been

given response to a request for information, within the time limit specified under the Act. When such a complaint is received the 1st respondent is bound to make an enquiry as contemplated under Section 18(2). Under Section 20 of the Act, the 1st respondent is empowered to impose penalty at the time of deciding any such complaint, if he is of the opinion that the SPIO had not furnished the information within the time limit specified under Section 7(1) or if he has knowingly given incomplete or misleading information. It provides that the 1st respondent shall impose penalty of Rs.250/- for each day of delay till the information is furnished, subject to a maximum limit not exceeding Rs.25,000/-. The 2nd proviso to Section 21 specifies that the burden of proving that the SPIO had acted delinquently is on the SPIO himself.

14. On the factual matrix it is not in dispute that there occurred delay of 187 days in furnishing copy of the document requested as item No.1. Therefore the 1st respondent was right in arriving at a conclusion that the information sought for was not furnished within the time

limit stipulated under Section 7(1). But for imposition of penalty, the question ought to have been considered is as to whether there was any reasonable cause on the part of the SPIO in causing delay in furnishing the information. From the materials available before the 1st respondent it was revealed that the RTI application was received by the SPIO on 12.7.2007. The legal opinion with respect to furnishing copy of the counter affidavit was sought for only on 22.8.2007. The legal opinion in this respect was received on 5.9.2007. Thereafter copy of the counter affidavit was obtained from the Standing counsel on 12.2.2008 and the copy was furnished to the RTI requester on 15.2.2008. Based on materials available before the 1st respondent whether he was justified in holding that the petitioner was solely responsible for the delay and in imposing penalty of Rs.22,500/- upon him on that count, is the question mooted for decision.

15. Findings arrived by the 1st respondent against the petitioner is that he had tried to scuttle the efforts of the SPIO in providing the information within the time limit. For

arriving at such a conclusion the 1st respondent found that the petitioner himself had prepared the counter affidavit in question and therefore he could not have turned around and said that a copy of the counter affidavit was not available with him. Such a finding was arrived only on the basis that the SPIO in his oral statement had submitted that the petitioner had prepared the counter affidavit in his laptop without assistance of anybody and that he filed it personally on 09.07.2007, and the usual practice in the University was to keep all the documents related to legal matters in the custody of the Registrar. Per contra, specific contention of the petitioner was that a copy of the counter affidavit was not available in his custody. Fact that the petitioner was not having possession of the copy of the counter affidavit was corroborated from the version of the SPIO itself that copy of the counter affidavit was obtained from the standing counsel. Merely because the SPIO had given statement that the petitioner had prepared the counter affidavit personally in his laptop, the 1st respondent could not have arrived at a conclusion that copy of the

counter affidavit was available with the petitioner. Statement of the SPIO in this regard cannot be accepted as proof of the fact, since the petitioner was not afforded with any opportunity to contradict such a version, or to cross-examine the SPIO. In all probability, the counter affidavit on behalf of the University might have been prepared by the Standing Counsel in his office, based on instructions or statement furnished by the Registrar. Therefore it is not absolutely necessary that the Registrar had kept a copy of the same in the office file. Unless it is proved beyond any doubt that the file which was in custody of the petitioner contained a copy of the counter affidavit and that the petitioner had refused to handover such copy to the SPIO, he cannot be attributed with any contribution in causing the delay.

16. In this regard it is pertinent to note that, the RTI request was received by the SPIO on 12-07-2007. But the first step of seeking legal opinion from the Standing counsel was initiated only on 22-08-2007, i.e., after about 40 days. The SPIO has not furnished any proper explanation for the

said delay of 40 days. Legal opinion was received on 05-09-2007. But copy of the counter affidavit was obtained from the Standing counsel only on 12-02-2008. Actions taken by the SPIO during the period in between, which is more than 3 months, is not properly explained. Eventhough it is stated by the SPIO that repeated requests were submitted to the petitioner, no documents in support is forthcoming. It is evident that copy of the counter affidavit was obtained from the Standing counsel on 12-02-2009 and it was furnished to the RTI requester on 15-02-2008. Hence there is no delay occurred after receipt of the copy of the counter affidavit from the Standing counsel. Therefore there is no much relevance to the allegation raised by the SPIO that even after receipt of the copy the petitioner had refused to furnish the same to the SPIO. The 'U.O Note' referred in this regard was not properly proved with opportunity afforded to the petitioner to explain about such a document.

17. It is evident that adjudication by the 1st respondent was done totally in the absence of the

petitioner. The 1st respondent had not issued any notice to the petitioner after receipt of his explanation on 14-08-2009. The 1st respondent had issued summons to the SPIO and his statement was recorded, without notice to the petitioner and without affording him any opportunity to cross-examine. It is true that in Ext.P3 judgment this court directed the 1st respondent not to insist upon personal appearance of the petitioner, unless the petitioner requires the same. But such an observation cannot be taken as a shield to proceed further in the matter, behind the back of the petitioner and without affording him any opportunity. While exercising power vested under Section 20 of the Act the 1st respondent is discharging a quasi-judicial function, in which he has to adhere to all principles of natural justice. The proceedings will reveal that the adjudication was proceeded denying principles of natural justice to the petitioner.

18. It is further pertinent to note that the 1st respondent had arrived at a conclusion that the petitioner alone is responsible for the delay caused in furnishing copy

of the document No.1. But as observed above no explanation is forthcoming from the SPIO with respect to the extent of delay for the period from 12-07-2007 to 12-08-2007 and from 05-09-2007 to 12-02-2008. The petitioner was penalised holding liability for the entire period upon him, that too on the basis that he can be deemed as the SPIO responsible under Section 5 (5) of the Act. The above findings to the extent of holding the entire liability on the petitioner and imposing penalty solely on the petitioner, with respect to document No.1 cannot be sustained as an order valid or legal and as one issued based on any acceptable materials. It cannot be considered as an order passed on proper exercise of jurisdiction vested on the 1st respondent. Hence this court is of the considered opinion that the impugned order to the extent it affects the petitioner could not be sustained.

19. In the result the writ petition is allowed and Ext.P5 order of the 1st respondent is hereby quashed, to the extent it holds the petitioner as responsible for the delay of 187 days caused in furnishing copy of document No.1

requested under RTI Act, and to the extent it imposed penalty of Rs.22,500/- on the petitioner.

**C.K. ABDUL REHIM
JUDGE**

SKV/AMG