

(1995) 08 KL CK 0046
In the High Court Of Kerala
Case No : O.P. No. 6744 of 1988-C

Glory Fernandez, P.

APPELLANT

Vs

High Court of Kerala and Another

RESPONDENT

Date of Decision : 22-08-1995

Acts Referred:

Constitution of India, 1950 — Article 235
Kerala Civil Services (Classification, Control and Appeal) Rules, 1960 — Rule 11,
11(1), 23

Citation : (1995) 08 KL CK 0046

Hon'ble Judges : M.M. Pareed Pillay, C.J.; P. Shanmugam, J

Bench : Division Bench

Advocate : M. Ramachandran and P.V. Abraham, for the Appellant; T.R.G. Warriar and R. Ramadas, for Respondent 1 and N.S. Menon, Government Pleader for Respondent 2, for the Respondent

Final Decision : Dismissed

Judgement

M.M. Pareed Pillay, C.J.—On the basis of an anonymous complaint action was initiated against the Petitioner. The District Judge Conducted enquiry with regard to the allegations and reported to the first Respondent that there is no substance in the allegations. As per orders of the first Respondent a further enquiry was conducted by the Vigilance Cell of the High Court. A charge sheet (Ext. P-1) was issued to the Petitioner on 3rd July 1986. He filed explanation on 3rd August 1986 denying the charges. His explanation has been, marked as Ext. P-2. The first Respondent as per order dated 31st October 1986 ordered departmental enquiry against the Petitioner. The Third Additional District Judge, Ernakulam was appointed as the Enquiry Officer. On the basis of the report of the Enquiry Officer (Ext. P-7) the first Respondent directed the Petitioner to show cause as to why he should not be dismissed from service as per Ext. P-8. Petitioner submitted Ext. P-9 reply to Ext. P-8. His explanation was found not acceptable and Ext. P-10 order of dismissal was issued.

2. Petitioner filed Ext. P-11 appeal under Rule 23(a) and Note 1 of the Kerala Civil Services (Classification, Control and Appeal) Rules before the second Respondent against Ext. P-10 order. The appeal was submitted before the first Respondent for the purpose of forwarding it to the second Respondent Appellate Authority. But, without forwarding the same Petitioner was informed as per Ext. P-12 that having regard to the control vested in the High Court over the Subordinate Courts under Article 235 of the Constitution of India the High Court is the final authority in disciplinary proceedings against the members of the subordinate judiciary, and no appeal against its decision lies to the Government. Accordingly the appeal petition addressed to the Government was withheld by the first Respondent.

3. Though several contentions have been raised in the writ petition, the only contention urged before m by Petitioner's Counsel is that withholding of the appeal petition addressed to the Government by the first Respondent was without any justification and that the reasons stated in Ext. P-12 cannot be sustained. Counsel for the Petitioner submitted that Article 235 of the Constitution really enables the Petitioner to file appeal before the second Respondent and there was no rhyme or reason for the first Respondent to have withheld the same. Learned Counsel appearing for the first Respondent submitted that the High Court being the appointing authority of the Petitioner is not subordinate to the Government and so Petitioner could not have filed appeal under Rule 23 of the Kerala Civil Services (Classification, Control and Appeal) Rules and hence no interference is warranted against Ext. P-12 order.

4. As the Petitioner during the relevant time was a Judicial Magistrate of the First Class he is governed by Kerala Criminal Judicial Service Rules. The Special Rules govern recruitments, promotions, etc. Rule 11 of the Kerala Civil Services (Classification, Control and Appeal) Rules relates to the nature of penalties that can be imposed against a Government servant. Rule 23 provides for appeals against orders imposing penalties. Rule 23(a) enables every member of service-State or Subordinate - to file appeal against an order imposing upon him any of the penalties specified in Rule 11(1) or discharging him in accordance with the terms of his contract, if he has been engaged on a contract for a fixed or for an indefinite period and has rendered under either form of contract continuous service for a period exceeding five years at the time when his services are terminated to the authority to which the authority imposing the penalty is immediately subordinate. The proviso makes the position clear that where an order is passed by the Government, there shall be no appeal. Note 1 reads:

A member of the Kerala Civil Judicial Service or the Kerala Criminal Judicial Service or the Kerala Judicial Ministerial or the Kerala Last Grade Service under the Courts subordinate to the High Court shall be entitled to appeal to the Government against an order passed by the High Court under these rules.

Counsel for the Petitioner relying on Rule 23 submitted that the appeal petition filed by the Petitioner ought to have been forwarded to the Government in view

of Note 1 which makes the position crystal clear.

5. The question that arises for consideration is whether it would be open to the Petitioner to file appeal against Ext. P-10 order of the first Respondent before the State Government. Heavily relying on Article 235 of the Constitution Petitioner's Counsel submitted that though the control over district Courts and subordinate Courts including the posting and promotion of the judicial officers is with the High Court, right of appeal against an order of the High Court pursuant to disciplinary proceedings cannot be denied to the Petitioner. Article 235 reads:

235. Control over subordinate Courts.-The control over district Courts and Courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of District Judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law.

On the strength of the Article contention put forward by the Petitioner is that Rule 23 of the Kerala Civil Services (Classification, Control and Appeal) Rules, which governs him as well, enables him to file appeal before the Government and hence Ext. P-12 order withholding the appeal from being forwarded to the Government cannot at all be justified. Learned Counsel relied on B.S. Yadav and Others Vs. State of Haryana and Others, (Paragraph 40) wherein the Supreme Court held that in the exercise of its control over district Court and subordinate Courts, it is not open to the High Court to deny to a member of the subordinate judicial service of the State the right of appeal given to him by the law which regulates the conditions of his service.

6. B.S. radav v. State of Haryana AIR 1981 S.C. 577 has application only in a case where right of appeal is conferred on a member of the subordinate judicial service by the law regulating conditions of service. If such a right of appeal is conferred on a member of the subordinate judicial service certainly it cannot be denied. Article 235 confers complete control to the High Court over district Courts and Courts subordinate thereto, including posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of District Judge. That control is subject to the right of appeal which a judicial officer may have under the law regulating conditions of his service. Rule 23(a) enables a Government officer to file appeal before the authority to which the authority imposing penalty is immediately subordinate. The proviso makes the position clear that where an order is made by the Government, there shall be no appeal. As the High Court is not subordinate to the Government appellate remedy is not available to the Petitioner as against the order of his dismissal. The proviso throws sufficient light in this regard. When no order passed by the Government against an employee is appealable it is beyond comprehension to hold that Ext. P-10 order of the High

Court can be made subject matter of appeal to the Government especially when the High Court is not an authority subordinate to the Government.

7. Learned Counsel for the Petitioner submitted that due significance should be attached to Note 1 to Rule 23 of the Kerala Civil Services (Classification, Control and Appeal) Rules and its importance cannot be brushed aside. In *Tara Singh and Others Vs. State of Rajasthan and Others*, para 18 the Supreme Court while considering the Notes under Rule 244(2) of the Rajasthan Civil Service Rules observed that the function of the Notes is to provide procedure and control discretion and its real purpose is that when rules are silent the Notes will fill the gaps. Note 1 to Rule 23 was substituted by G.O. (Ms.) No. 405/78/GAD, dated 24th August 1978 for "Kerala Judicial Service or the Kerala Subordinate Magisterial Service". As Note is inconsistent with Rule 23 it cannot in any manner enlarge the scope of the rule which specifically postulates that the appellate remedy is available to a member of the service only to an authority which is immediately superior to the authority imposing penalty. As already indicated appellate remedy is not available to a member of the Kerala Civil Judicial Service or Kerala Criminal Judicial Service against the order of the High Court to the Government and that being the position, on the basis of Note 1 it would not be possible to hold that appeal lies to the Government as against the order of the High Court imposing penalty. As the function of the Notes is to provide procedure and control discretion and also in cases where the rules are silent to fill the gaps it cannot be used to interpret the rule in such a manner as to destroy its purport and intendment, especially when the rule proclaims in unambiguous terms a particular position.

There cannot be any doubt that in a case where the High Court has imposed penalty against a delinquent officer belonging to the judicial service it would not be possible for him to prefer appeal before the Government as the High Court is not a subordinate authority to the Government. Note 1 cannot be construed to confer appellate power to the Government. To hold otherwise would make Rule 23 otiose.

8. We hold that Ext. P-12 order withholding the appeal petition filed by the Petitioner cannot be assailed. As no appellate remedy is available to the Petitioner we hold that it is open to him to file review petition if he is so advised.

Original Petition is dismissed.

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