

(2016) 10 KL CK 0029

In the High Court Of Kerala

Case No : W.A. No. 1812 of 2013 in WP(C). 13462 of 2012 (Against the order/ judgment in WP(C) 13462 of 2012 of High Court of Kerala dated 11-10-2013)

Rajan David

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 21-10-2016

Acts Referred:

Kerala Civil Services (Classification, Control and Appeal) Rules, 1960 — Rule 15(2)(b)
Kerala Sports Rules, 2008 — Rule 22(4)

Citation : (2016) 4 ILRKerala 841 : (2016) 4 KLT 73

Hon'ble Judges : Mr. Mohan M. Shantanagoudar, C.J. and Sathish Ninan, J.

Bench : Division Bench

Advocate : Smt. Sumathy Dandapani (Sr.) and Sri. Millu Dandapani, Advocates, for the Appellant; Smt. P.K. Radhika and Smt. Latha Krishnan, SCs, Kerala State Sports Council, for the Respondent No. 2; Sri. Tekchand, Senior Govt Pleader, for the Respondent No. 1

Final Decision : Dismissed

Judgement

Mr. Mohan M. Shantanagoudar, C.J. - Judgment dated 11.10.2013 in W.P(C). No. 13462/12 is called in question in this appeal by the unsuccessful writ petitioner. By the impugned judgment, the writ petition was dismissed and consequently, the order of termination of the appellant, passed by the disciplinary authority, is confirmed.

2. The appellant, while working as Basket Ball Coach in the second respondent Kerala Sports Council, was placed under suspension on 14.1.2009 owing to certain incidents happened during the period from September to December, 2008. A preliminary enquiry was conducted by Mr. M.M. Abdul Rahiman, who was a member of the Finance and Administrative Committee of the second respondent during the relevant point of time. After conducting preliminary enquiry, Mr. M.M. Abdul Rahiman recommended disciplinary action against the appellant. Consequently, on 12.5.2009, Mr. Mathew Paul, a member of the second

respondent, was appointed as Enquiry Officer. He served memo of charges on the appellant on 14.1.2000. However, the appointment of Mr.Mathew Paul as Enquiry Officer was cancelled as per Ext.P2 by the second respondent. Thereafter, Ext.P3 fresh memo of charges was issued by the Secretary of the second respondent on 7.6.2010, for which, the appellant submitted a statement of defence as per Ext.P4. Later, Mr.P.Babu, a retired Joint Labour Commissioner, was appointed as Enquiry Officer as per Ext.P5, who conducted enquiry and submitted Ext.P6 report on 9.5.2011 holding that the charges levelled against the appellant are proved. The disciplinary authority accepted the said report and issued show cause notice as per Ext.P7 to the appellant, in order to facilitate him to submit objections, if any. The appellant submitted his representation to the show cause notice as per Ext.P8. However, the same was rejected by the second respondent by passing order at Ext.P9. It was also decided to terminate the service of the appellant, based on which, Ext.P10 order of termination from service was issued on 2.9.2011. Against the order of termination, the appellant took recourse to the statutory remedy of revision before the first respondent under section 8(4) of the Kerala Sports Act, 2000, which was dismissed by the revisional authority. The order of termination as well as the order of the revisional authority was questioned by the appellant before this Court in W.P (C). 13462/12, which came to be dismissed by the impugned judgment. Accordingly, this appeal is filed by the unsuccessful writ petitioner.

3. Before proceeding further, we may take note of the memo of charges issued to the appellant, which stood thus:

That he misbehaved with Miss. Veena Ravi Mathew, D/o.Ravi Mathew, residing at Kottayadiyil, Thekkekara Village, mavelikkara during the competitions at Amaravathi;

That he compelled her for sexual relations and warned her that he would spoil her career if the matter is reported anywhere.

That he has sexually assaulted one Anjaly, a Plus I student of Vimala Hridaya School while she was undergoing practise in the Sports Council Hostel at Kollam.

That he has failed to comply with the general condition that while going to far off places for competitions, one lady should accompany, and accordingly it is alleged that he has committed irregularities and thereby has violated the conduct Rules 1 to 10 of the Rules for the Coaches under the Kerala State Sports Council.

4. The appellant has denied all the charges levelled against him specifically. As mentioned supra, the Enquiry Officer submitted his report holding that the charges levelled against the appellant are proved. The Disciplinary Authority, after following due procedure, accepted the enquiry report and passed the order of termination, which has been confirmed by the revisional authority as well as this Court.

5. Learned senior counsel Smt. Sumathi Dandapani who appeared on behalf of

the appellant, based on the materials on record, submits that the Disciplinary Authority is not justified in terminating the appellant from service and thus the Revisional Authority as well as this Court ought to have interfered with the order of the Disciplinary Authority and exonerated the appellant, particularly in view of the fact that three persons with similar allegations were exonerated earlier. She mainly stressed for imposition of lesser punishment bringing to the notice of the Court that those who had made allegations against the appellant have already married and are settled in life. The incident has occurred as back as in the year 2008. In other words, she argues that the punishment imposed is disproportionate to the proved charges. The aforesaid submissions are opposed by the learned advocates appearing for the respondents.

6. Though this Court, in this intra court appeal, is not expected to enter into the disputed facts in detail, in order to satisfy our conscience, we have meticulously perused all the records, including the enquiry report, the order passed by the disciplinary authority etc. We do not find any ground to conclude the enquiry as one held improperly.

7. As mentioned supra, Mr. M.M. Abdul Rahiman conducted preliminary enquiry and thereafter, the matter was referred for a detailed enquiry. Though certain allegations constituting bias were made by the appellant against Mr. M.M. Abdul Rahiman, no material is produced before any of the authorities to substantiate the contention of bias other than arguing that he has preferred complaints against other Coaches also and that in spite of he being a member of the Finance and Administrative Committee, he conducted the preliminary enquiry and also directed detailed enquiry to be conducted. The fact that Mr. M.M. Abdul Rahiman being the office bearer of the Council has conducted preliminary enquiry by itself will not indicate that he had bias against the appellant. On the other hand, it can be clearly said that Mr. Abdul Rahiman acted in his official capacity as the office bearer of the Council and performed his official duties, which cannot be termed as creating bias against the appellant. Moreover, the subject which led the matter for detailed enquiry was discussed and final decision was taken by an 8 member standing committee, as is clear from Ext.P9. We are of the opinion that the mere apprehension of bias cannot be accepted and that there must exist a real danger of bias. Though such domestic enquiries need to be undoubtedly fair, a member of the organisation cannot stretch the principle of fairness to the extent of demanding a forum consisting of outsiders on the mere allegation that the society members are biased against him. There is no allegation made by the appellant against other members of the standing committee who took final decision to conduct the detailed enquiry based on the preliminary enquiry report. The appellant is alleging institutional bias against a member of the committee on the basis of his participation in the meetings of the second respondent's committee. In this way, institutional bias can be alleged against every member as well as the general body of the second respondent. The appellant may have an apprehension but it could not be possible to say without materials that he was facing real danger of bias.

8. As mentioned supra, initially, Mr.Mathew Paul was appointed as enquiry officer and subsequently, that appointment was cancelled and another person by name P. Babu, a retired Joint Labour Commissioner, was appointed. Mr.P.Babu undertook the enquiry and submitted his report holding that the charges levelled against the appellant are proved. In this context, it is argued by the learned counsel for the appellant that there was no reason for the disciplinary authority to change the enquiry officer and such action shows clear bias on the part of the disciplinary authority. Such contention was rightly rejected by the learned single Judge. The service rules applicable to State Government employees are made applicable to the officers and staff of Kerala State Sports Council as per Rule 22(4) of the Kerala Sports Rules, 2008. As per Rule 15(2)(b) of the Kerala Civil Services (Classification, Control & Appeal) Rules, 1960 (hereinafter referred to as the "Rules", for short), the formal enquiry may be conducted by, (i) the Government; (ii) the appointing authority; (iii) the disciplinary authority; (iv) the head of the department or any officer of the department empowered by the appointing authority or the head of the department; or (v) a special officer or tribunal appointed by the Government for the purpose or a tribunal generally appointed for making enquiries into the conduct of Government servants. The argument of the appellant that the disciplinary authority should have got the enquiry conducted only through the agencies specified in Rule 15(2)(b) is also not rightly accepted by the learned single Judge.

Rule 15(2)(a) indicates that after the written statement is received and if the disciplinary authority is satisfied that a formal enquiry should be held into the conduct of the Government Servant, it shall forward the record of the case to the authority or officer referred to in clause (b) of Rule 15(2) of the Rules. In the matter on hand, in our considered opinion, Mr.P.Babu being a retired Joint Labour Commissioner may fall under clause (v) of Rule 15(2)(b) in as much as he may be considered as a special officer appointed by the second respondent for the purpose of conducting enquiry. Even assuming that Mr.P.Babu does not fall in any of the five clauses of Rule 15(2)(b) of the Rules, then also, the appellant cannot succeed on the said ground. The question would be whether failure to adhere to the clauses to Rule 15(2)(b) would vitiate the enquiry and whether the appellant has waived his right to object to such enquiry. There is no material on record to suggest that the appellant had objected to the appointment of the enquiry officer either at the time of appointing the enquiry officer as per Ext.P5 or during the enquiry. Moreover, the appellant participated in the enquiry, submitted his statement of objections, let in evidence on his behalf, cross examined the witnesses and fully participated in the proceedings. He had sent reply to the 2nd show cause notice issued by the disciplinary authority, wherein also no such objection was made. He took such contention for the first time before the revisional authority.

Learned single Judge, in the course of the impugned judgment, has discussed that an attempt was made by the appellant herein (i.e., the writ petitioner) to contend that he had orally objected before the enquiry officer as well as the

disciplinary authority. Such contention was rightly not accepted by the learned single Judge in as much as if that was his case, the appellant could have definitely put it in writing or he would have at least mentioned so in Ext.P5 reply. Moreover, the appellant has failed to establish that any prejudice has been caused to him by reason of appointment of Mr.P.Babu. As mentioned supra, the appellant had participated in the course of enquiry wholeheartedly even by letting in evidence and cross examining certain witnesses. Hence, it is not open for him to raise such contention before the revisional authority for the first time. In this context, it is rightly concluded in the judgment in the writ petition that as no prejudice is shown to have been caused to the appellant and as he had not objected to the enquiry being conducted through an outsider at the earliest occasion, he cannot contend that the enquiry is invalid on that ground. Moreover, the non-compliance of a procedural requirement does not make the enquiry report a nullity in the eye of law. The Apex Court, while considering similar question in the case of H.V. Nirmala v. Karnataka State Financial Corporation [(2008) 7 SC 639], has observed thus:

"10. Appellant did not raise any objection in regard to the appointment of the Enquiry Officer. She participated in the enquiry proceeding without any demur whatsoever. A large number of witnesses were examined before the Enquiry Officer. They were cross-examined. Appellant examined witnesses on her own behalf. Learned Single Judge as also the Division Bench of the High Court opined that the appellant has failed to establish that any prejudice has been caused to her by reason of appointment of a Legal Advisor as an Enquiry Officer and as the appellant has participated in the enquiry proceeding, she could not be permitted to raise the said contention."

"19. In Central Bank of India also this Court held that an Enquiry Officer need not be an officer of the Bank as even a third party can be appointed an Enquiry Officer to enquire into the conduct of an employee. What was, however, emphasised was that a non-official cannot act as a disciplinary authority and pass an order of punishment against the delinquent employee. It is in that view of the matter it was held that a retired employee could not act as a disciplinary authority."

"20. We may, however, notice that in a case of this nature where appointment of the Enquiry Officer may have something to do only for carrying out the procedural aspect of the matter, strict adherence to the Rules may not be insisted upon. Superior courts in a case of this nature may not permit such a question to be raised for the first time. (See - Sohan Singh and others v. The General Manager, Ordnance Factory, Khamaraia, Jabalpur and others (AIR 1981 SC 1862))."

9. The disciplinary authority having been satisfied that penalties/penalty specified among item Nos. (v) to (ix) of Rule 11(1) of the Rules should be imposed, furnished a copy of the enquiry report to the delinquent, informing that as per the enquiry report, it is satisfied that he is guilty. By issuing the show

cause notice, the disciplinary authority invited statement of objections from the appellant and gave him intimation regarding the actions proposed to be taken against him. The averments made in the show cause notice are based on rules 15(11) and 15(12) of the Rules. While serving the show cause notice, the disciplinary authority has provided an opportunity for him to have a say in the matter by filing statement of objections before taking final decision in the matter. The averments made in the show cause notice were based on enquiry report and they are not final. Certain observations are bound to be made in the 2nd show cause notice based on enquiry report. Only on that ground, it is not open for the appellant to contend that the disciplinary authority has prejudged the issue.

10. The statement of objections was filed by the delinquent to the show cause notice which was considered by the disciplinary authority in accordance with law. We find from the records that the disciplinary authority has applied its mind and come to the conclusion of passing an order of termination of the appellant from service.

11. Though we find from the order of the learned single Judge that the appellant had raised certain points on the question as to whether the post held by him was a civil post or not, such a question is not argued before us.

12. Yet another contention raised by the petitioner is that a similar complaint raised by Mr. M.M. Abdul Rahiman against another Coach, Mr. Biju Viswappan, was later withdrawn by the Government. Petitioner has produced in the Writ Appeal, as Annexure-A, the counter affidavit filed on behalf of the Director and Secretary, Department of Sports and Youth Affairs in W.P(C) No. 26060/09 which is a suo motu proceeding initiated on an anonymous petition regarding sexual exploitation of female athletes during School/ University level athletic competitions. The attempt of the petitioner is to point out other instances where, in spite of there being series of allegations of similar nature or so, either the delinquents were exonerated from the charges or the Government has withdrawn the proceedings. The learned Senior Counsel Smt. Sumathi Dandapani would contend that the matter may be sent back for reconsideration in the light of the said facts. The Apex Court in Lucknow Kshetriya Gramin Bank (now Allahabad, Uttar Pradesh Gramin Bank [(2013) 12 SCC 372] has held that a comparison regarding the punishment given to other employees is permissible only when they were co-delinquents. Such comparisons citing the cases of other employees, is totally impermissible, when they were involved in different departmental enquiries.

13. We make it clear that apart from the above, no other point except the point of "disproportionate penalty" is argued on behalf of the appellant in this appeal.

14. We do not find any ground to accept the contention urged on behalf of the appellant that the punishment imposed is disproportionate to the proved charges. The findings recorded against the appellant employee disclose that he misbehaved to the female player during the competitions at Amaravathi, that he

sexually assaulted a Plus One student while she was undergoing practise in the Sports Council Hostel at Kollam and that he failed to comply with the general condition that when taking a team of women players to far off places for competition, the team should be accompanied by one lady. These are very serious charges which are held proved. As such allegations are on the rise day by day and as we find that the enquiry officer as well as the disciplinary authority have applied their mind before coming to the conclusion that the charges are proved, it would not be proper for this Court to interfere in the findings of facts and law and consequently set aside the action against the appellant.

15. As has been held by the Apex Court in the case of Apparel Export Promotion Council v. A.K.Chopra [AIR 1999 SC 625], the court while exercising the power of judicial review must remain conscious of the fact that if decisions have been arrived at by the administrative authority after following the principles established by law and the rules of natural justice and the individual has received a fair treatment to meet the case against him, the court will not substitute its judgment for that of the administrative authority on a matter which fell squarely within the sphere of jurisdiction of that authority. Judicial review is not an appeal from a decision but it is a review of the manner in which the decision was arrived at. Since we find that the decision making process by the concerned administrative authority is just and proper, we do not find any cause to interfere in the order passed by the learned single Judge. So also, the Apex Court in Union of India and Others v. Narain Singh [(2002) 5 SCC 11] has held that when the charges proved are of very serious nature, the court should not interfere with the quantum of punishment awarded.

16. Moreover, a case of sexual abuse involves violation of human rights and the courts must ever remain alive with the international instruments and conventions and apply the same to the cruelties. Sexual harassment is a form of sex discrimination projected through unwelcome sexual advances, requests for sexual favours and other verbal or physical conduct of sexual overtones, whether directly or by implication, particularly when submission to or rejection of such a conduct by the female employee was capable of being used for effecting the employment for the female employee and unreasonably interfering with her work performance and had the effect of creating an intimidating or hostile working environment for her.

17. In the background of the social conditions prevailing in the society, the modesty of women is to be strongly guarded. Such instances as alleged are to be strongly deprecated and have to be looked down heavily. Taking a light and lenient view in such matters would convey a very wrong message to the society. The Apex Court has, time and again, condemned in heavy words about the "societal aberration" namely, sexual harassment of the female gender. The Apex Court has also observed that such incidents result in violation of the fundamental rights of "Gender Equality" and the "Right to life and liberty". The decision of the Apex Court in Vishaka v. State of Rajasthan [(1997) 6 SCC 241] is a land mark

on this issue. There are several instances of girls of young age being harassed which paves way for psychological issues and even lead to suicide. In Deputy Inspector General of Police and another v. S. Samuthiram, [(2013) 1 SCC 598], the Apex Court has cautioned, "More and more girl students, women etc., go to educational institutions, work places etc., and their protection is of extreme importance to a civilised and cultured society. The experiences of women and girl children in over-crowded buses, metros, trains etc., are horrendous and a painful ordeal". Necessary and appropriate measures and steps need to be taken at the concerned levels to curb such uncivilised activities. Necessarily such activities are to be frowned upon and condemned. No sympathy is to be shown to such delinquents, for it will percolate deep down into the different strata of the society spreading a wrong notion.

18. Since the serious charges made against the appellant with regard to sexual harassment are found to be proved, we are unable to persuade ourselves to accept the contentions made on behalf of the appellant that the penalty imposed is disproportionate to the proved charges. On the other hand, the penalty of termination of the delinquent employee from service is the only punishment that can be imposed under the facts and circumstances of the case.