

(1992) 07 KL CK 0009
In the High Court Of Kerala
Case No : O.P. No. 5907 of 1988

S.N.D.P. Sokha, Vavakad

APPELLANT

Vs

P.K. Sreedharan and Another

RESPONDENT

Date of Decision : 29-07-1992

Acts Referred:

Citation : (1992) 2 KLJ 319

Hon'ble Judges : K. Sreedharan, J

Bench : Single Bench

Advocate : M. Ramachandran, for the Appellant; A.K. Avirah, Sunny Joseph and Govt. Pleader, for the Respondent

Judgement

K. Srbedharan, J.—First respondent was employed under the petitioner as Head Clerk. On the allegation that he misappropriated funds and misconducted himself, he was placed under suspension on 27-2-1976 pending enquiry. A domestic enquiry was held into the alleged misconduct. Enquiry Officer found him guilty of 4 charges out of 5. That report was accepted by the petitioner. Consequently, first respondent was dismissed from service. He then moved the second respondent, the appellate authority, under the Kerala Shops & Commercial Establishments Act, 1960, in S.A. 108/1978. Before the second respondent, petitioner could not produce the records of the domestic enquiry. But, permission was sought to substantiate the charges levelled against the first respondent by adducing evidence before the second respondent. Permission was granted by the second respondent. Petitioner as well as first respondent adduced evidence in support of their respective claims. After a proper appreciation of the evidence, second respondent came to the conclusion that first respondent committed misconduct of a very grave nature and he does not deserve any sympathy. But, second respondent took the view that the order of dismissal will take effect only from the date of his order and first respondent must be deemed to have been under suspension from 27-2-1976 till the date of the order, namely 30-1-1988. In this view, second respondent directed the petitioner to pay

subsistence allowance under the Kerala Payment of Subsistence Allowance Act, 1972 to the first respondent. This direction is under challenge. Though notice of this petition was served on the first respondent way back in 1988, no counter affidavit has been filed. I heard Sri. M. Ramachandran, learned counsel representing the petitioner; and Sri. Sunny Joseph, learned counsel representing the first respondent.

2. The short question that arises for consideration in this Original Petition is whether second respondent was justified in directing the petitioner to pay Subsistence Allowance to first respondent for the period from 27-2-1976 to 30-1-1988. First respondent was placed under suspension on account of alleged misconduct. The misconduct alleged against him has been substantiated. Thereupon he is dismissed from service. Should the order of dismissal must relate back to the date of suspension?

3. On issue No. 4, the second respondent observed :-

When the case was posted for the evidence of the enquiry officer and for filing enquiry records, the respondent side on 5-10-82 made a submission that the enquiry records are not traceable, and that respondent may be permitted to adduce fresh evidence, before this Authority. This Authority permitting this, posted the case for Appellant's evidence. The report of Enquiry Officer was however marked through RW 1 as Ext. R6. The appellant side did not seem to have raised any objection to this.

From this, it is evident that petitioner conducted a domestic enquiry into the alleged misconduct committed by first respondent. The records of that enquiry could not be produced before the second respondent because the records were not traceable. First respondent has no case that no enquiry was held into the alleged misconduct, No argument was advanced before me by the learned counsel representing the first respondent that the domestic enquiry held was in violation of the principles of natural justice. In such a situation, it has to be held that a proper domestic enquiry was held into the charges levelled against the first respondent, in compliance with the principles of natural justice. At the enquiry, it was established that first respondent committed misconduct as alleged by the petitioner. Consequently, he was dismissed from service. When the matter came up before the second respondent, since the records relating to the domestic enquiry were not available, petitioner sought permission to establish the charges levelled against the first respondent by adducing evidence before it. In that attempt, petitioner succeeded in full. On the basis of the legal evidence let in by the parties, second respondent came to the conclusion:-

Considering the fact that charges 1 to 4 of Ext. R1 are proved, I consider that the appellant has committed a misconduct of a very grave nature and he does not deserve any sympathy or make him entitled for any benefits.

On the basis of this finding, second respondent upheld the order of dismissal. This order of dismissal should relate back to the date of suspension. At this

juncture, it is worthwhile to quote the following observation made by a Constitution Bench of the Supreme Court in *Kalyani v. Air France* (1963 (1) L.L.J. 679):-

If the inquiry is not defective, the labour Court has only to see whether there was a prima facie case for dismissal, and whether the employer had come to the bonafide conclusion that the employee was guilty of misconduct. Thereafter, on coming to the conclusion that the employer had bonafide come to the conclusion that the employee was guilty, i.e., there was no unfair labour practice and no victimization, the labour court would grant the approval which would relate back to the date from which the employer had ordered the dismissal. If the inquiry is defective for any reason, the labour court would also have to consider for itself on the evidence adduced before it whether the dismissal was justified. However, on coming to the conclusion on its own appraisal of evidence adduced before it that the dismissal was justified, its approval of the order of dismissal made by the employer in a defective inquiry would still relate back to the date when the order was made.

(emphasis added)

In the instant case, since the records relating to the domestic enquiry were not traceable, petitioner let in evidence before the second respondent to prove the charges levelled against first respondent. On the basis of the evidence, second respondent came to the conclusion that charges 1 to 4 levelled against the first respondent were proved to the hilt and that he does not deserve any sympathy. It means that the second respondent has approved the order of dismissal passed against the first respondent. That approval must relate back to the date of his suspension. In such a situation, second respondent was clearly in error in directing petitioner to pay subsistence allowance under the Kerala Payment of Subsistence Allowance Act to the first respondent. That part of the order passed by the second respondent is quashed, I declare that first respondent is not entitled to any amount by way of subsistence allowance as stated in Exhibit P1 order. By order dated 11-8-1988 in C.M.P. 19474/88, this court directed petitioner to pay a sum of Rs. 10,000/- to first respondent towards the amount payable to him under Exhibit P1 order. Since that part of Exhibit P1 order, which allowed first respondent to have subsistence allowance from the petitioner, quashed, he is bound to return the amount which he obtained by virtue of the above mentioned order. This Court's order will not in any way go to prejudice the petitioner. Therefore, first respondent should return the amount to the petitioner.

Original Petition is ordered in the above terms.

Issue photo copy of the judgment to the parties on usual terms.