
(1997) 07 KL CK 0045
In the High Court Of Kerala
Case No : O.P. No's. 5502 and 7219/91

Sreenivasan Nair

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 31-07-1997

Acts Referred:

Constitution (Forty-Second Amendment) Act, 1976 — Section 44

Constitution of India, 1950 — Article 226, 311

Kerala Civil Services (Classification, Control and Appeal) Rules, 1960 — Rule 116, 3, 59

Citation : (1997) 07 KL CK 0045

Hon'ble Judges : P.A. Mohammed, J

Bench : Single Bench

Advocate : M.N. Sukumaran Nair and B. Raman Pillay, for the Appellant; P.K. Santhamma, Government Pleader, for the Respondent

Judgement

P.A. Mohammed, J.—In these writ petitions a common order passed by the Secretary to Government dated 30th March 1991 authorising to recover the entire death-cum-retirement gratuity payable to the Petitioners as part of their liability fixed against them under Rule 3, Part III of the Kerala Service Rules read with Rule No. 30 is challenged. A sum of Rs. 1,91,725 each would be so recovered from M.S. Nair (Petitioner in O.P. No. 7219/91) and M.G. Krishna Warriar (Petitioner in O.P. No. 5502/91). Both retired from Government service on superannuation; M.S. Nair on 31st July 1987 and M.G. Krishna Warriar on 30th November 1987. At the time of retirement, M.S. Nair was the Additional Director of Soil Conservation and M.G. Krishna Warriar was the Joint Director of Soil Conservation.

2. The charge memo was issued to M.S. Nair on 23rd July 1987 whereas in the case of M.G. Krishna Warriar, it was issued on 21st July 1987. On the basis of the charge memos disciplinary proceedings had been initiated against the Petitioners under the provisions of the Kerala Civil Services (Classification, Control and Appeal) Rules, 1960. The charges framed against them are identical and they are as follows:

Failed in effective supervision and control over the 24 Soil Conservation Works in Shertallai Taluk executed during the period from 1980-81 to 1985-86 under the control of the District Soil Conservation Officer, Chengannur.

It is further alleged:

The Finance Inspection Wing examined 15 works costing about Rs. 71,43,366 and found that the arrangements for supervision of the works were too inadequate.

The case projected against the delinquent officers is their negligence to duty and lack of supervision which created damages to the department.

3. On receipt of the charge memos both the Petitioners filed written statement of defence. Their main common contention was that the District Soil Conservation Officer was the executing officer having overall control of the scheme and was fully answerable for any kind of irregularity in the scheme. Thereafter notices were issued calling upon them to explain why action should not be taken for recovery of liabilities from the amounts due to them on retirement. The Petitioners submitted their written statement of defence in reply to those notices reiterating the contention submitted in the earlier written statement. A detailed enquiry was conducted by the Finance Inspection Wing in so far as the allegations against the Petitioners and an enquiry report was submitted. However the copy of the said enquiry report was not furnished to the Petitioners. Though M.S. Nair was called for personal hearing such opportunity had been denied to Krishna Warriar. It was their case that in the absence of copies of the full text of the enquiry report and documents relied therein they could not effectively explain or controvert the findings or conclusions therein against them.

4. The Petitioners had however received communications from the Government that they were found liable to pay the amount of Rs. 1,91,725 each towards the loss sustained by the Government. It is further stated therein that a portion of the said liability would be recovered from the D.C.R.G. payable to them under Rule 3, Part III of the Kerala Service Rules. To that also the Petitioners submitted written explanations. Ultimately a common order was passed by the Government on 30th March 1991 fixing the liability of each Petitioner as Rs. 1,91,725. The operative portion of the said order is as follows:

In the circumstances, Government order that the entire D.C.R.G. payable to Shri M.S. Nair, Additional Director of Social Conservation (Retired) and Shri M.G. Krishna Warriar, Joint Director of Soil Conservation (Retired) will be recovered as part of the liability of Rs. 1,91,725 each fixed against them (vide Note 2 read with Ruling No. 3 under Rule 3, Part III of the K.S.Rs.)

Thereafter they received letters dated 12th April 1991 from the Government directing them to show cause as to why pension should not be reduced under Rule 59(b) Part III of the Kerala Service Rules to recover the rest of the liability fixed against them. The said direction was seriously objected by them in their

reply letters to the Government. In the aforesaid circumstances the Petitioners came before this Court in respective writ petitions seeking to quash the orders passed by the Government (Exts. P-8, P-9 and P-11 in O.P. No. 7219/91 and Exts. P-5, P-6 and P-9 in O.P. No. 5502/91).

5. During the pendency of these writ petitions the Petitioners received a common order from the Government issued on 22nd May 1993 ordering as below:

After having examined all the aspects of the case in detail, Government order that the balance amount of the liability not covered by the D.C.R.G. of the incumbents i.e. Rs. 1,91,725 (Rupees one lakh ninety-one thousand seven hundred and twenty-five only) minus D.C.R.G. fixed against Shri M.S. Nair, Additional Director (S.C.) (Retired) and Shri M.G. Krishna Warriar, Joint Director of Soil Conservation (Retired) will be recovered from each as per ruling No. 6, below Rule 116, Part III K.S. Rs.

Petitions for amendment of the writ petitions have been filed seeking to challenge the said order also in the writ petition.

6. Heard the counsel for the Petitioners and the Government Pleader for the Respondents.

7. The counsel for both the Petitioners mainly challenge the Government order dated 30th March 1991 (Ext. P-8 in O.P. No. 7219/91 and Ext. P-5 in O.P. No. 5502/91).

8. As pointed out above, the Petitioners retired from service in July 1987. The misconduct alleged is that they have failed to take effective supervision and control over the 24 Soil Conservation Works in Shertallai Taluk executed during the period from 1980-81 to 1985-86 under the control of the District Soil Conservation Officer, Chengannur. While denying the said charge, they contended that the District Soil Conservation Officer alone was responsible for the loss, if any, as observed earlier. It was further contended that the District Soil Conservation Officer and other subordinate officers have been specifically mentioned in Chapter II of the Soil Conservation Code and they will be responsible for any defalcations of money, omissions and commissions or any other malpractices. During the tenure of their respective services they have not received any complaint from any quarters or any malpractice pointed out regarding the implementation of the schemes.

9. The counsel for the Petitioners advanced an argument that the punishment has been awarded solely on the basis of the enquiry report submitted by the Financial Inspection Wing after inspecting the area on 28th May 1986. It is further pointed out that the copy of the enquiry report was not given to the Petitioners and therefore the disciplinary proceedings were vitiated. In reply to the said contention raised in the writ petitions, the case of the Government as revealed from the counter-affidavit is reproduced hereunder (O.P. No. 7219/91):

The liability of Rs. 30,67,608 has been apportioned among the officers involved

according to the degree of their responsibility. As such an amount of Rs. 1,91,725 was fixed as liability against the Petitioner. It was not practicable to forward copies of the report of the Finance Inspection Wing because it is voluminous. Moreover only one copy of the report of the Finance Inspection Wing is available with Government which could not be spared at any cost and it was required for examining two other disciplinary cases.

An identical position has been adopted in O.P. No. 5502 of 1991.

10. In view of the above premises, the question that falls for consideration is how far the non-furnishing of the enquiry report would vitiate the disciplinary proceedings. The supply of the copy of the report is a sine qua non for a valid, fair and just proper procedure for the delinquent to defend himself effectively and efficaciously. "The supply of the copy of the report is neither an empty formality, nor a ritual, but aims to digress the direction of the disciplinary authority from his derivative conclusions from the report to the palliative path of fair consideration". So laid down by Ramaswamy, J. in His Lordship's concurring judgment in Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc., . His Lordship further observed that the denial of the supply of the copy of enquiry report would cause to the delinquent a grave prejudice and avoidable injustice which cannot be cured or mitigated in appeal or at a challenge under Article 226 of the Constitution of India. Ex post facto opportunity does not efface the past impression formed by the disciplinary authority against the delinquent and the lurking suspicion always lingers in the mind of the delinquent that the disciplinary authority was not objective and he was treated unfairly. To alleviate such an impression and to prevent injustice or miscarriage of justice at the threshold, the disciplinary authority should supply the copy of the report to the delinquent. Unless the copy of the report is supplied to him he would be in the dark to know the findings, the reasons in support thereof or nature of the recommendation or penalty. The delinquent would point out all the factual or legal errors committed by the officer. He may also persuade the disciplinary authority that the finding is based on no evidence or relevant material evidence was not considered or overlooked by the enquiry officer in coming to the conclusions with a view to persuade the disciplinary authority to disagree with the enquiry officer and to consider his innocence of the charge.

11. It must be recalled that by virtue of Section 44 of the Constitution (Forty Second Amendment) Act, 1976 Clause (2) of Article 311 has been amended and the following proviso has been substituted:

Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed.

It was pointed out that on account of this amendment it was no longer necessary to issue to the delinquent employee to show cause against the punishment

proposed and therefore to furnish a copy of inquiry officer's report along with the notice to make representation against the penalty. In this context, the observation of the Constitution Bench of the Supreme Court in *Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc.*, is apt to be stated.

Thus the Article 311(2) makes it obligatory to hold an inquiry before the employee is dismissed or removed or reduced in rank. The Article, however, cannot be construed to mean that it prevents or prohibits the inquiry when punishment other than that of dismissal, removal or reduction in rank is awarded. The procedure to be followed in awarding other punishments is laid down in the service rules governing the employee. What is further, Article 311(2) applies only to members of the civil services of the Union or an all India service or a civil service of a State or to the holders of the civil posts under the Union or a State. In the matter of all punishments both Government servants and others are governed by their service rules. Whenever, therefore, the service rules contemplate an inquiry before a punishment is awarded, and when the Inquiry Officer is not the disciplinary authority the delinquent employee will have the right to receive the Inquiry Officer's report notwithstanding the nature of the punishment.

(emphasis supplied)

12. In view of the nature of the conclusion and findings contained in the inquiry report of the Finance Inspection Wing and the documents relied on, I am of the firm view that the copies of the report shall be furnished to the Petitioners. The reasons urged for non-supply of the inquiry report to the Petitioners are flippant and this Court cannot approve them. Unless the entire text of the report is given the explanation in whatever form submitted will be inadequate and ineffectual. What is indubitably evinced here is a serious haphazardness or malfunction in the process of completing the disciplinary proceedings. The rule assuredly observed is the supply of copy of the inquiry report to delinquent irrespective of whether he demands for it. The manifestation of the solemn principle of procedural fairness is embedded here. The dereliction of supplying the copy of the inquiry report to the delinquent officers is calamitous to entire process of disciplinary proceedings in view of the dictum laid down by the Supreme Court in *Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc.*, . The findings/conclusions entered by the first Respondent are therefore scrapped and the common order G.O. (Ms.) No. 128/91/AD, dated 30th March 1991 is quashed. However, it may not be interpreted to mean the entire disciplinary proceedings from the beginning to the end is null and void. When the copy of the enquiry report is given to the delinquent officers and they are thus allowed to file explanation or objection as against the conclusions or findings of the inquiry officer there is no hindrance to proceed with the enquiry from that stage. In this context the following observation of the Supreme Court in *State of Haryana and another Vs. Jagdish Chander*, is apposite.

However, the High Court was not justified in straightway, setting aside the order

and directing reinstatement with consequential benefits. In view of the judgment of this Court by a Constitution Bench in *E.C.I.L. Hyderabad v. B. Karunakar* AIR 1994 S.C.W. 1050 the appropriate course for the State would be to direct an enquiry if they intend to hold and to give an opportunity to the officer concerned to defend himself and then pass appropriate orders. On the basis of the result of the enquiry necessary reliefs need to be moulded.

13. What would be the impact of the above directions on D.C.R.G. and pensionary benefits which are otherwise payable to the Petitioners. Can they be withheld anticipating the assessment of the damages in the enquiry proceedings to be completed after complying with the direction given above. In this context, Clause (5) of Ruling under Rule 116, Part III K.S.R. is apposite and it is ectyped hereunder:

In all cases where the liabilities could not be assessed and fixed before the retirement of the Government employees, efforts should be made to assess and adjust the recoverable dues within a period of one year from the date of retirement of the Government employee concerned. If in any case, the liability could not be assessed and adjusted within one year, the amount withheld from the death-cum-retirement gratuity or the surety bond or cash deposit accepted under paragraph (1) or (3) above will be released. Disciplinary action shall be taken against the employees responsible for the failure to assess and adjust the liabilities within the prescribed period.

The above ruling contemplates the continuance of the proceeding for assessment of liabilities of Government employee even after the retirement in case the liabilities could not be assessed before retirement. However, efforts should be made to assess and adjust the recoverable dues within a period of one year from the date of retirement of the Government employee. In this case the liability has not been determined within the statutory period. Therefore the impugned orders fixing the liability do not conform to the above rule. Though the Petitioners retired from service during the year 1987 the liability has been finally assessed only in the year 1991 which is also set aside. The Division Bench of this Court in *State of Kerala v. C.V. Joseph* 1994 (2) K.L.J. 359 observed that since the liability was not fixed within one year of the retirement the entire amount of D.C.R.G. ought to have been released to the Government servant on the expiry of one year from the date of retirement.

14. In this context, it is brought to my notice Notes 2 and 3 to Rule 3, Part III Kerala Service Rules which are as follows:

Note 2.- The word "pension" used in this rule does not include death-cum-retirement gratuity. Liabilities fixed against an employee or pensioner can be recovered from the death-cum-retirement gratuity payable to him without the departmental/judicial proceedings referred to in this rule, but after giving the employee or pensioner concerned a reasonable opportunity to explain.

Note 3.- The liabilities of an employee should be quantified either before or after

retirement and intimated to him before retirement if possible or after retirement within a period of three years on becoming a pensioner. The liabilities of a pensioner should be quantified and intimated to him.

Rule 3 preserves the right of the Government to withhold the pension permanently or for a specified period. However, the Government have no such right to withhold payment of death-cum-retirement gratuity in view of the provision contained in Note 2, which says that the word "pension" used in Rule 3 does not include death-cum-retirement gratuity. At the same time the liability fixed against an employee or pensioner can be recovered from D.C.R.G. only after giving a reasonable opportunity to explain. At any rate the liability should be quantified and intimated within a period of three years of the retirement. Thus the position is crystalline that the Government have no power to withhold the death-cum-retirement gratuity or to recover the liability therefrom after the expiry of three years from the date of retirement.

15. Under Rule 59(b) of Part III Kerala Service Rules, the Government are authorised to make reduction in the amount of full pension admissible to a Government servant if his service has not been thoroughly satisfactory. However, this provision cannot be invoked as proposed in the letters dated 12th April 1991 in the absence of specific allegation that the services of the Petitioners had been thoroughly unsatisfactory. Further as per the Government decision this rule cannot be used directly to effect a penal recovery unless there is specific instance of fraud or negligence.

16. The question now falls for consideration is whether the pensionary benefits can be withheld in anticipation of the fresh order of fixing liability by the Government in the enquiry proceedings pursuant to the direction given hereinbefore. The allegations raised against the Petitioners relate to the year 1980-81 to 1985-86. As pointed out above, no reason is forthcoming for the delay in initiating the disciplinary proceedings and to recover the alleged loss from them. If there is any delay in completing the enquiry, the responsibility normally lies on the Department. Only for the reason that a disciplinary proceeding is pending, the pensionary benefits cannot be repressed. The Supreme Court in *State of Kerala and Others Vs. M. Padmanabhan Nair*, observed:

The necessity for prompt payment of the retirement dues to a Government servant immediately after his retirement cannot be over emphasised and it would not be unreasonable to direct that the liability to pay penal interest on these dues at the current market rate should commence at the expiry of two months from the date of retirement.

The Division Bench of this Court in *C.V. Joseph's case* 1994 (2) K.L.J. 359 supra held that all efforts should be taken to assess and fix the liability within a period of one year from the date of retirement of the Government servant and disproved the delay in disbursing the pension and gratuity. Reliance is also placed on the decision of this Court in *N. Ramanadan Vs. Dy. Director of Edn. and*

Others, .

17. In the case of a Government servant the receipt of pension is a primordial source of income after the retirement from service. It is not a bounty to be distributed by the Government. It is a pre-eminent right in esse for enjoyment by him after the retirement. Such enjoyment cannot be retarded by indiscretion of others or undone for vacuous reasons. The efficacy of its enjoyment cannot be whittled down by imaginary or anticipatory reasons. Therefore the disbursement of pensionary benefits to the Petitioners shall not be denied or withheld wholly or partially on the ground that the disciplinary proceedings initiated against them may culminate in the recovery of loss from them. I do not see any justification at this long distance of time to warrant such an action in anticipation of the punishment that may be inflicted on them in the enquiry proceedings to be finalised in view of the findings entered hereinbefore.

18. The Government Pleader has submitted that the principle laid down by the Supreme Court in *State of Maharashtra Vs. M.H. Mazumdar*, is applicable in this case. In that case the Supreme Court, no doubt, expressed the following view:

The question is whether the State Government was competent to take action against the Respondent by reducing his pension. Conditions for grant of pension to a Government servant of the State of Maharashtra are regulated by the Bombay Civil Services Rules (hereinafter referred to as the Rules). Rule 184 provides for grant of pension admissible under the rules to Government servant who is borne on its establishment.

The court further said:

Grant of pension and its continuance to a Government servant depend upon the good conduct of the Government servant. Rendering satisfactory service maintaining good conduct is a necessary condition for the grant and continuance of pension. Rule 189 expressly confers power on the Government to withhold or withdraw any part of the pension payable to a Government servant for misconduct which he may have committed while in service.

In this case the Supreme Court was discussing Rules 188 and 189 of the Bombay Civil Services Rules. Rule 188 in substance is analogous to Rule 59(b) Part III of the Kerala Service Rules. This rule cannot be invoked in the present case for the reasons already discussed hereinbefore. However, Rule 189 of the Bombay Civil Services Rules confers power on the Government for withholding or withdrawal of pension. In the present case what this Court is concerned is withholding of pension and not recovery from the pension. The recovery from pension is authorised only after the quantification of the liability and that too as per the procedure prescribed in that behalf.

19. In view of the discussion hereinabove, Exts. P-8, P-9 and P-11 in O.P. No. 7219/91 and Exts. P-5, P-6 and P-9 in O.P. No. 5502 of 1991 are quashed. Consequently I direct the Respondents to disburse the death-cum-retirement

gratuity and all pensionary benefits with interest at the rate of 12 per cent as expeditiously as possible, at any rate, within a period of two months from the date of receipt of a copy of the Judgment. I further direct the Respondents that the disciplinary proceedings initiated against the Petitioners shall be proceeded with only after furnishing copies of the enquiry report to the Petitioners and granting them an opportunity to file representations against the conclusions or findings thereon and that such proceeding shall at any rate be completed within a period of four months from the date of receipt of a copy of this Judgment. The Original Petitions are disposed of as above.