

(1999) 07 KL CK 0071
In the High Court Of Kerala
Case No : W.A. No. 1735/98

Thomas Mathew

APPELLANT

Vs

The Secretary to the Government

RESPONDENT

Date of Decision : 14-07-1999

Acts Referred:

Griminal Justice Act, 1925 — Section 24(1)
Kerala Government Business Rules — Rule 11, 12

Citation : (1999) 07 KL CK 0071

Hon'ble Judges : P.A. Mohammed, J; M.R. Hariharan Nair, J

Bench : Division Bench

Advocate : Mary Benjamin, for the Appellant; P.V. Asha, Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

P.A. Mohammed, J.—"The one who decides must hear". This is a sacred rule forming part of principles of natural justice. The aptness of this percept to the present context requires trenchant consideration. The decision in Union of India v. Andrew 1996 (1) KLT 133 : ILR 1996 Ker 118 handed down by a Division Bench forming one of us a party anatomized the above concept with some elaborateness. What we are impelled here is to have a closer outlook on it with reference to a facet which we call "seeming justice". "It is a cardinal principle of our judicial system that a case should be decided by the authority hearing the arguments and that a successor Cannot decide a case without hearing the arguments afresh on the ground that arguments have already been advanced before his predecessor who left the case without deciding it himself so said by the Division Bench in Andrew's case 1996 (1) KLT 133 : ILR 1996 Ker 118 (supra).

2. Ext. P-5 order dated 28th August 1997 passed by the Additional Secretary (Sri K. Rajendran) has been challenged by the Appellant in the writ petition wherefrom the present writ appeal arose. By the said order the Government

found that the Appellant was personally liable for the loss of Rs. 48,602 sustained by it and hence it ordered to recover the said sum from the D.G.R.G. payable to him, on retirement. The impugned order was passed by the Government in compliance of the direction of this Court in O.P. No. 1500 of 1997 directing to finalise the disciplinary proceedings against the Appellant within the period stipulated. The learned Single Judge however dismissed the Original Petition and hence the present writ appeal.

3. While attacking Ext. P-5, the Appellant at the outset contends that Ext. P-5 order is hit by the rule "the one who decides must hear". His case is that he was heard on 21st July 1997 by the Special Secretary to Government Sri Sajan Peter, but Ext. P-5 order was passed by the Additional Secretary, Sri K. Rajendran. He pointed out that there was no application of the mind by the authority who passed the impugned order. Therefore the counsel pleaded that the Appellant ought to have been heard by Sri K. Rajendran before Ext. P-5 order was passed and that was a requirement in the observance of the principles of natural justice.

4. On the other hand, Respondent contended that Sri Sajan Peter, Special Secretary heard the Appellant; on 21st July 1997 and findings on the questions were arrived at by himself after examining the submissions at the time of the hearing. It is further disclosed in the additional counter-affidavit that Sri Sajan Peter forwarded the file to the Hon"ble Minister for Agriculture and the Minister approved the same on 22nd August 1997. It was thereafter Additional Secretary Sri K. Rajendran issued the impugned order. It was also pleaded that the said procedure could not said to be unauthorised in view of Rules 11 and 12 of Rules of Business of the Government of Kerala.

5. Let us now examine as to how far there is application of the mind in the process of determination involved in Ext. P-5. When we say application of the mind it is meant to involve subjective process of analysis or appreciation. The person who decides must apply his mind in which event every material even the comportment, of the person who has been heard would be oscillating afresh in the mind. In such backdrop the decision making process would be serene and not shilly-shallying for the person who heard the matter. It would also enure unimpaired contentment for the person who has been heard that his case has been properly analysed and understood. Can we cull such results from Ext. P-5? What would appear from Ext. P-5 is that the decision that the Appellant was responsible for dereliction of duty and negligence which ultimately led to the loss to Government was taken by Additional Secretary K. Rajendran. Though the said order reveals that the Appellant was heard on 21st July 1997 it did not specifically say by whom the hearing was made. In the normal course we would presume that he was heard by K. Rajendran who passed the order. However the additional counter-affidavit says that he was heard by Sri Sajan Peter, Special Secretary and that too after the approval of the Hon"ble Minister. Even earlier, that is to say, on 16th August 1996 also Appellant was heard personally not by K. Rajendran. It can only be by Sri Sajan Peter who did not pass the order. If the

order has been passed by Sri Sajan Peter it would have been possible to plead that there was application of the mind by him. The additional counter-affidavit avers that Sri Sajan Peter, the Special Secretary recorded his findings on 18th August 1997 and the Additional Secretary Sri Rajendran issued the impugned order on the basis of the findings of the Special Secretary. This would indubitably bring forth there was no independent application of the mind by the Additional Secretary while passing Ext. P-5 order. The said order is therefore invalid.

6. Now let us cogitate what would be the reaction or frame of mind of the person who has been heard in a matter when he receives an order from the person who heard him. He at the first instance checks up whether his contentions are properly analysed and probed into. Then he turns to know whether the order has been passed by the person who actually heard him and whether the submissions made by him during the hearing have been properly taken note of. If these things are accomplished he may feel that the justice is seemingly bestowed to him. When we look at Ext. P-5 in this premise the Appellant would be right in saying that though he was heard by Sri Sajan Peter, Special Secretary, the order was passed by Sri Rajendran, Additional Secretary who never had the opportunity to hear him and record his submissions and hence there was non-application of mind.

7. "It is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done", so proclaimed Lord Hewart, C.J. in the King v. Sussex Justices, Ex parte Mc Carthy (1924) 1 K.B. 256. Lord Goddard, G.J. in R. v. Bodmin Justices Ex parte Mc Ewen (1947) 1 All. E.R. 109 had the following actualities before him in that case for finding solution: The applicant, a soldier, during a disturbance in the barrack room, stabbed a fellow-soldier in the back with a bayonet, as a consequence of which the injured soldier was not expected to live, but did in fact recover. The applicant was charged before petty sessions with wounding with intent to do grievous bodily harm, but, at the request of both the prosecution and the defence, the justices allowed the charge to be reduced to one of unlawful wounding, and, assuming jurisdiction under the Criminal Justice Act, 1925, Section 24(1), dealt with the case summarily. An officer of the applicant's unit gave some evidence as to character and said he could say a lot more but thought he had better not do so. The justices, having retired to consider their sentence, sent for the officer and interviewed him in their room in the absence of the applicant and his advisers. The applicant was sentenced to 6 months' imprisonment. Being aggrieved, applicant moved the Bench for an order of certiorari. It held to the following effect:

justice must not only be done, but must manifestly be seen to be done, and the interviewing by the justices of the officer in the absence of the applicant and his advisers could not be justified and the conviction must be quashed, the justices being ordered to pay the costs of the application for certiorari.

What we see here from the above factual background of the case is the

exemplifying sensitiveness of the rule. The observance of this rule of "seeming justice" is an indispensable requirement in the matter of administrative action. The agility of doing justice, would be of no use unless it appears to have been done so. The person who passes order after hearing has a dual functions thus to perform while conforming to the principles of natural justice. Justice does not appear to have been done to the Appellant in the process of moulding the conclusions contained in Ext. P-5.

8. The Respondent espoused his cause placing reliance on Rules 11 and 12 of the Rules of Business of the Government of Kerala. These rules are ectyped hereunder:

11. All orders or instruments made or executed by or on behalf of the Government of the State shall be expressed to be made or executed in the name of the Governor.

12. Every order or instrument of the Government of the State shall be signed by a Secretary, an Additional Secretary, a Joint Secretary, a Deputy Secretary, an Under Secretary or by such other officer as may be specially empowered in that behalf and such signature shall be deemed to be the proper authentication of such order or instrument.

The above rules do not have the force of obliterating the vibrative force and imprint of natural justice. It is supreme and far above the law, rule, regulation etc. unless the applicability of the rule is expressly dispensed with. The operation of the rule is inherent in every administrative or quasi-judicial functions notwithstanding the in house or business rules framed by the authorities. When the matter is thus crystalline it is inessential for us to explore any further on the above plea urged by the Respondent.

9. In the result, Ext. P-5 order issued by the Additional Secretary is quashed. Consequently we direct the Government of Kerala to pass fresh orders on merits and in accordance with the observations made hereinabove and after affording a reasonable opportunity of being heard to the Appellant. The writ appeal is thus allowed. No order as to costs.