

(2022) 04 KL CK 0152**High Court Of Kerala****Case No:** Writ Petition (C) No. 30721 Of 2021

Sivan T.P.

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision: April 29, 2022**Acts Referred:**

- Code of Criminal Procedure - Section 357(3)
- Indian Penal Code, 1860 - Section 302, 326, 448
- Kerala State Electricity Board Employees (Classification, Control and Appeal) Regulations 1969 - Regulation 16
- Kerala State & Subordinate Services Rules, 1958 - Rule 10(b)

Citation: (2022) 04 KL CK 0152**Hon'ble Judges:** V.G.Arun, J**Bench:** Single Bench**Advocate:** Kaleeswaram Raj, Varun C.Vijay, Thulasi K. Raj, Venugopal. V., K.S.Anil**Final Decision:** Dismissed

Judgement

V.G.Arun, J

1. The petitioner entered the service of the second respondent Board as Mazdoor (Electrical Worker) on 02.05.2014. Much prior to the petitioner's

appointment, a crime had been registered against him for the offences punishable under Sections 448 and 326 of I.P.C. The allegation was that the

petitioner had criminally trespassed into the tea shop of PW1 and inflicted grievous injuries to PW2 with a billhook. The jurisdictional Magistrate

acquitted the petitioner for the offence under Section 448 and convicted him for the offence under Section 326 of I.P.C. In the appeal filed against the

conviction and sentence, the Sessions Court reduced the sentence to rigorous imprisonment to one year and conformed the sentence of fine as well as

the default sentence. Aggrieved, the petitioner preferred revision before this Court, which culminated in Ext.P1 order, affirming the conviction and

reducing the sentence to simple imprisonment for one day, till raising of the court, and compensation of Rs.15,000/-to PW1 under Section 357(3) of

Cr.P.C. This court also observed that the offence under Section 326 I.P.C. being purely private in nature, will not come under the category of moral

turpitude.

2. In the meanwhile, a show cause notice dated 25.06.2015 was issued to the petitioner, proposing to terminate his service by reason of his conviction

in the criminal case. Thereafter, Ext.P3 order dated 30.09.2015 was issued terminating the petitioner from the service of the Board. The appeal

preferred against Ext.P3 was also rejected under Ext.P4 order dated 01.03.2016.

3. Challenging the show cause notice and Ext.P3 order of termination, the petitioner preferred W.P. (C).No. 21454 of 2015. In support of the

challenge, reliance was placed on the Division Bench decision of this Court in KSEB Ltd., Tvm and others v. Damodaran P [2017 (3) KLT 794].

Finding substance in challenge, with particular reference to the observation in the Criminal Revision Petition that the offence under Section 326 of

I.P.C. will not fall under the category of offences involving moral turpitude, this court set aside Ext.P3 order, granting liberty to the KSEB to issue

fresh order with respect to the petitioner's service, after adverting to the observations in the judgment (Ext.P2) and the ratio in Damodaran P (supra).

In purported compliance of the direction, the third respondent issued Ext.P6 order confirming Ext.P3 order. In the meanwhile, Ext.P4 order had also

been passed by the third respondent, affirming the petitioner's termination from service. Hence, the writ petition, seeking to quash Exts.P4 and P6 and

direct the respondents to reinstate the petitioner in service as Mazdoor (Electrical Worker) with effect from 30.09.2015.

4. Adv. Kaleeswaram Raj, appearing for the petitioner, assailed Ext.P6 order primarily on the ground of non-application of mind. It is contended that

the third respondent had passed the order based on the opinion of the Board's Legal Advisor, without forming an independent opinion. The order thus

passed under the dictate of a different authority, is antithetical to the decision making process itself. Learned Counsel contended that this Court having

observed that the offence under Section 326 of I.P.C. will not fall within the category of offences involving moral turpitude, the third respondent

committed an illegality in terminating the petitioner's service for the sole reason of his conviction for that offence. It is alleged that, despite the specific

direction in Ext.P2 order, the third respondent contumaciously refused to follow the ratio in Damodaran P.

5. Learned Standing Counsel for the KSEB Ltd. submitted that Ext.P6 order having been passed after considering all relevant aspects, there is no

scope for interference with the order, in exercise of the power of judicial review. It is submitted that the Legal Advisor of the Board had given a

detailed opinion after considering all factual and legal aspects. Having found the legal opinion to be correct, the the third respondent had every right to

pass Ext.P6 order based on the opinion. The mere fact that in Ext.P6 order, exclusive reference is made to the legal opinion cannot lead to the

inference that the third respondent had not independently applied his mind. According to the Standing Counsel, Damodaran's case pertains to

Regulation 19 of the Kerala State Electricity Board Employees (Classification, Control and Appeal) Regulations 1969, whereas the petitioner's case is

covered by Rule 10 (b) of the Kerala State & Subordinate Services Rules, 1958. The petitioner was appointed temporarily, subject to verification of

antecedents and hence, the Board had the authority to terminate his service, on being informed about his conviction in a criminal case. The termination

being in terms of Rule 10(b)(iii) of K.S. & S.S.R., no pre-decisional hearing is warranted. Reliance is placed on the decision in Anil Kumar A v. State

of Kerala and others [2012 (2) KHC 257] to bolster the contention.

6. The following facts are not in dispute. The petitioner entered the service of KSEB Ltd. on 02.05.2014. The fact regarding his conviction in a

criminal case was informed to the Board through the petitioner's police verification report dated 02.02.2015. The petitioner's conviction under Section

326 I.P.C. stands affirmed, though his sentence was reduced to imprisonment for a day. While setting aside Ext.P3 order by Ext.P2 judgment, this

Court made the following observations.

“Paragraph 10: Coming to the facts of this case, there is no doubt that the petitioner has been convicted under Section 326 of the IPC; but it has been

declared by this Court in the judgment in Crl.R.P.No.3722/2008 that the offence is not one that involves moral turpitude.

After making such observation and setting aside Ext.P3, the KSEB's liberty to issue fresh orders was reserved, with the rider that the order should be

passed after adverting to the observations in the judgment and following the ratio in Damodaran.

7. The legal question emerging from the above factual scenario is regarding the applicability of the dictum in Damodaran to the facts of this case and

the impact of the observation in Ext.P1 order that the offence under Section 326 is not one involving moral turpitude. In Damodaran, the petitioner was

recruited to the service of KSEB Ltd. as a Mazdoor in the year 2005. While continuing in service, he was convicted by a criminal court and sentenced

to undergo two years rigorous imprisonment. Consequent to his conviction, the petitioner was dismissed from service. Later, the appeal filed by the

petitioner was allowed and he was acquitted of the offence. Thereupon, the petitioner sought reinstatement in service, which the Board declined.

Hence, he filed writ petition before this Court. The writ petition was allowed and the Board directed to reinstate the petitioner with full back-wages

and other benefits, in terms of Rule 18 of the Civil Services (Classification, Control and Appeal) Rules, 1960. The judgment was challenged in appeal

by the Board. On the facts of that case, the Division Bench held that Regulation 19 of the Kerala State Electricity Board Employees (Classification,

Control and Appeal) Regulations 1969, would apply. It was also found that the only ground for dismissal being the conviction of the employee, then

upon acquittal, the employee should be reinstated, even if there is no provision in the Regulation for such a contingency.

8. In the case at hand, the petitioner's service is not terminated under Regulation 19. Ext.P4 order of the third respondent specifically refers to Rule 10

(b)(iii) of the K.S. & S.S.R. as the ground for termination. Unfortunately, Ext.P4 was not brought to the notice of the learned Single Judge who had

rendered Ext.P2 judgment. Rule 10 (b) of Kerala State & Subordinate Services Rules, 1958 being contextually relevant is extracted hereunder;

“(b) No person shall be eligible for appointment to any service by direct recruitment, unless-[(i) he satisfies the appointing authority that he is of sound

health, active habits and free from any bodily defect or infirmity rendering him unfit for such service;

(ii) that he does not have more than one wife living or, if the person is a woman, that she is not married to any person who has a wife living; and

(iii) the State Government are satisfied that his character and antecedents are such as to qualify him for such service”

Going by the rule, a person will become eligible for appointment by direct recruitment only if the State Government (here the 'KSEB') is satisfied about

the character and antecedents of the appointee. In Anilkumar (supra), while answering the reference pertaining to the practice of issuing interim

orders, permitting persons involved in criminal cases to undergo training on their selection as Police Constable, the Division Bench held as under;

“Paragraph 8: The proviso occurring after R.10(b)(iii) is a statutory provision. It is that proviso which enables appointment of a person temporarily before the

Government are satisfied as to his character and antecedents. That proviso itself contains the statutory command that, if on subsequent verification, the

Government are not satisfied of the character and antecedents of that person, the appointment shall be terminated without notice. When the statutory rule

provides for such termination and expressly excludes any pre-decisional notice in that regard, the interpretation given in Suresh (supra) would amount to

imposing a condition which is, not only not there in the proviso, but also one that is expressly excluded by the clear terms of that proviso. The authority of the

Government to terminate without notice in terms of the second limb of the proviso to R.10(b)(iii) cannot be watered down by judicial decision except by holding

that provision as ultra vires. Notwithstanding the fact that there was no challenge to the proviso to R.10(b)(iii) in Suresh (supra), we do not find any ground of

invalidity to apply the ultra vires doctrine and read down the said proviso. The view in Suresh (supra) that a person appointed invoking the proviso to R.10(b)

(iii) is entitled to notice and opportunity of hearing before being removed as enjoined by that proviso, amounts to re-writing that statutory provision. That is

impermissible. The said decision does not lay down the law correctly, in that regard.

9. Not only that, the last limb of the proviso to R.10(b)(iii) itself specifically states that a person appointed in terms of that proviso shall be eligible for

appointment in regular service in accordance with the Rules only if his character and antecedents are found satisfactory on subsequent verification. Note (1)

under that Rule clarifies that a person appointed under that proviso shall not be treated as a member of the service to which he has been so appointed, unless he

is appointed in regular service in accordance with the Rules. If his character and antecedents are verified and found to be satisfactory, his temporary appointment

shall be treated as appointment in regular service from the date of the temporary appointment. This means that a person appointed temporarily under the proviso

to R.10(b)(iii) cannot be treated as a member of the service until his character and antecedents, on subsequent verification, are found satisfactory and, following

such finding, he is appointed in regular service. Otherwise, the second limb of the proviso would operate and it would oblige the Government or the appointing

authority, as the case may be, to terminate the said person's temporary appointment without notice.

10. Logically, an appointee under the proviso to R.10(b)(iii) does not stand to lose anything if, ultimately, his character and antecedents are found to be

satisfactory. On the converse, if the finding as to character and antecedents is not satisfactory, it would be perilous in public interest, public service and for the

Government to continue such a person in service till he is heard on that issue by giving him a pre-decisional notice. Balancing the scales in that regard also, we

do not find the reasoning of Suresh (supra) as acceptable.

11. We may also indicate that R.3 of the Kerala Civil Services (Classification, Control and Appeal) Rules, 1960 would show that persons subject to discharge

from service without notice and persons whose appointment and other matters are governed by special provisions, would not fall within those Rules.

The proviso occurring after R.10(b)(iii) of Part II K.S. & S.S.R. stands as a separate law and would be governed only by the provisions in that proviso, unless and

until the competent authority is satisfied of the character and antecedents, on verification of the person concerned, and thereafter, inducts him into regular

service by appropriate action in accordance with law.

12. At any rate, one who is temporarily appointed cannot expect that he is entitled to be heard before being removed from service on a ground that the

Government are not satisfied as to his character and antecedents, which is essentially a condition to enable a person for appointment into service in terms of

R.10(b)(iii). The verification of the character and antecedents in terms of the proviso to R.10(b)(iii) of Part II of K.S. & S.S.R. is not one that provides any room

for pre-decisional hearing and the view to the contrary laid down in Suresh (supra) does not lay down the law correctly. In the result, the orders dated 21st

June, 2011 and 8th August, 2011, as noted above, are made absolute and it is directed that action shall proceed in strict conformity with the directions

contained in those orders. Writ Petitions ordered accordingly. No costs.

9. Going by the dictum in Anilkumar, the Board's discretion to terminate the service of an employee based on an adverse report regarding his

character and antecedents, cannot be interfered with easily. The subjective satisfaction of the employer cannot be substituted with the finding of the

Court. The observation of the revisional court that the offence under Section 326 does not involve moral turpitude, is immaterial in so far as the

satisfaction of Board under Rule 10(b)(iii) is concerned. The challenge on that premise is hence liable to be repelled.

10. The submission of learned Counsel for the petitioner that the language and tenor of Ext.P6 is not one expected of a person holding the post of

Chairman and Managing Director of the KSEB Ltd., is well founded. It does not augur well for the holder of such high office to term the judgment of

this Court as insignificant and to observe that this Court ought not have interfered with the decision of the appointing authority. If dissatisfied with the

decision of this Court, the third respondent should have challenged the decision in appeal, rather than making unwarranted comments in the order

passed pursuant to this Court's direction. I refrain from delving further into the matter, hoping that, at least in future, such unwholesome comments will

be avoided.

In the result, the writ petition is dismissed.