(2004) 08 KL CK 0042

High Court Of Kerala

Case No: Writ Petition (C) No''s. 15991 and 17381 of 2004

Sudheer		APPELLANT
	Vs	
K.S.R.T.C.		RESPONDENT

Date of Decision: Aug. 18, 2004

Acts Referred:

- Constitution of India, 1950 - Article 311
- Kerala Civil Services (Classification, Control and Appeal) Rules, 1960 - Rule 18

Citation: (2004) 3 ILR (Ker) 611 : (2004) 3 KLT 217

Hon'ble Judges: Kurian Joseph, J

Bench: Single Bench

Advocate: K.R.B. Kaimal, V. Madhusudhanan and S. Gopakumaran Nair, for the Appellant; George Poonthottam and James Koshy N. and K.J. Josemon, Sr. Government Pleader, for the Respondent

Judgement

Kurian Joseph, J.

After the amendment to Rule 18 of the Kerala Civil Services (Classification Control and Appeal) Rules (hereinafter referred to as the Rules) by introducing a second proviso to the Rule, is the dismissal/removal from service of a Government servant. who is convicted on a criminal charge by a criminal court and sentenced to imprisonment and or with fine is automatic is the question to be decided in these cases.

2. The petitioner in the former case Sudheer, an employee under the Kerala State Road Transport Corporation, was convicted by the Judicial First Class Magistrate, Attingal on 1.10.2003 in C.C.340/1999 for an offence u/s 498-A read with Section 34 of the Indian Penal Code. He was sentenced to undergo simple imprisonment for one year and pay a fine of Rs.5,000/- and in default to undergo simple imprisonment for another six months. Petitioner filed Criminal Appeal No.477/2003 before the Sessions Court, Trivandrum. By order dated 28.10.2003 in Crl.M.P.No.2320/2003 the

sentence was suspended. Thereafter the petitioner filed Crl.M.P.No.383/2004 praying for suspension of the conviction. Petitioner submitted before the lower appellate court that unless the conviction is suspended petitioner was likely to be terminated from service. The learned Sessions Judge, referring to two decisions of the Supreme Court in Rama Narang Vs. Ramesh Narang and Others, and K.C. Sareen Vs. C.B.I., Chandigarh, and finding that exceptional circumstances existed in the case justifying the suspension of the conviction so as to save the petitioner from the consequences which would otherwise follow, passed an order on 19.3.2004 suspending the conviction. Ext.P1 is the "order of suspension of sentence and Ext.P2 is the order of conviction. However, as per Ext.P6 order dated 17.5.2004 the petitioner was dismissed from service invoking the second proviso to Rule 18 of the Rules.

3. The petitioner in the later case-Chandrasekharan-who is a Government servant working as Rationing Inspector, at the relevant time was on deputation to the Civil Supplies Corporation. He was convicted by the Judicial First Class Magistrate Court, in C.C.No.260/1999 under Sections 409 and 418 of the Indian Penal Code. He was sentenced to undergo simple imprisonment for one month for offence u/s 418 IPC and simple imprisonment for three months with a fine of Rs. 1,000/- for the offence u/s 409. The petitioner filed appeal as Criminal Appeal No. 1/2004 before the Sessions Court, Manjeri. As per Ext.P2 order dated 2.1.2004 in Crl.M.PNo.2/2004 in Crl. Appeal No.1/04 the sentence was suspended. As per Ext.P3, the petitioner was terminated from service on account of the conviction.

4. Sri.K.R.B. Kaimal, counsel appearing for the petitioner in the former Writ Petition, contends that the dismissal from service under the amended Rule is not automatic. What the Rule contemplates is invocation of the second proviso to Article 311 of the Constitution of India and action under that Rule is to be taken, taking note of the conduct leading to the conviction. Since both the sentence and conviction have been suspended, there is no justification in dismissing the petitioner from service.

5. Sri. S. Gopakumaran Nair, learned counsel appearing for the petitioner in the latter case, submits that taking note of the conduct of the petitioner, the disciplinary authority had a duty to consider whether the misconduct is grave enough to impose major penalty. In other words merely because the Rule provides for dismissal or removal from service on conviction in a criminal case, the said extreme penalty is not automatic. It is submitted that in the instant case, the disciplinary authority has not applied its mind at all as to whether it is a situation warranting the invocation of second proviso to Rule 1 8 of the Rules.

6. Sri. James Koshy, learned Standing Counsel for the KSRTC and Sri. K.J. Josemon, learned Senior Government Pleader, submit that after the amendment to the Rules, the dismissal from service is automatic and in case the petitioners are acquitted by the Appellate Court they will be reinstated in service forthwith and that they will be entitled to all the benefits to which they would have been entitled had they been in

service.

7. In order to appreciate the rival contentions, it is necessary to refer to the relevant provisions. Article 311 of the Constitution of India provides for dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State. The said Article reads as follows:--

"311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State :--

(1) No person who is a member of a civil service of the Union or an all India service or a civil service of a State or holds civil post under the union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except (B) after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges;

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:

Provided further that this clause shall no apply--

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by the authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in Clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final".

8. Rule 18 of the Rules as amended reads as follows:--

"18. Special Procedure in certain cases. --Notwithstanding anything contained in Rules 15,16 & 17,

(i) where a penalty is imposed on a Government servant on the ground of conduct which had led to his conviction on a criminal charge; or

(ii) where the Disciplinary Authority is satisfied for reason to be recorded in writing that it is not reasonably practicable to follow the procedure prescribed in the said rules; or

(iii) where the Government is satisfied that in the interest of the security of the State it is not expedient to follow such procedure;

the Disciplinary Authority or the Governor, as the case may be, may consider the circumstances of the case and pass such orders thereon as he deems fit:

Provided that before passing such orders under Clauses (i) and (ii) the Commission shall be consulted in cases where such consultation is necessary under the Rules.

Provided further that where Government Servant is convicted on a criminal charge by a Criminal Court and sentenced to imprisonment and or with fine.--.

(a) he shall be dismissed or remove frorn service forthwith by invoking the provisions contained in item (a) of the second proviso to Clause (2) of Article 311 of the Constitution of India irrespective of the fact that an appeal is pending or that the execution of sentence is suspended in respect of the said conviction and

(b) in case the said conviction is subsequently set aside in appeal or otherwise and the Government servant is acquitted of the charges, the order of dismissal or removal ceases to have effect and revised orders shall be issued forthwith to reinstate him in service entitling him all the benefits to which he would have been entitled had he been in service:

Provided also that in case where conviction is on a summary trial for petty offences and the sentence is for a fine upto Rupees Two Thousand only such conviction shall not be treated as a conviction for the purpose of this rule and for the entry into service or retention in service as the case may be".

9. Ordinarily a Government servant shall not be imposed the major penalty of dismissal/removal/reduction in rank except after an enquiry where the incumbent is given a reasonable opportunity of being heard in respect of the charges. However, the second proviso to Article 311 carves out three exceptions of which what is relevant for the purpose of the decision is Clause (a) to the second proviso dealing with imposition of two of the three major penalties on the ground of conduct which has led to the conviction on a criminal charge by a criminal court. In that event the Government servant concerned is not entitled to have the procedure of enquiry and hearing. In other words, there is an express exclusion of the normal procedure of enquiry and hearing in such circumstances.

10. Yet the moot question is, on the only ground of conviction on a criminal charge by a Criminal Court is the imposition of dismissal/removal automatic? What the second proviso to the Rule permits is invocation of the provisions contained in item (a) of the second proviso to Clause (2) of Article 311 of the Constitution of India. That

item (a) in the second proviso to Clause (2) of Article 311 permits dismissal/removal/reduction in rank on the ground of the conduct, to put it more clearly, the criminal conduct, which led to the conviction on the criminal charge. Therefore, the conduct, rather the criminal conduct, leading to the conviction assumes significance and importance. The amended Rule would prima facie give an impression that once a Government servant is convicted on a criminal charge by a Criminal Court and sentenced to imprisonment and or with fine, the dismissal/removal from service is automatic. In the event of the conviction being set aside in appeal or otherwise and the Government servant is acquitted of the charges, the order of dismissal/removal ceases to have effect ab initio. Consequently the Government servant in such a situation will be entitled for reinstatement in service with all benefits which he would have been entitled had he been in service. The Rule also has carved out another exception that where the conviction is on a summary trial for petty offences and the sentence is for a fine upto Rupees Two Thousand only, such conviction shall not be treated as a conviction for the purpose of the amended Rule.

11. In situations where the second proviso to Article 311(2) are invoked, no notice is necessary is a well settled position, in the light of the Constitution Bench decision in Union of India and Another Vs. Tulsiram Patel and Others, . It is held thus:--

"Considerations of fair play and justice requiring a hearing to be given to a Government servant with respect to any of the major penalties proposed to be imposed upon him do not arise when the second proviso to Article 311(2) comes into play and the same would be the position in the case of a service rule reproducing the second proviso in whole or in part and whether the language used is identical with that used in the second proviso or not. The second proviso is based on public policy and is in public interest and for public good and the Constitution makers who inserted it in Article 311(2) were the best persons to decide whether such an exclusionary provision should be there and the situations in which this provision should apply".

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The phrase "this clause shall not apply" in second proviso to Article 311(2) are the keywords in the second proviso and govern each and every clause thereof. This phrase leaves no scope for any kind of opportunity to be given to a government servant. It takes away both the right to have an enquiry held in which the Government, servant would be entitled to a charge-sheet as also the right to make a representation on the proposed penalty. The phrase is mandatory and not directory. It is in the nature of a constitutional prohibitory injunction restraining the disciplinary authority from holding an inquiry under Article 311(2) or from giving any kind of opportunity to the concerned Government servant. There is thus no scope for introducing into the second proviso some kind of inquiry or opportunity by a process of inference or implication. The language of the second proviso is plain, and

unambiguous and so there is no need to call into aid rules of construing aproviso. The maxim "expression facit cessare taciturn" ("when there is express mention of certain things, then anything not mentioned is excluded") applies to this case".

The Constitution Bench has made it clear that the object under the second proviso is public policy, public interest and public good and the Court must repel the temptation to be carried away by feelings of mercy, indulgence or sympathy for the Government servants, who have been dismissed or removed invoking the said provision. To quote from the decision:--

"When a situation as envisaged in one of the three clauses of the second proviso to Article 311(2) arises and the relevant clause is properly applied and the disciplinary inquiry dispensed with, the concerned government servant cannot be heard to complain that he is deprived of his livelihood. The livelihood of an individual is a matter of great concern to him and his family but his livelihood is a matter of his private interest and where such livelihood is provided by the public exchequer and the taking away of such livelihood is in the public interest and for public good, the former must yield to the latter".

Thus it is a well settled position that even in extreme cases which would even prima facie appear to be exceptional cases requiring indulgence, the Government servant is not entitled for a pre-decisional hearing.

12. However, the Constitution Bench has made it clear that while invoking the constitutional provision, the entire conduct of the delinquent employee, the gravity of misconduct committed by him, the impact which his misconduct is likely to have on the administration and other extenuating circumstances or redeeming features will have to be considered by the disciplinary authority. In other words, the disciplinary authority is bound to consider the impugned conduct of the incumbent so as to take a decision as to whether such conduct deserves the punishment of dismissal/removal from service. The Constitution Bench made it clear that "the disciplinary authority must, however, bear in mind that a conviction on a criminal charge does not automatically entail dismissal, removal or reduction in rank of the concerned Government servant". The Apex Court also made it clear that it was also open to the incumbent concerned even to invoke the power of judicial review apart from the statutory remedy. One such instance where the Apex Court interfered with the punishment was also considered by the Constitution Bench. (Sankardas v. Union of India). It was found that the penalty of dismissal imposed on the delinquent in that case was whimsical and the Court ordered reinstatement with full backwages.

13. Shankar Dass Vs. Union of India (UOI) and Another, , was a case where the delinquent employee was prosecuted for breach of trust -- did not deposit the amount of Rs.500/- in time. However, he repaid the entire amount and pleaded guilty. The Magistrate convicted him u/s 409 of the Indian Penal Code. But in view of the peculiar circumstances relating to the crime and the criminal, he was released

under the Provision of Offenders Act, 1958. Yet he was dismissed from service. In that situation, the Supreme Court took the view as follows:-

"7. It is to be lamented that despite these observations of the learned Magistrate the Government chose to dismiss the appellant in a huff without applying its mind to the penalty which could appropriately be imposed upon him in so far as his service career was concerned. Clause (a) of the second proviso to Article 311(2) of the Constitution confers on the Government the power to dismiss a person from service "on the ground of conduct which has led to his conviction on a criminal charge". But that power like every other power has to be exercised fairly. justly and reasonably. Surely the Constitution does not contemplate that a Government Servant who is convicted for parking his scooter in a no-parking area should be dismissed from service. He may perhaps not be entitled to be heard on the question of penalty since Clause (a) of the second proviso to Article 311(2) makes the provisions of that article inapplicable when a penalty is to be imposed on a Government servant on the ground of conduct which has led to his conviction on a criminal charge. But the right to impose a penalty carries with it the duty to act justly. Considering the facts of this case, there can be no two opinions that the penalty of dismissal from service imposed upon the appellant is whimsical".

14. In Deputy Director of Collegiate Education (Administration), Madras Vs. S. Nagoor Meera, , the Supreme Court again had occasion to consider the purpose of item (a) to the second proviso to Clause (2) of Article 311. Referring to Sankardas'' case (supra) it was made clear at paragraph 10 as follows:--

"What is really relevant thus is the conduct of the Government servant which has led to his conviction on a criminal charge. Now, in this case, the respondent has been found guilty of corruption by a Criminal Court. Until the said conviction is set aside by the appellate or other higher Court, it may not be advisable to retain such person in service. As stated above, if he succeeds in appeal or other proceeding, the matter can always be reviewed in such a manner that he suffers no prejudice".

15. Guided by the wisdom of the Apex Court, what is the interpretation that is to be given to the amended Rules is the next question. The amended Rule also provides for invocation of item (a) of the second proviso to Clause (2) of Article 311. It is further made clear in the Rules that the mere pendency of an appeal against the conviction or the suspension of the Sentence in respect of the conviction will not be a ground for stalling the invocation of the constitutional provision. Though under the Constitution three penalties are contemplated, under the Rules only dismissal and removal are provided. The Rules deal with two situations where the appeal against conviction is pending and where the sentence is suspended. There is a possibility of a third situation where in an appeal, the very conviction itself is stayed. In such circumstances what is the impact of such a stay of conviction?

16. That in appropriate cases the Court is empowered to stay the conviction is also no more res Integra, in view of the decisions in Rama Narang v. Ramesh Narang and K.C. Sareen v. CBI, Chandigarh referred to above. In Rama Narang''s case dealing with the power and necessity to exercise the power in exceptional circumstances the Court held as follows:

"In a situation where the order of conviction may incur a disqualification, as in this case, the attention of the Appellate Court must be specifically invited to the consequence that is likely to fall to enable it to apply its mind to the issue since u/s 389(1) it is under an obligation to support its order ''for reasons to be recorded by it in writing". No one can be allowed to play hide and seek with the Court: he cannot suppress the precise purpose for which he seeks suspension of the conviction and obtain a general order or stay and then contend that the disqualification has ceased to operate. In the instant case the appellant indulged in an exercise of hide and seek in obtaining the interim stay without drawing the pointed attention of the Delhi High Court that stay of conviction was essential to avoid the disqualification u/s 267 of the Companies Act. The appellant did not approach the Delhi High Court with clean hands if the intention of obtaining the stay was to avoid the disqualification u/s 267 of the Companies Act. Since the appellant had not sought any order from the Delhi High Court for stay of the disqualification he was likely to incur u/s 267 of the Companies Act on account of his conviction, it cannot be inferred that the High Court had applied its mind to this specific aspect of the matter and had thereafter granted a stay of the operation of the impugned judgment. The interim stay granted by the Delhi High Court must, therefore, be read in that context and cannot extend to stay the operation of Section 267 of the Companies Act".
17. Referring to Rama Narang ''s case supra the position was further clarified by the Supreme Court in K.C. Sareen''s case. It was held there as follows:-

"Though the power to suspend an order of conviction, apart from the order of sentence, is not alien to Section 389(1) of the Code, its exercise should be limited to very exceptional cases. Merely because the convicted person files an appeal to challenge his conviction the Court should not suspend the operation of the order of conviction. The Court has a duty to look at all aspects including the ramifications of keeping such conviction in abeyance".

The Supreme Court in that decision has also given a clear picture as to the ramifications, In the words of Thomas, J.:

"When a public servant is found guilty of corruption after a judicial adjudicatory process conducted by a Court of law, judiciousness demands that he should be treated as corrupt until he is exonerated by a superior Court. The mere fact that an appellate or revisional forum has decided to entertain his challenge and to go into the issues and findings made against such public servants once again should not even temporarily absolve him from such findings. If such a public servant becomes

entitled to hold public office and to continue to do official acts until he is judicially absolved from such findings by reason of suspension of the order of conviction, it is public interest which suffers and sometimes, even irreparably. When a public servant who is convicted of corruption is allowed to continue to hold public office, it would impair the morale of the other persons manning such office, and consequently that would erode the already shrunk confidence of the people in such public institutions besides demoralising the other honest public servants who would either be the colleagues or subordinates of the convicted person. If honest public servants are compelled to take orders from proclaimed corrupt officers on account of the suspension of the conviction, the fallout would be one of shaking the system itself. Hence it is necessary that the Court should not aid the public servant who stands convicted for corruption charges to hold public office until he is exonerated after conducting a judicial adjudication at the appellate or revisional level".

18. Though in Nagoor Meera''s case supra the Apex Court had observed that there may be no question of suspending the conduct which led to the conviction on a criminal charge, it can be seen from Rama Narang''s case and Sareen''s case that for the purpose of operation of Clause (a) to the second proviso to Article 311(2), in appropriate cases, by specifically applying the mind of the Court to the consequences which would otherwise follow the appellate/revisional Court is empowered to keep the order of conviction in abeyance. It is not enough that the operation of the judgment as such is stayed. Unless the appellate or revisional Court has addressed itself on the ramifications or consequences which would otherwise follow if the conviction is not suspended or kept in abeyance during the pendency of the appeal or revision, even the operation of the judgment as such will not save a convicted person from the mandatory consequences under the said proviso. Yet as held in Shakar Das''s case (supra) the consequence is not automatic. The authority concerned has to exercise the power in such circumstances to dismiss or remove a Government servant in a fair, just and reasonable manner -- the right to impose a penalty carries with it the duty to act justly, fairly and reasonably.

19. One ancillary question remains to be considered is whether in exercise of such power under the second proviso to Rule 18 of the Rules is it necessary to consult the Public Service Commission. There is no dispute that when the power is invoked under Rule 18(i) and (ii) the Commission shall be consulted. But it has to be seen that Rule 18(i) and (ii) deal with situations of conviction by a Criminal Court on a criminal charge followed by sentence of imprisonment or fine or with both. Those are also situations where there is no express exclusion of notice and hearing under Article 311(2). It is in such circumstances the first proviso under Rule 18 expressly provided that the Commission shall be consulted. Operation of second proviso to Rule 18 is in cases where notice and hearing under Article 311(2) are expressly excluded. The second proviso to Rule 18 is operated when there is a conviction of a Government servant on a criminal charge by a criminal court followed by sentence of imprisonment or fine or with both. It is provided therein that once the conviction

and sentence are set aside by the appellate or revisional Court, the Government servant is to be reinstated in service forthwith with all the benefits to which he would have been entitled had he been in service. Therefore, while operating the second proviso to Rule 18 of the Rules it is not necessary to consult the Public Service Commission.

20. To sum up:

(1) When a Government servant is convicted on a criminal charge by a Criminal Court and sentenced to imprisonment or fine or with both, the appointing authority shall invoke the second proviso to Rule 18 of the General Rules to dismiss or remove him service.

(2) The dismissal/removal in such circumstances is on the ground of the conduct which has led to the conviction on the criminal charge by the Criminal Court.

(3) However, dismissal or removal of a Government servant in exercise of the power under the second proviso to Rule 18 of the General Rules does not automatically follow a conviction on a criminal charge by a criminal court followed by sentence of imprisonment or fine or with both.

(4) Since the dismissal or removal is thus on the ground of conduct which led to the conviction on the criminal charge by the Criminal Court, the power of dismissal/ removal should be exercised fairly, justly and reasonably, but exparte.

(5) A Government servant proceeded against under the second proviso to Rule 18 for dismissal/removal from service on the ground of conduct which led to the conviction on a criminal charge by the Criminal Court is not entitled to notice and hearing.

(6) It is not necessary to consult the Public Service Commission while dismissing/removing a Government servant on the ground of the conduct which led to his conviction on a criminal charge by the Criminal Court.

(7) Merely because there is a general order of stay of operation of the judgment in a criminal case in which there is conviction of a Government servant on a criminal charge by a Criminal Court followed by sentence of imprisonment or fine or with both, there is no escape from the operation of the second proviso to Rule 18, unless the appellate or revisional Court has made a specific reference to the consequences which would otherwise follow if the conviction is stayed.

(8) In case in an appeal or revision the Court on a specific request regarding the ramifications which would follow if the conviction is not suspended and if the Court applying its mind to the consequences has stayed the conviction apart from sentence, then the Government servant shall not be dismissed or removed from service under the second proviso to Rule 18.

(9) Where conviction is on summary trial for petty offences and where the sentence is for a fine upto Rs.2,000/-, the second proviso to Rule 18 shall not be invoked for dismissing or removing the Government servant.

21. Coming to the facts of the case in W.P.(C) No. 15991/04 in the case of Sudheer the Appellate Court, after specifically referring to Rama Narang ''s case and Sareen ''s case, has applied its mind on the consequences that would follow if the conviction is not suspended and passed an order suspending the order of conviction as per Ext.P2. As per Ext.Pl there is an order of suspension of sentence also. Therefore, the respondents should have desisted from invoking the second proviso to Rule 18 of the General Rules. Ext.P6 order is hence quashed. There will be a direction to the respondents to forthwith reinstate the petitioner therein. Further proceedings in the matter shall be taken only subject to the decision in the Criminal Appeal.

22. In the case of the petitioner Chandrasekharan -- in W.P.(C) No.17381/2004 it is seen that there is no stay of conviction by the Appellate Court. There is only stay of operation of sentence. It is also seen from Ext.P3 order that the appointing authority has applied his mind on the relevant aspects and has passed a just, fair and reasonable order, taking note of the conduct which led to the conviction in the criminal case followed by the sentence, though there is a wrong reference to the statute in the impugned order. Therefore, it is not necessary to interfere with the order. However, I make it clear that neither the impugned Ext.P3 order nor this judgment will stand in the way of the petitioner therein approaching the Appellate Court by way of a specific request u/s 389(1) of the Criminal Procedure Code since such an attempt has not been made by the petitioner.

The Writ Petitions are ordered accordingly.