2025:KER:5997

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

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THE HONOURABLE MR.JUSTICE P. KRISHNA KUMAR

WEDNESDAY, THE 29TH DAY OF JANUARY 2025 / 9TH MAGHA, 1946

OP(KAT) NO. 439 OF 2020

AGAINST THE ORDER DATED 06.05.2020 IN TA NO.471 OF 2014 OF KERALA ADMINISTRATIVE TRIBUNAL, THIRUVANANTHAPURAM

PETITIONER/APPLICANT:

P.N.SAJI,(FORMER SENIOR GRADE ASSISTANT, KERALA PUBLIC SERVICE COMMISSION, THIRUVANANTHAPURAM),PUTHENPARAMBIL HOUSE, MANNAMKANDAM P.O., ADIMALY-685561.

BY ADVS.
A.JAYASANKAR
MANU GOVIND

RESPONDENT/RESPONDENT:

KERALA PUBLIC SERVICE COMMISSION, REPRESENTED BY ITS SECRETARY, OFFICE OF THE KERALA PUBLIC SERVICE COMMISSION, PATTOM, THIRUVANANTHAPURAM-695004.

BY ADV SHRI.P.C.SASIDHARAN, SC, KPSC

THIS OP KERALA ADMINISTRATIVE TRIBUNAL HAVING COME UP FOR HEARING ON 13.12.2024, THE COURT ON 29.01.2025 DELIVERED THE FOLLOWING:

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CR

JUDGMENT

P.Krishna Kumar, J.

A disciplinary proceeding was initiated against the petitioner, an Assistant Grade II, in the service of the Kerala Public Service Commission while he was working on deputation in the Kerala State Beverages Corporation (KSBC). The allegation against him was that he had misappropriated Rs.2,26,335/- while working in a retail shop of KSBC at Bison Valley in Idukki District by falsifying and manipulating the sales records. After the formal enquiry, he was found guilty and was awarded with a punishment of dismissal from service. Against the order of dismissal, he approached the Kerala Administrative Tribunal, but it evoked no positive result, hence this original petition.

2. On 24/04/2009, when an inspection was

conducted in the retail shop of the petitioner, it was found that the petitioner did not remit Rs.5,000/- from the sale proceeds of 22.04.2009, and it was reported to the parent department. The KSBC further decided to take the stock in view of the above disparity. When the stock was inspected by the audit team, it was found that there were several short remittances on various days totalling Rs.2,26,335/-. Thereafter, on 17/07/2009, the Managing Director of KSBC reported to the respondent that the petitioner had misappropriated Rs.2,26,335/- from the proceeds of sale from the retail shop by falsifying the records. Based on the said report, the petitioner was repatriated to the parent department and placed under immediate suspension. A criminal case was also registered against him in Rajakkad police station for the offence punishable under Sections 409, 468 and 471 of the Indian Penal Code. It is also alleged that the petitioner had been absconding for some time,

and later, he was arrested and remanded to prison. These are the allegations upon which the disciplinary action was initiated against the petitioner.

3. On 22.06.2021, the petitioner was served with Ext.P1 charge memo. The petitioner submitted Ext.P2 reply to the charge memo on 8.7.2011 by contending that he was innocent of the allegations levelled against him and that everything was the brainwork of the Warehouse Manager of the KSBC and DAT staff to tarnish his reputation. A Joint Secretary of the Kerala Public Service Commission was appointed as the Enquiry Officer and he conducted a formal enquiry into the charges levelled against the petitioner. He submitted Ext.P3(a) enquiry report on 01.08.2011, finding the petitioner guilty of the charges. On 10/08/2011, the respondent issued a show-cause notice to the petitioner, calling upon him to explain why he should not be imposed with a punishment of dismissal. The

petitioner submitted Exts.P4 and P5 replies to the show-cause notice on 25/08/2011 and 29/08/2011, respectively, denying all allegations against him. On 12/10/2011, the respondent issued Ext.P6 order imposing the punishment of dismissal against the petitioner, with effect from 3/8/2011. Though the petitioner submitted an application for review of the said order by raising various contentions, the respondent reiterated its former decision, as per Ext.P8 order dated 18/02/2012.

4. Heard the learned counsel appearing for the petitioner and the learned Standing Counsel for the respondent.

5. The petitioner challenges the disciplinary proceedings on the following grounds:

The entire disciplinary action was vitiated for error of law and violation of principles of natural justice, as the charge memo and the memorandum of allegations are vague and imprecise. The charge memo contains only bald allegations, and the details of

misappropriation are not mentioned either in it or in the memorandum of allegations. The charge memo was issued on 22/06/2011 and an enquiry officer was appointed on 24/06/2011, even without waiting for the explanation from the petitioner against the charge memo. The entire enquiry proceedings were finished in a single day by the enquiry officer and he flouted all the mandatory procedural requirements while proceeding with the enquiry. The petitioner submitted an application for engaging a lawyer and also for getting copies of the documents which might be relied on in the enquiry, but the enquiry officer proceeded with the enquiry without allowing the said application. The statement of the petitioner was recorded first and only then the Manager of the KSBC was examined. The name and whereabouts of the witness who was examined during the enquiry and the particulars of the documents which were relied on in the enquiry were not made known to the petitioner. The Disciplinary Authority accepted the enquiry

report without seeking any explanation from the petitioner and then they straightaway issued Ext.P3 show-cause notice proposing the punishment. There was no opportunity of hearing. The petitioner further alleges that the entire inquiry process was conducted with an ugly haste, and thereby, the petitioner was denied a reasonable opportunity to disprove the allegations.

6. As the enquiry proceedings are assailed by the petitioner on account of the anomalies or lapses pointed out above, it is necessary to analyse the impact of such lapses or irregularities on the validity of the enquiry and the punishment imposed by the respondent on its basis.

7. Let us now consider the effect of non-compliance with the provisions regulating disciplinary enquiry in the light of settled legal principles. After considering nearly two dozen decisions of the Apex Court, as well as the English law in this regard, the Honourable Supreme Court in

State Bank of Patiala and Others v. S.K.Sharma [(1996) 3 SCC 364] held that it would not be correct to say that for any and every violation of a facet of natural justice or the statutory rule governing the disciplinary enquiry, the disciplinary proceedings can altogether be set aside. The test to be applied must be whether it is a case of "no hearing" (i.e. no notice, no opportunity and no hearing), or only one of not affording a "proper opportunity" (i.e. absence of adequate or full hearing). The court distinguished the effect of violation of a procedural rule governing the enquiry, in juxtaposition to violation of substantive provisions. It is also held that the complaint as to violation of such principles should be examined on the touchstone of prejudice i.e. the test should be whether the delinquent officer had or did not have a fair hearing, if all things taken together. The ratio of this decision has been followed by the Apex Court and this court in several

other decisions including in **Union of India v. Dilip Paul** [2023 LiveLaw (SC) 959], **Chairman, State Bank of India and Another v. M. J. James** [2022 (2) SCC 301] and **Radhadevi v. District Collector, Thrissur** [2021(5) KHC 289].

8. It is singularly important to understand the factual and legal issues involved in ***State Bank of Patiala*** and how the court answered those issues, applying the above legal principles, as they are significantly similar to the issues raised in the present case.

9. The respondent in the said case was a Manager of Patiala Bank during the relevant time and he did not deposit a sum of Rs.10,000/- handed over to him by one customer and on enquiry it was found that he utilized the sum for approximately three months for his own advantage and later he remitted the amount in the account of the customer. On enquiry he was found guilty and accordingly, he was removed from service. His challenge against the

order of removal was upheld by the civil court on the ground that "the list of witnesses and list of documents were not supplied along with charge sheet and the failure to supply the same violates Regulation 68(b)(iii) of the State Bank of Patiala (Officers') Service Regulations, 1979" (paragraph 6). During the course of enquiry the presenting officer filed a provisional list of documents/witnesses and though a copy of the list was supplied to the respondent, copies of certain documents were not supplied. However, he was advised to examine and take note of the said documents only half an hour before the commencement of the enquiry proceedings, whereas the said Rule provides that it should be supplied at least three days before the commencement of the enquiry. The decision of the civil court was upheld by the appellate court as well as by the High Court. In the said factual background, the Supreme Court noted in paragraph 9 that "*The issue boils down to this: whether the*

failure to literally comply with sub-clause (iii) of clause (b) of Regulation 68(ii)(x) vitiates the enquiry altogether or whether it can be held in the circumstances that there has been a substantial compliance with the said sub-clause and that on that account, the enquiry and the punishment awarded cannot be said to have been vitiated." The Apex Court further noted that though there is no provision in the State Bank of Patiala (Officers') Service Regulations similar to Section 465 of the Code of Criminal Procedure (Cr.P.C), it does not mean that every violation of the Regulations renders the enquiry and the punishment void and the test to be applied in such cases should be one of 'prejudice' which is explained in detail in the later part of the judgment.

10. The court further considered the decision of the Privy Council in **M.Vasudevan Pillai v. City Council of Singapore** [(1968) 1 WLR 1278) wherein it was held that unless the conditions of service are

governed by a statute or statutory rules, the principles of natural justice have no place in a dispute between the master and the servant. The Supreme Court then held that the procedural provisions governing the disciplinary enquiries, whether provided by rules made under the proviso to Article 309 of the Constitution or under a statute, are nothing but elaboration of principles of natural justice and their several facets and, thus, it is necessary to consider whether the violation of rules/regulations/statutory provisions incorporating such facets of natural justice is void or not. The court elaborately discussed various English decisions as well as its own decisions, and in particular the ratio of the Constitution Bench in **Managing Director, ECIL v. B.Karunakar [(1993) (4) SCC 727].**

11. The Apex Court further opined that the object of principles of natural justice, which are now understood as synonymous with the obligation to

provide a fair hearing, is to ensure that justice is done and that there is no failure of justice. Finally, the court further followed the decision of the Supreme Court in **Krishnan Lal v. State of J&K [(1994) 4 SCC 422]** wherein the question under consideration was whether the dismissal of the employee without supplying him a copy of the enquiry report, which was mandatory as per the applicable rules, is valid. In paragraph 28 the Court delineated that the question of non-compliance of principles of natural justice should be assessed from the standpoint of applying the test of prejudice. There may be situations where observance of requirements of prior notice/hearing may defeat the very proceeding, and there may be cases where the rule of post-decisional hearing as a sufficient compliance with natural justice, as evolved in the case like **Liberty Oil Mills v. Union of India [(1984 (3) SCC 465]**, the court opined. As noted above, the court further declared that the most important test

is to consider whether the violation is of a procedural rule or of a substantive provision. The court further held that the provision prescribing competence of the authority who can impose the punishment, etc., will be a substantive provision, and thus, if the complaint is about the violation of such a provision, the theory of substantial compliance or the test of prejudice would not be applicable, as the proceeding will be null and void. If the violation is in respect of a procedural character, the court should consider whether it is of a mandatory character or not. Even if it is of a mandatory character, violation of it will not nullify the proceedings if the delinquent by conduct or otherwise waived his right. If it is not of a mandatory character, substantial compliance is sufficient. If such a provision is violated, the disciplinary action can be set aside only if the violation has occasioned prejudice to the employee.

12. The Supreme Court further arrived at its

conclusion on the question of the effect of non-supply of copies of documents after considering the decision in **Krishnan Lal**'s case (supra) and concluded that no prejudice has resulted to the delinquent owing to the non-supply of documents. The court set aside the findings of the High Court and restored the punishment. The court held that setting aside the punishment and the entire enquiry on the ground of violation of sub-clause (*iii*) of the said rule would be a negation of justice. Justice means justice between both parties and the interests of justice equally demand that the guilty be punished and that technicalities and irregularities which do not occasion failure of justice are not allowed to defeat the ends of justice, it is held. The court summarised the principles emerging from the discussion made by it, in paragraph 33. The part of it which is relevant in the present context is as follows:

> "(1) An order passed imposing a punishment on an employee consequent upon a disciplinary/

departmental enquiry in violation of the rules/ regulations/statutory provisions governing such enquiries should not be set aside automatically. The Court or the Tribunal should enquire whether (*a*) the provision violated is of a substantive nature or (*b*) whether it is procedural in character.

(2) A substantive provision has *normally* to be complied with as explained herein before and the theory of substantial compliance or the test of prejudice would not be applicable in such a case.

(3) In the case of violation of a procedural provision, the position is this: Procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer/employee. They are, generally speaking, conceived in his interest.Violation of any and every procedural provision cannot be said to automatically vitiate the enquiry held or order passed. Except cases falling under — "no notice", "no opportunity" and "no hearing" categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice, viz., whether such violation has prejudiced the delinquent officer/employee in defending himself properly and effectively. If it is found that he has been so prejudiced, appropriate orders have to be made to repair

and remedy the prejudice including setting aside the enquiry and/or the order of punishment. If no prejudice is established to have resulted therefrom, it is obvious, no interference is called for. xxxxxxx

(4)(*a*) In the case of a procedural provision which is not of a mandatory character, the complaint of violation has to be examined from the standpoint of substantial compliance. Be that as it may, the order passed in violation of such a provision can be set aside only where such violation has occasioned prejudice to the delinquent employee.

(*b*) In the case of violation of a procedural provision, which is of a mandatory character, it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in public interest. If it is found to be the former, then it must be seen whether the delinquent officer has waived the said requirement, either expressly or by his conduct. If he is found to have waived it, then the order of punishment cannot be set aside on the ground of the said violation. If, on the other hand, it is found that the delinquent officer/employee has not waived it *or* that the provision could not be waived by him, then the Court or Tribunal should make appropriate directions (include the setting

> aside of the order of punishment), keeping in mind the approach adopted by the Constitution Bench in *B. Karunakar.* The ultimate test is always the same, viz., test of prejudice or the test of fair hearing, as it may be called.
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> (7) There may be situations where the interests of State or public interest may call for a curtailing of the rule of audi alteram partem. In such situations, the Court may have to balance public/State interest with the requirement of natural justice and arrive at an appropriate decision."

13. Let us now decide the issues in the light of the above principles after enumerating the irregularities and illegalities pointed out by the learned counsel for the petitioner, in respect of the impugned disciplinary action. (a) The charge memo does not contain meticulous details of the transactions leading to the inference of malpractice by the petitioner. (b) The enquiry officer was appointed even before considering the explanation of the petitioner against the charge memo. (c) The

petitioner was not supplied with the copy of materials relied on for framing the charge and some of them were given only on the date of the enquiry, when he made a specific request and was not permitted to engage a lawyer. (d) The name of the witness who was examined during the enquiry was revealed to the petitioner only on the date of the enquiry. (e) The statement of the petitioner was recorded before examining the Manager, KSBC and the entire evidence was recorded on a single day. (f) After the submission of the enquiry report, the Disciplinary Authority straight away issued a show-cause notice of the proposed punishment of dismissal, before considering the objection of the petitioner on the enquiry report or giving him an opportunity of a hearing. In view of the law laid down by the Apex Court as above, are these irregularities, in themselves, if actually found existing, vitiate the entire proceedings?

14. Before answering the above, it is

necessary to examine the relevant provisions of the Kerala Civil Services (Classification, Control & Appeal) Rules, 1960 ('KCS(CCA)Rules', for short) concerning the disputes raised by the petitioner to decide whether the abovesaid issues, if found existing, are violative of its provisions.

15. Rule 15 of the KCS(CCA) Rules is titled as the "procedure for imposing major penalties". Rule 15(2) provides that the Disciplinary Authority or such other authorities empowered on this behalf is satisfied that there is a *prima facie* case of taking action against a Government servant, such authority shall frame a definite charge or charges which shall be communicated to the Government servant together with a statement of the allegations on which each charge is based and of any other circumstances which it is proposed to take into consideration in passing orders on the case. The accused Government servant shall be required to submit within a reasonable time a written statement of his defence. The Government

servant may on his request be permitted to peruse or take extracts from the records pertaining to the case for the purpose of preparing his written statement. After the written statement is received, if the authority is satisfied that a formal inquiry should be held into the conduct of the Government servant, it shall forward the record of the case to the authority or officer referred to in Clause (b) of Rule 15(2) and order that a formal enquiry may be conducted. Sub-Rule (b) of Rule 15(2) gives an outline as to the officers or the authority that can conduct a formal enquiry.

16. Sub-Rule(6) of Rule 15 provides that the Disciplinary Authority may nominate a person to present a case in support of the charges before the Inquiring Authority and the Government servant may present his case with the assistance of any other Government servant, but he may not be permitted to engage a legal practitioner for the purpose unless the person nominated by the Disciplinary Authority

as aforesaid is a legal practitioner.

17. Sub-Rule(7) of Rule 15 states that the Inquiring Authority shall, in the course of the Inquiry, consider such documentary evidence and take such oral evidence as may be relevant or material in regard to the charges and the Government servant shall be entitled to cross-examine the witnesses examined in support of the charges and to give evidence in person and to examine such witnesses as may be produced in his defence. A Note appended to Sub-Rule(7) states that if the Inquiring Authority proposes to rely on the oral evidence of any witness, the authority should examine such witness and give an opportunity to the accused Government servant to cross-examine the witness. Sub-Rule (8) of Rule 15 states that the Government servant may present a list of witnesses to the Inquiring Authority.

18. Sub-Rule (9) of Rule 15 mandates that at the conclusion of the inquiry, a report of the

inquiry shall be prepared after recording the findings of the Inquiring Authority on each of the charges, together with the reasons thereof. The details of the matters to be incorporated in the record of the inquiry are narrated in Sub-Rule (10). Sub-Rule (11) states that the Disciplinary Authority shall consider the record of the inquiry and record its findings on each charge and it may depart from the findings of the Inquiring Authority and record its provisional findings on each charge with reasons thereof. Sub-Rule(12) declares that if the Disciplinary Authority is of the opinion that any of the penalties specified in items (v) to (ix) of rule 11(1) should be imposed, it shall furnish the Government servant a copy of the report of the Inquiring Authority and submit all its findings together with brief reasons and give him a notice stating the action proposed to be taken in regard to him and calling upon him to submit within a reasonable time such representation as he may wish

to make against the proposed action. Sub-Rule (13) provides that if the Disciplinary Authority having regard to its findings is of the opinion that any of the penalties specified in items (i) to (iv) of rule 11(1) should be imposed, it shall pass appropriate orders in the case. Sub-Rule (14) states that the orders passed by the Disciplinary Authority shall be communicated to the Government servant, who shall also be supplied with a copy of the report of the Inquiring Authority unless they have already been supplied to him. As per Sub-Rule 15, the procedure referred to above shall be concluded as expeditiously as the circumstances of the case may permit, particularly one against an officer under suspension.

19. Apart from the above Rules, the Government has issued a Manual for Disciplinary Proceedings, providing a detailed procedure to be followed by the appropriate authority during each stage of the proceedings against an employee. However, the

provisions of the Manual are only general guidelines for the officials to ensure due compliance with the provisions of the KCS(CCA) Rules, and thus, they are not adverted to here.

20. The discussion made in the first part of this judgment makes it clear that an order imposing punishment on an employee consequent upon a disciplinary enquiry should not be set aside lightly by finding that there are violations of rules regulating the disciplinary proceedings. The primary duty cast upon the Administrative Tribunal or the Court which is called upon to address such issues is to analyse the matter on the basis of the test of prejudice.

21. Looking at this backdrop, the challenge regarding the imprecise nature of the charge memo can be considered at first. As noted above, in ***State Bank of Patiala*** the Apex Court stated that even if a provision similar to Section 465 of the Cr.P.C. is not incorporated in the rules governing the

disciplinary enquiry, it does not mean that every violation of the rules makes the enquiry and the punishment, void. How the judicial proceedings of a criminal court are saved from mere error or irregularity (except in cases where it resulted in failure of justice or prejudice to the accused), the disciplinary actions are also unassailable for mere error or irregularities, unless it resulted in prejudice/failure of justice to the delinquent. Interestingly, Section 464 of Cr.P.C. states that no finding, sentence or order by a court of competent jurisdiction shall be invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge unless a failure of justice has occasioned thereby. In other words, even in a criminal case where the trial was conducted without framing a charge at all or when the charge framed suffers some error, omission or irregularity, the higher court, while considering the validity of the finding, shall not disturb the

finding, unless the said omission or irregularity resulted in failure of justice. Apart from that, Section 212 of Cr.P.C., which prescribes the details to be contained in a charge, provides that when the accused is charged with dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of the offence and the dates between which it was done, without specifying particular items or exact dates.

22. In this case, the charge memo is indeed not happily worded. The department could have provided more details. Instead of making a general statement that the petitioner misappropriated Rs.2,26,335/- *during the period he worked in the said retail shop,* the exact period could have been stated. Nevertheless, the charge memo provides reasonable details regarding the alleged misappropriation, which are sufficient to defend the disciplinary proceedings. It is to be remembered that the prime allegation against the petitioner is

that he manipulated sales registers, bank remittance challan and stock records while he was working as the shop-in-charge of the Beverages outlet and thereby misappropriated Rs.2,26,335/- and that on the basis of a complaint dated 17/07/2009 of the Warehouse Manager, Thodupuzha in that matter, Rajakad police has registered a criminal case against him for the offence punishable under Sections 408, 468 and 471 of the Indian Penal Code. We can find all the above details in the charge memo. Upon perusing the case records pertaining to the disciplinary enquiry, we find that the charge given to him is sufficient enough to defend the case in a proper and effective manner and there occurred no prejudice or failure of justice on account of the insufficiency in the charge memo.

23. As per the law settled in ***State Bank of Patiala***, if a substantial provision of the disciplinary rule is not complied with, the test of prejudice need not be applied in that case.

Nevertheless, the Apex court has clearly outlined the circumstances in which a provision can be stated as a substantive one; it is generally in respect of the competency of the Disciplinary Authority. In such cases the inquiry has to be set at naught without considering the question whether the delinquent suffered any prejudice owing to the irregularity. There is no challenge in this case as to the competency of the Disciplinary Authority and hence what remains now is to consider whether the irregularities pointed out in this case are coming within the next category of eventualities adumbrated in ***State Bank of Patiala*** viz., violation of procedural provisions which are meant to ensure compliance of the principles of natural justice. The challenge raised in relation to the non-supply of copies of materials relied on during the enquiry, the non-disclosure of the name of the witness examined, the inadequacy of opportunity to adduce evidence by the petitioner and the reverse order in

which the examination took place, etc. are related to the procedural provisions in the KCS (CCA) Rules ensuring the principles of natural justice and hence it requires careful examination.

24. The enquiry file reveals that the petitioner made a request to the enquiry officer on 26/07/2011 to supply him copies of the relevant documents, on the basis of which charges are framed against him, as well as the details of the prosecution witnesses. He also sought permission to seek the help of a lawyer to examine the prosecution witnesses. In the enquiry report, the enquiry officer recorded that his request for permission to seek the assistance of a lawyer was rejected as the rule does not permit the same. It is also stated that the petitioner was given a copy of the letter dated 17/07/2009 of the Managing Director of the KSBC, on which the charge was framed. The enquiry report further reveals that he was also intimated that KSBC has posted Sri.A.K.Subramanian, the

Manager of Warehouse, Chalakudy as the prosecution witness. The petitioner has not disputed the above facts in this original petition. Curiously, when we examined the reply statement furnished by the petitioner to the Secretary of the respondent on 25/08/2011 in response to the notice dated 10/08/2011 proposing punishment, it is evident that he was given an opportunity to peruse the documents so as to enable him to cross-examine the witness. He stated that:

> "I further submitted that though I have made a written request for serving copies of the document relied on by the department, it was not served to him in advance. **I was given the opportunity to peruse the documents so as to enable me to cross-examine the witness**. No witness list was given to me in advance."
>
> (emphasis added)

From the above, it is obvious that this is not a case where the employee was not served with copies of the documents relied on by the department for establishing the charge against him. The grievance

of the employee is only that he was not supplied with the documents in advance. In that circumstance, as observed by the Honourable Supreme Court in ***State Bank of Patiala***, the question is not in respect of a case falling under the category of *"no notice/ no opportunity/ no hearing"*, but whether the supply of documents for perusal only on the date of enquiry caused any prejudice to the petitioner in setting up a proper defence.

25. When we examined the enquiry file, we found that the petitioner had not made any request to postpone the examination of the witness to another day, for want of sufficient time to understand the documents. It is true that in the notice issued by the enquiry officer calling upon the petitioner to appear before him for the enquiry on 26/07/2011 at 11 a.m., it was stated as follows:

> "You are also requested to submit in any defence document or present witness from your side for defence of the charges. You can also peruse the documents marked as prosecution documents and examine the prosecution witness. No

> request for change of date will be entertained, as the time limit set for finalising the case by the Honourable High Court is fast approaching."

Referring to this, the petitioner may argue that he did not request to postpone the examination because of the specific interdiction engrafted in the said notice. Nevertheless, he could have requested to pass over the matter for a while to enable him to take note of the records and equip himself for the cross-examination, if it was actually necessary. It is indeed correct that the examination of the witness was over in one day, but at the same time, the petitioner has neither made any effort to get it continued to any other day nor did he raise any complaint that he was not in a position to make his defence properly or to adduce any evidence to contradict the documents produced by the department. The petitioner also did not furnish a witness list on that day or in the following days. On the contrary, he produced certain documents purportedly

to prove his contention that he remitted back Rs.5,000/- when the shortfall in the payment was noted during the inspection on 24/04/2009. (Page No. 381 to 383 of the enquiry file). The petitioner was also examined on that day.

26. We also perused the cross-examination made by the petitioner in respect of the witness examined by the department. The only aspect he raised during cross-examination was that he was not informed in writing as to the inspection made by the audit team on 02/07/2009 and also that he repaid Rs.5000/- the next day itself, which was found as a short remittance on 24/04/2009.

27. Even when we analysed the defence raised by him in the reply furnished against the notice proposing punishment, which was submitted after taking sufficient time, we could not find any materials suggesting that the petitioner suffered any prejudice because of the alleged irregularities pointed out by the learned counsel for the

petitioner. The petitioner gave a detailed reply running to three pages, wherein he alleged that the enquiry findings are false and incorrect. Apart from doubting the veracity of the documents produced during the enquiry on the ground that they are not authenticated ones, his contention was only that the district audit team used to visit the shop and inspect the registers every month and hence the enquiry officer ought to have found that there was no chance for any malpractice. All these matters strongly indicate that the petitioner was fairly able to defend his case to the extent he narrated in his reply and the closure of evidence on 26/07/2011 did not cause any prejudice to him. Thus, there is no reason to hold that he was denied the opportunity to adduce evidence owing to any of the irregularities pointed out.

28. Another challenge raised was on the ground that the petitioner was examined first and the witness of the department was examined only

after that. No doubt, the above procedure is irregular and the enquiry officer ought not to have done the same. However, here also, the test to be applied is whether it caused any prejudice to the petitioner. If the petitioner was permitted to give evidence only after the examination of the witness of the department, he could have contradicted the evidence of the department with his own version or documents. This is the advantage, had he been examined later. But in this case, the enquiry findings are entirely based on the matters revealed during the inspection of records, and not through the oral testimony of the witness. Apart from that, the enquiry officer re-examined the petitioner after the cross-examination of Sri. A.K. Subramanian, the Manager of WareHouse, Chalakudy, the sole witness to prove the charge. This is evident from page No.372 of the enquiry file. Then also, the petitioner did not state anything against the statement made by the witness. As stated above, the petitioner was asked

by the enquiry officer to present witnesses if he wished to examine them from his side, as per his letter dated 15/07/2011. The petitioner did not do so. He has no case even now that there were any materials to discredit the matters revealed through the enquiry. In short, none of the said irregularities have caused any prejudice to the petitioner in raising his contentions or defending the enquiry properly and thus, there is no failure of justice on account of it.

29. Similarly, when we consider the entire situation, we find that the irregularity of appointing the enquiry officer even before considering the written statement of the petitioner falls within the category of procedural irregularity, not causing any prejudice to the petitioner and hence that requires no elaboration.

30. However, the last one among them, i.e., the Disciplinary Authority straight away issued a show-cause notice of the proposed punishment of

dismissal, before affording him an opportunity to contend why the findings in the enquiry report should not be accepted by the disciplinary authority assumes serious relevance, in the light of the law settled by the Constitution Bench of the Hon'ble Supreme Court in **Managing Director, ECIL v. D.Karunakar** (supra).

31. When it was noticed that there was a conflict in the two decisions of the Apex Court, viz., **Kailash Chander Asthana v. State of U. P.** [(1988) 3 SCC 600] and **Union of India v. Mohd. Ramzan Khan** [(1991) 1 SCC 588], both delivered by the Benches of three Judges, the matter was placed before the Constitution Bench and accordingly the said decision was passed. The basic question of law considered by the Constitution Bench was whether the report of the Inquiry Officer, who is appointed by the disciplinary authority to hold an inquiry into the charges against the delinquent employee, is required to be furnished to the employee to enable

him to make proper representation to the disciplinary authority before it arrives at its own finding with regard to the guilt of the employee and the punishment, if any, to be awarded to him. The court observed that the provisions of clause (2) of Art.311 were amended by the Constitution (42nd Amendment) Act of 1976, to add a clause that "*it shall not be necessary to give such person any opportunity of making representation on the penalty proposed*". The court found that, a denial of the copy of the report of the Inquiry Officer before the disciplinary authority takes its decision on the charges is a denial of a reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice. It was also found that this requirement is part of the opportunity of hearing at the first stage of the enquiry and thus the 42nd Amendment does not affect it. However, it was further held that the Court/Tribunal should not mechanically set

aside the order of punishment on the ground that the report was not furnished at the previous stage. It is beneficial to quote the relevant findings hereunder:

> "Hence, in all cases where the Inquiry Officer's report is not furnished to the delinquent employee in the disciplinary proceedings, the courts and Tribunals should cause the copy of the report to be furnished to the aggrieved employee if he has not already secured it before coming to the Court/Tribunal, and give the employee an opportunity to show how his or her case was prejudiced because of the non-supply of the report. If after hearing the parties, the Court/ Tribunal comes to the conclusion that the non-supply of the report would have made no difference to the ultimate findings and the punishment given, the Court/Tribunal should not interfere with the order of punishment."

The court made the above observation in a case where the enquiry report was not at all supplied to the delinquent. However, the ratio of the above decision viz., if the court finds that the denial of opportunity to challenge the findings in the enquiry report would have made no difference to the ultimate

findings and the punishment given, it should not interfere with the disciplinary action, is equally applicable in the present case. In this case, the enquiry report was furnished to the petitioner along with the notice dated 10.08.2011 on the proposed punishment (Page 397 of the file). Then, the petitioner furnished an elaborate reply raising various challenges against the findings in the enquiry report and pointed out why the report ought not to have been accepted. The punishment was imposed after considering the situation fairly. The respondent specifically noted that the misappropriation happened not on a single day. The enquiry officer found that non-payment of considerably large amounts like Rs.46,525/- on one day and Rs. 32,900/- on another day and amounts like Rs. 20,000/- each, on certain other days, were proved through the sale register and bank remittance challans. Above all, the petitioner has admitted the non-remittance of Rs.5000/-.

32. It is an accepted principle of law that in a disciplinary enquiry, the standard of proof is the preponderance of probabilities and not proof beyond reasonable doubt, and the court should interfere with the enquiry finding only when it is perverse or based on no evidence at all [see **Union of India v. Dileep Paul** (2023 LiveLaw (SC) 959]. After perusing all those materials in the light of the written explanation of the petitioner, we are not persuaded to hold that if the petitioner had been given an opportunity before accepting the enquiry report, it would have made any difference to the ultimate findings and the punishment imposed. As the petitioner was already supplied with a copy of the said report and the written explanation furnished by him against it is available before this court, it is not necessary to give the petitioner an opportunity to show how he suffered prejudice because of the said irregularity. Such a course is mandatory, as observed in **D.Karunakar**'s case (supra), if the copy

was not supplied at all.

33. In short, after the 42nd Amendment to the Constitution and the consequential changes introduced to Article 311(2), it is not necessary to give an opportunity of hearing before imposing the punishment. Nevertheless, the delinquent is entitled to make a representation against the enquiry report, before the report of the enquiry officer is accepted by the disciplinary authority. If the disciplinary authority, rather than providing the opportunity to respond before accepting the enquiry officer's findings, proceeds directly to issue a show-cause notice on the proposed punishment after serving a copy of the inquiry report, and subsequently imposes a punishment, the procedure is irregular. However, the Court or Tribunal should not set aside the punishment solely on this ground. Instead, it should examine whether the irregular procedure actually caused prejudice to the employee, considering the specific facts and circumstances of the case. In

assessing prejudice, the task of the court is significantly eased when the employee, despite not being heard by the disciplinary authority before accepting the enquiry report, has nonetheless challenged the findings in the enquiry report and articulated reasons why the report ought not to have been accepted, when he was called upon to show cause about the proposed punishment. If it is evident that providing the opportunity would not have altered the outcome, no interference is warranted.

34. Let us now conclude. When reviewing disciplinary actions against employees, Courts or Tribunals should consider whether violations of rules or regulations are substantive or procedural. Violation of substantive provisions, such as those related to the competency of the authority imposing punishment, typically requires strict compliance, and thus, the test of prejudice has no role. Procedural violations, on the other hand, should be examined to determine whether they prejudiced the

employee's ability to defend himself. If prejudice is found, the order has to be set aside. Otherwise, no interference is necessary. Additionally, courts must consider whether the procedural provisions are mandatory or directory. Even if the provisions are mandatory, if the employee has waived any requirements of the provision by conduct, the disciplinary action will not become null and void. Nevertheless, an employee can waive the requirement under a mandatory procedure only if it is aimed to benefit him. If the procedural provision serves a public purpose, the question of waiver is out of place. The ultimate test is whether the employee received a fair hearing.

35. A fair hearing necessitates that the accused be informed of the charges and supporting allegations, giving him a chance to deny guilt and establish innocence. He must also be permitted to defend himself by cross-examining opposing witnesses and presenting his own testimony or witnesses.

36. Furthermore, at the conclusion of the enquiry, the disciplinary authority must provide the delinquent employee with a copy of the enquiry report if the authority and the inquiry officer are not the same, before imposing punishment by accepting the report. This enables the employee to respond to the findings in the report. As the disciplinary authority/employer has the discretion to depart from the inquiry officer's opinion, this opportunity is crucial for the employee to present his case before the employer. If the disciplinary authority omits this step, the procedure is irregular, even if an opportunity was given at the stage of imposing the punishment. However, the court should intervene only if the irregularity caused actual prejudice to the employee and not simply because of the procedural lapse.

37. While disciplinary actions seriously affect the individual rights of the employee, if undue leniency is shown, it would compromise the essential

discipline required in the public service and ultimately undermine the very administrative system. The governing principles in disciplinary actions aim to strike a balance between two key objectives: affording the employees a fair opportunity to defend their innocence and ensuring that justice is served to the employer as well for maintaining discipline within the public service and the administrative systems.

38. It is to be remembered that this is a case where misappropriation of funds was detected on stock verification by the team of Kerala State Beverages Corporation, followed by an incident of non-remittance of Rs.5000/- by the petitioner. The petitioner has admitted non-remittance of Rs.5,000/-. When the shortage was detected by the audit team, he quickly remitted it. In disciplinary proceedings for misappropriation of funds, subsequent payment will not absolve the delinquent

of the misconduct, unless he proves that the omission was due to a bonafide mistake despite the exercise of due care and attention. The competent team of KSBC found a huge shortfall in the stock and they also detected manipulations in the registers. An officer in charge of a retail outlet, admittedly entrusted to deal with public money, cannot shirk his responsibility for a short remittance of Rs.2,26,335/-, which is proved through the records marked as Ext. PI to P-VI in the enquiry file, and in particular Ext. P-V sale register, and the P-VI stock register prepared by the Audit team, by raising some defects or irregularity in the proceedings. The Inquiring Authority and the Disciplinary Authority arrived at the conclusion of guilt on evaluating those records pertaining to the actual sale on the relevant dates and the remittance made in the bank by the petitioner on those dates and also based on the register prepared on verification of stock.

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39. Considering the gravity of the charges proved against him, the punishment of dismissal is certainly proportionate and commensurable to the wrong done by the petitioner. In view of the above discussion, we do not find any reason to interfere with the impugned order and the inquiry proceedings or the punishment imposed on the petitioner.

Therefore, the Original Petition is dismissed.

Sd/-

A.MUHAMED MUSTAQUE

JUDGE

Sd/-

P. KRISHNA KUMAR

JUDGE

sv

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APPENDIX OF OP(KAT) 439/2020

PETITIONER'S EXHIBITS

EXHIBIT P1	**TRUE COPY OF WRIT PETITION (TRANSFERRED APPLICATION NO.471/2014) FILED BEFORE THIS HONOURABLE COURT.**
EXHIBIT P1 (TA NO.471/2014)	**TRUE COPY OF THE MEMO OF CHARGES NO.SSI(1)351/2009 DATED 22.06.2011.**
EXHIBIT P2 (TA NO.471/2014)	**TRUE COPY OF THE EXPLANATION DATED 08.07.2011 SUBMITTED BY THE PETITIONER TO EXHIBIT P1.**
EXHIBIT P3 (TA NO.471/2014)	**TRUE COPY OF THE SHOW CAUSE NOTICE NO.SSI(1) 351/09 DATED 10.08.2011.**
EXHIBIT P3(A) (TA NO.471/2014)	**TRUE COPY OF THE ENQUIRY REPORT.**
EXHIBIT P4 (TA NO.471/2014)	**TRUE COPY OF THE REPLY DATED 25.08.2011 SUBMITTED BY THE PETITIONER TO EXHIBIT P3(A).**
EXHIBIT P5 (TA NO.471/2014)	**TRUE COPY OF THE REPLY DATED 29.08.2011 SUBMITTED BY THE PETITIONER.**
EXHIBIT P6 (TA NO.471/2014)	**TRUE COPY OF THE ORDER NO.SSI(1) 351/2009 DATED 12.10.2011.**
EXHIBIT P7 (TA NO.471/2014)	**TRUE COPY OF THE REVIEW PETITION DATED 08.11.2011 SUBMITTED BY THE PETITIONER TO THE COMMISSION.**
EXHIBIT P8 (TA NO.471/2014)	**TRUE COPY OF THE ORDER NO.SSI(1) 351/09 DATED 18.02.2012.**
EXHIBIT P2	**TRUE COPY OF THE COUNTER AFFIDAVIT FILED BY THE RESPONDENT.**

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EXHIBIT P3	**TRUE COPY OF THE ORDER DATED 06.05.2020 IN TA NO.471/2014 OF THE KERALA ADMINISTRATIVE TRIBUNAL, THIRUVANANTHAPURAM.**