IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MRS. JUSTICE SOPHY THOMAS

MONDAY, THE 10TH DAY OF APRIL 2023 / 20TH CHAITHRA, 1945

WA NO. 493 OF 2023

AGAINST THE JUDGMENT IN WP(C) 4611/2023 OF HIGH COURT OF KERALA

APPELLANT/PETITIONER:

MAHESH THAMPI
AGED 39 YEARS
S/O.THAMPI, UMBAKKATTU HOUSE, NATTASSERY,
S.H.MOUNT P.O., KOTTAYAM., PIN - 686001

BY ADVS.
C.S.MANILAL
S.NIDHEESH
KUNJAPPEASOW RAINGE

RESPONDENTS/RESPONDENTS:

1 **THE DEPUTY DIRECTOR OF EDUCATION**
PALACE ROAD KOTTAYAM, PIN - 686001

2 **THE DISTRICT EDUCATIONAL OFFICER,**
NSS BUILDING NEAR THIRUNAKKARA TEMPLE
KOTTAYAM,, PIN - 686001

3 **THE MANAGER**
S.N.D.P.HIGHER SECONDARY SCHOOL, KILIROOR,
S.N.ROAD, KANJIRAM P.O., KOTTAYAM, PIN – 686020

BY SR.G.P. SRI. A.J.VARGHESE

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 27.03.2023, THE COURT ON 10.04.2023 DELIVERED THE FOLLOWING:

C.R.

P.B.SURESH KUMAR & SOPHY THOMAS, JJ.

Writ Appeal No.493 of 2023

Dated this the 10th day of April, 2023

JUDGMENT

P.B.Suresh Kumar, J.

The question raised in this appeal is whether a teacher in an aided school governed by the Kerala Education Act (the Act) and the Kerala Education Rules (the KER), can be dismissed from service on the basis of his conviction in a criminal case, without following the procedures prescribed under Rules 65, 74 and 75 of Chapter XIVA KER.

2. The appellant was the petitioner in the writ petition from which the appeal arises. On his conviction in a criminal case, the appellant was dismissed from service without following the procedures prescribed in Rules 65, 74 and 75. The writ petition was instituted challenging the dismissal of the appellant on the ground that a teacher in an aided school governed by the Act and the KER cannot be dismissed from service, even on the basis of his conviction in a

criminal case, without following the procedures prescribed in Rules 65, 74 and 75. The learned Single Judge dismissed the writ petition at the admission stage itself, relegating the appellant to the alternative remedy available to him. The appellant is aggrieved by the said decision of the learned Single Judge.

3. As the writ petition was one instituted raising a pure question of law, we are of the view that the learned Single Judge ought to have entertained the writ petition and decided the question not only for the purpose of giving a quietus to the dispute, but also for setting a precedent for others to follow in identical situations, as the authorities under the Act before whom the appellant could approach for resolving the dispute are not legally trained to decide such questions. It is now settled that a judicially trained mind with the experience of deciding questions of law is a *sine qua non* for ensuring correctness in the decisions on pure questions of law [See **Madras Bar Assn. v. Union of India**, (2014) 10 SCC 1]. It is all the more so, as Judges are trained to look at things objectively, uninfluenced by consideration of policy or expediency and the authorities under the Act being only

officers exercising quasi-judicial functions, looks at things generally from the stand point of policy and expediency [See **M.P. Industries Ltd. v. Union of India**, (1966) 1 SCR 466].

4. Let us, therefore, resolve the dispute in this proceedings itself. The appellant was a drawing teacher in an aided school. He was suspended from service by the Manager of the School on 15.02.2020 on a serious allegation that he had shown to a girl child, obscene pictures while conducting classes. Although disciplinary proceedings were initiated against the appellant on the aforesaid charge later, the same was not continued and he was reinstated in service awaiting the decision of the court in the criminal case registered against him on the very same allegation. On 16.12.2022, in terms of Ext.P5 judgment, the criminal court convicted the appellant under Section 354(A)(1)(i) and (iii) of the Indian Penal Code and Section 10 read with Section 9(f) and (m) and Section 12 read with Section 11(iii) of the Protection of Children from Sexual Offences Act (the POCSO Act) and sentenced him to undergo rigorous imprisonment for six years and to pay a fine of Rs.50,000/- each under Section 10 read with Section 9(f) and (m) of the POCSO Act and rigorous imprisonment for two

years and pay a fine of Rs.25,000/- under Section 12 read with Section 11(iii) of the POCSO Act. Though the appellant preferred an appeal before this Court against his conviction and sentence, this Court did not suspend his conviction. Inasmuch as the conviction of the appellant was not suspended, the Manager dismissed the appellant from service solely based on his conviction as per Ext.P7 order. Ext.P7 order was under challenge in the writ petition.

5. Rule 65 which prescribes the penalties that could be imposed on teachers of aided schools provides that no punishment shall be imposed without giving the person affected an opportunity to show cause against the action proposed to be taken. Rule 74 provides that the teachers of aided schools shall be dismissed from service only with previous sanction of the Director. Rule 75 prescribes the detailed procedure for imposing major penalties, including the penalty of dismissal from service. Ext.P7 order was passed without following the aforesaid procedures and it is in the said background that the question aforesaid arises for consideration.

6. We have heard the learned counsel for the

appellant as also the learned Government Pleader.

7. Article 311(2) of Part XIV of the Constitution of India dealing with the services under the Union and the State provides that 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 a civil post under the Union or a State shall be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. The first proviso to Article 311(2) of the Constitution clarifies that where it is proposed after the enquiry provided for in Article 311(2) to impose upon the person concerned any penalty, it shall not be necessary to give such person any opportunity of making representation on the penalty proposed. The second proviso to Article 311(2) clarifies further that the provisions contained therein shall not apply where a person is dismissed or removed or reduced in rank on the ground of his conviction on a criminal charge. In **Union of India v. Tulsiram Patel**, (1985) 3 SCC 398, it was held that the second proviso to Article 311(2) is in the nature of a constitutional prohibitory injunction restraining the disciplinary authority from

holding an enquiry under Article 311(2) or from giving any kind of opportunity to the concerned Government servant and that there is no scope for introducing into the second proviso any kind of enquiry or opportunity by a process of inference or implication. The relevant passage contained in paragraph 70 of the judgment reads thus:

> "70. The position which emerges from the above discussion is that the keywords of the second proviso govern each and every clause of that proviso and leave no scope for any kind of opportunity to be given to a government servant. The phrase "this clause *shall* not apply" 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 maxim "*expressum facit cessare tacitum*" ("when there is express mention of certain things, then anything not mentioned is excluded") applies to the case. As pointed out by this Court in B. Shankara Rao Badami v. State of Mysore this well-known maxim is a principle of logic and common sense and not merely a technical rule of construction. The second proviso expressly mentions that clause (2) shall not apply where one of the clauses of that proviso becomes applicable. This express mention excludes everything that clause (2) contains and there can be no scope for once again introducing the opportunities provided by clause (2) or any one of them into the second proviso. x x x x x x x x x x"
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> (Underline supplied)

Although Article 311 does not directly apply to the appellant as he was neither a member in a civil service of the Union or an All-India Service or a civil service of a State or held a civil post under the Union or a State, according to us, the question raised needs to be answered keeping in mind the constitutional scheme, as it is now settled that the interpretation of statutory provisions shall always be in consonance with the constitutional scheme[See **A.Satyanarayana v. S.Purushotham**, (2008) 5 SCC 416].

8. Rule 77A of the KER reads thus:

> "**77A.** Notwithstanding anything contained in Rules 75, 76 and 77.
>
> (i) where a penalty is imposed on a teacher on the ground of conduct which had led to his conviction on a criminal charge: or
>
> (ii) where the authority imposing the penalty is satisfied for reasons to be recorded in writing that it is not reasonably practicable to follow the procedure prescribed in the said rules; or
>
> (iii) where such authority for reasons to be recorded in writing is satisfied that in the interest of the Security of the State, it is not expedient to follow such procedure;
>
> Such authority may consider the circumstances of the case and pass such order thereon as it deems fit."

As explicit from Rule 77A, the said provision starts with a *non obstante* clause to exclude the application of Rules 75, 76 and 77, while dealing with the matters covered therein. Rule 77A, as in the case of the second proviso to Article 311(2) of the Constitution, clarifies that where a penalty is imposed on a teacher on the ground of conduct which had led to his conviction on a criminal charge, the authority taking action under the Rule, may consider the circumstances of the case and pass such orders thereon as it deems fit. In other words, where a penalty is imposed on a teacher on the ground of his conduct which had led to his conviction on a criminal charge, it is not necessary to follow the procedure prescribed in Rule 75 and the competent authority is empowered to pass appropriate orders in such cases as it deems fit. In the light of Rule 77A, inasmuch as the penalty was imposed on the appellant on the ground of conduct which had led to his conviction on a criminal charge, the contention of the appellant that Ext.P7 order is vitiated on account of non-compliance of the procedure prescribed in Rule 75, is without substance and liable to be rejected.

9. The learned counsel for the appellant

persuasively argued that inasmuch as Rule 74 is not included in the opening sentence of Rule 77A containing the *non obstante* clause, the requirement under Rule 74 that the penalty of dismissal from service can be imposed by the Manager only with the previous sanction of the Director, needs to be complied with for dismissing a teacher from service, even on the ground of conduct which had led to his conviction on a criminal charge. Although the argument appears to be attractive at the first blush, a close perusal of the provisions contained in Rule 75 would show that there is no substance in the argument. True, Rule 74 is not included in the opening sentence of Rule 77A containing the *non obstante* clause, but as found by us, where a penalty is imposed on a teacher on the ground of his conduct which had led to his conviction on a criminal charge, the procedure prescribed in Rule 75 need not be followed. Dismissal from service is a penalty prescribed in Clause (vii) of Rule 65. Rule 75 reads thus:

> "**75.Procedure for imposing major penalities** :- (1) (a) Whenever a complaint is received or on intimation from the authorised Officer as per Section 12(A) is recorded or on consideration of the report of investigation or for other reasons the manager is satisfied that there is prima facie case for taking action against the teacher definite charge or charges shall be framed and communicated to him with the

statement of 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 teacher shall be required to submit within a reasonable time to be specified in that behalf a written statement of his defence and also to state whether he desires to be heard in person. The teacher may on his request be permitted to peruse or take extracts from the records pertaining to the case for the purpose of preparing the written statement; provided the manager may, for reasons to be recorded writing refuse him such access if in his opinion such records are not strictly relevant to the case or it is not essential in Public interest to allow such access. After the written statement is received within the time allowed, the manager may if he is satisfied that a formal enquiry should be held into the conduct of the teacher, order that a formal enquiry may be conducted.

(b) The Manager shall forward the records of the case with a request to the Deputy Director (Education) in the case of Headmasters of High Schools and Training Schools or to the Educational officers in other cases, that the formal enquiry may be conducted by that Officer or any other officer not below the rank of an Assistant Educational Officer authorised by that officer or an officer of the department appointed by the Director or Government.

(c) The Manager shall also intimate the Government or the authorised officer as the case may be, the date of initiation of the disciplinary proceedings and also the date of passing final order within 7 days from such dates.

(2) The Inquiring Authority may during the course of inquiry if it deems necessary, add to, amend, alter or modify the charges framed against the teacher in which case, the teacher shall be required to submit within a reasonable time to be specified in that behalf any further written statement of

his defence.

(3) The teacher shall for the purpose of preparing his defence be permitted to inspect and take extracts from such official records as he may specify. Provided that such permission may be refused, if for reasons to be recorded in writing, in the opinion of the Inquiring Authority, such records are not relevant for the purpose or it is against the Public Interest to allow him such access thereto.

(4) On receipt of the further written statement of defence under sub-rule (3) or if no such statement is received within the time specified therefor or where the teacher is not required to file a written statement under the said sub-rule the Inquiring Authority may inquire into such of the charges as are not admitted.

(5) The teacher may himself present his case before the Inquiring Officer and he may not be allowed to engage a legal practitioner for the purpose.

(6) 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. The teacher shall be entitled to cross examine witnesses examined in support of the charge and to give evidence in person and to have such witnesses as may be produced, examined in his defence. The person presenting the case in support of the charges shall be entitled to cross examine the teacher and the witnesses examined in his defence. If the Inquiring Authority declines to examine any witness on the ground that his evidence is not relevant or material it shall record its reason in writing.

Note:- If the Inquiring Authority proposes to rely on the oral evidence of any witness the authority should examine such witness in the presence of the teacher and give an

opportunity to cross-examine the witness.

(7) The teacher may present to the Inquiring Authority a list of witnesses whom he desires to examine in his defence. The Inquiring Authority will normally request such witnesses to appear before him to give evidence. Where the witness to be examined is any other teacher the Inquiring Authority will normally try to secure the presence of witnesses unless he is of the view that the witness's evidence is irrelevant or not material to the case under inquiry. Where the witness proposed to be examined by the teacher is any other person the Inquiring Authority will be under no obligation to summon and examine him unless the teacher himself produces him for examination.

(8) At the conclusion of the inquiry, the Inquiry Authority shall prepare a report of the inquiry, recording its findings on each of the charges together with the reasons therefor. If in the opinion of such authority the proceedings of inquiry establish charges different from those originally framed, it may record its findings on such charges provided that findings on such charges shall not be recorded unless the teacher has admitted the facts constituting them or has had opportunity of defending himself against them.

(9) The records of inquiry shall include:-

(i) the charges framed against the teacher and the statement of the allegation furnished to him;
(ii) his written statement if any;
(iii) the oral evidence taken in the course of inquiry;
(iv) the documentary evidence considered in the course of the inquiry;
(v) the orders; if any; made in regard to the inquiry;
(vi) a report setting out the findings on each charges and the reasons therefor.

(10) After the inquiry authority shall forward the record of inquiry to the manager.

> (11) If the Manager is of opinion that any of the penalities specified in items (iv) to (viii) of rule 65 should be imposed, he shall;
>
> (a) Furnish to the teacher a copy of the report of the Inquiring Authority.
>
> (b) Give him a notice stating the action proposed to be taken in regard to him and calling up on him to submit within a specified time which may not generally exceed one month such representation as he may wish to make against the proposed action provided that such representation, shall be based only on the evidence adduced during the inquiry.
> (c) On receipt of the representation, if any and after taking into consideration the representation, final orders shall be passed by the manager imposing the penalty with the previous sanction of the competent authority.
>
> (12) The procedure referred to above shall be conducted as expeditiously as the circumstances of the case may permit, particularly one against a teacher under suspension.]”

Sub-rule (11) of Rule 75 would show that in the case of a teacher to whom Rule 75 applies, if on a perusal of the record of enquiry received from the enquiring authority, the Manager is of the opinion that the penalty of dismissal from service should be imposed on him, the Manager shall give the delinquent teacher a notice stating the action proposed to be taken against him and calling upon him to submit his representation against the proposed action. Sub-rule (11) of

Rule 75 would also show that on receipt of representation, if any, and after taking into consideration the representation, if the Manager decides to impose on the delinquent a penalty of dismissal from service, such a penalty could be imposed on him with the previous sanction of the competent authority. Inasmuch as Rule 74 also provides that the penalty of dismissal from service can be imposed by the Manager with previous sanction of the Director, the first and foremost question to be resolved is as to which among the said provisions is the substantive one that mandates the previous sanction of the competent authority. Rule 74 reads thus:

> “74. The penalty of compulsory retirement, removal, or dismissal from service can be imposed by the Manager only with previous sanction of the Director, in the case of teachers in the graduate teacher's scale and Headmasters of Secondary Schools and Training Schools and of the District Educational Officer in the other cases.”

On a close reading of Rule 74 and sub-rule (11) of Rule 75, we are of the view that the substantive provision is one contained in sub-rule (11) of Rule 75, for the same is part of Rule 75 dealing with the procedure for imposing major penalties. Having regard to the words and expressions used in Rule 74, especially the expression “can be”, we are of the view that

Rule 74 is only a provision intended to indicate the particulars of the competent authorities from whom the previous sanction shall be obtained for different categories of teachers. If sub-rule (11) of Rule 75 is the substantive provision which mandates the previous sanction of the competent authority for imposing major penalties, inasmuch as the requirements contained in Rule 75 do not apply to a case where a penalty is imposed on a teacher on the ground of conduct which led to his conviction on a criminal charge, by necessary implication, the requirement of previous sanction of the competent authority for imposing major penalties does not apply to such cases. We take this view also for the reason that our constitutional scheme is that there shall not be any kind of restriction on a disciplinary authority in the matter of taking appropriate action against a delinquent employee on the ground of conduct which had led to his conviction on a criminal charge.

10. Another argument seriously pressed into service by the learned counsel for the appellant to contend that Rule 74 is a mandatory provision is that sub-section (2) of Section 12 of the Act also contains an identical provision.

Section 12 of the Act reads thus:

> "**12. Conditions of service of aided school teachers.** - (1) The conditions of service of teachers in aided schools, including conditions relating to pay, pension, provident fund, insurance and age of retirement, shall be such as may be prescribed by the Government.
>
> (2) No teacher of an aided school shall be dismissed, removed or reduced in rank by the Manager without the previous sanction of the officer authorised by the Government in this behalf, or placed under suspension by the Manager for a continuous period exceeding fifteen days without such previous sanction."

True, sub-section (2) of Section 12 of the Act also provides that no teacher of an aided school shall be dismissed by the Manager without the previous sanction of the officer authorised by the Government in this behalf. But, it is by virtue of the power conferred on the Government under sub-section (1) of Section 12, the conditions of service of teachers in aided schools as incorporated in Chapter XIVA KER have been framed by the Government. It is now well settled that rules validly framed become part of the statute and the same are, therefore, required to be read as part of the main enactment itself. In other words, the provisions contained in Chapter XIVA KER including Rule 77A is part of sub-section (1) of Section 12. If the provisions contained in Chapter XIVA KER is part of sub-

section (1) of Section 12, sub-section (2) of Section 12 cannot be understood as a provision, inconsistent with the provisions contained in sub-section (1) of Section 12. In other words, the provisions need to be interpreted harmoniously. If that be so, the appellant cannot be heard to contend that previous sanction of the competent authority is required for dismissing a teacher from service on the basis of his conviction in a criminal case. Needless to say, the contention of the appellant that Ext.P7 order is vitiated for non-compliance of the provisions contained in Rule 75 is without substance and is liable to be rejected.

11. What remains to be considered is the contention raised by the appellant based on Note 2 to Rule 65. The relevant portion of Rule 65 reads thus:

> "**65. Discipline - Penalties**: - The following penalities may, for good and sufficient reasons and as herein after provided; be imposed upon teachers of aided schools, namely
>
> (i) Censure;
>
> x x x x x x x x
>
> x x x x x x x x
>
> (vi) Removal from service which shall not be a disqualification for future employment
>
> (vii) Dismissal from service which shall ordinarily be a disqualification for future employment
>
> (viii) Reduction of pension

> **Note**:- (1) The penalty of reduction of pension shall be imposed in such a manner that pension will not be reduced to nothing or to a nominal amount.
>
> (2) No punishment shall be imposed without giving the person affected an opportunity to show cause against the action proposed to be taken.
>
> x x x x x x x x”

As evident from the extracted provision, Rule 65 is only a provision which prescribes the various penalties that could be imposed upon teachers of aided schools. Among the penalties, items (iv) to (xiii) including dismissal from service are major penalties. As stated, Rule 75 prescribes the procedure for imposing major penalties. As evident from Rule 75 which is extracted in one of the preceding paragraphs, sub-rule (11) of Rule 75 also provides that no punishment shall be imposed without giving the person affected, an opportunity to show cause against the action proposed to be taken. Inasmuch as we have found that Rule 75 does not apply where a penalty is imposed on a teacher on the ground of conduct which had led to his conviction on a criminal charge, we are of the view that, by necessary implication, it has to be held that the similar provision contained in Rule 65 also does not apply to such cases. Any other interpretation to Rule 65, according to us,

would go against our constitutional scheme that no kind of opportunity of hearing need be given to an employee before imposing upon him a penalty on the ground of conduct which had led to his conviction on a criminal charge. The contention of the appellant that Ext.P7 order is vitiated for non-compliance of Rule 65 is also without substance and is liable to be rejected.

In the result, the appeal is dismissed, though on different grounds.

Sd/-
P.B.SURESH KUMAR, JUDGE.

Sd/-
SOPHY THOMAS, JUDGE.

ds 29.03.2023