

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

OA 304/05

...Monday.....this the 18th day of September, 2006

CORAM

HON'BLE MRS. SATHI NAIR, VICE CHAIRMAN
HON'BLE MR. GEORGE PARACKEN, JUDICIAL MEMBER

K.Gopalan,
S/o late Thoomban, aged 54 years
Postmaster (BCR)
Kottakkal Mughya Dak Ghar,
Kottakkal-676 503, residing at Post Office
Quarters, Kottakkal 676503.Applicant

(By Advocate Mr.OV Radhakrishnan (Sr)

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- 1 Superintendent of Post Offices,
Tirur Division, Tirur.
- 2 Union of India, represented by its
Secretary, Ministry of Communications,
New Delhi.110 001.Respondents

(By Advocate Mr.Varghese P.Thomas, ACGSC)

The application having been finally heard on 28.8.2006, the Tribunal
on.....18 . 9.2006 delivered the following:

O R D E R

Hon'ble Mr. George Paracken, Judicial Member

The applicant has approached this Tribunal aggrieved by (i) Annexure.A7 notice dated 13.8.04 which was a direction to him to explain why disciplinary action should not have been taken against him and the (ii) Annexure.A9 Memorandum dated 7.2.05 by which the statement of imputation of misconduct was served upon him and (iii) Annexure.A13 disciplinary authority's proceedings dated 25.4.2005 under Rule 16 of the CCS (CCA) Rules, 1965 by which it was ordered to recover a sum of Rs.

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29000/- from the pay of the applicant in 29 installments beginning from the pay of April, 2005.

2 The brief facts of the case are that vide letter dated 26/4/2004, the applicant was asked to explain why he did not stay in the quarters allotted to him on the night of 22/23-10-2003. He explained the reasons vide his letter dated 24/05/2004. The respondents, after considering the explanation held that he did not stay in the quarters during the night of 22/23-10-2003 on which day the burglary took place in Kottakkal Post Office and an amount of Rs.93,487.50 was burgled. Thereafter, Annexure A7 notice dated 13/8/2004 was issued directing him to explain why disciplinary action should not be taken against him for contributory negligence by which huge loss has been suffered by the Department. He again explained his position vide the Annexure A8 letter. After considering his explanation the disciplinary authority proposed to take action under Rule 16 of the CCS (CCA) Rules, 1965 against the applicant and the statement of imputations of misconduct was served on him vide Annexure A9 Memorandum dated 7/2/2005. The applicant was also granted an opportunity to make a representation against the aforesaid proposal. Following is the misconduct alleged against the applicant.

"Shri K.Gopalan had been working as Postmaster, Kottakkal MDG with effect from 21.5.2001. He had been occupying the quarter attached to the Post Office situated in the first floor of the PO building. A burglary was taken place a Kottakkal MdG on the night of 22/23.10.2003 resulting in a loss of Rs. 93,487.50 in cash by disfiguring the opening of the cash safe in the PO treasury room in the ground floor of the PO building. Shri K.Gopalan was not available in the quarters on that night. When asked to explain vide SP,Tirur letter No.F1/05/03-04 dated 26.4.04 why he did not stay in the quarters on the night of 22/23.10.03, when no permission was granted to him to stay away from the quarters on that night, he vide his letter dated 24.5.04 replied that he was granted half-pay leave without MC for

nineteen days from 13.10.2003 to 31.10.2003 and leave address was given in the application for leave which was indicative that he would not be in the PO quarters. He also stated that he was under the impression that once leave address was given in the application form and the leave was granted no separate request for seeking permission was required and that he was not aware of the need for vacating the quarters, under intimation, for a short period of leave. Vide SP,Tirur letter No.F1/5/03-04 dated 13.8.2004 he was asked to show cause why disciplinary action shall not be taken against him for contributory negligence by which huge loss was sustained to the department. In his reply dated 23.8.04, Shri K.Gopalan stated that when the leave was granted, his absence from office was also permitted and that SPOs interpretation that separate permission/sanction was required to stay away from the quarters was not specified or contemplated in rules."

The Applicant submitted the Annexure A 10 representation denying the charges and claiming innocence. However, after considering the representation made by the applicant the disciplinary authority, vide Annexure.A13 proceedings, under Rule 16 of the CCS (CCA) Rules, 1965 passed an order to recover Rs. 29000/- from the pay of the applicant in 29 installments beginning from the pay of April, 2005. Though the said Annexure.A13 order of the disciplinary authority is an appealable one under Rule 23 of the CCS (CCA) Rules, 1965, the applicant has chosen to file the present OA before this Tribunal without availing himself of the opportunity of making such an appeal. Apart from seeking the direction to set aside Annexures A7. A9 and A 13 and related reliefs, the applicant had also sought the interim order for staying the Annexure A 13 order dated 25/4/2005 till the disposal of the OA. When the OA was heard initially on 4.5.05, it was admitted and an interim stay was granted directing the respondents not to make any recovery from the pay of the applicant as per the Anenxure.A13 order.

3 Shri O.V.Radhakrishnan senior counsel, on behalf of the

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applicant, has taken various grounds to assail the Annexure A13 Disciplinary Authority's order in order to establish that it is illegal, arbitrary, discriminatory and violative of Articles 14, 16 and 300A of the Constitution of India. Shri Radhakrishnan has submitted that the applicant was very well justified in approaching the Tribunal without availing himself of the appellate remedy available to him as the same, according to him, is not an effective or efficacious remedy and the availability of alternate remedy itself is not a bar for this Tribunal to adjudicate the present OA. In support of his contentions he has relied upon the judgments of the Apex Court in **Whirlpool corporation Vs. Registrar of Trade Marks, Mumbai and others, 1998(8) SCC-1** and **Ghyan Chand and others Vs. State of Haryana and others, AIR 1971 SC 333** and argued that this Tribunal is exercising jurisdiction similar to that of the High Court under Article 226 of the Constitution of India which is plenary in nature and is, therefore, not restricted by the Constitution. In para 14 & 15 of the judgment, of the Whirlpool Corporation (supra), the Apex Court held as under:-

“14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any the Fundamental Rights contained in Part III of the Constitution but also for “any other purpose”.

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights, or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an

Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.

4 As regards the merits of the case, he has relied upon the orders of this Tribunal in OA 1807/91 dated 9.11.92 and OA 209/01 dated 13.11.02. In both these cases, the amounts recovered from the applicants concerned were ordered to be refunded to them. In OA 1807/91, the applicant therein was challenging the Disciplinary Authority's order imposing the penalty of the recovery and the Appellate Authority's order upholding the Disciplinary Authority's order. Same was the case in OA 209/01. He further contended that the recovery could have been ordered only under Rule 58 and 106 of the P&T Manual. In the present case no such situation exists and as such no recovery should have been ordered from the applicant's pay. The provisions of Rule 58 and 106 of the P&T Manual Vol.III are extracted below;

"58 In cases of burglary, theft, highway robbery, fire etc., the primary offender is usually an outsider, but in some cases, collusion of a departmental official may also be suspected. In such cases, if sufficient evidence to make the conduct of the official doubtful is available, disciplinary proceedings against him should be drawn up and exemplary punishment imposed. While dealing with such cases, subtle niceties need not be allowed to overshadow the broad facts. While it should be seen that natural justice is done and that no innocent person is punished, the moral convictions of the disciplinary authorities should not be eclipsed at least by petty-fogging arguments."

"106. in the case of proceedings relating to recovery of pecuniary losses caused to the government by negligence or breach of orders by a Government Servant, the penalty of recovery can be imposed only when it is established that the government servant was responsible for a particular act or acts of negligence or breach of orders or rules and that such negligence or breach caused the loss".

The other submission on merit was that the charge against the applicant

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itself was framed against the instructions contained in DG P&T's letter No.114/176/78/Disc.II dated 13.2.81 according to which while an official can be punished for good and sufficient reasons, the penalty of recovery can be awarded only if the lapses on his part have either led to the commissions of the fraud or misappropriation or frustrated the inquiries a result of which it has not been possible to locate the real culprit.

5 In reply, Advocate Mr.Varghese P. Thomas, on behalf of the respondents, argued that the present OA is premature as the applicant has not exhausted the appeal provision contained in the CCS (CCA) Rules, 1965 and therefore, the Annexure A13 order is not to be interfered with by this Tribunal at this stage. He has also submitted that in view of the mandatory provision of Section 20 of the CAT (Procedure) Rules, 1987 that "a Tribunal shall not ordinarily admit an application unless it is satisfied that the applicant had availed of all the remedies available to him under the relevant service rules as to redressal of grievances", the present OA is to be dismissed as premature and not maintainable. He has also relied upon the judgment of the Hon'ble High Court of Kerala in **Georgekutty V. State of Kerala, 1993(2) KLT 755 and Ismail V. State Consumer Disputes (Redressal) Commission, 1993(2) KLT 1000**. The case of Georgekutty (supra) relates to a Consumer Protection Act 1986. The said petition was filed for issue of a Writ of Certiorari to quash the notice issued by the Consumer Dispute Redressal Forum, Kottayam contending that the Forum has jurisdiction to issue the said notice. It was held in that case that merely because of a question of jurisdiction arises in such cases the High Court should not feel it ordinarily imperative to admit such writ petitions. The High Court has also observed that though the Court will not normally

interfere with cases pending before the Consumer Court merely because jurisdictional question are raised, in exceptional cases, the Court would not hesitate to interfere, but such contingencies are rare. In Ismail's case (supra) while reiterating the position held in Georgekutty's case(supra), it was further held that

"there is no such absolute rule which prohibits this Court at the time of final hearing from directing the parties to pursue their alternative remedies under the Special Act. We adopt the reasons given by us in that batch of cases, and hold that there "is no absolute rule that once the Writ Petitions are admitted, we cannot relegate the parties to their alternative remedies under the Special Statute, at the time of final hearing of the cases." (Underling given by the Tribunal).

6 We have heard the counsel for both the parties. First of all we observe that even though the Annexure A7 notice and Annexure A9 charge and Annexure A-13 disciplinary authority's order have been impugned and sought to be set aside, no grounds for doing so in respect of Annexure A 7 and Annexure A 9 have been adduced in the Original Application. Moreover, the Annexure A7 notice and Annexure A9 charge were issued on 13/8/2004 and 7/2/2005 respectively and they were never challenged till the Annexure A-13 penalty was imposed upon the applicant. Further, the applicant has submitted the Annexure A-10 explanation dated 14/2/2005 to the impugned Annexure A-9 directions dated 7/2/2005 which ultimately resulted in the Annexure A13 order of the Disciplinary Authority imposing him the punishment. However, Relying upon the judgment of the Apex Court in the case of Whirlpool Corporation (Supra), the contention of Shri Radhakrishnan is that the Tribunal is required to interfere in the matter at the stage of Annexure A-13 without resorting to the appeal provision contained in CCS(CCA) Rules. In our considered opinion, the aforesaid judgment of the Apex Court has no application in the present case. The

applicant has no justifiable ground to say that the Respondents had no jurisdiction to issue the Annexure A-7 notice or the Annexure A-9 memorandum containing the statement of imputation of Misconduct or the Annexure A-13 Disciplinary Authority's proceedings. Rather, as observed earlier, the applicant has not even taken any grounds in the OA to challenge the Annexure A-7 and the Annexure A-9. The applicant himself has submitted to the jurisdiction of the Disciplinary Authority and submitted his Annexure A 10 explanation to the Annexure A 9 Memorandum. The reliance of the applicant on the orders of this Tribunal dated 9/11/1992 in OA 1807/91 and 13/11/2002 in OA 209/2001 is also misplaced. These orders cannot come to the rescue of the applicant as the applicants in both those OAs have approached this Tribunal only after availing themselves of the alternate remedy of appeal, unlike the applicant in the present OA. Challenge to the Annexure A-13, Disciplinary Authority's proceedings are on the grounds that it is illegal, arbitrary, discriminatory and violative of Article 14 and 300A of the Constitution of India. There are no allegations that the proceedings have been held against the provisions contained in the CCS (CCA) Rules, 1965 or the penalty imposed upon the applicant is not one which has been prescribed in the CCS (CCA) Rules or there is any challenge to its vires. According to the scheme of the CCS (CCA) Rules, the order of the disciplinary authority takes immediate effect unless otherwise stated in the order itself. The appeal against the disciplinary authority's order is a statutory right guaranteed to the delinquent employee (applicant). All the grounds to challenge the Annexure A-13 order taken in this O.A could have been taken before the Appellate Authority. It is for the appellate authority to consider the appeal under Rule 27(2) of the CCS

(CCA) Rules, 1965 as to (a) whether the procedure laid down in these rules has been complied with and if not, whether such non-compliance has resulted in the violation of any provisions of the Constitution of India or in the failure of justice; (b) whether the findings of the disciplinary authority are warranted by the evidence on the record; and (c) whether the penalty or the enhanced penalty imposed is adequate, inadequate or severe and to pass orders (i) confirming, enhancing, reducing, or setting aside the penalty; or (ii) remitting the case to the authority which imposed or enhanced the penalty or to any other authority with such direction as it may deem fit in the circumstances of these cases. From the aforesaid provisions of the CCS (CCA) Rules, it is quite clear that the reliefs sought by the applicant in the present OA to set aside the Annexure A13 disciplinary authority's order is well within the power of the appellate authority. However, it is true there is no provision under CCS (CCA) Rules for the Appellate Authority to stay orders of the disciplinary authority during the pendency of the appeal. Therefore, the punishment inflicted upon the applicant by the disciplinary authority in his order has to be undergone by the delinquent government servant till the same is set aside or modified by the appellate authority in its order, at a later stage. But in the absence of any challenge to the vires of Rule 27 of the CCS (CCA) Rules, 1965 or any other rules for the lack of power for the appellate authority to stay the disciplinary authority's order, it is not necessary for this Tribunal to go into this aspect any further in this order.

7 It is a well settled principle of law that the jurisdiction of the Tribunal to interfere with the disciplinary matters or punishment cannot be equated with the appellate jurisdiction.

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8 In U.P.State Spinning Co.Ltd V/s. R.S.Pandey and another 2006(2)ATJ 161 while considering the plea of the Appellant that the High Court should not have entertained the Writ Petition as the employee concerned did not avail the alternate remedy of appeal, the Apex Court held as under:-

“There are two well recognized exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the principles of natural justice. We may add that where the proceedings itself are an abuse of process of law the High Court in an appropriate case can entertain a writ petition.”

In the very same judgment, the Apex Court has further observed as under:-

“19. In a catena of decisions it has been held that writ petition under Article 226 of the constitution should not be entertained when the statutory remedy is available under the Act, unless exceptional circumstances are made out.

20. In U.P.State Bridge Corporation Ltd. And others v. U.P.Rajya Setu Nigam S Karamchari Sangh, 2004(4) SCC 268, it was held that when the dispute relates to enforcement of a right or obligation under the statute and specific remedies, therefore, provided under the statute, the High Court should not deviate from the general view and interfere under Article 226 except when a very strong case is made out for making a departure. The person who insists upon such remedy can avail of the process as provided under the statute. To same effect are the decisions in Premier Automobiles Ltd. v. Kamlekar Shantarum Wadke, 1976(1)SCC 496; Rajasthan SRTC v. Krishan Kant, 1995(5) SCC 75; Chandrakant Tukaram Nikam v. Municipal Corporation of Ahmedabad and another, 2002(2)SCC 542 and in Scooters India and others v. Vijai V Eldred, 1998(6)SCC 549.”

9 In the above facts and circumstances of the case, we do not think that Applicant has made out any case in the present OA to convince us to deviate from the general view and interfere with the proceedings initiated against him before the statutory alternate remedy of appeal has

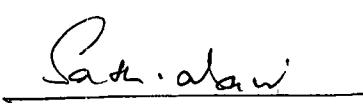
been availed of. The Applicant has also not made out that the present case is one coming under the category of cases decided by the Apex Court in **Ram and Shyam Co. V/s. State of Haryana and Ors AIR 1985 SC 1147** where the appeal is from "Caeser to Caesar's wife" and existence of alternative remedy would be a mirage and an exercise in futility. The Applicant has not stated any reason as to why the alternate remedy of appeal is not an efficacious one and in the absence of any such pleadings, we consider it not necessary to interfere with the Disciplinary Authority's order at this stage as it would amount to usurping its statutory powers.

10 We, therefore, following the judgments of the Apex Court in the case of U.P.State Spinning Co.Ltd (supra) and the Hon'ble High Court of Kerala in the cases of Georgekutty (supra) and Ismail (supra), dismiss the present application. The interim stay granted on 4.5.05 is vacated. The applicant may prefer a statutory appeal as provided in the CCS (CCA) Rules, 1965, within a period of 30 days from the date of receipt of this order. The appellate authority on receipt of such appeal shall dispose it of in accordance with rules within a period of two months thereafter, after affording the applicant an opportunity of being heard in person. There shall be no order as to costs.

Dated this the 18th day of September, 2006.


GEORGE PARACKEN
 JUDICIAL MEMBER

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SATHI NAIR
 VICE CHAIRMAN