

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE V.CHITAMBARESH

&

THE HONOURABLE MR. JUSTICE ASHOK MENON

MONDAY, THE 02ND DAY OF SEPTEMBER 2019 / 11TH BHADRA, 1941

OP(KAT).No.27 OF 2018(Z)

AGAINST THE ORDER/JUDGMENT IN OA 794/2016 OF KERALA ADMINISTRATIVE
TRIBUNAL, THIRUVANANTHAPURAM

PETITIONERS/RESPONDENTS:

- 1 GOVERNMENT OF KERALA,
REPRESENTED BY THE SECRETARY,
DEPARTMENT OF HEALTH, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM, KERALA - 695 001.
- 2 THE DIRECTOR OF MEDICAL EDUCATION,
MEDICAL EDUCATION DIRECTORATE,
THIRUVANANTHAPURAM, KERALA - 695 023.
- 3 THE PRINCIPAL,
GOVERNMENT MEDICAL COLLEGE HOSPITAL,
MEDICAL COLLEGE P.O., KOZHIKODE, KERALA - 673 008.

BY SRI.ANTONY MUKKATH, SR.GOVERNMENT PLEADER

RESPONDENT/APPLICANT:

P. GOPINATHAN
S/O. P. GOPALAN,
ASSOCIATE PROFESSOR (UNDER ORDER OF REMOVAL)
DEPARTMENT OF ORTHOPAEDICS,
MEDICAL COLLEGE HOSPITAL, KOZHIKODE - 673 008,
(THULASI, PUTHIYANGADI, KOZHIKODE - 673 021), KERALA
- 673 021.

R1 BY ADV. SRI.BABU JOSEPH KURUVATHAZHA

THIS OP KERALA ADMINISTRATIVE TRIBUNAL HAVING BEEN FINALLY
HEARD ON 13.08.2019, ALONG WITH OP(KAT).308/2018(Z), THE COURT ON
02.09.2019 PASSED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE V.CHITAMBARESH

&

THE HONOURABLE MR. JUSTICE ASHOK MENON

MONDAY, THE 02ND DAY OF SEPTEMBER 2019 / 11TH BHADRA, 1941

OP(KAT).No.308 OF 2018

AGAINST THE ORDER/JUDGMENT IN O.A.(EKM) NO.794/2016 DATED
30.05.2017 OF KERALA ADMINISTRATIVE TRIBUNAL, THIRUVANANTHAPURAM

PETITIONER/APPLICANT:

P. GOPINATHAN
S/O. P. GOPALAN, AGED 52 YEARS,
ASSOCIATE PROFESSOR (UNDER ORDER OF REMOVAL),
DEPARTMENT OF ORTHOPAEDICS,
MEDICAL COLLEGE HOSPITAL, KOZHIKODE - 673 008,
'THULASI', PUTHIYANGADI, KOZHIKODE - 673 021.

BY ADVS.
SRI.BABU JOSEPH KURUVATHAZHA
SRI.P.T.ABHILASH

RESPONDENTS/RESPONDENTS:

- 1 GOVERNMENT OF KERALA,
REPRESENTED BY ITS SECRETARY,
DEPARTMENT OF HEALTH, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM - 695 001.
- 2 THE DIRECTOR OF MEDICAL EDUCATION,
MEDICAL EDUCATION DIRECTORATE,
THIRUVANANTHAPURAM - 695 001.
- 3 THE PRINCIPAL,
GOVERNMENT MEDICAL COLLEGE HOSPITAL,
MEDICAL COLLEGE P.O, KOZHIKODE - 673 008.

OTHER PRESENT:

SRI.ANTONY MUKKATH, SR. GOVERNMENT PLEADER

THIS OP KERALA ADMINISTRATIVE TRIBUNAL HAVING BEEN FINALLY
HEARD ON 13.08.2019, ALONG WITH OP(KAT).27/2018(Z), THE COURT ON
02.09.2019 PASSED THE FOLLOWING:

JUDGMENT

[OP (KAT) .27/2018, OP (KAT) .308/2018]

Dated this the 2nd day of September 2019

Ashok Menon, J.

The Government of Kerala was reviewing absenteeism in Medical Education Services of more than 75 Doctors. Could the Doctors bound by the Hippocratic Oath, unauthorisedly absent themselves from duty and serve the private institutions offering more lucrative pay packages be terminated from service with the great objective of public health sector by the Government by initiating disciplinary action collectively against all the unauthorised absentees, is the precise question that arises before us.

2. Dr.P.Gopinathan, an Associate Professor on Orthopaedics, Government Medical College, Kozhikode, was one among them, who is alleged to have been unauthorisedly absent with effect from 20.02.2010 stating that he was suffering from severe irritable bowel disease with post cholecystectomy syndrome and being confined and bedridden at his home without

mobility, on the basis of a certificate issued by another Doctor, named Dr.Jayachandran M.V. on 29.09.2009; applied for 89 days leave vide Annexure A5 application. The Principal of the College asked him to appear before a Medical Board. Vide Annexure A6 letter dated 19.10.2009 he detailed his illness and bedridden situation and stated that he cannot physically attend before the Medical Board in the Chamber of the Superintendent, Medical College Hospital, Kozhikode on 21.10.2009 as directed by the Principal. He also stated that he had already applied for voluntary retirement due to health reasons because of his inability to work for prolonged time and travel. He also referred to the pendency of W.P.(C) No.27431/2009 before this Court regarding his plea for retirement.

3. Conceding to his inability in attending the Medical Board at the Medical College Hospital as a patient completely confined to bed, the Principal constituted a Medical Board consisting of three Doctors and directed them to examine him at his residence. He was examined by the Medical Board on 30.11.2009 and they submitted a report stating that Dr.Gopinathan has

clinical evidence of having undergone cholecystectomy and is having symptomatology suggestive of irritable bowel syndrome and post cholecystectomy syndrome and that the certificate produced by Dr.Gopinathan is genuine.

4. Dr.Gopinathan thereafter continued to apply for leave incessantly vide Annexures A8, A9, A10 and A11. No action was taken on those applications for leave.

5. Following his continued absence, the Government published a show cause notice No.30906/S1/10/H&FWD in the news papers informing that the services of the Doctors, who are on unauthorised absence, would be terminated if they failed to rejoin duty immediately. The Government was apprehensive about Doctors who were availing leave for employment abroad and failing to return even after expiry of the period of leave.

6. Dr.Gopinathan intimated the Government that he is not on unauthorised leave, but the absence is on medical ground for which he has also submitted leave applications throughout. He also informed that he was ready and willing to rejoin duty as and when he is fit to discharge the duties.

7. Consequent to that, the Government issued Annexure A12 order on 16.08.2010 asking him to join duty at the Government Medical College, Kozhikode, where he was reposted pending disciplinary action for his unauthorised absence. He did not join duty. However, on 03.12.2010, when Dr.Gopinathan ultimately reported before the Principal for joining duty, he was informed that he should get specific permission from the Government and he approached the Government vide letter dated 03.12.2010 at Annexure A13 expressing his willingness to join as Associate Professor in Orthopaedics. On 04.04.2011 he sent another letter at Annexure A14 expressing his willingness to join duty. But he was kept waiting.

8. While so, he received Annexure A15 order of the Government dated 21.05.2011 stating that the Government has decided to confirm the disciplinary action against him by invoking Article 311(2) of the Constitution and Rule 18(ii) of Kerala Civil Services (Classification, Control and Appeal) Rules, 1960. It was also made clear that the KPSC has also agreed with the tentative decision of the Government and that he is being removed from the services.

9. Aggrieved by this, Dr.Gopinathan preferred a review petition under Rule 35 of the KCS (CC&A) Rules explaining the reasons for his absence. On receipt of the order dated 16.08.2010 directing his reposting at the Medical College Hospital vide Annexure A12, he gave an explanation that he again fell ill and was not able to join duty, and therefore, requested the Government to reinstate him in service. The review petition was dismissed vide Annexure A20 dated 06.03.2012. He again made a request to the Government vide Annexure A21 under Rule 38 of Kerala State and Subordinate Service Rules, 1960 and also issued a legal notice vide Annexure A22.

10. Thereafter, the applicant filed O.A. No.794/2016 before the Kerala Administrative Tribunal for reliefs to quash Annexures A15 and A20 orders and to reinstate him in service with all benefits stating that his removal from service is arbitrary and in violation of the principles of natural justice.

11. The Tribunal set aside Annexures A15 and A20 orders and directed the Government to reinstate the applicant in service immediately within a period of one

month and also to reconsider the applications for medical leave submitted by the applicant after 20.02.2010 and pass appropriate orders regarding the period of his absence between 20.02.2010 and 03.12.2010. It was also declared that he is entitled to treat the period from 03.12.2010 to 25.05.2011 as he was on duty with all consequential benefits and the Government was directed to pass appropriate orders regularising the period of absence of the applicant from service between 21.05.2012 till the date of his reinstatement. All amounts due to him was directed to be released within a period of six months.

12. Aggrieved by this the Government has filed O.P. (KAT) No.27/2018; while the applicant Dr.Gopinathan has also filed another O.P. from the same order as O.P. (KAT) No.308/2018 insofar as the Tribunal failed to direct the Government to reinstate the applicant with all consequential service benefits, including seniority, pay and allowances as if Annexure A15 order was not issued. He also claims that he is entitled to interest on the monetary benefits due to him with effect from 03.12.2010.

13. We heard the learned Counsel Sri.Babu Joseph Kuruvathazha appearing for the applicant and Sri.Antony Mukkath, the learned Government Pleader representing the Government.

14. The main objection raised by the petitioner with regard to this termination from service is for the reason that there is no enquiry conducted by the Department and that there are no justifiable grounds for the Government to invoke the powers under Article 311(2) of the Constitution and Rule 18(ii) of KCS (CC&A) Rules.

15. The reasons stated by the Government for not conducting a proper enquiry in so many words mentioned in the notice. It is made clear that several persons, who had gone on leave for serving abroad and other cases, failed to report for duty even after their period of leave was over. There were acute shortage of Faculties in the Government Medical Colleges and that is the reason why the Government had decided to initiate disciplinary proceedings collectively against all the unauthorised absentees. Show cause notice was issued to Dr.Gopinathan as well and a notice was also

published in the leading daily. Dr.Gopinathan had expressed his willingness to join duty, but he did not comply with the Government Order directing him to join duty in the Government Medical College, Kozhikode and continued with the unauthorised absence.

16. We agree with the learned Tribunal that no member of the civil service shall be dismissed or removed from service except after enquiry in which he is given an opportunity of being heard in respect of the charges levelled against him. Many Doctors had gone abroad and did not even respond to the notice that was served by them either by publication or by notice. The case of the applicant herein is different for the reason that he has expressed his willingness to join the service. But still did not join despite being posted at the Government Medical College, Kozhikode.

17. We agree with the Tribunal on the point that no circumstances contemplated in Article 311(2) of the Constitution or under Rule 18(ii) of the KCS(CC&A) Rules, arise in this case. The Government found it not feasible to follow the disciplinary proceedings laid down in KCS (CC&A) Rules against a large number of

unauthorised absentees on individual basis, which according to the Government was time consuming and a herculean task. The decision in **State of Kerala v. Gopakumar, 2012 (2) KLT 932 (SC)** pressed into service by the learned Government Pleader cannot be applied to the case in hand because the facts in that decision defers to the instant case. In **Gopakumar's case** (supra) the Doctor in question had already accepted another employment without permission and therefore the Honourable Supreme Court endorsed the view taken by the Government that holding an enquiry would be an empty formality. But here the only reason attributable for not holding an enquiry is because of time consuming and a herculean task. Each individual case has to be taken separately. One cannot be terminated from his service without giving him an opportunity to explain. The Honourable Supreme Court has in **Arjun Chanbey v. Union of India, AIR 1984 SC 1386, Shanker Dass v. Union of India, AIR 1985 SC 772** and **Union of India v. Thulsiram Patel, AIR 1985 SC 1416** held that fair-play and justice require an opportunity of hearing to be given to a Government employee before imposing a major penalty on

him. In **Jaswanth Singh v. State of Punjab, (1991) 1 SCC 362**, the Honourable Supreme Court has held that clause (b) of the second proviso to Article 311(2) can be invoked only when the authority is satisfied from the material placed before him that it is not reasonably practicable to hold a departmental enquiry.

18. The circumstances in the case in hand cannot be interpreted to state that it would be an empty formality to conduct a departmental enquiry and therefore an opportunity necessarily has to be given to the applicant herein to put forth his case regarding his reasons for absenting himself for so long period.

19. In the departmental enquiry it will have to be established that the applicant was profitably engaged elsewhere. It is pertinent to note that the applicant had applied for a Visa to go to United States of America, definitely he would have attended the interview on the basis of which he granted a Visa. True, there is no evidence regarding going abroad and getting employed. But a person, who could not even appear for medical examination by the Medical Board, had gone for obtaining the Visa that was issued to him

on 21.04.2011. So it is adequately clear that he was not completely bedridden as claimed by him. That apart, he has also sought permission to go abroad for higher education. In case he was medically not fit to attend to his duties, how he could have go abroad for higher education is a question which he needs to answer.

20. Medical profession like any other profession in modern times become part of consumerist and materialist society. The money-maniac syndrome that afflicts the medical profession has to be taken care of. The poor persons in the society, who come to Medical Colleges for treatment, are deprived of the best treatment because the Doctors are in hunt for greener pastures and lucrative postings in the private sector or abroad and even indulge in private practice; depriving thereby the patients in the lower strata of the society of good treatment at the Medical Colleges and the Government Hospitals.

21. Though we agree with the Tribunal that the termination of the applicant without conducting a formal enquiry is not proper, we cannot agree with the

impugned order reinstating the applicant to the service with all benefits. The impugned order is therefore modified to that extent. Both the Petitions are disposed of with a direction to the Department and the Government to conduct formal enquiry against the applicant for his unauthorised absence from duty and thereafter the Government and the Department shall be at liberty to take appropriate action against him. No order as to costs.

Sd/-

V.CHITAMBARESH

JUDGE

Sd/-

ASHOK MENON

JUDGE

dkr

APPENDIX OF OP (KAT) 27/2018

PETITIONER'S/S EXHIBITS:

EXHIBIT P1	COPY OF O.A. ALONG WITH ANNEXURES.
EXHIBIT P2	COPY OF REPLY STATEMENT FILED ON BEHALF OF THE 1ST RESPONDENT.
EXHIBIT P3	COPY OF THE REJOINDER FILED BY THE APPLICANT.
EXHIBIT P4	COPY OF ORDER DATED 30.05.2017 IN O.A. (EKM) NO. 794/2016.
EXHIBIT P5	COPY OF THE AFFIDAVIT FILED BY THE 2ND RESPONDENT.

APPENDIX OF OP (KAT) 308/2018

PETITIONER'S/S EXHIBITS:

EXHIBIT P1	COPY OF THE ORDER DATED 30.5.2017 IN O.A (EKM) NO. 794/2016 OF KERALA ADMINISTRATIVE TRIBUNAL, THIRUVANANTHAPURAM.
EXHIBIT P2	COPY OF O.A (EKM) NO. 794/2016, ALONG WITH ANNEXURES -A1 TO A22.
EXHIBIT P3	COPY OF THE REPLY STATEMENT DATED 9.11.2016 FILED ON BEHALF OF THE 1ST RESPONDENT IN O.A (EKM) 794/2016.
EXHIBIT P4	COPY OF THE REJOINDER DATED 27.1.2017 FILED BY THE APPLICANT IN O.A (EKM) NO.794/2016.
EXHIBIT P5	COPY OF THE AFFIDAVIT DATED 3.3.2017 FILED ON BEHALF OF THE 1ST RESPONDENT IN O.A (EKM) NO. 794/2016.