
(2003) 04 SC CK 0018

In the Supreme Court Of India

Case No : Civil Appeal No's. 5072 and 5073 of 1999

Ali M.K. and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 22-04-2003

Acts Referred:

Kerala State and Subordinate Services Rules, 1958 — Rule 18, 24, 28, 8

Citation : AIR 2003 SC 4006 : (2003) AIRSCW 2931 : (2003) 97 FLR 1003 : (2003) 2 KLT 922 : (2003) 4 SCALE 197 : (2003) 11 SCC 632 : (2003) 3 SCR 826 : (2003) 2 SLJ 380 : (2003) 3 Supreme 575

Hon'ble Judges : Shivaraj V. Patil, J;Arijit Pasayat, J

Bench : Division Bench

Advocate : Roy Abraham, Himinder Lal, Karthika S., N.R. Shonker, C.K. Sasi, Goodwill Indeevar and G. Prakash, John Mathew, for K.R. Sasiprabhu, for appearing partie, for the Appellant;

Final Decision : Dismissed

Judgement

Arijit Pasayat, J.—In these appeals the scope, content and ambit of Rule 8, Part II of the Kerala State and Subordinate Service Rules, 1958 (in short the 'KSSR') is the pivotal issue. Full Bench judgment of the Kerala High Court under challenge.

2. Parties are litigating in the following factual background. Non-official respondents and the appellants were originally appointed in the Rural Development Department on different posts. Subsequently, the said respondents joined the services of the Co-operative Department. A fixed percentage of posts in the Co-operative Department are to be made by transfer. Non-official respondents applied to the Kerala Public Service Commission (in short the 'Commission') and on being selected joined the Co-operative Department. Question arose whether the benefit of Rule 8 of the KSSR is available to a person who is appointed to a post in another service and whether the lien of such a member continued in the former service. Controversy was whether their names

were to be included in the promotion list. A learned Single Judge took the view that their names could not be included. Foundation for this view was a Division Bench judgment in an earlier case.

3. Judgments of the learned Single Judge were challenged in Writ Appeals before the Division Bench. The matter was referred to a Full Bench to be heard along with an Original petition which was earlier referred to such Bench, as correctness of some earlier decisions was doubted. Parties before the Full Bench focused their attention on Rule 8 of the KSSR. While the appellants herein submitted that some was not applicable to the non-official respondents, the latter contended that it was applicable. The Full Bench by the impugned judgment accepted the contention of the non-official respondents. Appellants, as noted above, have questioned correctness of the Full Bench's decision.

4. According to the learned counsel for the appellants Rule 8 has no application to the facts of the present case since no person can have lien over two substantive posts in two different services. The non-official respondents have acquired lien on posts in the Co-operative Department and, therefore, they cannot be considered along with the appellants for the promotion and other service benefits in the Rural Development Department. With reference to Rules 24 and 28 of the KSSR, he submitted that the non-official respondents have been appointed in posts which were substantive in nature and character and, therefore, they had lost their lien over the posts in the Rural Development Department. They had on their own applied for absorption in the Co-operative Department and by no stretch of imagination, can their appointment be considered to be in exigencies of public service.

5. In response, learned counsel for the non-official respondents submitted that Note I appended to Rule 8 made the position clear that Rule 8 is applicable to their cases. The Full Bench has recorded a categorical finding that there was no material to show that they had been confirmed in the Co-operative Department as there was no order of confirmation. This is a factual finding recorded. therefore, the Full Bench's decision is on terra firma.

6. Since Rule 8 of the KSSR is the touchstone on which the respective stands are to be tested, it would be appropriate to quote the same. The same reads as follows:

"Rule 8: Members absent from duty:- The absence of a member of a service from duty in such service whether on leave, other than leave without allowances for taking up other employment on foreign service or on deputation or for any other reason and whether his lien in a post borne on the cadre of such service is suspended or not, shall not, if he is otherwise fit, render him ineligible in his turn

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(a) for re-appointment to a substantive or officiating vacancy in the clause, category, grade or post in which he may be a probationer or an approved probationer;

(b) for promotion from a lower to a higher category in such service and

(c) for appointment to any substantive or officiating vacancy in another service for which he may be an approved candidate; as the case may be, in the same manner as if he has not been absent. He shall be entitled to all the privileges in respect of appointment, seniority, probation and appointment as full member which he would have enjoyed but for his absence:

provided that subject to the provisions of Rule 18 he shall satisfactorily complete the period of probation on his return;

provided further that a member of a service who is appointed to another service, and is a probationer of an approved probationer in the latter service, shall not be appointed under Clause (c) to any other service for which he may be an approved candidate unless he relinquishes his membership in the latter service in which he is a probationer or he approved probationer:

Provided further that this rule shall not have retrospective effect so as to disturb the decision taken by the Travancore Cochin Government in respect of the Travancore Cochin personnel:

Provided also that this rule shall not apply in the case of a member whose absence from duty in such service is by reason of his appointment to another service not being Military Service, solely on his own application, unless such appointment is made in the exigencies of public service.

Note 1:- An appointment made in pursuance of applications invited sponsored or recommended by Government or other competent authority shall be deemed to be an appointment made in the exigencies of public service for the purpose of this rule.

Note 2:- The benefit of this rule shall not be available to a person holding a post in any class or category in a service if his appointment to that post was from a post in another class or category in the same service."

7. The last proviso to Rule 8 consists of two parts. The first part is that the rule has no application where a member of a service is appointed to another service solely on his application. The second part is an exception to general prescription and is applicable if the appointment is made in the exigencies of public service.

8. Note I is of considerable significance. It is a deeming provision and provides that the appointment made in pursuance of an applications invited, sponsored or recommended by Government or other competent authority shall be deemed to be an appointment made in the exigencies of public service for the purpose of Rule 8.

9. It would be appropriate to note the affects of a proviso and a deeming provision.

10. The normal function of a proviso is to except something out of the enactment

or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. As was stated in *Mullins v. Treasurer of Survey* [1880 (5) QBD 170, (referred to in *Shah Bhojraj Kuverji Oil Mills and Ginning Factory Vs. Subbash Chandra Yograj Sinha, and The Calcutta Tramways Co. Ltd. Vs. The Corporation of Calcutta*, ; when one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject matter of the proviso. The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. It is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule. "If the language of the enacting part of the statute does not contain the provisions which are said to occur in it you cannot derive these provisions by implication from a proviso." Said Lord Watson in *West Derby Union v. Metropolitan Life Assurance Co.* 1897 Ac 647 (HL). Normally, a proviso does not travel beyond the provision to which it is a proviso. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other. (See *A.N. Sehgal and others Vs. Raje Ram Sheoram and others*, , *Tribhovandas Haribhai Tamboli Vs. Gujarat Revenue Tribunal and others*, and *Kerala State Housing Board and Others Vs. Ramapriya Hotels (P) Ltd. and Others*, .

11. "This word (proviso) hath divers operations. Sometime it worked a qualification or limitation; sometime a condition; and sometime a convent" (Coke upon Littleton 18th Edition, 146).

12. "If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant, and the earlier clause prevails.....But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole" (per Lord Wrenbury in *Forbes v. Git* [1922] 1 A.C. 256).

13. A statutory proviso "is something engrafted on a preceding enactment" (*R. v. Taunton, St. James.* 9 B. & C. 836).

14. "The ordinary and proper function of a proviso coming after a general enactment is to limit that general enactment in certain instances" (per Lord Esher in *Re Barker*, 25 Q.B.D. 285).

15. A proviso to a section cannot be used to import into the enacting part something which is not there, but where the enacting part is susceptible to several possible meanings it may be controlled by the proviso (See *Jennings v. Kelly* [1940] A.C. 206).

16. So far as Rule 8 is concerned, the proviso referred to above operates in cases where even though the member of a service is appointed in another service on

the basis of his own application, same is in the exigencies of public service. therefore, the vital question is whether the appointment is made in the exigencies of public service. For that purpose, note I assumes significance. It is, as noted above, a deeming provision. Such a provision creates a legal fiction. As was stated by James L.J. in *Ex parte, Walton. In re. Levy* 1881 (17) Ch D 746 "when a statute enacts that something shall be deemed to have been done, which in fact and in truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to. After ascertaining the purpose full effect must be given to the statutory fiction and it should be carried to its logical conclusion and to that end it would be proper and even necessary to assume all those facts on which alone the fiction can operate (see *Hill v. East and West India Dock Co.* (1884 (9) AC 448 (H.L.), *State of Travancore-cochin and Others Vs. Shanmugha Vilas Cashew Nut Factory and Others*, , *American Home Products Corporation Vs. Mac Laboratories Pvt. Ltd. and Another*, and *Smt. Parayankandiyal Eravath Kanapraavan Kalliani Amma and others Vs. K. Devi and others*, . In an oft-quoted passage, Lord Asquith stated, "if you are bidden to treat an imaginary state of affairs as real you must surely, unless prohibited from doing so, also imagine as real the consequence and incidents which, if the putative state of affairs had, in fact, existed must inevitably have flowed from or accompanied it...." the statute states that you must imagine a certain state of affairs, it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs." (See *East End Dwelling Co. Ltd. v. Finsbury Borough Council* 1951 (2) All ER 587.

17. "The word 'deemed' is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible" (per Lord Radcliffe in *St. Aubyn (L.M.) v. A.G.* (No.2) (1951) 2 All E.R. 473 (HL)

18. "Deemed". as used in statutory definitions "to extend the denotation of the defined term to things it would not in ordinary parlance denote, is often a convenient device for reducing the verbiage of an enactment, but that does not mean that wherever it is used it has that effect; to deem means simply to judge or reach a conclusion about something, and the words 'deem' and 'deemed' when used in a statute thus simply state the effect or meaning which come matter of things has - the way in which it is to be adjudged; this need not import artificially or fiction; it may simply be statement of an undisputable conclusion" (per Windener J. in *Hunter Douglas Australia Pty v. Perma Blinds*, (1970) 44 A.L.J.R. 257),

19. When a thing is to be "deemed" something else, it is to be treated as that something else with the attendant consequences, but it is not that something

else (per Cave J., R. v. Norfolk County Court, 60 L.J.Q.B. 380).

20 "When a statute gives a definition and then adds that certain things shall be 'deemed' to be covered by the definition, it matters not whether without that addition the definition would have covered them or not": (per Lord President Cooper in *Ferguson v. Mcmillan*, 1954 S.L.T. 109).

21. Whether the word "deemed" when used in a statute established a conclusive or a rebuttable presumption depended upon the context (See *St. Leon Village Consolidated School District v. Ronceray* [1960] 23 D.L.R. 32.

22. "I ...regard its primary function as to bring in something which would otherwise be excluded" (per Viscount Simonds in *Barclays Bank v. I.R.C.* [1961] A.C. 509).

23 "Deems" means "is of opinion" or "considers" or "decides" and there is no implication of steps to be taken before the opinion is formed or the decision is taken." (See *R. v. Brixton Prison Governor ex.p. Soblen* (1962) 3 All E.R. 641)

24. The Full Bench as a matter of facts found that Note I applies because the appointments of the non-official respondents in the Co-operative Department were made in pursuance of applications invited, sponsored and recommended by the Government. In view of this factual finding, the conclusions are in order.

25. A faint attempt was made to submit that the non- official respondents had lost their lien as they were appointed to posts of substantive nature. Reference was made to Rule 28 to submit that on completion of probation and in case of promotion, it is to be presumed that there was substantive appointment. The Full Bench has recorded a factual finding the non-official respondents have not been confirmed in the posts in the Co-operative Department. It has been specifically recorded that no material was placed to show that any order has been passed by the Co-operative Department confirming the concerned employees in their posts, with reference to Rule 24 it was noted that mere completion of probation does not result in automatic confirmation. It is a settled position in law that a person can be said to acquire a lien on a post only when he has been confirmed and made permanent on that post and not earlier. [See *Triveni Shankar Saxena Vs. State of U.P. and others*, and *Parshotam Lal Dhingra Vs. Union of India (UOI)*,].

26. Above being the position, the Full Bench's decision does not suffer from any vulnerability to warrant interference. The appeals are dismissed, but in the peculiar circumstances, there will be no order as to costs.

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