(2015) 09 KL CK 0185

In the High Court Of Kerala

Case No : Writ Petition (C) Nos. 14753 of 2015 (T) and 19579 of 2015

K.A. Ipekutty — APPELLANT

Vs

State of Kerala and Others — RESPONDENT

Date of Decision : 28-09-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Kerala Co-operative Societies Act, 1969 — Section 69, 80, 80(3)

Citation : (2015) 09 KL CK 0185

Hon'ble Judges : Dama Seshadri Naidu, J

Bench : Single Bench

Advocate : S.P. Aravindakshan Pillay, N. Santha, K.A. Balan, V. Varghese, Peter Jose Christo, S.A. Anand and L. Annapoorna, for the Appellant; George Poonthottam, SC and K.C. Vincent, Spl. Government Pleader, Advocates for the Respondent

Judgement

Dama Seshadri Naidu, J—The petitioner, a Co-operative Agricultural and Rural Development Bank, assails Ext. P7 order of the first respondent, the Government. In elaboration, it can be said that Ext. P7 order of the Government directs the petitioner Bank to extend the benefit of stepping up of pay to the third respondent with retroactive effect on a par with another employee who is, in fact, junior to the third respondent. The challenge is essentially on the ground that Ext. P7 order is ultra vires of the Government. The third respondent, in turn, filed W.P.(C) No. 14753 of 2015 seeking enforcement of Ext. P7 order of the Government.

2. Since both the writ petitions raise the same question of law and fact involving the same parties, this Court has decided to dispose of both the writ petitions together through a common judgment. For ease of reference and convenience, I take into consideration the facts and exhibits in W.P.(C) No. 19579 of 2015 for the narrative purpose.

3. On 10.10.2003, one Mr. Balagopalan, junior to the third respondent, obtained

''grade promotion'' and started drawing higher pay than the third respondent. In that context, on 07.09.2009, the third respondent filed a representation before the second respondent seeking pay parity. Acting on the third respondent''s representation, the second respondent passed Ext. P1 order dated 07.07.2011 resulting in stepping up of the third respondent''s pay with effect from 10.10.2003.

4. In the interregnum, before effect could be given to Ext. P1 order, the Government issued Ext. P2 order of pay revision with effect from 01.07.2008. The Government, evidently, issued Ext. P2 in exercise of its powers under Section 80 of the Kerala Co-operative Societies Act (''the Act'' for brevity). Since the employees have been given an option either to opt for the new scale or to remain in the old scale of pay, the third respondent opted for the new scale of pay with effect from 01.07.2008; his junior Mr. Balagopalan also opted for the new scale with effect from 01.10.2008, though.

5. Complaining that in the implementation of Ext. P1 in the face of options given in the Ext. P2 revised pay scales, once again an anomaly has crept in, the third respondent approached the Government and invited Ext. P3 order.

6. As the record reveals, the Board of Directors of the petitioner Bank acted upon Ext. P3 and extended the benefit to the third respondent through Ext. P3, but only prospectively: with effect from 29.11.2012. Further, through Ext. P5, the petitioner Bank forwarded its decision to the Regional Manager of the Bank for implementation prospectively, however.

7. Once again, complaining that the benefit has not been extended retroactively from 10.10.2003, the third respondent submitted another representation before the first respondent. In the course of time, seeking expeditious consideration of his representation by the first respondent, the third respondent also filed W.P.(C) No. 17943 of 2014 and invited Ext. P6 judgment (in W.P.(C) No. 14753 of 2015).

8. Eventually, the first respondent issued Ext. P7 order directing the petitioner to step up the third respondent''s pay on a par with that of Mr. Balagopalan with effect from 10.10.2003; that is, retrospectively. Now the petitioner Bank has come before this Court assailing Ext. P7 essentially on the ground that the Government has no power to issue the said directive. In other words, Ext. P7 is ultra vires of the first respondent.

9. In the above factual background, the learned Standing Counsel for the petitioner Bank has submitted that the first respondent initially issued Ext. P2 proceedings of pay revision in terms of Section 80 of the Act. According to him, if there is any anomaly in its implementation or any dispute affecting any individual employee, it essentially falls into the realm of a service dispute concerning the pay. And it is required to be resolved by a competent judicial or quasi-judicial forum.

10. It is the contention of the learned counsel for the petitioner that in terms of

Section 69 of the Act, the Co-operative Arbitration Court is the only forum available for the third respondent to have his grievance, if any, redressed.

11. Per contra, the learned counsel for the third respondent has strenuously contended that initially the first respondent passed Ext. P3 order that has not been objected to by the petitioner Bank. He has further contended that Ext. P7 order is only in furtherance of Ext. P3 order, which, in fact, the petitioner Bank has partially implemented. It is the specific contention of the learned counsel for the third respondent that the petitioner Bank is estopped from assailing Ext. P7 having already implemented, though in part, Ext. P3 order of the first respondent.

12. The learned counsel has further submitted that the petitioner was already retired from service his having attained the age of superannuation on 30.11.2013. According to him, to disable the first respondent from passing Ext. P7 order, there were no disputed questions of facts; nor was there any requirement of having any further evidence placed before the authorities so that they could consider the issue. The entire material evidence, contends the learned counsel, has already been on record to enable the first respondent to come to a just conclusion: to pass Ext. P7 order. At this juncture, driving the third respondent in the name of an alternative remedy is iniquitous, contends the learned counsel.

13. The learned counsel for the third respondent has further submitted that if at all Ext. P7 order is to be set aside by this Court on the ground that the third respondent should approach the Arbitration Court under Section 69 of the Act, it will only result in reviving an illegality in the form of discriminatory approach adopted by the petitioner Bank vis-?-vis the third respondent concerning the pay parity. In support of his submissions, the learned counsel has placed reliance on Ramachandran K. Vs. Kasargod Printing and Publishing Co-op. Society Ltd. and Others(2015) 3 KLT 961 .

14. The learned counsel has drawn my attention to Section 80(3) of the Act to lay emphasis on the fact that once the Government has plenary power to issue ''executive orders'' concerning pay fixation, it is entirely well within its jurisdiction to set right any anomalies arising in the implementation of the said pay revision. According to the learned counsel, Ext. P7 order is very much intra vires of the first respondent.

15. The learned counsel has also submitted that the Government rendered Ext. P7 order in terms of a judicial directive of this Court in a judgment filed as Ext. P6 in W.P.(C) No. 14753 of 2015.

16. Summing up his submissions, the learned counsel for the third respondent has urged this Court to dismiss W.P.(C) No. 19579 of 2015 and allow W.P.(C) No. 14753 of 2015 directing the petitioner Bank to implement Ext. P7.

17. In reply, the learned counsel for the petitioner has submitted that once an authority has no power to pass an order, be it administrative or quasi-judicial,

the issue of estoppel does not arise. According to him, the partial implementation of Ext. P3, if any, by the petitioner Bank does not come in the way of its challenging Ext. P7 order. In support of his submissions, the learned counsel has placed reliance on Harshad Chiman Lal Modi Vs. DLF Universal and Another, AIR 2005 SC 4446 : (2006) 101 CLT 5 : (2005) 5 CTC 133 : (2005) 8 JT 561 : (2005) 7 SCALE 533 : (2005) 7 SCC 791 : (2005) AIRSCW 5369 : (2005) 6 Supreme 634 .

18. The learned counsel has, first, submitted that merely because this Court in Ext. P6 judgment has directed the first respondent to consider the petitioner''s representation, it cannot be concluded that there was any adjudication by this Court on the merits of the matter. Second, he has contended that even assuming that there was any positive direction from this Court; it does not go to the extent of conferring jurisdiction on authority that inherently lacks it. In support of his submissions, the learned counsel has placed reliance on Raveendran v. State of Kerala 2007(3) KLT 558. The learned counsel has eventually urged this Court to allow W.P.(C) No. 19579 of 2015 declaring Ext. P7 to be ultra vires.

19. Heard the learned counsel for the petitioners, the learned counsel for the respondent Bank and the learned Government Pleader, apart from perusing the record.

20. At the outset, it is made clear that though both the learned counsel have tried to make submissions on the merits of the matter, this Court dissuaded them from doing so on the premise that it would take up the question of vires of Exts. P7 as a preliminary issue. Accordingly, I have confined the discussion exclusively to the vires of the first respondent in issuing Ext. P7 order, rather than the merits of Ext. P7.

21. Indeed, Section 80 of the Act empowers the Government to make rules either prospectively or retrospectively regulating the qualification, remuneration, allowances and other conditions of service of the officers and servants of different classes of societies. There is no gainsaying the fact that Section 80 essentially contemplates legislative power delegated to the Government. It is further not in dispute that the Government issued Ext. P2 proceedings of pay revision by exercising its powers under Section 80 of the Act. Put differently, Ext. P2 proceedings of pay revision are legislative in character.

22. In the course of time, the third respondent has opted for new scales of pay in terms of Ext. P2. Similarly, Mr. Balagopalan, said to be the petitioner''s junior, has also opted for the new scales of pay. Nevertheless, while the stepping-up of pay was implemented in the case of the third respondent, especially in terms of Ext. P1 order and P2 pay revision, there was said to be an anomaly. In that context, the third respondent represented to the Government and invited Ext. P3 order.

23. There is, indeed, sufficient force in the contention of the learned counsel for the third respondent that the petitioner Bank implemented Ext. P3 order of the

Government in part, however. According to the learned counsel, Ext. P7 being only an extension of Ext. P3 order re-affirming the Government''s stand, which has been consistent all through, it is impermissible for the petitioner Bank to assail Ext. P7. In other words, the petitioner Bank is estopped.

24. I am afraid the above contention cannot be countenanced. If at all the first respondent had the necessary power to issue Ext. P3 and once the said order had attained finality, the petitioner Bank would have been prevented from questioning any orders consequential in nature, such as Ext. P7. It is essentially a case of vires. To put it differently, the Government is said to suffer from lack of power to issue either Ext. P3 or Ext. P7.

25. Once it is a question of inherent lack of power, even an order said to have been implemented earlier by oversight or even willingly would not come in the way of the petitioner Bank''s assailing subsequent proceedings. Such course of action is permissible on the premise that there can be no estoppel against the statute. Any other interpretation of the issue to the effect that in the face of the petitioner Bank''s implementing Ext. P3 it is estopped from questioning Ext. P7 amounts to conferring jurisdiction on an authority by consent which, as is well established, is impermissible. In this regard, it is instructive to refer to the decision of the Hon''ble Supreme Court in Harshad Chiman Lal Modi (supra). Their Lordships have observed that so far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. Jurisdiction as to subject matter, however, is totally distinct and stands on a different footing. The Apex Court has emphatically laid down that where a court has no jurisdiction over the subject matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is nullity.

26. In The Bahrein Petroleum Co. Ltd. Vs. P.J. Pappu and Another, AIR 1966 SC 634 : (1966) 2 LLJ 144 : (1966) 1 SCR 461 , a three Judge Bench of the Hon''ble Supreme Court has held that neither consent nor waiver nor acquiescence can confer jurisdiction upon a court, otherwise incompetent to try the suit. It is well-settled and needs no authority that ''where a court takes upon itself to exercise a jurisdiction it does not possess, its decision amounts to nothing.'' A decree passed by a court having no jurisdiction is non-est and its validity can be set up whenever it is sought to be enforced as a foundation for a right, even at the stage of execution or in collateral proceedings. A decree passed by a court without jurisdiction is a coram non judice. (as quoted in Harshad Chiman Lal Modi (supra)).

27. The next contention of the learned counsel for the third respondent is that Ext. P7 was rendered by the first respondent essentially based on a judicial directive of this Court in Ext. P6 judgment. In the first place, it is to the credit of the learned counsel that he has fairly conceded that Ext. P6 judgment is not rendered on merits. Nevertheless, the learned counsel would contend that the

Government has the necessary power under Section 80 of the Act to rectify the anomaly that has crept in during the implementation of Ext. P2 proceedings of pay revision.

28. It is, however, trite to observe that a mere judicial directive of this Court in a writ petition that the Joint Registrar shall consider, or even decide, an issue cannot amount, in my view, to conferring jurisdiction on the Joint Registrar to decide a dispute over which he has no jurisdiction. A judgment rendered by this Court, according to a learned Division Bench of this Court Raveendran (supra), would not confer any jurisdiction or authority on the Joint Registrar, when the legislature, in fact, has conferred the jurisdiction on another authority --as the statutory scheme reveals, the Arbitration Court. It needs no further cogitation to hold that the judicial dictum of Raveendran squarely applies to the present set of facts as well.

29. The learned counsel for the third respondent has further urged before this Court that any interdiction of Ext. P7 would only result in reviving an earlier illegality perpetrated by the petitioner Bank. In other words, according to the learned counsel, the question of pay disparity clearly falls foul of Article 14 of the Constitution of India. And the petitioner cannot be allowed to continue to discriminate against the third respondent under the excuse that the first respondent does not have the power to issue Ext. P7 orders.

30. Indeed, it is beyond any cavil that under Article 226 of the Constitution of India, this Court would be loath to interdict any orders passed by the authorities, provided that such interdiction has the potential of reviving something which is clearly illegal. At the same time, I hasten to add that such exercise of discretionary power on the part of this Court would be available only if the impugned order passed by the authorities, though may be unsustainable on merits, is essentially intra vires of the authority that has passed, in the first place.

31. Put differently, I may observe that once an order is ultra vires, it is non est and is deemed to have no existence in the eye of law. As such, the question of condoning the said order on the premise that lest it should revive something which is clearly illegal does not, in my view, arise.

32. The learned counsel for the third respondent has strenuously contended that the Government, which has the power under Section 80 of the Act to issue proceedings of pay revision, has the necessary incidental power to set right any anomalies that arise in the implementation of those proceedings. Attractive as the submission appears to be, on a closer scrutiny it, however, fails to pass the judicial muster.

33. As has already been observed, Section 80 of the Act essentially delegates to the Government the legislative power of, inter alia, the pay fixation. Though the difference between the orders of legislative nature and administrative nature, inclusive of the quasi-judicial, is extremely thin; nevertheless, the difference does exist. One of the broad features that marks an order legislative in nature is

that it will have impact across the board without being person specific. On the other hand, an order of administrative or quasi-judicial nature could be rendered, inter alia, settling interpersonal disputes.

34. Further, a legislative order is aimed at regulating the future affairs, whereas an administrative one is aimed at resolving the conflicts in praesenti. Neither consultation nor adherence to the principles of natural justice is a sine qua non in the former, but in the latter either of them plays a role unless the statute has excluded it. These differences, however, are illustrative, but not exhaustive.

35. The learned author C.K. Thakkar in his treatise Administrative Law1 has summarised the observations of de Smith in his classic commentary, Judicial Review of Administrative Act (1980), thus:

1. If an order is legislative in character, it has to be published in a certain manner, but it is not necessary if it is of administrative nature.

2. If an order is legislative in character, the court will not issue a writ of certiorari to quash it, but if an order is an administrative order and the authority was required to act judicially, the court can quash it by issuing a writ of certiorari.

3. Generally, subordinate legislation cannot be held invalid for unreasonableness, unless its unreasonableness is evidence of mala fide or otherwise shows the abuse of power. But in case of unreasonable administrative order, the aggrieved party is entitled to a legal remedy.

4. Only in most exceptional circumstances can legislative power be sub-delegated, but administrative powers can be sub-delegated.

5. Duty to give reasons applies to administrative orders but not to legislative orders.

36. In the present instance, both Ext. P3 and Ext. P7 have been rendered by the Government confining to the alleged pay disparity in the case of the third respondent. As such, the question of the Government fixing up any anomalies in implementing a legislative directive vis-?-vis a single individual does not arise. If the Government has to amend the pay revision rules under Section 80 of the Act having noted the shortcomings in their implementation, such an effort on the Government''s part has to be in exercise of its legislative power. And, it is entirely permissible.

37. With the incorporation of Section 69 into the statute book, every employee has come to possess an efficacious, remedial quasi-judicial forum concerning his service disputes. If there is any anomaly in the stepping up of pay, be it involving the third respondent or any other employee, it is essentially a service dispute affecting the individual right of that particular person, but nothing more. Under these circumstances, it is quite essential for the third respondent to approach, if advised, the Co-operative Arbitration Court under Section 69 of the Act.

38. As has been rightly contended by the learned counsel for the petitioner, it is

not a question of alternative remedy, but of the only remedy, apart from being a question of ultra vires. At this juncture, it may be appropriate, though hypothetical, to observe that had the third respondent approached this Court instead of approaching the first respondent inviting Ext. P7 concerning either the anomaly in stepping up of the pay or the partial implementation of Ext. P3, the entire submission of the learned counsel for the third respondent concerning the alternative remedy could have borne fruit. I am afraid, that is not the case.

39. In the facts and circumstances, whatever be the merits of the third respondent''s claim concerning the stepping up of pay on a par with his junior, the fact remains that Ext. P7 is ultra vires and is devoid of any enforceability. As a natural corollary, it is but inescapable to hold that Ext. P7 is ultra vires and void ab initio. In the result, W.P.(C) No. 19579 of 2015 is allowed, and W.P.(C) No. 14753 of 2015 is dismissed.

Having regard to the declaration made by this Court concerning Ext. P7 order of first respondent, it is further made clear that the third respondent is at liberty to approach, if advised, an efficacious judicial or quasi-judicial forum, such as the Co-operative Arbitration Court to ventilate his grievance concerning either the disparity in stepping up his pay or concerning partial extension of the benefit prospectively instead of applying the benefit with effect from 10.10.2003, retrospectively. No order as to costs.

12nd Ed., EBC., Pg.64