

(2005) 06 KAR CK 0057

In the Karnataka High Court

Case No : Writ Petition No. 4431 of 2000

Malnad College of Engineering

APPELLANT

Vs

State of Karnataka and Another

RESPONDENT

Date of Decision : 30-06-2005

Acts Referred:

Constitution of India, 1950 — Article 12, 226, 265

Citation : (2005) ILR (Kar) 5022 : (2005) 3 KCCR 215 SN

Hon'ble Judges : S. Abdul Nazeer, J

Bench : Single Bench

Advocate : Ashok Haranahalli, for the Appellant; B. Manohar, AGA for R-1 and S.G. Bhagawan Advocate for R-2, for the Respondent

Final Decision : Dismissed

Judgement

Abdul Nazeer, J.—In this writ petition the Petitioner - College has challenged the order passed by the 2nd respondent dated 06.08.1998 (Annexure "A") whereby the 2nd respondent has permitted the excess students admitted by the Petitioner to the B.E. Course for the academic year 1995-1996 to appear in the 6th Semester Examination subject to payment of penalty of Rs. 10 lakhs and on certain other conditions.

2. The brief facts of the case may be stated as follows:

3. Petitioner is an Engineering College, affiliated to the 2n Respondent - University during the relevant period. It is contended by the Petitioner that for the academic year 1995-96 it had admitted 5% of its Management quota by 16.10.1995 out of total number of 570 seats. Out of the remaining 542 seats, the Government could fill up only 471 seats by 16.10.1995 leaving a balance of 71 seats unfilled on that date. The College filled up 49 seats of the balance of 71 seats, which had remained unfilled. The GET Cell sent 71 students after 26.10.1995. Thus, the College had to admit 619 students even though 570 seats were available resulting in 49 excess admissions. However, 16 students did not

join the Course and the excess seats came down to 33 seats. The Petitioner - College sought regularisation of excess admission made by it. The State Government by its Communication dated 12.03.1996 rejected the request of the College.

4. Feeling aggrieved by the said order, the Petitioner filed a Writ Petition in W.P. No. 7295/1996 and W.P. Nos. 7401-7476/1996 questioning the above communication of the State Government and sought for regularisation of admission of 77 students i.e. 28 students admitted in NRI quota and 49 students admitted by the College after the order of the Hon"ble Supreme Court. This Court by the order dated 27.05.1996 dismissed the said writ petitions. Feeling aggrieved by the said order, the Petitioner filed a Writ Appeal in W.A. Nos. 6445-6521/1996 and other connected matters. The Writ Appeals were also dismissed by this Court on 22.10.1997.

5. The Petitioner filed a Civil Appeal against the said order of this Court in SLP (Civil) No. 5346-5422/1998. During the pendency of the said SLPs, All India Council for Technical Education by the communication dated 28.08.1998 granted one time exemption for excess admission to the Petitioner - Institution for the academic year 1995-1996. In view of granting of exemption by the AICTE the Hon"ble Supreme Court disposed of the said SLPs in the following terms:

"Copy of the letter dated 28th August 1998 from all India Council for Technical Education to their Advocate is taken on record. In view thereof, these Special Leave Petitions are disposed of on condition that the two colleges, file within two weeks an undertaking in this Court not to admit excess students in future as required by all India Council for Technical Education in the said letter of 28th August 1998."

6. In the meantime, the Petitioner had made a representation to the State Government seeking regularisation of excess admission of 77 students. The State Government recommended to the AICTE to regularise the excess admissions made by the College. Petitioner requested the University to permit the said students to appear in the examination. The Syndicate of the University resolved to permit the Students to appear in the 6th semester examination pending regularisation of admission by the AICTE. The University imposed a penalty of Rupees ten (10) lakhs on the Petitioner for making excess admissions as per the order dated 06.08.1998. Petitioner paid the said amount and the excess students were permitted to appear in the 6th Semester examination.

7. After disposal of the SLPs, the Petitioner filed the above writ petition for quashing the order dated 6.8.1998 and for a mandamus directing the 2nd respondent - University to refund the amount of Rs. 10.00 lakhs paid by the Petitioner to the 2nd respondent together with interest from the date of receipt till the date of payment.

8. The 2nd respondent - University has filed its objections stating that the Division Bench while dismissing the Writ Appeals No. 6445-6521/1996 on

22.10.1997 reserved liberty to the Petitioners to approach the 2nd respondent or any other competent authority for regularisation of their admissions if permissible under law. The petitioner by the letter dated 04.08.1998 informed the 2nd respondent that it was prepared to abide by its decision including whatever penalty that would be imposed by it regardless of the validity or otherwise of the 77 admissions made. Pursuant to the undertakings of the Petitioner in its letter dated 4.8.1998, the 2nd respondent passed the order dated 6.8.1998 as per Annexure "A" and a penalty of Rs. 10 lakhs was imposed for the irregularity and illegal action committed by it in admitting 77 students. The said amount was paid by the Petitioner without any demur. It is further contended that the AICTE has not regularised the excess admissions made by the College. It has only granted one time exemption for the excess admission made during the year 1995-96 and the said order does not amount to regularisation of excess admission made by the Petitioner. Having offered to pay the penalty for illegally admitting the students in excess of its intake, the Petitioner cannot seek the aid of the Court in relieve of its act of payment made after invitation by itself. It is further stated that having defied the Rule of intake, the petitioner cannot be permitted to take advantage of its own wrong because of the subsequent event of one time exemption more so, when it has not made any demand to the respondent before filing the writ petition seeking remedy of writ in the nature of mandamus. It is contended that the 2nd respondent has not collected any amount illegally.

9. The 2nd respondent has filed a Memo on 10.09.2003 along with a communication of the 2nd respondent dated 22.08.2003 stating therein that the penalty of Rs. 10.00 lakhs collected from the Petitioner - College was credited to the General Administrative Expenses (Block Grant) for the year 1998-99 and that the amount was utilised for the purpose of purchase Lab Equipments, Sports activities, development programme, publications, student welfare activities, scholarship, etc., during the year 1998-99 itself.

10. The Petitioner has filed an amendment application for amendment of the petition on 16.10.2003. It has incorporated paragraphs 6(a), 6(b) and 15(a) to the Writ petition. The letter dated 04.08.1998 referred to in the objection statement of the 2nd respondent - University has also been placed on record and marked as Annexure "C-1". In the additional pleadings, it is stated that since the University refused to accept the examination fee on the ground of delay, the Chairman of the Petitioner - Institution gave a letter dated 04.08.1998 stating that the Institution is agreeable to pay penalty for delayed acceptance of examination fee. The penalty agreed to be paid by the Petitioner was with a view to seek permission of the University to permit the students to appear for the 6th Semester Examination. The Petitioner agreed to pay the penalty on the impression that the University is competent to levy penalty, with a further understanding that the payment of the amount was an interim measure subject to the final decision of the Apex Court and the AICTE.

11. The 1st respondent - State Government has also filed its objections supporting the stand taken by the 2nd respondent. It is stated that the Petitioners have to approach the Civil Court for refund of the amount of Rs. 10.00 lakhs.

12. I have heard the Learned Counsel for the parties and perused the materials on record.

13. Learned Counsel for the petitioner submits that the University has no authority to collect the amount in question. It is further submitted that the University being a creation of statute it has to act in accordance with the Universities Act and the Statutes, Regulations or Rules made thereunder. There are no statutes empowering the University to collect penalty. It is further argued that the College has paid the said amount out of its fund and that the same has not been collected from its students.

14. On the other hand, Learned Counsel for the respondent -University has contended that the amount collected by the University has been spent for the development of the students welfare activities. The College has not produced any material to show that the said amount has not been passed on to its students. Thus, it is not entitled for refund of the amount. The writ petition seeking refund of the amount is not maintainable. He prays for dismissal of the writ petition.

15. Having regard to the contentions of the Learned Counsel for the parties, the points for consideration in this writ petition are as follows:

i) Whether the University is competent to collect the penalty as has been done in this case?

ii) If the answer to the above question is in the negative, whether the Petitioner is entitled to seek its refund in this petition?

Re. Point No. 1:

16. A University is a creation of Statute. It is a legal entity and it is an "authority" under Article 12 of the Constitution. The functions of the Universities are regulated under the Statutes, Ordinances, Regulations or Rules, etc., for its internal management and also to deal with its affiliated Colleges as passed by respective authorities under its various provisions. Learned Counsel for the University is not able to show any provision in the Karnataka State Universities Act, 1976 or the Statutes, Regulations or Rules made thereunder or any other authority empowering the University to collect penalty for the excess admission made by its affiliated Colleges.

17. It is well settled that to impose penalty, the University must have the authority of law. The imposition of pecuniary liability is comparable to punishment for commission of an offence. Imposition of pecuniary liability for breach of a legal obligation cannot be relegated to the region of mere procedure and machinery for its realisation. Such liabilities must be created by the

enactment or a statute made by the competent authority under the enactment.

18. In *Khemka and Co. (Agencies) Pvt. Ltd. Vs. State of Maharashtra*, the Apex Court has held that the pecuniary liabilities must be created by clear and unambiguous and express enactment. Neither the pecuniary liability nor an offence be created by mere implication. It is held as under:

"The imposition of a pecuniary liability, which takes the form of a penalty or fine or a breach of a legal obligation cannot be relegated to the region of mere procedure and machinery for the realization of tax. It is more than that. Such liabilities must be created by clear, unambiguous and express enactment. The language used should leave no serious doubts about its effect so (hat the persons who are to be subjected to such a liability for the infringement of law are not left in a State of uncertainty as to what their duties or liabilities are. This is an essential requirement of a good government of laws. It is implied in the constitutional mandate found in Article 265 of our Constitution; "No tax shall be levied or collected except by authority of law".

19. In *Hindustan Steel Ltd. Vs. State of Orissa*, the Hon"ble Supreme Court has held that an order imposing penalty of failure to carry out a statutory obligation is the result of a quasi-criminal proceeding an penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard or its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances.

20. In *G.S Ravindra and Ors. v. The Chairman, B.D.A. and Ors.* ILR 1997 K.AR 3364 this Court was considering the power of the Bangalore Development Authority to collect the penalty for not constructing the building within the period prescribed after allotment of the building sites by it. It is has held as follows:

"There is no provisions either under the Act or under the rules empowering BDA to impose penalty for non-compliance with the allotment rules or the terms and conditions of the lease-cum-sale agreement where the BDA has power to extend the time. Where the law prescribed a particular consequence either for commission of an act or for its omission, only such consequences must ensue and not other which is not prescribed by law. The BDA has no authority of law, howsoever benevolent it may be to impose fine or to take action in the manner not otherwise provided. The rules of allotment and the terms and conditions of the lease-cum-sale agreement would not authorise the BDA to impose penalty against the allottees for not constructing the buildings within the period prescribed in the absence of any provision of the imposition of penalty is without authority of law".

21. An "offence" means any act or omission made punishable by law for the time being in force. Law should provide for the imposing penalty for commission of the

offence. The order levying penalty is quasi-judicial in character and involves exercise of judicial discretion. An offence can be compounded provided it is statutorily permissible. In my view University cannot take the shelter under the offer made by the College to pay penalty voluntarily unless it is shown that College has committed an "offence" and it is legally permissible for the University to collect penalty or compounding fee. The University has no authority of law to levy penalty in the manner not otherwise provided. If the University was of the view that the College has failed to observe any conditions of affiliation, or the College is conducted in a manner, prejudicial to the interest of education, it can withdraw the affiliation in accordance with law. Even if the College offers to pay the penalty voluntarily, the University cannot accept the same without the support of law. I answer point No. (1) accordingly.

Re. Point No. 2:

22. Now, the question for consideration whether the Petitioner is entitled for refund of the amount collected by the University by way of penalty. The University has taken a stand that the amount collected from the Petitioner was credited to its General Administrative expenses for the year 1998-99 and the amount was utilised for the purpose of Lab equipments, Sports activities, Developmental Programme, Publications, Student Welfare activities, Scholarship, etc., during the year 1998-99 which is not denied by the Petitioner. The Petitioner contends that it has paid the amount out of its funds and that it has not collected the amount from 77 excess students admitted by it or from any other students. On the other hand, University contends that the College has passed on the amount to its students and if refund is ordered, the College will be unjustly enriched which is not permissible in law.

23. In *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, (a 9 Judge Constitution Bench of the Supreme Court was dealing with refund of excise and customs duties collected contrary to law. In this case, the Court has held that a tax levied under a provision struck down as unconstitutional is an "unconstitutional levy" and tax collected under the Act by misconception on wrong interpretation of the provisions of the Act, Rules and Notification or by an erroneous determination of facts is an "illegal levy" In so far as the first category is concerned, the Court has held that it is open for the person claiming refund to either file a suit for recovery of tax or to file a writ petition for an appropriate direction of refund, if the tax so collected is not passed on to the customer the Second category is not relevant for our purpose. While dealing with the refund in the first category, it is further held that the claim of refund in a suit or writ petition can succeed only if the Petitioner/plaintiff alleges and establishes that he has not passed on the burden of duty to other persons. The relevant portion of the order is as follows:

"A claim for refund, whether made under the provisions of the Act as contemplated in Proposition (i) above or in a suit or writ petition in the situations contemplated by Proposition (ii) above, can succeed only if the Petitioner/plaintiff

alleges and establishes that he has not passed on the burden of the duty to another person/other persons His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of the duty or to the extent he has not so passed on, as the case may be. Whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation but is subject to the above requirement, as explained in the body of the judgment. Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund. But where such person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that, that amount is retained by the State, i.e. by the people. There is no immorality or impropriety involved in such a proposition.

The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched".

(Emphasis supplied)

24. The said view is once again reiterated by the Apex Court in Union of India and others Vs. Solar Pesticide Pvt. Ltd. and Another,

25. Thus it is clear that in it is open for the person claiming refund either to file a suit for recovery of the amount collected from him or file a writ petition under Article 226 of the Constitution for appropriate direction for refund. But the question is whether the college is entitled for refund if it has passed on the burden to its students. The penalty collected by the University may be legally due to the College only to the extent it has not been passed on to the students. The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the amount from both ends. In other words, the College cannot collect the penalty from its students at one end and also collect the same from the University on the ground that the collection is contrary to law. A claim for refund can succeed only if the Petitioner alleges and establishes that it has not passed on the burden of penalty to another person or other persons. The refund shall be allowed only when it establishes that it has not passed on the burden. The Petitioner has failed to plead and establish that it has not passed on the burden to its students in this writ petition. Therefore, it is not entitled for a direction for refund of the amount in this petition. It is open for the College to plead and establish the same in a civil suit and claim its refund in the said suit.

26. Learned Counsel for the Petitioner has relied on the decision of a Division Bench of this Court in Sri Baber Prash v. The Commissioner and Ors., W.A. No. 5901/1998 and other connected Writ Appeals disposed of on 08.02.2000 for the proposition that the College is entitled for refund of the penalty. In this case a Learned Single Judge of this Court held that the Corporation had no authority to collect the money by way of Cess or Surcharge towards implementation of a scheme. However, the Court rejected the claim of refund on the ground the amount collected has been spent for the purpose of executing the scheme framed by it. However, the Division Bench took a view that the amount of Cess was undisputedly paid by the Petitioner therein and therefore, it has not been passed on to any other persons. Therefore, the Court directed the refund of the said amount. That is not the position here. The College has neither pleaded nor established that the amount is not passed on to the students, and that the same was paid out of its funds. Therefore, the said decision is not applicable to the facts of this case.

27. In the result, the writ petition fails and accordingly dismissed. However, liberty is reserved to the Petitioner to file a Civil Suit claiming refund of the amount in the terms stated above. No costs.