

(2018) 08 J&K CK 0043

In the Jammu And Kashmir High Court

Case No : Service Writ Petition No.1751 Of 2013

Showkat Ahmad Mir @APPELLANT@Hash Union Of India And Others

Date of Decision : 14-08-2018

Acts Referred:

Constitution of India, 1950 — Article 311

Citation : (2018) 08 J&K CK 0043

Hon'ble Judges : Tashi Rabstan, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

1. Petitioner vide Order no.1(1)/Spl/2005/4598 dated 1st February 2012, issued by Prasar Bharati Broadcasting Corporation of India, Doordarshan

Kendra, Srinagar, was appointed on a temporary post of Tailor, reserved for OBC Category candidate under Direct Recruitment Quota. However, by

order no.21 (Misc) 10-S(TV)/2144 dated 10thSeptember 2013, petitioner's services have been terminated with immediate effect. It is this order,

of which petitioner is aggrieved and seeks following relief:

a) Writ of certiorari, quashing impugned order no. 21

(Misc) 10-S(TV)/2144 dated 10.9.2013;

b) Writ of mandamus, commanding respondents to reinstate petitioner to his original post and release all consequential relief.

2. Respondents 1 to 3, in their Reply, insist that petitioner has committed serious misconduct by producing fraudulent certificate along with his

application and is not entitled to claim any right of hearing because of fraud committed by him and as a sequel thereto a genuine candidate could not

be selected and appointed. Petitioner at the time of appointment was overage and by submitting fake and fraudulent certificate qua date of birth got

appointed and after seeking confirmation of the said certificate from the concerned official, it came to fore that petitioner has resorted to fraud and by

deceitful means, got appointment. The actual date of birth of petitioner is 2nd February 1974 instead of 2nd February 1984. Letters dated 23rd April

2012 and 22nd March 2013, issued from the office of Zonal Education Officer, Tangmarg, clearly showed that actual date of birth of petitioner is 2nd

February 1974. Respondents also maintain that petitioner got appointment by tampering the documents showing his date of birth as 2nd February

1984. The duplicate school leaving certificate no.3592, in which date of birth of petitioner is shown as 2nd February 1984, has not been issued by

school as is evident by letter dated 4th March 2014 of the office of Headmaster, Government Girls Middle School, Devdrager.

3. Respondents 1 to 3 also maintain that the post was advertised as having been reserved for OBC category whereas petitioner does not possess said

certificate and does not belong to said category whereas he has produced a certificate of being resident of backward area, so he could not have been

appointed and has usurped the post and therefore, he is not entitled to any equity or hearing.

4. Rejoinder has been filed by petitioner to controvert averments made by respondents 1 to 3 in their Reply. According to petitioner, his services have

been terminated without any enquiry and without giving any notice to petitioner.

5. Heard and considered.

6. Mr Naik, learned senior counsel appearing on behalf of petitioner has stated that impugned termination order has been passed without following

principles of natural justice inasmuch as he has been condemned unheard. He also states that respondents have not even followed and complied with

mandate of Article 311 of the Constitution of India while terminating petitioner's services.

7. Mr Ratanpuri, learned counsel for respondents 1 to 3, to confute the submissions made by learned senior counsel for petitioner, has vehemently

argued that petitioner is not entitled to any hearing or inquiry as he was on probation and during period of probation, he was terminated and otherwise

also settled position of law is that probationer is not entitled to claim any inquiry, more particularly when fraud has been committed by him, which has

been proved beyond any shadow of doubt inasmuch as the authorities, who are

said to have issued the certificates, on the basis whereof petitioner obtained an entry in the respondent organisation, have unveiled and established fraud having been committed made petitioner. In such circumstances, learned counsel also exhorts, petitioner, having approached this Court with unclean hands, cannot claim any right in equity and writ petition, therefore, is liable to be dismissed. To bolster his averments, learned counsel places reliance on a judgement rendered by a Division Bench of this Court in *Sham Lal and another v. State of J&K and others*, 2005 (II) SLJ 475.

8. It is worthwhile to mention here that can a person, securing an appointment in a government organisation or even in any organisation, either governmental or non-governmental, on the edifice of fraud, forgery, crime or illegality, has constitutional right, percolating from Article 311 of the Constitution to demand affording of adequate opportunity of hearing and setting in motion of departmental enquiry permitting him to partake therein inconsonance with Article 311, prior to termination of his services. Answer thereto is in negative. It is well settled law that if the very appointment to civil post is vitiated by fraud, forgery or crime or illegality, it would necessarily follow that no constitutional rights under Article 311 can possible flow from such a tainted force. In such a situation, the question is whether the person concerned is at all a civil servant of the Union or the State and if he is not validly so, then the issue remains outside the purview of Article. If the very entry or the crossing of the threshold into the arena of the civil service of the State or the Union is put in issue and door is barred against him, the cloak of protection under Article 311 is not attracted. [Vide: *R. Vishwanatha Pillai v. State of Kerala*, (2004) 2 SCC 105; *Ishwar Dayal Sah v. State of Bihar* 1987 Lab IC 390; *Rita Mishra v. Director Primary Education Bihar*, AIR 1998 Pat 26].

9. "Fraud-avoids all judicial acts, ecclesiastical or temporal", observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and honest in the eyes of law. Such a judgment/decree - by the first court or by the highest court - has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings.

10. The effect of fraud and its impact as well as the remedy has been considered

by the Supreme Court in *S.P. Chengalvaraya Naidu v. Jagannath*

1994 AIR SC 853, in following terms:

“Fraud-avoids all judicial acts, ecclesiastical or temporal, observed Chief Justice Edward Coke of England about three centuries ago. It is the

settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/

decree - by the first court or by the highest court - has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in

any court even in collateral proceedings.”

11. The Supreme Court in *Patel Bhagubhai Ranchhodas v. Bai Arvinda*, AIR 1937 Calcutta 334, has held:

“that it appears that this order cancelling the previous order for maintenance was really obtained by fraud upon the Magistrate in his not being

apprised on that date that the decree for restitution of conjugal rights was liable to be set aside by the District Judge of Ahmedabad on appeal which

was then pending before him and an order obtained by fraud must be treated as having no legal effect.”

12. In *A. V. Papayya Sastry and others v. Government of A.P. and others* (2007) 4 SCC 221, it has been held:

21. Now, it is well-settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law. Before

three centuries, Chief Justice Edward Coke proclaimed:

Fraud avoids all judicial acts, ecclesiastical or temporal.

22. It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the court, tribunal or authority is a nullity and non

est in the eye of the law. Such a judgment, decree or order--by the first court or by the final court--has to be treated as nullity by every court, superior

or inferior. It can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings.”

13. In the leading case of *Lazarus Estates Ltd. v. Beasley* (1956)1 All ER 341: (1956) 1 QB 702: (1956)2 WLR 502 (CA), Lord Denning observed

that “No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud”.

14. In *Duchess of Kingstone*, Smith's Leading Cases, 13th Edn., p. 644, explaining the nature of fraud, de Grey, C.J. stated that though a judgment

would be *res judicata* and not impeachable from within, it might be impeachable from without. In other words, though it is not permissible to show that the court was mistaken, it might be shown that it was misled. There is an essential distinction between mistake and trickery. The clear implication of the distinction is that an action to set aside a judgment cannot be brought on the ground that it has been decided wrongly, namely, that on the merits, the decision was one which should not have been rendered, but it can be set aside, if the court was imposed upon or tricked into giving the judgment. It has been said: fraud and justice never dwell together (*fraus et jus nunquam cohabitant*); or fraud and deceit ought to benefit none (*fraus et dolus nemini patrocinari debent*).

15. Fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of another. In fraud one gains at the loss of another. Even most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is, thus, an extrinsic collateral act, which vitiates all judicial acts, whether in *rem* or in *personam*. The principle of "finality of litigation" cannot be stretched to the extent of an absurdity that it can be utilised as an engine of oppression by dishonest and fraudulent litigants.

16. In *S. P. Chengalvaraya Naidu v. Jagannath* (1994) 1 SCC 1, the Supreme Court had an occasion to consider the doctrine of fraud and the effect thereof on the judgment earned by a party. In that case, one A by a registered deed, relinquished all his rights in the suit property in favour of C, who sold the property to B. Without disclosing that fact, A filed a suit for possession against B and obtained preliminary decree. During the pendency of an application for final decree, B came to know about the fact of release deed by A in favour of C. He, therefore, contended that the decree was obtained by playing fraud on the court and was a nullity. The trial court upheld the contention and dismissed the application. The High Court, however, set aside the order of trial court, observing that there is no legal duty cast upon plaintiff to come to court with a true case and prove it by true evidence. B approached the Supreme Court. Allowing the appeal, setting aside judgment of the High Court and describing observations of the High Court as wholly perverse, Kuldip Singh, J. stated that "The courts of law are

meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often

than not, process of the court is being abused. Property grabbers, tax-evaders, bankloan-dodgers and other unscrupulous persons from all walks of life

find the court process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, whose case is based on

falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigationâ??.

The Supreme Court proceeded to state that â??A litigant, who approaches the court, is bound to produce all the documents executed by him which

are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on

the court as well as on the opposite partyâ?. The Court concluded: â??The principle of â??finality of litigationâ?? cannot be pressed to the extent of

such an absurdity that it becomes an engine of fraud in the hands of dishonest litigantsâ??.

17. In *United India Insurance Co. Ltd. v. Rajendra Singh* (2000) 3 SCC 581: 2000 SCC (Cri) 726: JT (2000) 3 SC 151, by practicing fraud upon

Insurance Company, claimant obtained an award of compensation from the Motor Accident Claims Tribunal. On coming to know of fraud, the

Insurance Company applied for recalling of the award. The Tribunal, however, dismissed the petition on the ground Â that it had no power to review

its own award. The High Court confirmed the order. The Company approached this Court. Allowing the appeal and setting aside the orders, the

Supreme Court stated that it is unrealistic to expect appellant Company to resist a claim at the first instance on the basis of fraud because appellant

Company had at that stage no knowledge about fraud allegedly played by claimants. If Insurance Company comes to know of any dubious concoction

made with sinister object of extracting a claim for compensation, and if by that time the award was already passed, it would not be possible for

Company to file a statutory appeal against the award. Not only because of the bar of limitation to file the appeal but the consideration of the appeal

even if the delay could be condoned, would be limited to the issues formulated from the pleadings made till then.

18. A Division Bench of this Court in case of *Barat Bushan v. Kashi Nath Tikoo & others*(LPA No. 40 of 2008) decided on 27.06.2013, observed:

â??Fraud avoids all judicial acts, ecclesiastical or temporal observed Chief Justice Edward Coke of England about three centuries ago. It is the settled

position of law that a judgment or decree obtained by playing fraud on the Court is a nullity and non-est in the eyes of law. Such a judgment/decre by

the first Court or by the highest court - has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court

even in collateral proceedings. The aforesaid observations were made by Honâ??ble the Supreme Court in the case of S.P. Chengalvaraya Naidu v.

Jagannath and ors, (1994) 1 SCC 1.Â Similar observations have been made subsequently by Honâ??ble the Supreme Court in the case of State of

Chhattisgarh and ors v. Dhirjo Kumar Sengar, (2009) 13 SCC 600 and Ganpatbhai Mahijibhai Solanki v. State of Gujarat and ors, (2008) 12 SCC

353.â??

19. The Division Bench also observed:

â??Once there is a fabricated document on the base of the proceedings and the edifice of such proceedings has been built on such a fabricated order

dated 27.11.2006 passed by the District Magistrate Anantnag, then all proceedings in appeal (revision) before the Financial Commissioner, all

proceedings in OWP no.935/2007, relatable to the instant appeal and the proceedings before the Letters Patent Bench stand vitiated.â??

20. The Supreme Court in the case of R. Vishwanatha Pillai, (supra) though on little varied subject matter, held that when an appointment is made on

fake and frivolous documents, question of violation of principles of natural justice does not arise at all and wrong doer/delinquent can be shown the exit

door without conducting inquiry.Â This Court also in the case Mubarak Ahmad Bhat v. State & others, 2011 (2) J&K 586 (HC), has held that

principles of natural justice demand that right of hearing is to be given to such a person who has acquired some right genuinely and not otherwise. It

would be advantageous to reproduce relevant paragraphs of the judgment hereunder:

â??4. The respondents after noticing the said fraud have drawn action, lodged FIR against the petitioner and rightly issued the impugned order. Any

person making entry in the Govt. department de hors of rules, by fraud has not claim to seek consideration. My this view is notified by a judgment

passed by this court in case titled Mohammad Maqbool Wagay v. State of J&K &

others, 2007 (3) JKJ HC-167 : SLJ 2007 351.

5. The principles of natural justice demand that even right of hearing is to be given to such a person who legally has acquired some right or a person

who genuinely came to be appointed or engaged and not to the person who adopts illegal means to accomplish his desire of making entry in the public

service. A Government employee is an essential component of the machinery that helps to keep the public order intact and in lieu thereof gets paid the

salary as per his ability. The right of wages, is a precious right, and is available only to such persons, who make their entry into Govt. service by legal

means. At a time when unemployment is a global challenge in general and in our State in particular; educated but unemployed youth are dying to get a

chance to serve the public machinery; when courts are burdened with heavy litigation on this count; when even the street vending has fallen in the

hands of educated persons; the people like petitioner cannot be allowed to drain out such a valuable and highly sought after treasure.â??

21. While reading the above extracted observations given by the Division Bench of this Court with reference to background of writ petition on hand,

one important facet comes out that petitioner has based his claim on such documents, which have been called by official respondents as tampered,

overwritten or fabricated. The said plea of respondents is based on inquiry conducted by them, that has been brought by them in their reply, as

discussed herein above, which is self-explanatory and needs no further explication or illumination. Rules of natural justice, as is often said, cannot be

expressed like strait jacket formulae. The nature and extent of their application depends on the facts of the case. If a person, in the present case is

petitioner, obtains appointment on the basis of false certificate(s), it would necessarily follow that no constitutional right under Article 311 of the

Constitution can flow from such a tainted force and the cloak of protection under Article 311 is not attracted. Once there is/are fabricated

document(s) on the fundament of the case and the edifice of such case has been built on such fabricated document(s), any proceeding having taken

place and/or order passed on such petition stand vitiated, so is writ petition on hand.Â

22. Keeping in view totality of facts and attending circumstances of the case, and given the above discussion, writ petition lacks in merit and is

accordingly, dismissed, with connected MP(s). Interim direction, if any, shall stand vacated.