

(2010) 01 KL CK 0142
In the High Court Of Kerala
Case No : W.A. No. 521 of 2007

The Manager, P.H.M.K.M.H.S., Panavoor	APPELLANT
Vs	
State of Kerala and Others	RESPONDENT

Date of Decision : 25-01-2010

Acts Referred:

Citation : (2011) 4 KLJ 324

Hon'ble Judges : P.N. Ravindran, J;K. Balakrishnan Nair, J

Bench : Division Bench

Advocate : M.A. Thomas Kutty and Asha Cherian, for the Appellant; Benny Gervasis (GP), V.A. Muhammed and D. Kishore, for the Respondent

Judgement

K. Balakrishnan Nair, J.—A Single Bench of this Court disposed of W. PNos. 26516 of 2006 and 24858 of 2006, filed by the Manager of P. H. M. K. M. H. School and his wife respectively, by a common judgment dated 14. 2. 2007. The Writ Petitions were filed by them against the impugned Government order GO. (Rt) No. 3313/20CF6/GE dn. dated 31. 7. 2006. The learned Single Judge quashed the said order and remitted the matter to the Government for fresh consideration in accordance with law. Smt. Anju, a claimant under Rule 51B of Chapter XIVA of Kerala Education Rules (for short "KER"), who was the respondent in both the Writ Petitions has preferred W. A. Nos. 612 of 2007 and 613 of 2007, challenging the said judgment and seeking to sustain the above Government order While remanding the matter to the Government, the learned Single Judge entered certain findings, which are adverse to the Manager and his wife. Therefore, the Manager has preferred W. A. Nos. 521 of 2007 and 696 of 2007 against the said common judgment.

W. A. No. 613 of 2007:

2. This Writ Appeal is treated as the main case, for the purpose of referring to the Exhibits. The brief facts of the case are as follows:

This Writ Appeal arises from W. P. (C) No. 26516 of 2006. Smt. Anju, the fifth respondent in the Writ Petition, is the appellant. The Manager,

who was the writ petitioner, is the first respondent. Respondents 2 to 5 were respectively respondents 1 to 4 in the Writ Petition.

3. The appellant's father was the Headmaster of P. H. M. K. M. H. S., Panavoor, managed by the first respondent. He died while in service on

24. 6. 1997. The appellant's elder sister filed an application on 17. 6. 1999, claiming appointment under the Dying-in-Harness Scheme, that is,

under Rule 5 IB of the KER. She got married on 30. 8. 2001. Therefore, the appellant submitted an application on 15. 1. 2002, claiming

appointment under the above rule. It was followed by an application in the prescribed form, Ext. R5 (a) dated 3. 12. 2002. While so, a regular

vacancy of Clerk arose in the school with effect from 1. 6. 2003. Instead of appointing the appellant, the Manager appointed the fifth respondent,

who is his wife. The said appointment was made on the strength of an earlier approved appointment of the fifth respondent in the school in a leave

vacancy for the period from 14. 2. 2000 to 18. 4. 2000. In view of that appointment, she is entitled to get preference in the matter of appointment,

when vacancies in the post of Clerk arise in future. The said right is conferred by Rule 7 of Chapter XXIV B read with Rule 51A of Chapter XIV

A of the KER.

4. When the appellant found that her application is not being considered by the Manager, she moved this Court by filing W. P. (C) No. 21841 of

2003. The said Writ Petition was disposed of by this Court by Ext. P4 judgment dated 16. 10. 2003, directing the Manager to dispose of

appellant's application dated 3. 12. 2002, claiming employment under the Dying-in-Harness Scheme. Pursuant to the directions in the judgment,

the Manager passed Ext. P5 order on 13. 11. 2003, rejecting her claim for appointment. Two grounds were taken for rejecting her application.

One was that the application was not submitted within the time limit prescribed for the same. Secondly, it was stated that when the vacancy arose

on 1.6.2003, there was a claimant under Rule 51 A, the fifth respondent herein,

who was none other than the wife of the Manager.

5. Challenging Ext. P5, the appellant again approached this Court, by filing W. P. (C) No. 39571 of 2003. The said Writ Petition was disposed of

by this Court on 29. 9. 2005 with the following directions:

5. Whatever that be, I have already found that the first reason mentioned in Ext. P6 for rejecting the application submitted by the petitioner on the

ground of limitation is bad. The question as to whether it was with the deliberate objective of denying the petitioner of her claim to compassionate

employment that the appointment during the period from 14. 2. 2000 till 18. 4. 2000 was given to the 4th respondent and the further aspect

whether the manager was bound to inform the petitioner and the other dependents of her late father of the vacancy which arose on 14. 2. 2000 are

all aspects which should be gone into afresh. The period for preferring statutory appeals against Ext. P6 is already over. Still, in the circumstances

of this case I permit the petitioner to file a revision before the Government under Rule 92 of Chapter XIV-A impugning the appointment given to

the 4th respondent. In the revision the manager as well as the 4th respondent should also be arrayed as respondents. If such a revision is filed by

the writ petitioner within one month from today, the Government will hear the writ petitioner, the 3rd respondent-manager, the 4th respondent and

the concerned official respondents and take a decision on the revision petition in the light of all relevant materials including the binding judicial

precedents which may be cited before the Government by the writ petitioner, the 3rd respondent-manager and the 4th respondent. It is made clear

that I have not expressed any opinion regarding the merits of the rival contentions. The approval presently granted to the appointment given to th

4th respondent will be subject to the result of the above revision petition. (emphasis supplied)

In the light of the above judgment, the appellant filed a revision petition before the Government on 30. 11. 2005. The Government, after hearing

both sides, by Ext. P7 order dated 31. 7. 2006, allowed the revision and set aside the approval of appointment of the fifth respondent with effect

from 1. 6. 2003, which was granted in the meantime. The Government also directed the Manager to give appointment to the appellant within one

month.

6. The first respondent and the fifth respondent, as mentioned earlier, challenged Ext. P7. by filing separate Writ Petitions. W. P. (C) No. 26516

of 2006 was filed by the first respondent Manager. The appellant filed a detailed counter affidavit in the Writ Petition, supporting the impugned

order. After hearing both sides, the learned Single Judge quashed Ext. P7 and remitted the revision filed by the appellant for fresh hearing and

disposal. According to the appellant, the decision of the learned Single Judge to remit the matter was unwarranted. The learned Single Judge took

the technical view that since the Government did not set aside the approval of appointment of the fifth respondent for the period from 14. 2. 2000

to 18. 4. 2000, the order of the Government cannot be sustained. So long as the approval of appointment of the said period, granted as per Ext.

P1 remains in force, the fifth respondent has a superior claim. The Government were therefore directed to reconsider the matter and decide

whether the earlier approval of appointment of the 5th respondent should be sustained or not. In this appeal, the appellant/5th respondent

challenges the said judgment and seeks to support Ext. P7.

7. The Manager has preferred Writ Appeal No. 521 of 2007, contending that the Government should be directed to consider the income of the

appellant herein, to find out whether she is eligible for appointment under the scheme. According to the Manager, she and her family members have

substantial landed properties and are earning substantial income. Therefore, she is Ineligible for appointment. But, the learned Single Judge took the

view that since the Manager did not take such a ground in Ext. P4, he. being a statutory authority, cannot be permitted to take such a contention

now. According to the Manager, that view is not correct.

8. We heard Sri. D. Kishore, learned counsel for the appellant, Sri. M. A. Thomaskutty, learned counsel for the first respondent and Sri. V. A.

Mohammed, learned counsel for the fifth respondent. We also had the benefit of hearing Sri. Benny Gervasls, learned Senior Government Pleader,

who appeared for respondents 2 to 4. According to the learned counsel for the appellant, the Government have clearly found that the approval

ordered by the District Educational Officer (for short "DEO") of the appointment of the 5th respondent, made in 2000 by the Manager, was

obtained by making a false declaration. The said appointment was contrary to

law as, at the relevant time, a claim under Rule 51B was subsisting.

Therefore, for the failure of the Government to specifically say that Ext. P1 approval is not set aside, it was unjust to remand the matter. The

learned counsel for respondents 1 and 5 submitted that so long as Ext. P1 remains in force, the fifth respondent is entitled to get preference. The

appellant became eligible to apply for the post, when she became a major on 16. 5. 2000. Strictly, going by the Rules, the learned counsel

submitted that she became eligible to apply only on 1. 1. 2001, as the qualifying age is reckoned with reference to first January of the year

concerned. So, she has no claim, whatsoever, for the vacancy which arose in 2000, to which the fifth respondent was appointed. The learned

counsel also pointed out that the appellant's sister did not pursue her claim for appointment and the appellant can claim only the vacancy that arose

after she became a major. Since her elder sister cannot pursue her claim for employment under Rule 51B, after her marriage on 30. 8. 2001, the

claim of her sister, which stood in the way of appointing the fifth respondent, no longer survived. The learned Senior Government Pleader

supported the order of the Government and pointed out that in view of Ext. P6 judgment, the Government was competent to go into the validity of

Ext. P1. The Government, while passing Ext. P7, found that Ext. P1 is illegal, being one made ignoring a claim under Rule 51B. Based on that

finding, the Government ignored the claim of the fifth respondent under Rule 51A and upheld the claim of the appellant under Rule 51B. So, the

finding of the learned Single Judge that the Government did not set aside Ext. P1 is hyper-technical and is liable to be reversed.

9. We considered the rival submissions made at the Bar and perused the materials on record. The fifth respondent was appointed in a short term

leave vacancy of two months" duration on 14. 2. 2000, while the appellant's sister's claim under Rule 51B was pending. Though the first

respondent Manager has a case that he did not receive any application from her sister, stated to be Filed on 17. 6. 1999, the learned Single Judge

took the view that such a stand is untenable. In Ext. R5(a), which is the application submitted by the appellant, in Column No. 11 the appellant

specifically mentioned about the earlier application dated 17. 6. 1999, submitted by her sister. Pursuant to Ext. P4 judgment, when her claim was

considered, the Manager has chosen not to dispute the said submission. Therefore, the learned Single Judge took the view that while the appointment of the fifth respondent was made in 2000, a claim under Rule 51B was pending before the Manager, which was submitted by the appellant's sister on 17. 6. 1999. It is not in dispute that the appellant attained majority only on 16. 5. 2000. When her sister got married on 30. 8. 2001, in the place of her sister, the appellant submitted the application on 3. 12. 2002. In view of the above factual position, the Manager could not have appointed his wife without offering employment to the appellant's sister. But, the Manager made a declaration that there is no claim under Rules 43, 51A or 51B and got the appointment of the 5th respondent approved as per Ext. P1, Therefore, the said approval is unsustainable in law.

10. The next point to be considered is whether the appellant can challenge the approval of appointment made in 2000, for the reason that at that time she was ineligible to get appointment. Further point to be considered is whether the Government-should have passed a specific order setting aside Ext. P1, before proceeding to grant reliefs in the revision petition filed by the appellant. We notice that G. O. (P) NO. 12/99/P& ARD dated 24. 5. 1999. which deals with the compassionate employment scheme for the dependents of Government servants who died-in-harness, permits substitution of one claimant by another. Paragraph 26 of the said order reads as follows:

Applicant will have the right to withdraw his/her application at any time before the job is accepted, so as to enable another dependant of the family to make his/her application for employment assistance.

An applicant will have the right to withdraw his/her application at any time before the job is accepted, so as to enable another dependant of the family to make his/her application for employment assistance. So, in this case, in the place of the appellant's sister, she has stepped in. In view of the above position, she can attack the appointment of the fifth respondent made in 2000 and its approval, after the same was known to her. The Manager does not have a case that a copy of the appointment order or its approval by Ext. P1 was marked to the appellant or her sister. They came to know of it only when the appellant staked her claim to the vacancy

which arose on 1. 6. 2003. The invalidity of that appointment was immediately canvassed by her. By Ext. P6 judgment, this Court directed the Government to consider that question also. Though the contentions of both sides were kept open by the learned Single Judge, we are of the view that her right to raise that point cannot be disputed by the Manager or by the fifth respondent before the Government. When the learned Single Judge says that the Government shall consider whether the appointment of the fifth respondent was a deliberate attempt to defeat the claim of the appellant, what is kept open is whether that claim of the appellant is right or wrong. The Manager is free to contend that he made the appointment not to defeat the claim of the appellant and the appellant, in turn, can contend that the appointment itself was made with mala fide intention to defeat her claim under Rule 51B. The learned Single Judge also observed that the Government shall consider whether the Manager has got an obligation to inform the dependents of the deceased Headmaster about the vacancies which arose in his place. So, the directions issued by the learned Single Judge, which we have already quoted above and the gist of which has been quoted by the Government also in Ext. P7 impugned order, cannot be said to be futile directions. Therefore, we are of the view that the appellant is entitled to canvass the correctness of the appointment made in 2000. Further, it is a well-settled principle in law that an order obtained by fraud can be attacked in any proceedings at any time and even collaterally, as the order never attains finality. The fraudster, the law says, cannot be allowed to reap the benefits of fraud. In this case, the Manager approached the DEO and obtained Ext. PI order, by making a false declaration that there was no lawful claimant for the vacancy which arose in 2000, as a fresh hand from outside could be appointed only in the absence of a claimant under Rule 43 for promotion, Rule 51A for reappointment and Rule 51B for compassionate employment.

11. We notice that in Ext. P7 impugned order the Government have found that the appointment of the fifth respondent in 2000 and its approval were illegal as the appointment was made ignoring a claim under Rule 51B and its approval was obtained by making a false declaration. Based on that finding, the Government ignored the claim of the fifth respondent under Rule 51A and granted reliefs to the appellant. Such a course of action

cannot be faulted for the reason that the Government specifically did not set aside Ext. P1. Substance and not the form is important. Since the order in favour of the fifth respondent being obtained by fraud, the Government can simply ignore it and pass appropriate orders. That was done in this case. So, the view advanced by the learned Single Judge that the Government did not set aside Ext. PI, as a justification for remanding the matter, is unsustainable in law.

12. The contention of the first respondent in the Writ Appeal filed by him that the income of the appellant herein exceeds the limit fixed by the

Government, cannot be accepted. The present income limit is Rs. 3,00,000/-, which was introduced as per GO. (P) NO. 37/2002/P& ARD

dated 15. 7. 2002. The learned Single Judge rightly took the view that since the Manager did not have such a case in Ext. P5, he cannot be

permitted to rake up that issue before this Court. The defect pointed out by the first respondent concerning lack of entries in Appendix B in Ext.

R5 (a) application of the appellant is untenable. Appendix B is for "office use" and it is not to be filled up by the candidate. In Column No. 6 of

Appendix A, the annual family income of the deceased Government servant is not given. Since the first respondent Manager did not raise any

dispute regarding that, when he was asked by this Court to consider the appellant's representation, it is not fair or proper to allow him to rake up

that issue before this Court.

13. The first respondent has filed I. A. No. 73 of 2010 in W. A. No. 521 of 2007, producing certain documents to prove that he has offered

appointment to the appellant Smt Anju as Full-time Menial with effect from 2. 4. 2007 and she did not turn up. It appears, at present, she is out of

India. While considering the validity of Ext. P7 and also the validity of the appointment of the Fifth respondent on 1. 6. 2003, those documents are

not relevant. Of course, if the Manager appoints her as Clerk with effect from 1. 6. 2003 and she does not join, it can be taken that she has

relinquished her claim or it is forfeited. So, the present documents produced cannot have any effect on the validity of Ext. P7. In the result, this

Writ Appeal is allowed, the judgment under appeal is reversed and the Writ Petition is dismissed.

In view of the above judgment, W. A. No. 612 of 2007 is allowed and W. A. Nos.

521 of 2007 and 696 of 2007 are dismissed. Nocosts.