
(2015) 10 KL CK 0030
In the High Court Of Kerala
Case No : OP(KAT) No. 114 of 2015 (Z)

Valsakumari E.G. and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 28-10-2015

Acts Referred:

Administrative Tribunals Act, 1985 — Section 20

Citation : (2015) 10 KL CK 0030

Hon'ble Judges : K. Surendra Mohan and S.P. Chaly, JJ.

Bench : Division Bench

Advocate : K. Jaju Babu, Senior Advocate, M.U. Vijayalakshmi and Brijesh Mohan, Advocates, for the Appellant; Rekha Vasudevan, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

S.P. Chaly, J.—The above original petition is filed by the petitioners against the order in OA(EKM) No. 286/2015 of the Kerala Administrative Tribunal, Trivandrum dated 12.3.2015. By the said order, learned Tribunal has refused to interfere with Ext. P23 order passed by the 3rd respondent herein, recasting seniority of the petitioners to their detriment. Since applicant Nos. 2 and 12 in the application before the Tribunal were not interested in prosecuting the matter, they are not made parties to this original petition.

2. Brief facts leading to the filing of this original petition as discerned from the pleadings of the petitioners are as follows:

3. Petitioners are working in the cadre of Head Nurses under the 2nd respondent. Earlier Staff Nurses were under the dual administrative control of respondents 2 and 3. Subsequently the dual control system was abolished by the 1st respondent and Staff Nurses were given option to work either under the 2nd respondent or the 3rd respondent. The Medical Colleges under the State and other hospitals were put under separate control of the 2nd and 3rd respondents

respectively.

4. Petitioners joined as Staff Nurses Gr.II on various dates beginning from the year 2000 and by securing periodical promotion they are presently working in the cadre of Head Nurses. The final seniority list of Staff Nurse Grade II was published as early as on 25.10.2007 as per Annexure A1. Based on the same, promotions were effected as early as in 2008 pursuant to the abolition of the dual control system, and the petitioners herein opted for Medical Education Department Services and their options were accepted and seniority in the cadre of Staff Nurse Grade I was finalised as per Annexure A2 dated 01.11.2013.

5. After a lapse of more than 7 years, respondents 4 to 6 filed O.A. No. 2237/2013 and respondents 7 and 8 filed O.A. No. 375/2014 before the Tribunal. The relief sought in O.A. No. 2237/2013 was for disposal of the representations filed by the applicants therein against Annexure A1 final seniority list of Staff Nurse Grade II dated 25.10.2007, sought direction to dispose of the appeal filed by the 5th respondent herein against the seniority list of Staff Nurse Grade I published by the 3rd respondent on 03.01.2013 and also sought direction to the 2nd respondent herein to consider the appeals filed against the draft seniority list dated 6.9.2013 of Staff Nurse Grade I. The Tribunal as per Annexure A3 order dated 19.10.2013 disposed of the application directing the 2nd respondent herein to consider the appeals filed by the applicants in the O.A. against the draft seniority list of Staff Nurse Grade I. However, the Tribunal found that the appeal filed against the final seniority list of Staff Nurse Grade II published by the 3rd respondent was not maintainable since the same was laid before the very same authority who published the final seniority list. O.A. 375/2014 was filed seeking a direction to consider the appeals filed by the respondents Nos. 7 and 8 herein against Annexure A2 final seniority list of Staff Nurse Grade I published by the 3rd respondent herein on 01.11.2013. The said application was disposed of by the Tribunal as per Annexure A4 order dated 20.03.2014 directing the 1st respondent to consider and pass orders on the appeals after affording an opportunity of being heard to them and other affected persons.

6. Pursuant to Annexure A4 order of the Tribunal, 1st respondent passed Annexure A5 order by which the 3rd respondent was directed to take appropriate action for redressal of the grievances of respondents 7 and 8 herein. Based on Annexure A5 order, 3rd respondent issued Annexure A6 notice dated 02.12.2014 directing the petitioners to submit objections regarding revision of seniority in the cadre of Staff Nurse Grade II. Thereupon the petitioners filed Annexures A7 to A20 objections before the 3rd respondent. Thereafter, petitioners filed O.A. No. 61/2015 challenging Annexures A5 and A6 and also seeking other reliefs. The Tribunal as per Annexure A21 interim order dated 9.1.2015 directed the petitioners to appear for the hearing scheduled on 13.01.2015 and urge their contentions before the 3rd respondent. Consequently petitioners appeared and submitted Annexure A22 submission dated 13.01.2015 before the 3rd respondent. However, taking into account the subsequent developments, learned

Tribunal has closed O.A. No. 61/2015 on 20.2.2015 retaining the liberty of the petitioners to challenge the decision of the 3rd respondent if the same was decided against the petitioners. It was challenging Annexures A5, A6 and A23 that the petitioners had preferred O.A. No. 286/2015 before the Tribunal.

7. The Tribunal dismissed the said O.A. in limine by Ext. P3 order dated 12.3.2015 holding that Annexure A23 order passed by the 3rd respondent was an appealable order to the 1st respondent in accordance with Rule 27B of Kerala State Subordinate Services Rules (hereinafter shortly called as "KS & SSR"). It is challenging the said order of the Tribunal, these original petitions are filed by the petitioners. Second respondent has filed a counter affidavit basically contending that verification of the service records of Staff Nurse Grade I who were transferred from Health Service to Medical Education Service, was conducted for identifying the incumbents who got wrong seniority and promotion. It is also contended that on verification of service records in respect of Staff Nurse Grade I, 17 Staff Nurses including the petitioners were found to have been assigned wrong seniority in the entry cadre of staff Nurse Grade II. Accordingly the service details were forwarded to the Director of Health Services, the 3rd respondent herein for further action and thereupon all affected persons were heard and passed Annexure A6 order in accordance with law.

8. It is also contended that while preparing and finalising Annexure A1 seniority list of Staff Nurse Grade II the 3rd respondent has mistakenly assigned their seniority without considering the fact that the 1st, 3rd, 9th and 10th petitioners herein were advised for appointment as Staff Nurse Grade II two times by different District-Wise appointments by the Public Service Commission and further that the 4th, 8th and 11th petitioners availed inter-district transfer in the entry cadre and were hence eligible for seniority assignment from the date of joining duty in the newly transferred District. Subsequently petitioners were given promotion as Staff Nurse Grade I under the 3rd respondent and as Head Nurse under the 2nd respondent on the basis of wrong assignment of seniority in the entry cadre. As a result, not only were the petitioners granted promotion illegally but the rightful entitlement of incumbents continuing in service were also overlooked. The 2nd respondent has relied on Ext. R2(a) decision of a Division Bench of this Court in O.P.(KAT) NO.3467/2013 wherein a similar circumstance was considered and held that the petitioners therein did not point out the mistake committed by the department while finalising the seniority list and therefore, they were responsible for the mistake and attempted to capitalise the mistake committed by the appointing authority and in such a case the benefit of the principle of sit back cannot be allowed to be extended to such persons. The 2nd respondent also contended that, Annexure A5 order issued by the 1st respondent was in accordance with law and further that the Tribunal by impugned order has dismissed the application by providing liberty to the petitioners to approach the 1st respondent. Accordingly, 2nd respondent has contended that the impugned order passed by the 3rd respondent is in accordance with law.

9. Respondents 4 to 6 and 7 and 8 have filed separate counter affidavits and supported the contentions raised by the 2nd respondent. Respondents 7 and 8 have specifically contended that they came to know of the incorrect assignment of seniority of the petitioners when the promotion order was issued by the 3rd respondent by proceedings dated 10.11.2008 promoting the petitioners and the respondents as Staff Nurse Grade I and thereupon the said respondents along with others filed appeal petition before the 1st respondent to correct the mistake through proper channel on 01.01.2009 which is evident from Ext. R7(a). It was also contended that after submission of the said appeal, the dual control system was abolished and the respondents were absorbed to Medical Education Department. Thereafter, the 2nd respondent issued a final seniority list of Staff Nurse Grade I, who crossed over to Medical Education Department from Health Services Department by proceedings dated 28.3.2011. It is further contended that in the said seniority list also, wrong seniority was given to the petitioners, overlooking seniority of the said respondents and thereupon they have filed appeal before the 1st respondent as provided under Rule 27B of KS & SSR. In view of the inaction in considering the appeal, respondents have secured order in W.P.(C) No. 13854/2011 as per Ext. R7(b) by which, this Court directed the 2nd respondent to publish a revised seniority list of Staff Nurse Grade II as on 28.02.2011 cancelling the seniority list published by proceedings dated 28.03.2011. But without considering any of the objections, 2nd respondent published Annexure A2 final seniority list without taking into account the leave availed for employment abroad before declaring their probation, inter-district transfer and without taking note of acceptance of second advice from Public Service Commission to another district.

10. Thereby, it is contended by the respondents that ever since the knowledge of assigning seniority respondents were prosecuting the proceedings diligently and therefore the petitioners cannot be heard to contend that they are entitled to the seniority fixed as per Annexure A1 by applying the principles of sit back. Respondents 4 to 6 also raised similar contentions and seek dismissal of the original petition. Party respondents also supported the findings of the learned Tribunal and contended that the petitioners are at liberty to file the statutory appeal as provided under law.

11. Apart from the same, some of the beneficiaries to Ext. P23 order have filed I.A. No. 6792/2015 in this original petition seeking to get themselves impleaded. Their basic contention was that none of the affected persons were made parties to the application before the Tribunal and therefore, the application filed by the petitioners before the Tribunal was lacking inherent defect affecting the root of the case and therefore, the original petition is to be dismissed on the said sole ground of non-impleadment of necessary parties to the proceedings. However, petitioners herein have filed a counter to the said impleading application contending that the impleading application itself is not maintainable in view of the decision of the Hon"ble Apex Court in Rajeev Kumar and Another Vs. Hemraj Singh Chauhan and Others, .

12. We heard learned Senior counsel Sri.K. Jaju Babu for the petitioners, learned Senior counsel Sri. K.P. Satheesan for respondents 4 to 6, learned Senior Government Pleader Smt. Rekha Vasudevan for respondents 1 to 3, and learned counsel Sri. Aravind Babu for respondents 7 and 8. We also heard Advocate Sri. Anison. M.R. who appears for the impleading petitioners who contended that the dictum laid down in *Rajeev Kumar (supra)* will not attract since the impleading petitioners are not seeking any relief aggrieved by the order passed by the Tribunal, but only supporting the order passed by the Tribunal.

13. The thrust of the contentions advanced by the learned Senior Counsel for the petitioners is that Annexure A5 order passed by the 1st respondent is violative of the direction contained in Annexure A4 order and also violative of the principles of natural justice. Learned Senior Counsel contended that as per Annexure A4, Tribunal has specifically directed the first respondent to consider and pass orders on the appeals filed by respondents 7 and 8 after affording opportunity to them as well as other affected persons. Taking cue from the said direction, learned Senior Counsel contended that since petitioners were likely to be affected in view of the direction they ought to have been heard before passing Annexure A5 order. It was further contended by the learned Senior Counsel that Annexure A1 list finalised in Staff Nurse Grade II was never under attack at any point of time and therefore the decision of the 3rd respondent to re-cast the same after a period of 7 years cannot be sustained. It was also contended that in Annexure A5 order there was a direction to consider the grievances of the respondents if and when an appeal is received by the 3rd respondent and to the knowledge of the petitioners there was no appeal preferred by the respondents. Learned Senior counsel for the petitioners also contended that in compliance with the direction in Annexure A5, to the knowledge of the petitioners respondents 7 and 8 have not preferred any appeal. It was also contended that since the petitioners are working under the second respondent, the 3rd respondent did not have any power to consider the grievances and therefore, the direction contained in Annexure A5 order to that effect is bad. Apart from the said contentions on merits of the factual aspects, learned counsel also contended that the Tribunal went wrong in relegating the petitioners to the appeal remedy provided under Rule 27B of the KS & SSR, since while disposing of O.A. No. 61/2015 petitioners were given liberty to challenge the order passed by the 3rd respondent. Learned Senior Counsel therefore contended that the impugned order is not passed in accordance with law.

14. On the other hand it was contended by the learned Senior Government Pleader that Annexure A5 does not suffer from any illegality in view of the fact that, by the said order a direction was issued to the 3rd respondent, the competent authority to take a decision after hearing all concerned. It was also contended by the learned Senior Government Pleader that at the time of disposal of Annexure A5, 1st respondent was under the impression that the promotion was effected to Grade I Staff Nurse in accordance with the seniority fixed in the entry cadre correctly and therefore, at that point of time, first respondent was

not at all under the impression that the petitioners were affected persons. It was also contended that the normal remedy available to the petitioners was to invoke the statutory right of appeal and there was no exceptional circumstance to invoke the jurisdiction of the Tribunal under the Administrative Tribunals Act before exhausting the remedy provided under the statute.

15. Learned Senior Government Pleader also placed reliance on Annexure R1 judgment in O.P.(KAT) 3467/2013 dated 04.12.2014 and contended that in the said judgment it was held that the seniority list was finalised without taking into account the leave without allowance for seeking employment abroad and further that on the basis of the wrong seniority assigned, petitioners therein earned promotion as Staff Nurse Grade I and thereafter the same was carried again in the final seniority list of Head Nurses in the Medical Education Services as on 31.03.2011 which was published on 25.08.2011. Taking cue from the said decision, learned Senior Government Pleader contended that since the fundamental mistake committed was in the office of the 3rd respondent and that too during the period the petitioners were under that department the correction of the seniority list should be by the 3rd respondent itself. Learned Senior counsel for the party respondents apart from supporting contentions raised by the learned Senior Government Pleader, also attacked the sit back theory put forth by the learned Senior Counsel for the petitioners. It was submitted that ever since the wrong casting of the seniority list in the entry cadre became known to them, they were following it up without any delay and therefore, principle of sit back sought for by the petitioners cannot be applied in this case.

16. It was also contended by the learned Senior Counsel that Ext. R1 judgment produced along with the counter affidavit filed by the Government, the issue raised by the petitioners is settled and therefore the petitioners are bound by the said judgment also. Further it was contended that Rule 27B of KS & SSR is the normal channel available to the petitioners since they have suffered Annexure A23 order and therefore the Tribunal was right in relegating the petitioners to seek their statutory remedy. Learned counsel for respondents 7 and 8 supported the contentions advanced by learned Senior Counsel and learned Senior Government Pleader.

17. We have considered rival submissions made by the learned counsel and perused the records. Since the thrust of the contentions advanced by the learned Senior Counsel for the petitioners was that Annexure A5 order dated 4.9.2014 was passed by the 1st respondent without complying with the directions in Annexure A4 order of the Tribunal and was violative of the principles of natural justice, we proceed to consider the said contention first. It is true that the applicants in O.A. N.375/2014 who are respondents 7 and 8 herein were alone heard by the 1st respondent.

18. Therefore the question remains, whether the petitioners herein were affected parties who also were entitled to be heard by the 1st respondent in compliance with Annexure A4 direction of the Tribunal We perused Annexure A5 and in fact,

according to us, 1st respondent has evaluated the situation of the seniority list by bonafidely thinking that since the promotion was granted to the respective parties by following the seniority list published in the entry cadre and the second respondent has prepared the seniority list in accordance with the said list, there was no defect at all to the list prepared. Bearing in mind the factual aspects in that background only the 1st respondent has met with the directions contained in Annexure A4. To put it otherwise 1st respondent was bonafidely under the impression that Annexure A1 seniority list prepared by the 3rd respondent in the cadre of Staff Nurse Grade II was in order and therefore, since the 1st respondent had such a bonafide impression, we are of the considered opinion that while considering the appeal petitions of respondents 7 and 8 the 1st respondent was never under the impression that the petitioners were affected parties. The said view of the first respondent is further reflected in the last paragraph of the said order when it stated that if at all there is any discrepancy in the seniority list prepared at the entry cadre, the 3rd respondent is directed to consider the said aspect also.

19. That apart on a perusal of Annexure A6 notice the 3rd respondent has issued the said notice to the petitioners and other affected persons after drawing report from the 2nd respondent and on realising that a mistake has crept in while finalising Annexure A1 seniority list and subsequent seniority lists. Therefore, even the 3rd respondent became aware of the said discrepancy in the seniority list only after evaluating the records available with the parent department as well as the second respondent. On realising the said situation only notices were issued to the petitioners and other employees concerned. Therefore, these circumstances persuade us to think that the first respondent while disposing of Annexure A5 was not aware of the fact that the petitioners were affected persons and viewed accordingly, we are of the considered opinion that the first respondent has not violated the direction of the Tribunal in Annexure A4 nor was there any violation of principles of natural justice.

20. Therefore, the attack raised by the petitioners on Annexure A5 cannot be sustained at all. Since we have taken such a view, we are also of the considered opinion that Annexure A6 notice issued by the 3rd respondent can never be heard to be illegal. In that view of the matter there is no legal infirmity in passing Annexure A23 order pursuant to the direction issued in Annexure A5. That apart if at all the petitioners were aggrieved by the action of issuing Annexure A6 challenged in O.A. No. 61/2015 and when Annexure A21 interim order was passed by the Tribunal directing the petitioners to participate in the proceedings before the 3rd respondent, that order should have been challenged by the petitioners. Furthermore, when final order was passed in the said O.A. on 20.02.2015 closing the said O.A. granting liberty to the petitioners to challenge Annexure A23 order and Annexures A5 and A6, the said final order in O.A. should have been the subject matter of challenge at least along with this original petition. Having not done so the petitioners cannot be heard to contend that the Tribunal was duty-bound to entertain the original application challenging

Annexure A23 order. In short, the order passed by the Tribunal as per Annexure A21 and the final order in O.A. No. 61/2015 dated 20.02.2015 have become final and conclusive by applying also the principles of acquiescence. In that view of the matter also, Annexure A5 order passed by the 1st respondent has become final.

21. We are of the considered opinion that for the reasons discussed above, the Tribunal was right in relegating the petitioners to seek their statutory remedy as provided under Rule 27B leaving open the contentions raised by the petitioners to be agitated before the 1st respondent in the proposed appeal. Tribunal has also held that under normal circumstances, the parties have to exhaust the statutory remedies as provided under law before invoking the powers of the Tribunal. Learned Tribunal by reserving the right of the petitioners to challenge the order passed by the 3rd respondent in O.A No. 61/2015 can only be presumed as a safety vault provided, to the petitioners in case of any exceptional circumstances. But when the application was considered, Tribunal realised that no exceptional circumstances existed, to entertain the same. Even if any right was reserved; Tribunal was bound by the stipulations contained under Section 20 of the Administrative Tribunals Act. Tribunal might have restrained itself by saying so, since it is a sound judicial principle that, it is not open to the author to explain his own judgment/order in a later proceeding. In the absence of any illegality in Annexures A5 and A23 orders, no exceptional circumstance existed enabling the petitioners to invoke the jurisdiction of the Tribunal without exhausting the remedy otherwise provided under law.

22. We are also of the view that when a streamline is provided to impugn the grievances of the petitioners under law definitely under ordinary circumstance, the authority conferred with that power, has a right to exercise that power, enjoined with duty to take a decision in accordance with law. Therefore, we are of the considered opinion that the Tribunal was fully justified in relegating the petitioners to avail the statutory remedy.

23. That apart respondents as well as the intervening petitioners in the I.A. referred supra, have advanced a contention that since the petitioners have not impleaded the affected parties in the original application, the original application suffered from an incurable inherent defect and therefore, the maintainability of the said application itself was at stake.

24. Learned counsel for the intervening petitioners in that background has invited our attention to the judgment in Prabodh Verma and Others Vs. State of Uttar Pradesh and Others, with specific reference to paragraph 28 and canvassed the proposition that all affected parties should be impleaded in the litigation and the same is not a substitute for making any person in representative capacity and carrying out paper publications. Learned counsel for the respondents 4 to 8 have also contended that the O.A. as well as this O.P. are not maintainable in view of the inherent defect of not impleading all the affected parties in the proceedings. Learned counsel for the respondents have also

brought our attention to the judgment reported in Khetrabasi Biswal Vs. Ajaya Kumar Baral and Others, and also the judgment in K.H. Siraj Vs. High Court of Kerala and Others, with specific reference to paragraphs 4 and 62 respectively to contend that an order passed without the affected parties on the party array is a nullity. We find force in the said contention also.

25. However, we are leaving open the question with regard to the application filed by the intervenors to implead in the O.P since several other petitions are pending before this Court raising the similar question. But, we heard counsel for the intervenors by invoking our powers conferred under Rule 152(2) of the Kerala High Court Rules.

26. After evaluating the entire facts and circumstances and law involved in the case, we find that there are no illegalities or other legal infirmities warranting our interference in the impugned order of the Tribunal. We make it clear that we have not expressed any opinion on merits of the case and if at all any observations are made, they are made for the sole purpose of deciding the issues raised in this original petition. If and when an appeal is filed by the petitioners as provided under the Rules, the 1st respondent shall consider the same untrammelled by any observations contained in this judgment.

Original Petition is accordingly dismissed with the above observations.