Ali M.K. And Ors vs State Of Kerala And Ors on 22 April, 2003

Equivalent citations: AIR 2003 SUPREME COURT 4006, 2003 AIR SCW 2931, 2003 LAB. I. C. 2131, (2003) 7 ALLINDCAS 466 (SC), 2003 (7) ALLINDCAS 466, 2003 (6) SRJ 337, (2003) 2 KHCACJ 738 (SC), 2003 (4) SLT 119, (2003) ILR(KER) 3 SC 79, 2003 (4) SCALE 197, 2003 (11) SCC 632, 2003 (5) ACE 40, 2003 (2) SERVLJ 380 SC, 2003 (2) KHCACJ 738, (2003) 2 KER LT 922, (2003) 2 SCT 914, 2004 SCC (L&S) 136, (2003) 97 FACLR 1003, (2003) 3 SUPREME 575, (2003) 4 SCALE 197, (2003) 6 INDLD 382

Author: Arijit Pasayat

Bench: Shivaraj V Patil, Arijit Pasayat

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           CASE NO.:
Appeal (civil)  5072 of 1999

PETITIONER:
Ali M.K. and Ors.

RESPONDENT:
State of Kerala and Ors.

DATE OF JUDGMENT: 22/04/2003

BENCH:
SHIVARAJ V PATIL & ARIJIT PASAYAT.

JUDGMENT:
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J U D G M E N T WITH CIVIL APPEAL NO. 5073 OF 1999 ARIJIT PASAYAT, J.

In these appeals the scope, content and ambit of Rule 8, Part II of the Kerala State and Subordinate Service Rules, 1958 (in short the 'KSSR') is the pivotal issue. Full Bench judgment of the Kerala High Court is under challenge.

Parties are litigating in the following factual background. Non-official respondents and the appellants were originally appointed in the Rural Development Department on different posts. Subsequently, the said respondents joined the services of the Co-operative Department. A fixed percentage of posts in the Co-operative Department are to be made by transfer. Non-official respondents applied to the Kerala Public Service Commission (in short the 'Commission') and on being selected joined the Co-operative Department. Question arose whether the benefit of Rule 8 of the KSSR is available to a person who is appointed to a post in another service and whether the lien of such a member continued in the former service. Controversy was whether their names were to be

included in the promotion list. A learned Single Judge took the view that their names could not be included. Foundation for this view was a Division Bench judgment in an earlier case.

Judgments of the learned Single Judge were challenged in Writ Appeals before the Division Bench. The matter was referred to a Full Bench to be heard along with an Original petition which was earlier referred to such Bench, as correctness of some earlier decisions was doubted. Parties before the Full Bench focused their attention on Rule 8 of the KSSR. While the appellants herein submitted that same was not applicable to the non-official respondents, the latter contended that it was applicable. The Full Bench by the impugned judgment accepted the contention of the non- official respondents. Appellants, as noted above, have questioned correctness of the Full Bench's decision.

According to the learned counsel for the appellants Rule 8 has no application to the facts of the present case since no person can have lien over two substantive posts in two different services. The non-official respondents have acquired lien on posts in the Co-operative Department and, therefore, they cannot be considered along with the appellants for the promotion and other service benefits in the Rural Development Department. With reference to Rules 24 and 28 of the KSSR, he submitted that the non-official respondents have been appointed in posts which were substantive in nature and character and, therefore, they had lost their lien over the posts in the Rural Development Department. They had on their own applied for absorption in the Co-operative Department and by no stretch of imagination, can their appointment be considered to be in exigencies of public service.

In response, learned counsel for the non-official respondents submitted that Note I appended to Rule 8 made the position clear that Rule 8 is applicable to their cases. The Full Bench has recorded a categorically finding that there was no material to show that they had been confirmed in the Co-operative Department as there was no order of confirmation. This is a factual finding recorded. Therefore, the Full Bench's decision is on terra firma.

Since Rule 8 of the KSSR is the touchstone on which the respective stands are to be tested, it would be appropriate to quote the same. The same reads as follows:

> "Rule 8: Members absent from duty:- The absence of a member of a service from duty in such service whether on leave, other than leave without allowances for taking up other employment on foreign service or on deputation or for any other reason and whether his lien in a post borne on the cadre of such service is suspended or not, shall not, if he is otherwise fit, render him ineligible in his turn -
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> (a) for re-appointment to a substantive or officiating vacancy in the clause, category, grade or post in which he may be a probationer or an approved probationer;
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> (b) for promotion from a lower to a higher category in such service and
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> (c) for appointment to any substantive or officiating vacancy in another service for which he may be an approved candidate; as the case may be, in the same manner as if he has not been absent. He shall be entitled to all the privileges in respect of

appointment, seniority, probation and appointment as full member which he would have enjoyed but for his absence:

provided that subject to the provisions of Rule 18 he shall satisfactorily complete the period of probation on his return;

provided further that a member of a service who is appointed to another service, and is a probationer or an approved probationer in the latter service, shall not be appointed under clause

(c) to any other service for which he may be an approved candidate unless he relinquishes his membership in the latter service in which he is a probationer or he approved probationer:

Provided further that this rule shall not have retrospective effect so as to disturb the decision taken by the Travancore Cochin Government in respect of the Travancore Cochin personnel:

Provided also that this rule shall not apply in the case of a member whose absence from duty in such service is by reason of his appointment to another service not being Military Service, solely on his own application, unless such appointment is made in the exigencies of public service.

Note 1:- An appointment made in pursuance of applications invited sponsored or recommended by Government or other competent authority shall be deemed to be an appointment made in the exigencies of public service for the purpose of this rule.

Note 2:-The benefit of this rule shall not be available to a person holding a post in any class or category in a service if his appointment to that post was from a post in another class or category in the same service."

The last proviso to Rule 8 consists of two parts. The first part is that the rule has no application where a member of a service is appointed to another service solely on his application. The second part is an exception to general prescription and is applicable if the appointment is made in the exigencies of public service.

Note I is of considerable significance. It is a deeming provision and provides that the appointment made in pursuance of an applications invited, sponsored or recommended by Government or other competent authority shall be deemed to be an appointment made in the exigencies of public service for the purpose of Rule 8.

It would be appropriate to note the effects of a proviso and a deeming provision.

The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. As was stated in Mullins v. Treasurer of Survey [1880 (5) QBD 170, (referred to in Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha (AIR 1961 SC 1596) and Calcutta Tramways Co. Ltd. v. Corporation of Calcutta (AIR 1965 SC 1728); when one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject matter of the proviso. The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. It is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule. "If the language of the enacting part of the statute does not contain the provisions which are said to occur in it you cannot derive these provisions by implication from a proviso." Said Lord Watson in West Derby Union v. Metropolitan Life Assurance Co. (1897 AC 647)(HL). Normally, a proviso does not travel beyond the provision to which it is a proviso. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other. (See A.N. Sehgal and Ors. v. Raje Ram Sheoram and Ors. (AIR 1991 SC 1406), Tribhovandas Haribhai Tamboli v. Gujarat Revenue Tribunal and Ors. (AIR 1991 SC 1538) and Kerala State Housing Board and Ors. v. Ramapriya Hotels (P)Ltd. and Ors. (1994 (5) SCC 672).

"This word (proviso) hath divers operations. Sometime it worketh a qualification or limitation; sometime a condition; and sometime a covenant" (Coke upon Littleton 18th Edition, 146) "If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant, and the earlier clause prevails....But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole" (per Lord Wrenbury in Forbes v. Git [1922] 1 A.C. 256).

A statutory proviso "is something engrafted on a preceding enactment" (R. v. Taunton, St James, 9 B. & C.

836).

"The ordinary and proper function of a proviso coming after a general enactment is to limit that general enactment in certain instances" (per Lord Esher in Re Barker, 25 Q.B.D. 285).

A proviso to a section cannot be used to import into the enacting part something which is not there, but where the enacting part is susceptible to several possible

meanings it may be controlled by the proviso (See Jennings v. Kelly [1940] A.C. 206).

So far as Rule 8 is concerned, the proviso referred to above operates in cases where even though the member of a service is appointed in another service on the basis of his own application, same is in the exigencies of public service. Therefore, the vital question is whether the appointment is made in the exigencies of public service. For that purpose, Note I assumes significance. It is, as noted above, a deeming provision. Such a provision creates a legal fiction. As was stated by James L.J. in Ex parte, Walton, In re, Levy [1881 (17) Ch D 746] "when a statute enacts that something shall be deemed to have been done, which in fact and in truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to. After ascertaining the purpose full effect must be given to the statutory fiction and it should be carried to its logical conclusion and to that end it would be proper and even necessary to assume all those facts on which alone the fiction can operate (See Hill v. East and West India Dock Co. (1884 (9) AC 448 (H.L.), State of Travancore Cochin and Ors. v. Shanmugha Vilas Cashewnut Factory (AIR 1953 SC 333), American Home Products Corporation v. Mac Laboratories Pvt. Ltd. and Anr. (1986 (1) SCC 465) and Smt. Parayankandiyal Eravath Kanapravan Kalliani and Ors. v. K. Devi and Ors. (AIR 1996 SC 1963). In an oft-quoted passage, Lord Asquith stated, "if you are bidden to treat an imaginary state of affairs as real you must surely, unless prohibited from doing so, also imagine as real the consequence and incidents which, if the putative state of affairs had, in fact, existed must inevitably have flowed from or accompanied it...." The statute states that you must imagine a certain state of affairs, it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs." (See East End Dwelling Co. Ltd. v. Finsbury Borough Council (1951 (2) All ER 587).

"The word 'deemed' is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible" (per Lord Radcliffe in St. Aubyn (L.M.) v. A.G. (No.2) (1951) 2 All E.R. 473 (HL) "Deemed", as used in statutory definitions "to extend the denotation of the defined term to things it would not in ordinary parlance denote, is often a convenient devise for reducing the verbiage of an enactment, but that does not mean that wherever it is used it has that effect; to deem means simply to judge or reach a conclusion about something, and the words 'deem' and 'deemed' when used in a statute thus simply state the effect or meaning which some matter or thing has the way in which it is to be adjudged; this need not import artificially or fiction; it may simply be the statement of an undisputable conclusion" (per Windener J. in Hunter Douglas Australia Pty v. Perma Blinds, (1970) 44 A.L.J.R. 257), When a thing is to be "deemed" something else, it is to be treated as that something else with

the attendant consequences, but it is not that something else (per Cave J., R. v. Norfolk County Court, 60 L.J.Q.B. 380).

"When a statute gives a definition and then adds that certain things shall be 'deemed' to be covered by the definition, it matters not whether without that addition the definition would have covered them or not": (per Lord President Cooper in Ferguson v. McMillan, 1954, S.L.T. 109).

Whether the word "deemed" when used in a statute established a conclusive or a rebuttable presumption depended upon the context (See St. Leon Village Consolidated School District v. Ronceray [1960] 23 D.L.R. (2 d) 32).

"I....regard its primary function as to bring in something which would otherwise be excluded" (per Viscount Simonds in Barclays Bank v. I.R.C. [1961] A.C. 509).

"Deems" means "is of opinion" or "considers" or "decides" and there is no implication of steps to be taken before the opinion is formed or the decision is taken."(See R v. Brixion Prison Governor ex.p. Soblen (1962) 3 All E.R.

641) The Full Bench as a matter of fact found that Note I applies because the appointments of the non-official respondents in the Co-operative Department were made in pursuance of applications invited, sponsored and recommended by the Government. In view of this factual finding, the conclusions are in order.

A faint attempt was made to submit that the non- official respondents had lost their lien as they were appointed to posts of substantive nature. Reference was made to Rule 28 to submit that on completion of probation and in case of promotion, it is to be presumed that there was substantive appointment. The Full Bench has recorded a factual finding that non-official respondents have not been confirmed in the posts in the Co-operative Department. It has been specifically recorded that no material was placed to show that any order has been passed by the Co-operative Department confirming the concerned employees in their posts. With reference to Rule 24 it was noted that mere completion of probation does not result in automatic confirmation. It is a settled position in law that a person can be said to acquire a lien on a post only when he has been confirmed and made permanent on that post and not earlier. [See Triveni Shankar Saxena v. State of U.P. (AIR 1992 SC 496) and Parshotam Lal Dhingra v. Union of India (AIR 1958 SC 36)] Above being the position, the Full Bench's decision does not suffer from any vulnerability to warrant interference. The appeals are dismissed, but in the peculiar circumstances, there will be no order as to costs.