Amir Jamal Khan And 6 Ors vs State Of U.P. And 4 Ors on 5 January, 2018

Author: Vivek Kumar Birla

Bench: Vivek Kumar Birla

HIGH COURT OF JUDICATURE AT ALLAHABAD

?AFR

Court No. - 30

Case :- WRIT - A No. - 57276 of 2014

Petitioner :- Amir Jamal Khan And 6 Ors

Respondent :- State Of U.P. And 4 Ors

Counsel for Petitioner :- M.A. Khan,Ashok Khare,J P Singh

Counsel for Respondent :- C.S.C.,Bheem Singh

Hon'ble Vivek Kumar Birla,J.

Heard Sri Ashok Khare, learned Senior Counsel assisted by Sri M.A. Khan, learned counsel for the petitioners as well as Sri Ashok Kumar, learned Standing Counsel appearing for the State respondents and Sri J.P. Singh, learned counsel for the contesting respondent no. 5 and the newly impleaded respondent no. 6.

Impleadment application filed by Sri J.P. Singh, learned counsel for the respondent no. 6-Committee of Management was allowed by this Court vide order dated 3.10.2016, however necessary amendment was not carried out. Sri M.A. Khan, learned counsel for the petitioners is permitted to carry out necessary amdnemdnt during the course of day.

Present petition has been filed challenging the order dated 15.10.2014 (wrongly mentioned as 15.10.2011) passed by the respondent no. 2-Regional Level Committee, Azamgarh. A further prayer in the nature of mandamus is made to direct the respondents not to interfere in the working of the petitioners as Assistant Teacher in LT Grade in Shibli National Inter Collect, Azamgarh and to pay the petitioners their regular monthly salary on the said post regularly every month including arrears of such salary from 23.8.2014.

I have heard learned counsel for the parties at length.

The case of the petitioners has already been suitably taken note of in the interim order dated 29.10.2014 and it is not necessary to repeat the same. For convenience, the order dated 29.10.2014 is quoted as under:-

> "Heard Sri Ashok Khare, learned Senior Advocate assisted by Sri M.A. Khan for the petitioner and learned Standing Counsel.
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> Petitioners herein were selected and appointed as Assistant Teachers in Shibli National Inter College, Azamgarh, by the earlier management.
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> It appears that there was some dispute with regard to the validity of the election of the said management which was under consideration by the Court. Subsequently the very notification in pursuance to which the election of the management was held, was quashed.
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> When the papers relating to the selection/appointment of the petitioners were sent to the concerned committee for its approval as per Rule, the same has been declined by the impugned order dated 15.10.2014, only on the ground that the as election of the Manager who had held the selections has been quashed therefore, the said selection stands vitiated and is illegal.
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> The contention of Sri Khare is that the selection of the petitioners cannot be said to be vitiated merely because the election of the Manager who held the selection has been set aside.
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> Prima facie there appears to be merit in the contention of the learned Senior Advocate. Unless and until some illegality is pointed out in the selection and appointment of the petitioner per-se their appoint cannot be dis-approved merely because the election of the management which conducted the selection has been declared void, as such, selection and appointment would be protected by the defacto doctrine.
>
> Issue notice to respondent no. 5.
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> Respondent may file counter affidavit within six weeks.

List thereafter.

Till the next date, operation and implementation of the impugned order dated 15.10.2014 shall remain stayed."

Advancing the arguments, submission of Sri Ashok Khare, learned Senior counsel appearing for the petitioners is that the selection/appointment of the petitioners is protected by de facto doctrine and the same cannot be nullified on the basis of a subsequent event that the election of the Committee of Management that has selected and appointed the petitioners was subsequently nullified by the High Court. It was pointed out that the election of the concerned Committee of Management was conducted by the Additional District Judge under the directions of this Court and it is not in dispute that on the date of selection, the same was the validly constituted Committee of Management and was duly recognized by the order dated 30.4.2014 passed by the District Inspect of Schools, Azamgarh (annexure 6 to the petition). In support of his argument, he has placed reliance on the judgements of Hon'ble Apex Court rendered in the cases of M/s Beopar Sahayak (P) Ltd. and others vs. Vishwa Nath and others, (1987) 3 SCC 693 and Dr. A.R. Sircar vs. State of UP and others, 1993 Suppl (2) SCC 734. He, thus, submits that de facto doctrine will protect the appointment of the petitioners.

Relevant paragraphs 12 and 13 in the case of M/s Beopar Sahayak (supra) are quoted as under:

"12. There is also another angle from which the matter needs to be considered. Shri Senger was not appointed a Prescribed Authority as persona designata. On the other hand he exercised the powers of a Prescribed Authority by reason of his posting as Additional City Magistrate II, Kanpur, in the place of one Shri S.D. Sharma and by virtue of an earlier Notification of the Government dated 9. 9.1974 constituting the Additional City Magistrate II, Kanpur, as the Prescribed Authority for certain areas in Kanpur city including the area falling within the limits of the Collector Ganj Police Station. The above said Notification of the Government was a General Notification and, therefore, whoever came to be posted as Additional City Magistrate II, Kanpur, automatically became a Prescribed Authority for the areas indicated in the Government Notification. Such being the case, as long as the Government Notification dated 9.9.1974 is not challenged, the exercise of powers by Shri Senger as a Prescribed Authority cannot also be challenged. This position would then call for the application of the 'de-facto doctrine' to the facts of the case. The principle of the 'de-facto doctrine' has been considered in several cases. this Court had occasion in G. Rangarajan v. Andhra Pradesh: 1981CriLJ876 , to which one of us (Sen, J.) was a party, to refer to those decisions and enunciate the law relating to the 'de-facto doctrine. In that case a criminal appeal filed by one Gokaraju Rangaraju under Section of the Essential Commodities Act was dismissed by Shri G. Anjappa, Additional Sessions Judge and a revision was preferred to the High Court. One Shri Raman Raj Saxena, another Additional Sessions Judge, had tried a Sessions case and awarded conviction to two of the accused persons and they had filed appeals to the High Court against their conviction and sentence. By the time the Criminal Revision

and the Criminal Appeal filed by the accused came to be heard by the High Court, this Court had quashed the appointments of the abovesaid two Additional Sessions Judges and two others as District Judges Grade II on the ground that their appointment was in violation of Article 233 of the Constitution. Therefore, the accused who had preferred the Criminal Revision and the Criminal Appeals respectively raised a contention before the High Court that the judgments rendered against them by the concerned Additional Sessions Judges were void and should therefore, be set aside. The High Court rejected the contention on the ground that the Additional Sessions Judges had held their offices under lawful authority and not as usurpers and therefore, the judgments rendered by them were valid and could not be questioned in collateral proceedings. Against the judgments of the High Court the accused preferred appeals by special Leave to this Court and those appeals were dismissed by this Court on the ground the 'de-facto doctrine' was clearly attracted. After referring to several decisions rendered by the Courts in India and England, Chinnappa Reddy, J. speaking for the Bench enunciated the law relating to the 'de-facto doctrine' as under:

A judge, de facto, therefore, is one who is not a mere intruder or usurper but one who holds office under colour of lawful authority, though his appointment is defective and may later be found to be defective. Whatever be the defect of his title to the office, judgments pronounced by a him and acts done by him when he was clothed with the powers and functions of the office, albeit unlawfully, have the same efficacy as judgments pronounced and acts done by a Judge de jure. Such is the de facto doctrine, born of necessity and public policy to prevent needless confusion and endless mischief. There is yet another rule also based on public policy. The defective appointment of a de facto judge may be questioned directly in a proceeding to which he be a party but it cannot be permitted to be questioned in a litigation between two private litigants, a litigation which is of no concern or consequence to the judge except as a judge. Two litigants litigating their private titles cannot be permitted to bring in issue and litigate upon the title of a judge to his office. Otherwise as soon as a judge pronounces a judgment a litigation may be commenced for a declaration that the judgment is void because the judge is no judge. A judge's title to his office cannot be brought into jeopardy in that fashion. Hence the rule against collateral attack on validity of judicial appointments. To question a judge's appointment in an appeal against the judgment is, of course, such a collateral attack.

The ensuing position therefore is that even if we are to countenance the argument of the appellant's counsel that Shri Senger had not gained experience as an Executive Magistrate exercising First Class powers for a period of not less than three years and could not therefore be appointed as a Prescribed Authority under the Act, the validity and legality of the order of release passed by him cannot be impugned because Shri Senger had not held the office as an usurper but only under colour of lawful authority. There is, therefore, no escape for the appellant from being governed by the 'de-facto doctrine' and thereby being disentitled to impugn the validity of the release

order on the ground of want of jurisdictional competence for Shri Senger to pass the order. Furthermore, the appellant is also not entitled to question the validity of the appointment of Shri Senger as a Prescribed Authority in a collateral proceeding. These additional factors also militate against the contentions of the appellant.

13. In view of our conclusion that Shri Senger's experience as an Executive Magistrate satisfied the requirements of Section of the Act and as such he was not incompetent to act as a Prescribed Authority and pass the impugned order of release, that secondly even if he was not fully qualified to act as a Prescribed Authority and pass the order of release the validity of the order cannot be impugned because of the 'de-facto doctrine' and thirdly, the appellant is not entitled to question the competence of Shri Senger to act as a Prescribed Authority in a collateral proceeding, it is really not necessary for us to examine the correctness of the view taken by the High Court that by reason of the merger of the order of Shri Senger with the order of the Appellate Authority, there is no room for the appellant to contend that the release order is a nullity because Shri Senger did not have jurisdiction to pass the order. Even so we may make a brief reference to the arguments of the counsel on that aspect of the matter and the case law cited by them to be fair to the counsel and to their arduous preparation of the case. Mr. Kacker's argument was that the High Court was not right in its view because the rule of merger would not be attracted where there is a total lack of jurisdiction in the Tribunal or Court of first instance to pass an order. Mr. Kacker submitted that there is a clear distinction between the manner of exercise of jurisdiction and the existence of jurisdiction and whenever an order was passed without jurisdiction by a Tribunal or Court, the rule of merger will have no application. In support of his contention the learned Counsel referred us to the following decisions. Hriday Nath Roy v. Ram Chandra Barna Sarma, ; Collector of Customs v. A.H.A. Rahima: AIR1957Mad496 ; The State of Uttar Pradesh v. Mohammad Noon [1958] SCR 595; Kumaran v. Kothandaraman: AIR 1963 Guj 6; Toronto Railway v. Toronto Corporation and Barnard v. National Dock Labour Board . Refuting the contentions of Mr. Kacker, Mr. Lalit argued that in several later judgments the view taken in Mohammad Noon's case (supra) has been explained as being confined to the peculiar facts of that case and that the rule of merger has not under gone any change and the consistent view that has been taken is that even an order passed by a Tribunal or Court without jurisdiction can be challenged before the Appellate Authority or Court, that in such an appeal the question of the initial Court's jurisdiction can also be gone into and that once the Appellate Authority or Court found jurisdictional competence in the Tribunal or Court of first instance and confirmed the order in appeal, then the rule of merger of the order of the original authority with the order of the Appellate Authority would be clearly attracted and thenceforth the order of the original authority cannot be assailed on the ground of jurisdictional error or incompetence. The learned Counsel further submitted that besides the rule of merger the rule of finality of judgments would also be attracted and on that score too the order of the original authority will attain immunity from attack. Mr. Lalit cited several decisions in support of his arguments but we need refer only to the decisions of this Court. The

decisions cited are: U.J.S. Chopra v. State of Bombay: 1955CriLJ1410 ; Madan Gopal Rungtas. Secretary to the Govt. of Orissa and Collector of Customs, Calcutta v. East India Commercial Co. Ltd.: [1963] 2 SCR 563." (Emphasis supplied) Relevant Paragraph 7 in the case of Dr. A.R. Sircar (supra) is also quoted as under:

"7. We have dealt with the question of the appellant's seniority both under Rule 20(1) and also de hors the said Rules on the assumption they are non-est on the statute being declared ultra vires. This is on the premiss that generally decisions taken bona fide under any law or rule in force which is later declared unconstitutional are saved on the de facto doctrine for otherwise even the regularisation of respondents 4 and 5's promotion would have to be invalidated." (Emphasis supplied) A reference may also be made to a judgement of Hon'ble Apex Court rendered in the case of Gokaraju Rangaraju vs. State of Andhra Pradesh, (1981) 3 SCC 132 wherein particularly in paragraph 11 the legality of appointment or election has been considered with regard to de facto doctrine, which is quoted as under:

"11. In Norton v. Shelby County : , Field, J., observed as follows :

The doctrine which gives validity to acts of officers de facto whatever defects there may be in the legality of their appointment or election is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined. It is manifest that endless confusion would result, if in every proceeding before such officers their title could be called in question." (Emphasis supplied) A reference may also be made to a judgement rendered by a Division Bench of Hon'ble Andhra Pradesh High Court in Immedisetti Ramkrishnaiah Sons, Anakapalli and others vs. State of Andhra Pradesh and another, AIR 1976 AP 193. This judgement was also delivered by Hon'ble Chinnappa Reddy, J. wherein he has considered the action of the Market Committee nominated by the Government under Section 5(1)(i) of Andhra Pradesh Agricultural Produce and Livestok Markets Act, 1966, the relevant paragraphs 7, 11, 12 and 13 whereof are quoted as under:-

"7. In England, the de facto doctrine was recognised from the earliest times. In Pulin Behari v. King Emperor, Sir Asutosh Mookerjee J., traced the first of the reported cases where the doctrine received judicial recognition as the case of Abbe de Fontaine decided in 1431. Mookerjee J., noticed that even by 1431 the de facto doctrine appeared to be quite well known. After 1431 the doctrine was again and again reiterated by English Judges, Mookerjee, J., referred to these cases and said :

> "From this period, the de facto doctrine rapidly spread in England and became firmly established, as is clear from a long series of decisions dealing with the various features and expanding its principles to meet the requirements of diverse circumstances and different items. We may briefly state that these cases illustrate the following positions : First, that a person presented by an usurping patron, who was wholly without authority to present, was a good person de facto : Abbey of Fontaine, (1431) YB 9 H 6 Fol 32. Secondly that a clerk of a Lord of the Manor holding a Manorial Court without any authority whatever and deriving colour only from his known relation to the Lord of the Manor as a simple clerk,, was a good officer de facto Knowles v. Luce (1580 Moore KB 109); thirdly so of the servant of a steward holding a manorial Court without authority from the steward or the law : Lord Dacre's case (1553) 1 Leonard 288); Fourthly, so of the Deputy of a Deputy to whom authority could not be delegated; Leak v. Howel (1596) Cro Eli 533); Fifthly so of the steward of a Manor appointed not by the Lord who alone had the power to appoint, but by county officers who had no authority whatever to appoint : Harris v. Jays (1599 Cro Eli 699); Sixthly reaffirmation of the doctrine by Lord Holt that the deputy of a deputy has sufficient colour to make him a de facto officer ; Parker v. Kett (1693-1701) 1 LD Rayam 658=12 Mod 467), which is not inconsistent with the decision in Rex v. Lide (1738) Andres 163) and, Seventhly the adoption of Lord Holt's definition that an officer de facto is none other than he who has the reputation of being the officer he assumes to be. Although he is not such in point of law, by Lord Ellenborough in Rex v. Redform Level (1805) 6 East 356); amongst later decisions in which the existence of the de facto doctrine as well-settled rule of law, is fully acknowledged, may be mentioned. Margaret v. Hannan, (1819) 3 B and Ald 266=22 RR 378). R. v. Herefordshire, JJ (1819) 1 Chitty 700) R. v. Slythe (1827) 6, B & C 240=30 RR312), De Grave v. Monmouth (1830) 4 C & P 111), R. v. Dolgelly (1838) 8 A & E 561, Penney v. Slade (1839) 5 Bing NC 319), R. v. ST. Clement (1840) 12 A & E 177), R. v. Mayor of Cambridge (1840) 12 A & E 702), R. v. Cheshire (1840) 4 Jur 484) Scadding v. Lorant affirming (1851) 3 HLC 418) affirming (1849) 13 QB 706), Lancaster v. Heaton (1858) 8 E & B 952, Waterloo v. Cull (1858) 1 EI & EI 213 and Mahorry v. East Holyford (1875) LR 7 HL 869=IR 9 CL 306)."

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11. The de facto doctrine has been recognised by Indian Courts also. We have already referred to Pulin Behari v. King Emperor where Mookerjee, J., traced the history of the doctrine in England, Mookerjee, J., further observed as follows :

> "The substance of the matter is that the necessity, to protect the interest of the public and the individual where the duties of an office without being lawful officers. The doctrine in fact is necessary to maintain the supremacy of the law and to preserve peace and order in the community at large. Indeed, if any individual or body of individuals were permitted at his or their pleasure, the collaterally challenge the authority of and to refuse obedience to the Government of the State and the

> numerous functionaries through whom it exercised its various powers on the ground of irregular existence or defective title, in subordination and disorder of the worst kind would be encouraged. For the good order and peace of society their authority must be upheld until in some regular mode their title is directly investigated and determined."

12. The de facto doctrine was invoked by the Allahabad High Court in Jai Kumar v. State to uphold the judgments of the District Judges whose appointments had been declared invalid by the Supreme Court. Dwivedi, J., after referring to the rule against collateral challenge and the de facto doctrine said.

> "The first rule establishes that the acts of a de facto judge are not suffered to be questioned because of the want of valid appointment, in a collateral proceeding. His title may be challenged only in a proceeding for a writ of quo warranto or in a suit for a declaration of his status or legal character, to which he is a party. These two proceedings are direct proceedings to challenge his title. Any other proceeding is a collateral proceeding. Accordingly, his title cannot be challenged in a proceeding before him, or in appeal or revision from his order or in a proceeding for certiorari. The second rule establishes that the acts of a de facto judge are suffered to be valid as to the public and the litigants before him until his title is investigated and determined against him in a direct proceeding. A de facto judge is one who has the reputation of being the judge although he is not a judge in the eye of law."

13. In I.J.Rajasekhar v. G. Immanuel, (Criminal Appeal No. 728/1974) Kuppuswami and Kuktadar, JJ., upheld the judgments of District Judges whose appointment has been declared unconstitutional by the Supreme Court. The de facto doctrine was invoked. Kuppuswami, J., observed :

> "Logically speaking if a person who has no authority to do so functions as a judge and disposes of a case the judgment rendered by him ought to be considered as void and illegal, but in view of the considerable inconvenience which would be caused to the public in holding as valid judgments rendered by judges and other public officers whose title to the office may be found to be defective at a later date. Courts in a number of countries have, from ancient times evolved a principle of law that under certain conditions, the acts of a judge or officer not legally competent may acquire validity."

Though, the Allahabad and the Andhra Pradesh High Courts were concerned with the question of the validity of Judgments of de facto Judges, the very observations of the learned Judges extracted by us show that the de facto doctrine is a doctrine of general applicability which may properly be invoked to validate acts of de facto public officers. We have, therefore, no doubt that the declaration of market area published in the Andhra Pradesh Gazette on 5-3-1970 is valid despite the fact that the Market Committee was illegally constituted. In the result the writ petition is dismissed with costs. Advocate's fee Rs.100/-." (Emphasis supplied) Sri J.P. Singh, learned counsel appearing for the Committeee of Management could not dispute the said legal position.

Per contra, Sri Ashok Kumar, learned Standing Counsel appearing for the State respondents has drawn the attention to paragraph 6 of the counter affidavit and has submitted that the election of the Committee of Management was held to be illegal and as such, the selections made by the Selection Committee constituted by the aforesaid Committee of Management are illegal. Other grounds have been taken in this paragraph that the posts were not advertised properly and that there was no mention of subject-wise post and necessary qualification etc. I have considered and rival submissions and perused the record.

On perusal of the impugned order, I find that other grounds that have been taken in the counter affidavit that the posts were not advertised properly and that there was no mention of subject-wise post and necessary qualification etc, have not been taken in the impugned order. It is settled law that the grounds/reasons for passing the impugned order cannot be supplemented by means of counter affidavit. In the impugned order, the sole ground given for setting aside the selection and appointment of the petitioners is that the election of Committee of Management was quashed by this Court.

A reference may be made in this regard to a judgement of Hon'ble Apex Court rendered in the case of Mohinder Singh Gill and Anr. vs. The Chief Election Commissioner, New Delhi and others, (1978) 1 SCC 405, paragraph 8 whereof is quoted as under:

> "8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in Commr. of Police, Bombay vs. Gordhandas Bhanji, AIR 1952 SC 16:
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> Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.
>
> Orders are not like old wine becoming better as they grow order."

(Emphasis supplied) A perusal of the judgement passed in M/s Beopar Sahayak (supra), Dr. A.R. Sircar (supra), Gokaraju Rangaraju (supra) and Immedisetti Ramkrishnaiah (supra) would clearly indicate that when an authority or elected body (see paragraph 11 of Gokaraju Rangaraju (supra) was acting in the colour of his authority and was validly exercising its power at the time of the action that was taken, such action is protected by de facto doctrine. In such view of the matter, the order impugned herein is not sustainable in the eye of law.

Accordingly, the present petition stands allowed. The impugned order dated 15.10.2014 (wrongly mentioned as 15.10.2011) passed by the respondent no. 2-Regional Level Committee, Azamgarh is quashed. The matter is remanded back to the respondent no. 2 for decision afresh, which shall be taken by the respondent no. 2 within a period of three months from the date of production of certified copy of this order.

In case the decision is taken in favour of the petitioners, all consequential benefits shall also be extended to the petitioners.

No order as to costs.

Order Date :- 5.1.2018 Abhishek