Dr. B. Kumar and Others Vs. State of Karnataka and Others

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Court : Karnataka

Decided On : Jul-24-2000

Reported in : ILR2000KAR3187; 2000(6)KarLJ296

Judge : A.V. Srinivasa Reddy, J.

Acts : Sri Jayadeva Institute of Cardiology (Pay, Recruitment, Conditions of Service and Miscellaneous Provisions) Rules, 1987 - Rule 6; Constitution of India - Articles 226 and 227; Indian Electricity Act - Sections 4

Appeal No. : Writ Petition Nos. 32117 to 32119 of 1999

Appellant : Dr. B. Kumar and Others

Respondent : State of Karnataka and Others

Advocate for Def. : Sri Ashok N. Nayak, High Court Government Pleader, ;M/s. Aaren Associates, Advs. and ;Sri Kiran Javali, ;Senior Advocate for Sri S. Shadaksharaiah

Advocate for Pet/Ap. : Sri K. Subba Rao, Senior Advocate ;for Sri M.S. Anandaramu

Judgement :
ORDER

1. The petitioners have filed these petitions praying for a writ of certiorari quashing Orders No. HFW 109 HS 96, dated 6th March, 1996 and No. HFW 109 PTD 96, dated 2-5-1997, produced at Annexure-D and F respectively, and for a writ in the nature of mandamus directing the respondents to relieve respondent 3 forthwith and initiate action for filling up the post of Director strictly in accordance with the rules and regulations of the Institute.

2. The facts leading to the filing of these writ petitions, briefly stated, are as follows:

Jayadeva Institute of Cardiology ('the Institute' for short) was established and registered as a society under the Karnataka Societies Registration Act with the sole objective of providing comprehensive care to cardiothoracic patients. The Governing Council is the Supreme Authority vested with the power to function within the framework of the memorandum of association, rules and bye-laws of the Institute. During December 1995 a notification dated 11-12-1995 was issued inviting applications from eligible candidates for consideration for appointment as Director. A Selection Committee headed by Dr. J.P. Das, Professor and Head of the Department of Cardiology, Medical College, Cuttack, Orissa recommended the appointment of third respondent. This recommendation was approved by the Governing Council. It was also approved by the Governing Council to keep petitioner 1 and another Professor in the waiting list. Pursuant to the approval of the appointment of the third respondent by the Governing Council, the third respondent was appointed as Director of the Institute on 6th March, 1996. The appointment was limited to three years from the date of appointment. However, on 29-4-1997 just about 13 months after the appointment, the Governing Council met again and took a decision to appoint the third respondent on a regular basis till his superannuation without restricting his term of appointment to three years. This decision was later approved by the Governing Council and the third respondent was appointed as such on 2-5-1997 by the State Government. It is these twin orders of appointment that are now challenged by the petitioners on the ground that both these appointment orders are in gross violation of the rules and, therefore, bad in law.

3. The rules and regulations of the Institute govern all aspects relating to composition of the Governing Council, conduct of meetings, appointment of Director, the financial aspects and the composition of the Committees. There is also a set of Cadre and Recruitment Rules which stipulate the mode of recruitment, pay and the service conditions governing all employees of the Institute.

4. Before I proceed to consider these two orders of appointments, in order to examine their legality or otherwise, I must place on record the stand taken by both sides in regard to the nature of the two orders of appointments. The petitioners have challenged both the appointment orders generally on the ground that they are in violation of the rules and regulations of the Institute and, therefore, bad in law. The third respondent, on the other hand, has taken a stand that the second appointment is, in fact, a continuation of the first appointment. The second appointment, it is said, is not independent of the first appointment and it is more in the nature of an extension of the first appointment. This statement was further accentuated by learned Senior Counsel Mr. Kiran Javali when he sought to emphasize that the second appointment was resorted to by the Governing Council only in order to remove the defects that had manifested themselves in the first appointment. However, I must place on record that learned Senior Counsel Mr. R.N. Narasimha Murthy did not refer to this aspect in the submissions he made and only limited his arguments to the solitary stand taken by him viz., that the petitioners are not 'the aggrieved parties' and, even if it be held that the appointments are not in conformity with the rules and regulations, the appointment cannot be interfered with at their instance.

5. I am quite in agreement with Mr. Kiran Javali on the point that the second of the appointment orders is a continuation of the first appointment order and had been resorted to only in order to remove some irregularities that had crept in while issuing the first appointment order. The assertion made by him during the course of the arguments to this effect had not been disputed by the learned Counsel for the petitioners and also there is sufficient material produced on record in the form of Governing Council proceedings to show that the second appointment order had, in fact, been passed in order to remove the defects in the first appointment order.

The question as to whether the Governing Council has the power to correct the defects in the first appointment order becomes purely academic. When the Governing Council is held to have the power to make the appointment of the Director, it goes without saying that it also has the power to correct the defects or irregularities that may have occurred in making the appointment. It is now well-settled in law that an authority which has the power to perform a principal act has also the power to perform all acts corollary to the performance of such an act. But the question that looms large is, if the appointment at the first instance is held to be non est, void ab initio and in total derogation of the rules and regulations, as alleged by petitioners, the mere fact that the Governing Council has the power to pass another appointment order in order to remove the defects and the Governing Council having taken resort to such powers, could it be said that the errors have been removed and the first appointment order rendered legal and in accordance with law. It is in this background that the first order of appointment and the challenge to it becomes crucial for deciding the case on hand.

6. Therefore, the questions that arise for my consideration are:

(i) Whether the first appointment is valid and in accordance with law?

(ii) If the first appointment was not in accordance with law, whether the second appointment order would render it legal and in accordance with law?

(iii) Whether the petitioners are not aggrieved parties?

It cannot be disputed that an error even if it is manifest can be cured but not an illegality which is inherent. No matter what powers an authority may possess in making an order, an illegal order cannot be cured of its illegality and the power would be limited to only curing an irregularity or defects that may have crept in.

7. That the first order of appointment was defective cannot be disputed and is also not disputed by either side. Whether the first appointment order is merely defective as alleged by the respondents or is an illegal order as alleged by the petitioners, is the substantial question to be determined in this case.

8. The petitioners have challenged the first appointment order mainly on the following two grounds:

(i) That the first appointment order amounts to the third respondent selecting himself and, therefore, illegal and violative of principles of natural justice.

(ii) The constitution of the Selection Committee was in violation of Rule 6 of Sri Jayadeva Institute of Cardiology (Pay, Recruitment, Conditions of Services and Miscellaneous Provisions) Rules, 1987 and, therefore, the selection itself is bad in law.

9. The rule that no one should be a judge in his own cause has a wide application in law. The dividing line between an administrative power and a quasi-judicial power is quite thin and is gradually obliterated. In A.K. Kraipak and Others v Union of India and Others , the Constitution Bench of the Apex Court had occasion to deal with the question whether the principle, 'Nemo debet esse judex in propria causa' applies to administrative powers and held:

'Till very recently it was the opinion of the Courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice there is no reason why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character.' Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching effect than a decision in a quasi-judicial enquiry'.

If a person interested in a subject-matter takes part in adjudicating upon it, the decision arrived at on such subject-matter would be without jurisdiction and, therefore, non est in law. It is an admitted fact that the third respondent was a member of the Governing Council which met on 4-3-1996 and took a decision to

appoint him as a Director. The defence put forth by the respondents in this regard is that the third respondent had walked out of the room just before the matter regarding his appointment was taken up and, therefore, that decision does not run counter to the doctrine of natural justice. It cannot be disputed that the third respondent had a personal interest in the matter which was taken up by the Governing Council on 4-3-1996, when the decision to appoint him was taken. There is, however, nothing to indicate in the Governing Council proceedings that the third respondent had walked out of the room just before the matter of his appointment was taken up.

10. As to what is the course to be adopted by Courts in situations where a person having a legal interest in a given matter takes part in deciding it or is a part of a body which decides it is best brought out by the House of Lords case in Dimes v Grand Junction Canal. In the said case a public company brought a bill in equity against a landowner in a matter involving the interests of the company which was heard by the Vice-Chancellor who granted relief to the company. On appeal, the order was confirmed by the Lord Chancellor, Lord Cottenhan, who was a shareholder in the company. The decree was impugned before the House of Lords after Lord Cottenham had retired and the House, presided over by another Lord Chancellor (Lord St. Leonards) set aside the decree, with the observation:

'No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest he had in this concern; but it is of the last importance that the maxim that no man is to be a judge in his case should be held sacred. .... This will be a lesson to all inferior Tribunals to take care not only that in their decrees they are not influenced by their personal interest but to avoid the appearance of labouring under such an influence'.

11. No doubt, in the case on hand, the selection was made by the Selection Committee and the third respondent was not part of the Selection Committee. The Selection Committee in this case performed the limited function of recommending the names of the suitable candidates. In fact the Selection Committee had recommended two other names i.e., of the first petitioner and Dr. Yavagal for being placed on the panel. It was the Governing Council which took the ultimate

decision of appointing the Director. Therefore, what is important to be examined is whether the participation of the third respondent in the proceedings on 4-3-1996 when he was appointed as Director has vitiated the proceedings of the Governing Council.

12. The Apex Court also had occasion in A.K. Kraipak's case, supra, to deal with a situation where a member of the Selection Board was himself a candidate for a post. The Apex Court held that the member of the Selection Board could not be present at the meeting of the Board even though he does not take part in the deliberations of the Board when the particular selection takes place. The ratio decidendi laid down by the Apex Court is to the following effect:

'It is unfortunate that Naqishbund was appointed as one of the members of the Selection Board. It is true that ordinarily the Chief Conservator of Forest in a State should be considered as the most appropriate person to be in the Selection Board. He must be expected to know his officers thoroughly, their weaknesses as well as their strength. His opinion as regards their suitability for selection to the All India Service is entitled to great weight. But then under the circumstances it was improper to have included Naqishbund as a member of the selection board. He was one of the persons to be considered for selection. It is against all canons of justice to make a man judge in his own cause. It is true that he did not participate in his deliberations of the committee when his name was considered. But then the very fact that he was a member of the selection board must have had its own impact on the decision of the selection board. Further admittedly he participated in the deliberations of the Selection Board when he claims of his rivals particularly that of Basu was considered. He was also a party to the preparation of the list of selected candidates in order of preference. At every stage of his participation in the deliberations of the Selection Board there was conflict between his interest and duty. Under those circumstances it is difficult to believe that he could have been impartial. The real question is not whether he was biased. It is difficult to prove the state of mind of a person. Therefore what we have to see is whether there is reasonable ground for believing that he was likely to have been biased. We agree with the learned Attorney General that a mere suspicion of bias is not sufficient. There must be a reasonable likelihood of bias. In deciding the question of bias we

have to take into consideration human probabilities and ordinary course of human conduct. It was in the interest of Naqishbund to keep out his rivals in order to secure his position from further challenge. Naturally he was also interested in safeguarding his position while preparing the list of selected candidates'.

(emphasis supplied)

13. The Apex Court then went on to state what is the effect of such participation and held that the proceedings get vitiated. I am of the view that the decision taken by the Governing Council to appoint the third respondent is, therefore, vitiated on account of the participation of the third respondent in the proceedings of the Council. The end result cannot be and is not altered by 'the circumstance that the third respondent walked out from the meeting when his matter was being considered.

14. The next substantial point of law raised by the petitioners is that the formation of the Selection Committee was in derogation of the bye-laws and, therefore, the selection itself was void. Rule 6 of the Pay and Recruitment Rules produced as Annexure-1 to the Cadre and Recruitment Rules prescribe that the Selection Committee shall comprise of the following members:

'6. Selection Committee.--There shall be the following Selection Committees to make recommendations to the Governing Council, Board of Appointments and to the Director, for recruitment to the various posts of the Institute.

(A) For the post of Director: Chairman, Governing Council ChairmanPro Chairman MemberDirector of Medical Education MemberOne outside expert MemberDirector Member.'Secretary

(emphasis supplied)

15. The Selection Committee formulated for selection of the Director as could be gathered from the Government Order No. HFW 14 PTD 96, Bangalore, dated 31-1-1996 comprised of the following persons:

1. Dr. J.P. Das Chairman

2. Dr. Jagadish Prasad Member

3. Dr. Raj Gopal Member.

Therefore, the Selection Committee formulated for selecting the Director is clearly in violation of Rule 6 of the Pay and Recruitment Rules. It is to be noted that the said rule begins as, 'There shall be the following Committees to make recommendations to the Governing Council...'. It leaves no room for discretion and any violation of the said rule which is mandatory in nature would render the selection invalid in law. Where the statute requires a power to be exercised in a certain form, the neglect of that form renders the exercise of the power ultra vires.

16. In Jackson and Sons v Butterworth, while carrying out the work under a written licence, the plaintiffs found that the total cost of the work would exceed the amount covered by the licence and instead of obtaining a fresh licence they obtained an oral permission from the local authority and completed the work. Later they obtained a written licence in respect of the additional work. In an action by the plaintiffs to recover the cost of the additional work the Court of Appeal allowed the appeal by the defendant from the judgment of the country Court Judge in favour of the plaintiff. The Court held:

'the 'supplementary' licence was of no effect, because the wording of 56-A(2) prevented a licence having retrospective effect and required the licence to precede the work'.

Where a statute prescribes a procedure or a condition precedent for the doing of a thing or the exercise of a power, the non-compliance thereof would render the resulting act void. It is more so, when the obligation to follow the procedure is mandatory. If the procedure is mandatory, non-compliance with the procedure renders the exercise of the power ultra vires and the act done becomes void.

17. A statutory act, if ultra vires, becomes a nullity. In Narayana Sankaran Mooss v State of Kerala and Another, the Apex Court was considering the revocation of a licence under Section 4 of the Indian Electricity Act which contemplated that the Board should make its recommendation only after considering the explanation of

the licensee after giving three months notice in writing and after consultation with the Board. The Court allowed the appeal by the licensee after laying down the dictum as below:

'Having regard to the object and context the condition of consulting the Board after the licensee's explanation was received is mandatory and the breach of the condition will make the order of revocation void'.

18. Thus examined, it is clear that the appointment of the third respondent cannot be supported in law and it has to be held to be illegal, non est and ab initio void.

19. That takes me to the next question 7(iii) as to what should happen to the appointment of the third respondent in such a scenario. Should the Court strike down the appointment at the instance of the petitioners or as argued by learned Senior Counsel Sri Narasimha Murthy the Court should steer clear of such an endeavour and leave the appointment untouched because the persons who have challenged it are, at the present, shown to be not aggrieved.

20. The learned Senior Counsel Mr. R.N. Narasimha Murthy relied on the decision in Gopabandhu Biswal v Krishna Chandra Mohnnty and Others , in support of his case that the petitioner herein are not 'persons aggrieved' and therefore even if it be held that the appointment of the third respondent is nan est in law the same cannot be struck down at the instance of the petitioners.

21. In Gopabandhu Biswal's case, supra, the Apex Court was dealing with a review petition filed by persons who were not parties to the earlier proceedings, against an order which became final with the dismissal of the SLP. Dealing with such a situation the Apex Court observed:

'It is difficult to include the applicants in the review applications in the category of 'persons aggrieved'. The main applicant i.e., the present appellant Biswal had joined as party respondents all those persons who had superseded him for selection to the Indian Police Service since they would be persons affected in case he succeeded in his application. The Tribunal has directed that Biswal be considered for promotion between 1977 and 1980 and not thereafter. During this

period, the two applicants in Review Application No. 16 of 1993 were nowhere within the zone of consideration for promotion of IPS. One of the applicants joined the police service only in 1974 and was not eligible for further promotion till 1982. The other applicant though eligible for promotion, was on account of his rank in the seniority list, not within the zone of consideration at any time prior to 5-11-1980. As a matter of fact the two applicants in Review Application No. 16 of 1993 were selected for promotion to IPS only in 1993 when they were included in the select list of 1993. Therefore, they could not have been made parties in T.A. No. 1 of 1989. At that point of time, these applicants had only a chance of promotion in future. This does not confer any legal right on these applicants and they cannot be considered as parties aggrieved by the impugned judgment. However, leniently one may construe the term 'party aggrieved', a person not directly affected cannot be so considered. Otherwise for years to come, every person who becomes eligible for promotion will be considered a 'party aggrieved' when the Tribunal interprets any service rule such as in the present case. Only persons who are directly and immediately affected by the impugned order can be considered as 'parties aggrieved''.

The Apex Court took the view as aforesaid considering the fact that the petitioners seeking for review of an order which had become final with the dismissal of the SLP on the ground that they were not directly and immediately affected by the impugned order. In P.S. Sadasivaswamy v State of Tamil Nadu and Sudhir Vishnu Panvalkar v Bank of India , the Apex Court declined to interfere with the promotion on the ground of laches and delay considering that in cases of inter se claim for promotion delay and laches on the part of the person claiming promotion is fatal as it would amount to unsettling matters which are settled.

22. There is one glaring distinction in the facts of the cases on which reliance was placed by Mr. R.N. Narasimha Murthy and the present case. That is, in all those cases the promotions were on merit and in accordance with law and the challenge to the promotion was only on the ground of relative merit of the petitioner being ignored and not on account of the illegality of the promotion/appointment.

23. I would have had little or no hesitation to agree with Mr. R.N. Narasimha Murthy, if it were to be an inter se dispute between the petitioners and the third respondent wherein the petitioners are vying for the post on the ground that they should have been selected to the post. The writ petition is only for the purpose of striking down the appointment as bad in law and to initiate action for fresh appointment in accordance with law. The question is whether on account of passage of time and the fact that the first petitioner is no more entitled to compete for the post of a Director, could it be said that the appointment should not be interfered with. Delay is not fatal to a case if the appointment is shown to be not in accordance with mandatory provisions or illegal. This is based on the principle that where the appointment of an officer is illegal, everyday he acts in that office a fresh cause of action arises; there can, therefore, be no question of delay in presenting a petition in which is very right to act in such a responsible post has been questioned. It is also based on the principle that an illegality cannot be allowed to be perpetuated. In this context it must be said that it will be always open for any one and everyone affected by an illegal order to challenge it and the term 'person aggrieved' would have to be given a broader and a wider meaning than the one that is given in a case of inter se dispute in which the parties are coveting for a particular promotion on the basis of their better right to such promotion.

24. Mr. R.N. Narasimha Murthy placed reliance on the order passed by the Division Bench of this Court comprised of the Chief Justice and myself to bring it within the scope of the dictum in Gopabandhu Biswal's case, supra. In the said writ petition though the challenge to the appointment of respondent 3 was on the ground of illegality of his appointment, this Court dismissed the writ petition merely on the ground that since it is a service matter only an aggrieved person can challenge the appointment. The question whether the appointment was one made in accordance with law or was illegal was never gone into in the said writ petition. It is also to be noticed that the petitioners in the Public Interest Litigation were not even remotely aggrieved by the appointment of the third respondent as Director. The same cannot be said of the petitioners herein. It cannot be disputed that if the appointment of the third respondent is allowed to stand, certainly petitioners 2 and 3 would be affected. Though, it may not be at this point of time or in the very near future the fact that in due course of time it would work to the disadvantage of the

petitioners 2 and 3 would be sufficient ground to bring petitioners 2 and 3 within the ambit of 'persons aggrieved'.

25. Another point to be borne in mind is that the post or Director of the Institute is not the exclusive preserve of the petitioners and the third respondent. If the appointment of third respondent is illegal and non est, it goes without saying that all those who are qualified to be appointed as Director of the Institute and who are interested for being appointed as such would become aggrieved persons. The regulations also provide for extension of the maximum age limit of 50 prescribed if the Governing Council deems it necessary to accommodate any person in the best interests of the Institute. Thus, in the case on hand the concept of 'person aggrieved' cannot be narrowed down to only persons who are directly and immediately affected by the impugned order especially in the light of the fact that the impugned order is shown to be illegal, non est and ab initio void. Therefore, the decisions cited by learned Counsel Sri R.N. Narasimha Murthy do not apply to the facts of this case.

26. Mr. R.N. Narasimha Murthy also relied upon the decision in Union of India and Others v Tushar Ranjan Mohanty and Others, to contend that any interference at this stage with the appointment of respondent 3 would affect the interest of respondent 3 irretrievably and that would amount to adding insult to injury. But, in the facts of the present case, the third respondent cannot be allowed to take up this defence because his very appointment being non est in law he is not entitled to any protection that may be available under law to an appointment made in accordance with law. To say that because the third respondent's interest will be adversely and irretrievably affected, his appointment, though illegal, should not be disturbed would amount to stretching things a little too far. The fact, even if indisputable, that a grave injury would be caused to an individual should be no consideration and the Court cannot restrain itself from setting at naught the appointment if in law it is held to be bad.

27. Sri Kiran Javali cited a number of decisions to support his contention that the Governing Council was empowered to correct the mistakes that had crept in in the first appointment order. He placed heavy reliance on the following decisions:

(i) Dhirendra kumar and Another v Registrar of Societies and Others;

(ii) Hubli Manekattuva Sahakari Sangha Limited, Hubli v Deputy Registrar of Co-operative Societies, Dharwad.

Since I have agreed with the contention canvassed by Sri Kiran Javali on this point, there is no need to refer to those decisions in this order. It is also clear that the first appointment having been held to be illegal, non est and ab initio void the second appointment order which is a continuation of the first appointment order would also be bad in law.

28. In the result, for the reasons stated above, the writ petitions are allowed and the two appointment orders dated 6th March, 1996 and 2-5-1997, produced as Annexure-D and F respectively, are quashed and the appointment of respondent 3 is struck down as bad in law.