

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN

&

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

WEDNESDAY, THE 22ND DAY OF JULY 2015/31ST ASHADHA, 1937

WA.NO. 694 OF 2015 () IN WP(C).18584/2013

AGAINST THE JUDGMENT IN WP(C) 18584/2013 OF HIGH COURT OF KERALA
DATED 12-08-2014

APPELLANT(S)/RESPONDENTS IN W.P.C.:

1. STATE OF KERALA

REPRESENTED BY ITS SECRETARY TO GOVERNMENT
AGRICULTURE DEPARTMENT, GOVERNMENT SECRETARIAT
THIRUVANANTHAPURAM-695 001.

2. THE DIRECTOR OF AGRICULTURE, DIRECTORATE OF
AGRICULTURE, VIKAS BHAVAN,
THIRUVANANTHAPURAM-695 001.

3. THE AGRICULTURAL PRODUCTION,
COMMISSIONER, GOVERNMENT OF KERALA
OFFICE OF THE AGRICULTURAL PRODUCTION COMMISSIONER
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM-695 001.

BY SPECIAL GOVERNMENT PLEADER SMT.GIRIJA GOPAL

RESPONDENT(S)/PETITIONER IN W.P.C.:

B L BIJULAL

S/O.V.BHARGAVAN, DIRECTOR

M/S.GREEN TOUCH FARM MEDIA & SUPPORT SERVICES

AGRI-CLINIC & AGRI-BUSINESS CENTRE, KALYAN NAGAR

ARYASALA, MANACAUD P.O., THIRUVANANTHAPURAM-9.

R1 BY ADV. SRI.K.JAYAKUMAR (SR.)

R1 BY ADV. SRI.D.KISHORE

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON
13.07.2015, THE COURT ON 22-07-2015 Y DELIVERED THE FOLLOWING:

“C.R.”

ASHOK BHUSHAN, C.J.

and

A.M. SHAFFIQUE, J.

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W.A. No.694 of 2015

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Dated this the 22nd day of July, 2015

J U D G M E N T

Ashok Bhushan, C.J.

This Writ Appeal has been filed against the judgment dated 12.08.2014 in W.P(C) No.18584 of 2013 filed by the 1st respondent. The Writ Petition has been allowed by the learned Single Judge setting aside Ext.P17 order of the State Government cancelling the contract awarded to the Writ Petitioner. Parties shall be referred to as described in the Writ Petition.

2. Brief facts giving rise to the Writ Petition are: Petitioner while working as Agricultural Officer under the Directorate of Agriculture made an application dated 13.11.2008 praying for leave without allowance for taking better employment in the country. The leave

application of the petitioner was forwarded by the Director of Agriculture to the State Government. The State Government vide order dated 24.01.2009 granted leave without allowance for five years for taking better employment within the country. After getting leave petitioner promoted an agency in the name and style 'Green Touch Farm Media and Support Services', petitioner being Director of the Agency. By Exhibit P4 Government of Kerala invited expression of interest from reputed agencies working in farm media sector for providing electronic media support for digital documentation and preparation of interactive training materials in connection with the Scheme for Development of Vegetables implemented in 14 Districts during 2012-13. Petitioner submitted application in response of the expression of interest. Another agency, namely, NTV has also submitted application. A Committee headed by the Additional Secretary, Finance

by its proceedings dated 22.10.2012 made recommendation for accepting the offer of the petitioner. On the basis of the recommendation of the Committee, the Government vide order dated 22.11.2012 awarded the work to the petitioner. An agreement dated 30.05.2012 was entered into between the petitioner and the Director of Agriculture, copy of which is filed as Ext.P9. Petitioner started carrying out the work in pursuance of the contract awarded to him. Certain payments were also made to the petitioner. The NTV, second contestant made Exhibit P10 detailed complaint on 02.01.2013 to the Director of Agriculture and the Government stating that petitioner's Agency having been promoted by a Government servant which is against the existing Rules, the contract be cancelled. It was alleged in the complaint that Bijulal, Director, manipulated his position and collected order from the Animal Husbandry Department. It was further alleged

that Bijulal had prior knowledge about the tender and he was prepared enough to make available 85 documents and 34 CDS within five working days. On the complaint submitted by NTV, Secretary of Government wrote a note on 03.11.2013 to the Director of Agriculture. The Secretary noticed in his note that "if Bijulal is still in service he cannot do any business with the Government". The Director by letter dated 19.01.2013 asked the Government to relook the decision of the Government. It was stated that Bijulal is on leave without allowance for better employment within the country. The State Government after considering the report submitted by the Director of Agriculture, passed an order dated 18.07.2013 cancelling the contract awarded to the petitioner. It was stated in the order that the fact that Biju Lal is a Government servant was suppressed from the Government and participation of Bijulal in the Government tender without prior

permission of the Government is against Rules 45 and 48(1) of the Government Servants' Conduct Rules, 1960 (hereinafter referred to as "the 1960 Rules"). Challenging the order dated 18.07.2013, the petitioner filed the Writ Petition praying for quashing Ext.P17 order and to issue any other appropriate direction.

3. Counter affidavit has been filed in the Writ Petition by the State where it was stated that by Exhibit P1 Order petitioner was allowed leave for better employment within the country. Details of expression of interest and applications submitted were mentioned. It was pleaded that petitioner ought to have obtained prior sanction from the Government under Rule 48(1) and 45 of the 1960 Rules before participating in the tender. The learned Single Judge by the impugned judgment has set aside Exhibit P17 Order passed by the Government. The learned Single Judge held that Exhibit P17 Order was issued without opportunity to the

petitioner and is liable to be set aside. Petitioner's conduct as Government servant cannot be pressed into service on a contract awarded to the petitioner which is purely in private domain. The learned Single Judge directed that the period lost on account of termination of the contract is liable to be recouped to the petitioner on the request if so warranted.

4. State Government being aggrieved by the said judgment has come up in this appeal. Smt. Girija Gopal Special Government Pleader challenging the order contended that the leave granted to Bijulal was for the purpose of taking better employment in the country. Sanction was not granted to Bijulal to carry out any trade or business with the Government. Without sanction under Rule 48, Bijulal could not have carried out any trade or business. Award of contract and carrying out the contract is carrying on business with the Government which is prohibited in Rule 48. It is

submitted that the State Government was never informed that Bijulal in whose favour recommendation has been given for award of contract is a Government servant. It is submitted that after coming to know about the fact that a Government Servant is carrying on business with the State, decision was taken to cancel the work awarded to the petitioner. It is submitted that power to take action for violation of conduct rules is a power given to the State Government which is a different power. Cancellation of the work awarded is in public interest since petitioner could not have carried out business with the Government.

5. Shri K.Jayakumar, learned Senior Advocate appearing for the petitioner refuting the submissions of the learned Government Pleader contended that along with the leave application petitioner has given details of the intended work by letter dated 12.11.2008 addressed to the Director of Agriculture. The bid of petitioner was

considered by higher Officers who were aware of the leave of the petitioner. No notice was given before passing Exhibit P17 order. Government sanction enables the petitioner to undertake all activities and what cannot be done has been specifically stated in the sanction order. Taking up employment does not mean taking only a job. It encompass self employment also. Action could have been taken against the petitioner under the 1960 Rules but alleged violation of the conduct rules cannot be a ground to cancel the work awarded to the petitioner.

6. We have heard learned counsel for the parties and perused records.

7. Before we proceed to consider the rival submissions of learned counsel for the parties it is necessary to look into certain provisions of the 1960 Rules. Rule 4 prohibits employment of near relatives of Government servants in private firms enjoying

Government patronage. Rule 4 is quoted below:

“4. Employment of near relatives of Government servants in private firms enjoying Government patronage.- No Government servant shall, except with the previous sanction of the Government, permit his son, daughter or dependent to accept employment with any private firm, with which he has official dealings, or with any other firm having official dealings with Government provided that where the acceptance of the employment cannot await the prior permission of the Government or is otherwise considered urgent, the matter shall be reported to the Government and the employment may be accepted provisionally subject to the permission of the Government.”

Rules 45 and 48(1) and (2) which are relevant for the present case are quoted below:

“45. Promotion and management of companies.- No Government servant shall, except in course of duty take part in the promotion, registration or management of any Bank or Company:

Provided that a Government servant may in accordance with the provisions of any general or special order of Government, take part in the promotion, registration or management of a Co-operative Society registered or deemed to be registered under the Co-operative Societies Act.

48. Private trade or employment:- (1) No

Government servant shall, except with the previous sanction of the Government, engage directly or indirectly in any trade or business or undertake any employment:

Provided that a Government servant may, without such sanction undertake honorary work of a social or charitable nature or occasional work of literary, artistic or scientific character, subject to the condition that his official duties do not thereby suffer, but he shall not undertake or shall discontinue such work if so directed by the Government.

Explanation I. *Canvassing by a Government servant in support of insurance agency, commission agency, etc., owned or managed by his wife or any other member of his family shall be deemed to be a breach of this sub-rule.*

2. *Every Government servant shall report to the Government if any member of his family is engaged in a trade or business or owns or manages an insurance agency or commission agency.”*

The 1960 Rules governs the conduct of Government servants. The 1960 Rules have been framed in public interest and as a matter of public policy. The leave application which was submitted by the petitioner for grant of leave has been brought on record by the petitioner. Purpose for which leave is applied was mentioned as “for better employment within the

country.” Government sanctioned the leave as per Exhibit P1 order which is relevant to be extracted:

GOVERNMENT OF KERALA

Abstract

Agriculture Department - Establishment - Shri B.L. Bijulal, Agricultural Officer, Kissan Kerala Project, Directorate of Agriculture - Leave without allowance for five years for taking up better employment within the country - Granted - Orders issued.

Agriculture (Estt.A) Department

G.O.(Rt.) No.131/09/AD Dated, Thiruvananthapuram,
24.1.09

- Read: 1. Application dated 13.11.2008 from B.L.
 Bijulal, Agricultural Officer, Kissan Kerala
 Project, Directorate of Agriculture.
2. Letter No.SD(2) 53524/08 dated
 03.02.2009 from the Director of
 Agriculture, Thiruvananthapuram.

ORDER

In the circumstances reported by the Director of Agriculture in the letter read above, Shri B.L. Bijulal, Agricultural Officer, Kissan Kerala Project, Directorate of Agriculture is granted leave without allowances for five years from the date of avail after the issuance of this Government Order for taking up better employment within the country as per the terms and conditions contained in Appendix XIIA, Part I, Kerala Service Rules and on the further condition that the leave without allowances should not be utilized for accepting employment in any public sector undertaking,

*aided school and colleges or any body incorporated or not,
which is wholly or substantially in owned controlled or aided
by any State Government or Government of India.*

(By Order of the Governor)

T.P.VIJAYAKUMAR
UNDER SECRETARY TO GOVERNMENT

To

*The Director of Agriculture, Thiruvananthapuram.
Shri Bijulal, Agricultural Officer (through the Director of
Agriculture, Thiruvananthapuram).
The Accountant General (A&E)/Audit Kerala,
Thiruvananthapuram.
The Stock File/Office copy."*

8. Whether the leave granted to the petitioner can be said to be leave for purposes of carrying out trade or business is also one of the issues which needs to be considered. Learned counsel for the petitioner submitted that when sanction has been granted under Rule 48 petitioner is entitled to carry out all the activities mentioned therein. Rule 48(1) uses the following two phrases, (i) engage directly or indirectly in any trade or business; or (ii) undertake any employment. Thus the Rules envisages previous

sanction for the aforesaid two activities. Petitioner's application as noted above was for taking better employment within the country. In the application purpose of conducting any trade or business was not mentioned nor the sanction order can be read accordingly.

9. A perusal of Rule 4 as quoted above would indicate that the Government servant cannot permit his son, daughter or dependent to accept employment in private firm which has official dealings with the Government without sanction. When the son, daughter and dependent are prohibited from taking any employment in private firms dealing with the Government there cannot be any doubt that Government servant himself cannot be permitted to carry on any business without sanction of the Government as required under Section 48(1) of the Rules. Rule 48(2) further provided that every

Government servant shall report to the Government if any member of his family is engaged in a trade or business or owns or manages an insurance agency or commission agency. The object of Rule 48(2) is that the Government should be aware of trade or business carrying out by the member of his family. All the above Rules clearly indicate that Government servant cannot undertake any trade or business without sanction of the Government and the Rules clearly prohibit carrying on any trade or business. Petitioner having taken leave without allowance for engaging himself in a better employment, it cannot be said that sanction permitted him to carry on trade or business. Thus we have no doubt that the activities which were undertaken by the petitioner in submitting the tender and obtaining contract of work is clearly prohibited by Rule 48(1) and sanction granted to the petitioner cannot be read as sanction for permitting the petitioner to engage in trade

or business.

10. The submission which has been much pressed by the learned counsel for the petitioner is that while cancelling the contract, the Government has acted against the violation of the principles of natural justice since no notice was given to the petitioner and the State even while dealing in any contractual matter cannot act arbitrarily. In this context it is relevant to note clauses 16 and 19 of the agreement, which are to the following effect:

“16. None of the parties shall withdraw from this agreement during the currency of the assignment in hand without written consent of the other.

19. In the event of arising any dispute between the parties regarding the performance of this agreement, the same shall be settled through appropriate legal forums within Trivandrum.”

11. In so far as the submission of the learned counsel for the petitioner that Government in contractual matters cannot act arbitrarily, there cannot

be any dispute to the said proposition. The issue has been considered by the Apex Court in several cases. It shall be useful to refer to the judgment of the Apex Court in **Noble Resources Ltd. v. State of Orissa and another** ([2006] 10 SCC 236). Paragraphs 15 and 27 which are relevant for the present case are quoted below:

“15. It is trite that if an action on the part of the State is violative the equality clause contained in Art.14 of the Constitution of India, a writ petition would be maintainable even in the contractual field. A distinction indisputably must be made between a matter which is at the threshold of a contract and a breach of contract; whereas in the former the court's scrutiny would be more intrusive, in the latter the court may not ordinarily exercise its discretionary jurisdiction of judicial review, unless it is found to be violative of Art.14 of the Constitution. While exercising contractual powers also, the government bodies may be subjected to judicial review in order to prevent arbitrariness or favouritism on its part. Indisputably, inherent limitations exist, but it would not be correct to opine that under no circumstances a writ will lie only because it involves a contractual matter.

27. Contractual matters are, thus, not beyond the realm of judicial review. Its application may, however, be

limited.”

We thus have to consider as to whether the decision of the Government can be said to be arbitrary. As noted above, the Government in Exhibit P17 order has stated that the Government after coming to know about the fact that the petitioner has suppressed that he is a Government servant on leave, the order was passed. It is useful to quote the operative portion of Exhibit P17 order:

“Later, it has come to the notice of the Government that one of the promoters of M/s.Green Touch Farm Media & Support Service, Thiruvananthapuram (Sr.Biju Lal, Agricultural Officer), suppressed while finalizing the tender process/Government Order. As participation of Sri Biju Lal in the Government tender without prior sanction of the Government is violation of Rule 48(1) and Rule 45 of Government Servant Conduct Rules, 1960.

Government have examined the matter in detail. Since there was suppression of facts, Government are hereby decided to cancel the work entrusted to M/s.Green Touch Farm Media & Support Service, Thiruvananthapuram headed by Sri Biju Lal, Agricultural Officer sanctioned as per the Government Order read as 2nd paper above.”

12. There is no material on record to indicate that before sanction of the contract in favour of the petitioner, Government was made aware of the fact that petitioner is a Government servant on sanctioned leave to obtain better employment within the country. Application dated 12.11.2008 which has been brought on record by the petitioner addressed to the Director of Agriculture specify the works which the petitioner has to undertake. The learned Special Government Pleader has rightly submitted that the said application dated 12.11.2008 refers to leave application dated 13.11.2008 and there cannot be any reference of a subsequent application in an earlier date makes the application dated 12.11.2008 suspicious. Be that as it may, the said letter was addressed to the Director of Agriculture and cannot be said to be any information to the Government. In the proceeding which recommended for grant for contract also there is no

mention about the petitioner's concern being run by a Government servant who is on leave. Thus on the ground that relevant fact was concealed, the State Government has taken action to cancel the contract which cannot be said to be arbitrary. Further the conduct Rules prohibit a Government servant to enter into trade or business with the Government without prior sanction and in the event contract has been given to a Government servant in violation of Rule 45 of the 1960 Rules, the State Government cannot be said to be lacking power to cancel the contract apart from taking action against the petitioner under the Rules. Faithful observance of Rules 1960 by a Government servant is in public interest.

13. Submission pressed by the learned counsel for the petitioner is that the decision was taken by the State Government in violation of the principles of natural justice. Under clause 16 of the agreement there

is a clause that none of the parties shall withdrew from the agreement during the currency of the agreement without written consent of the other. The decision of the Government to cancel the contract without consent of the petitioner can be thus said to be breach of contract. For breach of contract remedy for a contracting party is remedy of damages. The Apex Court in **Noble Resources Ltd. v. State of Orissa and another (supra)** observed in paragraph 43 as follows:

“43. Ordinarily, a specific performance of contract would not be enforced by issuing a writ of or in the nature of mandamus, particularly when keeping in view the provisions of the Specific Relief Act, 1963 damages may be an adequate remedy for breach of contract.”

The Apex Court in **State Bihar and Others v. Jain Plastics and Chemicals Ltd.** ([2002] 1 SCC 216 had again laid down the following in paragraphs 2 and 3:

“2. Limited question involved in this appeal is -- whether the High Court ought not to have exercised its jurisdiction under Art.226 of the Constitution of India for granting relief in case of alleged breach of contract.

3. Settled law -- writ is not the remedy for enforcing contractual obligations. It is to be reiterated that writ petition under Art.226 is not the proper proceeding for adjudicating such disputes. Under the law, it was open to the respondent to approach the Court of competent jurisdiction for appropriate relief for breach of contract. It is settled law that when an alternative and equally efficacious remedy is open to the litigant, he should be required to pursue that remedy and not invoke the writ jurisdiction of the High Court. Equally, the existence of alternative remedy does not affect the jurisdiction of the Court of issue writ, but ordinarily that would be a good ground in refusing to exercise the discretion under Art.226."

Thus in a contractual matter where breach of contract is alleged, remedy of the petitioner is to take recourse to the remedy of damages. The present case at best can be said to be violation of clause 16 of the agreement. In view of the forgoing discussion, we do not find any error in the Order of the Government cancelling the contract with the petitioner. We are of the view that the learned Single Judge committed error in setting aside Exhibit P17. For the reasons stated above, judgment of the learned Single Judge dated

12.08.2014 deserves to be set aside and the Writ Petition is to be dismissed.

14. We however, observe that it shall be open to the petitioner to take such remedy as available in law against the cancellation of the contract.

In the result, the Writ Appeal is allowed. Writ Petition stands dismissed.

Parties shall bear their own costs.

**ASHOK BHUSHAN,
CHIEF JUSTICE.**

**A.M. SHAFFIQUE,
JUDGE.**