

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC

&

THE HONOURABLE SMT. JUSTICE P.V.ASHA

TUESDAY, THE 8TH DAY OF SEPTEMBER 2015/17TH BHADRA, 1937

WA.No. 1871 of 2015 () IN WP(C).35171/2014

AGAINST THE JUDGMENT IN WP(C) 35171/2014 of HIGH COURT OF KERALA
DATED 16-07-2015

APPELLANT/4TH RESPONDENT:

THE MANAGER,
ST.DOMINIC'S COLLEGE, KANJIRAPPALLY,
PARATHODE.P.O
PIN-686512.

BY ADVS.SRI.BABY ISSAC ILLICKAL
SRI.ISAAC KURUVILLA ILLIKAL

RESPONDENTS/PETITIONER AND RESPONDENTS 1 - 3:

1. JOSEPH CHACKO
LAST GRADE STAFF, ST.DOMINIC'S COLLEGE,
PARATHODE.P.O,
KANJIRAPPALLY, RESIDING AT KAIPPANPLACKAL HOUSE
NEAR BISHOP'S HOUSE, KANJIRAPPALLY.P.O
KOTTAYAM DISTRICT, PIN-686507.

2. STATE OF KERALA
REPRESENTED BY THE SECRETARY
DEPARTMENT OF GENERAL EDUCATION
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.

3. THE DIRECTOR OF
COLLEGIATE EDUCATION, VIKAS BHAVAN
THIRUVANANTHAPURAM.

4. THE DEPUTY DIRECTOR OF COLLEGIATE EDUCATION,
KOTTAYAM, PIN-686001.

R1 BY ADV. SRI.BIJU MARTIN
R BY GOVERNMENT PLEADER SRI SHYSON P.MANGUZHA

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON
08-09-2015 ALONG WITH W.A NO.1876 OF 2015, THE COURT
ON THE SAME DAY DELIVERED THE FOLLOWING:

ANTONY DOMINIC & P.V ASHA, JJ.

W.A Nos.1871 and 1876 of 2015

Dated this the 8th day of September, 2015

JUDGMENT

Antony Dominic, J.

These Writ Appeals are filed by the 4th respondent in W.P(c) Nos.35171 of 2014 and 26977 of 2012, which were disposed of by the learned Single Judge by common judgment dated 16.07.2015. We heard the learned counsel for the appellant, the learned counsel appearing for the 1st respondent and the learned Government Pleader appearing for the other respondents. Since the parties are common and issues are connected, both the appeals are disposed of by this common judgment. Documents referred to are those produced in W.P(c) No.26977 of 2012, against which W.A No.1876 of 2015 is filed.

2. Briefly stated, the facts of the case are that the appellant is the Manager of an aided college affiliated to the Mahatma Gandhi University. The 1st respondent is a last grade employee in that college. Disciplinary action was initiated against the 1st respondent on allegations of misconduct and he was placed under suspension. Not satisfied with the explanation

submitted by the 1st respondent, an external enquiry officer was appointed, and report, finding that the allegations of misconduct were proved against the 1st respondent, was submitted.

3. Disciplinary proceedings were finalised by order dated 5.11.2009, produced as Ext.R4(d), whereby the Manager imposed a punishment of censure. It was also ordered that he will not be eligible for wages during the period of unauthorised absence and that the period of suspension will be treated as eligible leave. It is stated by the learned counsel for the appellant that, by the time the order was issued, the salary for the aforesaid period was already paid and that despite the directions issued by the Manager calling upon the 1st respondent to refund the ineligible amount, that was not complied with. It is also alleged that he did not apply for regularising the suspension period as eligible leave.

4. While matters stood thus, the 1st respondent moved an application to the Director of Collegiate Education, which in turn was forwarded to the Deputy Director of Collegiate Education, for appropriate action in the matter. In this representation though the punishment imposed was not challenged or sought to be reversed, the complaint was only against the remaining part

of the order of the Manager.

5. In the meanwhile, complaining that there was delay on the part of the Deputy Director of Collegiate Education in finalising the proceedings, the 1st respondent approached this Court and filed W.P(c) No.7389 of 2012. That Writ Petition was disposed of by Ext.P1 judgment dated 23.03.2012 directing the Deputy Director to pass orders on the petition filed by the 1st respondent. Accordingly, parties were heard and the Deputy Director passed Ext.P3 order. In Ext.P3 order, the Deputy Director ordered that the suspension period and the period of absence may be regularised immediately by sanctioning leave applied for by the 1st respondent. It was also directed that all his claims including salary, subsistence allowance, annual increment, earned leave surrender, pay revision benefits and such other benefits shall be admitted immediately. Despite Ext.P3 order, the benefits thereof were not extended by the Manager. It was in such circumstances that the 1st respondent filed W.P(c) No.26977 of 2012 seeking implementation of the said order.

6. It would appear that the Manager had challenged Ext.P3 order by filing W.P(c) No.17884 of 2012. However,

Ext.P4 judgment dated 08.08.2012 shows that W.P(c) No.17884 of 2012 was dismissed as withdrawn. It is stated that after the dismissal of this Writ Petition, the Manager moved the Director of Collegiate Education, impugning Ext.P3 order of the Deputy Director. On its receipt, the Director remitted the matter to the Deputy Director for appropriate action. Accordingly, the matter was considered by the Deputy Director and order dated 06.11.2012 modifying Ext.P3 mentioned above was issued. In this order, it was ordered that suspension period may be regularised by sanctioning eligible leave and that the 1st respondent did not have right to claim salary for the days of absence. He was directed to apply for leave for regularising his period of absence. In other words, by this order, the Deputy Director restored the order passed by the Manager. Producing the order dated 06.11.2012 of the Deputy Director as Ext.P7, and challenging the same the 1st respondent filed W.P(c) No.35171 of 2014.

7. These Writ Petitions were heard and were disposed of by the impugned common judgment. In the judgment under appeal, the learned Single Judge set aside Ext.P7, mainly on the ground that the Deputy Director did not have any power of

review enabling him to review Ext.P3 issued by him. It is also stated therein that the Deputy Director had acted at the dictates of the Director and that therefore also the order was vitiated. As a consequence, it was ordered that the Manager shall give effect to Ext.P3 order. It is challenging this common judgment, the Manager of the college has filed these appeals.

8. In support of the appeal, the main contention raised at the Bar was that the orders impugned; viz; Exts.P3 and P7 mentioned above, were issued by the Deputy Director without jurisdiction and that therefore there orders are a nullity. According to the learned counsel for the appellant, the remedy available to the 1st respondent, against the order of the Manager imposing punishment on him, was before the University Appellate Tribunal and not before the Deputy Director or Director of Collegiate Education. In support of his contentions, the learned counsel also referred to us the judgment of the Apex Court in **Zuari Cement Ltd. v. Regional Director E.S.I.C Hyderabad and Ors.** [(2015) 7 SCC 690].

9. On the other hand, according to the learned counsel for the 1st respondent, the University Act or the statutes do not provide any remedy to the 1st respondent before the Tribunal.

According to him, it was therefore that he represented to the Director, who remitted the matter to the Deputy Director. It was also his contention that the Deputy Director issued Ext.P3 order, on the basis of the directions of this Court in the judgment in W.P(c) No.7389 of 2012 and that Ext.P7 order was issued on the representation made by the appellant himself. It was also pointed out that neither before the Director nor before the Deputy Director nor in any previous proceedings, did the Manager contend that the Deputy Director and the Director did not have the jurisdiction to entertain the petition. Yet another contention that was raised by him was that, Ext.P7, the order impugned in W.P(c) No.35171 of 2014, was passed without notice to him and that therefore the said order is vitiated for violation of the principles of Natural Justice.

10. We have considered the submissions made. Facts stated above reveal that the grievance of the 1st respondent arose out of the order dated 05.11.2009 issued by the Manager, by which punishment of censure was imposed. It was also ordered that he will not be eligible for wages during the period of absence and that suspension will be regularised by granting eligible leave. In this context, the first question to be considered

is whether the 1st respondent had any remedy against the order of the Manager before the University Appellate Tribunal. This question has to be considered in the light of Sections 63 and 67 of the Mahatma Gandhi University Act, 1985. Section 67 provides that the provisions of Chapter VIII of the Act, dealing with private colleges and affiliation of colleges, shall, so far as may be, apply to non teaching staff of private colleges. Section 63, which also is incorporated in Chapter VIII, provides for disciplinary powers of educational agency. Sub section 6 provides that any teacher, aggrieved by an order imposing on him any of the penalties mentioned therein, may, within the time specified, appeal to the appellate tribunal on any of the grounds mentioned in this sub section. Section 63(6) is extracted below for easy reference:

63. Disciplinary powers of Educational
Agency over teachers of private colleges:- xxxx
xxxx xxxxx xxxx xxxx xxxxx

xxxx xxxxx xxxxxx xxxxxxxx xxxxxx

(6) Any teacher aggrieved by an order imposing on him any of the following penalties, namely:-

- (a) withholding of increment;
- (b) recovery from pay of any pecuniary loss

caused to the institution or the monetary value equivalent to the amount of increment ordered to be withheld;

(c) reduction to a lower rank in the seniority list or to a lower grade or post; and

I[(cc) removal from service;

(ccc) compulsory retirement from service.]

(d) dismissal from service,

may within sixty days from the date on which a copy of such order is served on him, appeal to the Appellate Tribunal on any one or more of the following grounds, namely:-

(i) that there is want of good faith in passing the order;

(ii) that the order is intended to victimise the appellant;

(iii) that in passing the order, the educational agency has been guilty of a basic error or violation of the principles of natural justice;

(iv) that the order is not based on any material or is perverse:

Provided that the Appellate Tribunal may admit an appeal presented after the expiration of the said period of sixty days if it is satisfied that the appellant had sufficient cause for not presenting the appeal within that period.”

11. Reading of this provision shows that the appellate

remedy provided before the tribunal is only against the punishments enumerated in clauses (a) to (d) and the grounds available to the delinquent are those mentioned in clauses (i) to (iv). From this, it is clear that punishment of censure is not mentioned in Section 63(6), and in so far as this case is concerned, since censure is the punishment imposed, the 1st respondent could not have availed the appellate remedy before the Tribunal. Though Ext.P7 provided that he will not be eligible for wages during the period of his absence, that is not an order whereby any recovery was ordered from the pay of the 1st respondent towards any pecuniary loss caused to the institution to attract clause (b) of Section 63(6). Therefore for both these reasons, the 1st respondent could not have availed any remedy before the University Appellate Tribunal. In such circumstances, the contention of the learned counsel for the appellant that the 1st respondent should have pursued his remedy before the University Appellate Tribunal is misconceived and cannot be accepted.

12. The further question in this context is whether the Director or Deputy Director had any appellate or other power over an order passed by the Manager of an aided college

exercising his disciplinary power on a non teaching staff. We have not been shown any provision either in the University Act or elsewhere, conferring any power on the Director or the Deputy Director of Collegiate Education to sit in judgment over such an order passed by the Manager of an aided college. Therefore we have to proceed on the basis that the Director and Deputy Director had no jurisdiction whatsoever to interfere with an order passed by the Manager of an aided college in exercise of his disciplinary power on a non teaching staff.

13. Then the question that arises for consideration is whether Ext.P3 order could be saved relying on Ext.P1 judgment of this Court in W.P(c) No.7389 of 2012, where this Court directed the Deputy Director to pass orders in the matter. In our view, the answer to this question should be in the negative. It is in this context, the judgment of the Apex Court in **Zuari Cement Ltd. v. Regional Director E.S.I.C Hyderabad and Ors.** [(2015) 7 SCC 690], cited by the learned counsel for the appellant, assumes significance. **Zuari Cement Ltd.** (supra) was a case where the appropriate Government under the E.S.I Act granted exemption to the appellant from the purview of the said Act in exercise of its powers under Section 87 of the Act.

For a subsequent period, the request of the appellant for exemption was rejected. The appellant challenged the order of rejection in a Writ Petition before the High Court. The High Court disposed of the writ petition relegating the appellant to pursue their remedy under Section 75 of the E.S.I Act before the E.S.I Court. Accordingly, the appellant moved the E.S.I Court and after hearing the parties, the E.S.I Court passed an order exempting the establishment from the purview of the Act. Here it is worth mentioning that when the matter was considered by the Court, the E.S.I Corporation did not dispute the jurisdiction of the Court to consider the application. Despite submitting itself to the jurisdiction of the Court, the order passed by the E.S.I Court was challenged by the Corporation before the High Court, and the order of the E.S.I Court was set aside on the ground that it did not have jurisdiction to pass the order impugned. The view taken by the Court was that an order of exemption could be passed only by the appropriate Government, which is empowered under Section 87 of the Act. Appeal was filed before the Supreme Court in its judgment, the Apex Court considered the issue and held in paragraphs 11 to 15, thus:

“11. While disposing the writ petitions, of

course, the High Court directed the Appellant to approach the ESI Court constituted Under Section 74 of the Act for the relief which the Appellant had claimed in the writ petitions. Notably, both the Appellant as well as the ESI Corporation did not challenge the order of the High Court but subjected themselves to the jurisdiction of the ESI Court. In our view, neither the order of the High Court nor the act of Corporation subjecting itself to the jurisdiction of ESI Court would confer jurisdiction upon ESI Court to determine the question of exemption from the operation of the Act. By consent, parties cannot agree to vest jurisdiction in the Court to try' the dispute when the Court does not have the jurisdiction.

12. As discussed earlier, in terms of Section 87 of the Act, only the appropriate government has the power to grant exemption to a factory or establishment or class of factories or establishment from the operation of the Act. In fact, the Appellant-factory itself has obtained exemption from the appropriate Government-State Government Under Section 87 of the Act for the period from 1986 to 1993. Likewise, the rejection of exemption was also under Section 87 of the Act. While so, seeking the relief of declaration from the ESI Court that the Appellant is entitled to exemption from the operation of the Act is misconceived. Contrary to the scheme of the statute, the High Court, in our view, cannot confer jurisdiction upon the ESI Court to determine the issue of exemption. ESI Corporation, of course, did not raise any objection and subjected itself to the jurisdiction of the ESI Court. The objection as to want of jurisdiction can be raised at any stage when the Court lacks jurisdiction, the fact that the parties earlier acquiesced in the proceedings

is of no consequence.

13. The Employees Insurance Court is a tribunal specially constituted for the purpose of deciding any controversy that may arise on the matters enumerated in Section 75 of the Act. A reading of Section 75 of the Act would show that the E.S.I Court has full jurisdiction to decide all the matters arising between the employer and the Corporation under the Act. Section 75 of the Act sets out the matters to be decided by the ESI Court. As per Section 75(1)(g) of the Act, ESI Court is empowered to decide any matter which is in dispute between the employer and the Corporation in respect of any contribution or benefit or other dues payable or recoverable under the Act or any other matter required to be or which may be decided by the ESI Court under the Act and such question or dispute subject to the provisions of Sub-section (2-A) shall be decided by the ESI Court in accordance with the provisions of the Act. When considered in the light of clauses (a) to (d) in Section 75(1) of the Act, the expression "any other matter" occurring in Section 75(l) (g) only means any other dispute between an employer and corporation or a person and Corporation pertaining to the contribution or benefit or other dues payable under the Act or any other matter required to be decided by ESI Court under the provisions of the Act. Grant or refusal of exemption by the appropriate government cannot be said to be a dispute between the employer and the Corporation. For grant or refusal of exemption, a specific provision is prescribed under the Act, it cannot be brought within the ambit of "any other matter" required to be decided by the Employees' Insurance Court under this Act.

14. As per the scheme of the Act, appropriate government alone could grant or refuse exemption. When the statute prescribed the procedure for grant or refusal of exemption from the operation of the Act, it is to be done in that manner and not in any other manner.

In *State of Jharkhand and Ors. v. Ambay Cements and Anr.* : (2005)1SCC 368. it was held that "It is the cardinal rule of interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way". In *Babu Verghese and Ors. v. Bar Council of Kerala and Ors.* MANU/SC/0168/1999 SCC 422, it was held as under:

31. It is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all. The origin of this rule is traceable to the decision in *Taylor v. Taylor* (45 LJCH 373) which was followed by Lord Roche in *Nazir Ahmad v. King Emperor* : AIR 1936 PC 253) who stated as under:

[Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all.

32. This rule has since been approved by this Court in *Rao Shiv Bahadur Singh v. State of V.P.*: AIR 1954 SC 322 and again in *Deep Chand v. State of Rajasthan* : AIR 1961 SC 1527). These cases were considered by a three Judge Bench of this Court in *State of U.P. v. Singhara Singh* : AIR 1964 SC 358) and the rule laid down in *Nazir Ahmad* case : AIR 1936 PC 253) was again upheld. This rule has since been applied to the exercise of jurisdiction by courts and has also been recognised as a salutary principle of administrative law.

15. Where there is want of jurisdiction, the order passed by the court/ tribunal is a nullity or nonest. What is relevant is whether the Court had the power to grant the relief asked for. ESI Court did not have the jurisdiction to consider the question of grant of exemption, order passed

by the ESI Court granting exemption and consequently setting aside the demand notices is non-est. The High Court, in our view, rightly set aside the order of ESI Court and the impugned judgment does not suffer from any infirmity warranting interference.”

14. Principles laid down by the Apex Court makes it clear that, in the absence of power conferred by the statute, the parties cannot confer jurisdiction by consent and that the High Court also cannot confer jurisdiction on such an authority. It is also evident that, objection as to want of jurisdiction can be raised at any stage and the fact that the parties had earlier acquiesced and submitted to the proceedings before the Court which has no jurisdiction is of no consequence and that an order passed by such an authority or court is nonest for want of jurisdiction.

15. In so far as this case is concerned, it is true that neither when Ext.P3 order was passed at the instance of the 1st respondent nor when Ext.P7 order was passed at the instance of the Manager himself, the question of absence of jurisdiction of the Deputy Director was raised by any one of the parties and in fact the Manager had submitted himself to the jurisdiction of the Deputy Director. However, in the light of the principles laid

down by the Apex Court, such conduct of the Manager is of no consequence and it is still open to the Manager to impugn these orders setting up his plea that the order was passed by an authority which did not have jurisdiction in the matter. If that be so, the fact that Ext.P3 was passed pursuant to the directions of this Court or that Ext.P7 was passed on the basis of a petition moved by the Manager before the Director, cannot legitimise these orders.

16. Yet another contention raised by the learned counsel for the 1st respondent was that Ext.P1 order was passed without notice to him. There is no material before us to reject this contention and its acceptance will render Ext.P7 unsustainable for violation of the principles of Natural Justice. Resultantly, we are left with Ext.P3 which, for the reasons we have already stated, is also unsustainable. Another contention that was urged by the Counsel for the 1st respondent was that since the Manager did not challenge Exts.P3 or P7, it is not open to the Manager to resist its implementation. We cannot accept this plea either when an order is nonest in the eye of law, that plea can be successfully urged to resist implementation of such an order.

17. For all these reasons, according to us, Exts.P3 and P7,

which were sought to be enforced by the 1st respondent, are orders which could not have been enforced against the Manager. Therefore the conclusion of the learned Single Judge, directing implementation of Ext.P3, cannot be sustained.

We therefore set aside the judgment of the learned Single Judge and allow these Writ Appeals and dismiss the Writ Petitions. However, having regard to the fact that the 1st respondent was litigating against the order dated 05.11.2009, passed by the Manager imposing punishment of censure on him, we clarify that if he is still aggrieved by the order, it will be open to him to pursue his remedy before the appropriate forum.

The Writ Appeals are allowed. No costs.

Sd/-
ANTONY DOMINIC
Judge

Sd/-
P.V.ASHA
Judge

rtr/

/true copy/

P.S to Judge