

(1959) 04 KL CK 0008
In the High Court Of Kerala
Case No : O.P. No. 839 of 1958

Akhileswara Iyer

APPELLANT

Vs

Cochin Devaswom Board

RESPONDENT

Date of Decision : 03-04-1959

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : AIR 1959 Ker 390

Hon'ble Judges : Varadaraja Iyengar, J

Bench : Single Bench

Advocate : T.N. Subramania Iyer and S. Subramania Iyer, for the Appellant; P.K. Krishnankutty Menon, for the Respondent

Final Decision : Allowed

Judgement

Vardaraja Iyengar, J.—This is a petition under Article 226 of the Constitution. The petitioner is Mr. Akhileswara Iyer Principal of the Shree Kerala Varma College, Trichur. His complaint is that he has been wrongly suspended as and from 4-12-1958 from his office as Principal by the respondent, the Cochin Deva-swom Board, in whom is vested the management of the College. .

2. The petitioner joined this institution in 1957 within a week of its inauguration as a First Grade College as Professor and Head of Department of History and Economics. He had already 19 years" service in the St. Joseph"s College, Bangalore. In June 1951 he was appointed vice Principal of the College and later in November of that same year as the Principal. He has ever since continued in that office. The respondent Board is a body corporate and consists of three members who hold office periodically by election or nomination as the case may be. Before petitioner became principal there had been three variations in the constitution of the Board. The Fourth Board which came into office in September 1958 included Messrs. K.N. Gopalan (President), Kodanad Narayanan Nambu-diripad and Kumaran,

3. It had happened that before this last Board assumed office, there was the retrenchment of the service of A. V. Narayanan Nambudiri, Lecturer in the Malayalam and son-in-law of Kodanad Narayanan Nambudiripad, Member of the Board and again the refusal to give retrospective effect to the promotion of Mr. Sathi M. Warriar, Lecturer in English. These two matters were apparently the subject of certain pending representations before the new Board and so became topics of conversation when the petitioner made his courtesy call on them on 1-10-1958. During the course of the conversation the new Board would appear to have expressed themselves clearly that the two staff members concerned had not been correctly treated by their predecessor Board and incidentally they must have given their view also that petitioner was not fit for his office as Principal.

In their respective versions of what actually took place however the Board and the petitioner differed to certain extent. It is unnecessary to go into the details of these differences. Anyhow the Board felt that petitioner had imputed untruth to them and thought it fit to issue notice to the petitioner to terminate his services and called upon him to submit his explanation on or before 14-11-1958, vide Ext. E dated 19-10-1958. While so, on 30-10-1958 a checking of the College Library by the Devaswom Commissioner was set afoot for the period 1953-58 though there had been half yearly checkings already. On 4-12-1958 Ext. G notice of suspension now complained against was issued to the petitioner as follows:

"Library books -- Shree Kerala Varma College -- purchase of. Read: Reports on C. 245/58 from the Principal, Shree Kerala Varma College.

Order M. 1919/58 dated 4-12-1958.

In view of the disclosures in the Devaswom Commissioner's report about the purchase of books for the College Library and in view of other matters pending consideration the Board considers it undesirable to allow the Principal Sri A. V. Akhileswara Iyer to continue in his post any longer pending action on the above matter and suspends him from his office with immediate effect. On receipt of this, order he will hand over charge to Sri Rama Varma, Professor of Commerce, who will be in charge during the period of suspension.

Sri A. V. Akhileswara Iyer will keep this office informed of any change in his present address".

By order,

Sd/- Secretary,

As it was learnt that the Professor for Commerce was on casual leave petitioner was directed to hand over charge to the Head Clerk and he did so on the same day. This petition was filed soon after on 17-12-1958.

4. The main grounds raised by the petitioner are :

(i) Ext. G is a mala fide and colourable exercise of power to remove him from office under one pretext or another,

(ii) Ext. G amounts to punishment in fact.

(iii) The infliction of such punishment without observing the procedure prescribed by law and the principles of natural justice is illegal. The report referred to in Ext. G had not even been served on the petitioner.

The prayer is therefore made for quashing Ext. G by issue of a writ of certiorari or other appropriate writ.

5. The petitioner is resisted by the respondent-Board on the footing that Ext. G suspension order was passed on valid and proper grounds and in the exercise of its powers as the appointing authority of the staff of the College and was not intended by way of punishment. The Board had the right to suspend the petitioner as soon as the enquiry against him was contemplated, viz. on 3-12-1958 when the report of the Devasworn Commissioner on the library check was received by them.

There were also other matters pending consideration while the Commissioner's investigation was on. They along with the disclosures on the Commissioner's report made the suspension necessary so as to facilitate the enquiry against petitioner though it is conceded that the enquiry about Ext. E notice was already closed apparently by virtue of Ext. F reply dated 14-11-1958. It should be added that on 19-12-1958 subsequent to the filing of the petition charges which were to be the subject of enquiry have been framed. There are 11 of these charges, 1 to 5 and 9 being based on the Commissioner's report, 6 to 8 and 8-A relate to the College Bookstall, 10 relates to the retrenchment of A. V. Narayanan Nambudiri and 11 to certain matter of accommodation of the inmates of the Women's hostel.

6. The two questions that arise for consideration are :

(i) Whether Ext. G suspension order really amounts to a punishment and is void because the necessary preliminaries were not fulfilled,

(ii) Whether the respondent Board was wanting in jurisdiction in issuing Ext G even as a normal interlocutory measure pending an enquiry.

7. Taking up the second of the questions to begin with for purposes of convenience, we find that the conditions of service of the petitioner and other teachers are embodied in certain rules filed as Ext. R-I drawn up by the management and acknowledged to be binding on them by the petitioner and others affixing their signatures in the forms containing the rules. Respondent relies on R. 18 (1) of these rules.

"Rule 18 (i) The Management shall have the power to terminate the services of any teacher when he becomes a permanent member of the staff of the said College :

(a) without notice for any or all of the following reasons:

Wilful neglect of duty; serious misconduct; gross insubordination, mental unfitness;

(b) With three months notice or three months salary in lieu thereof for the following reasons:

Incompetence, retrenchment, physical unfitness, or any other good cause: Provided that

(a) The management shall not terminate the services of any teacher whether summarily or otherwise without informing him in writing of the grounds on which they intended to take action and giving him what in their view is a reasonable opportunity for stating his case in writing and before coming to a final decision, shall duly consider his statement and if he so desires give him a personal hearing."

There is a proviso (b) which it is unnecessary to extract.

This rule in terms provides only for the power of termination of services and does not contain any rule regarding enquiries into alleged misconduct or suspension pending such enquiries. Learned counsel for the respondent suggests that the power of suspension pending enquiry must be taken to be incidental to the power to enquire and so impliedly agreed to between the parties. The doctrine, however, is not to be resorted to for the purpose of reading into a contract just anything which though useful, the parties might have, but have not thought of.

On the contrary, the basis of the doctrine is the presumption that what" is to be implied was all along at least intended by the parties, because without an agreement upon the terms so to be introduced the contract itself would not be workable, and it has been held that there is no authority for including a power to "suspend", as necessarily to be implied in a contract of service in order to give the contract efficacy in a business sense. The principles governing suspension as such and whether it carries a right to withhold wages during the period of suspension have been formulated as follows in Barwell, Law of Service in India, Master and Servant. 1 339:

"The power to suspend in the sense of a right to forbid a servant to work, is not an implied term in an ordinary contract between Master and Servant (ii) such a power in any event, can only be the creature either of a statute governing the contract or of an express term in the contract itself; (iii) that it does not necessarily follow that even a power to suspend entitles the employer to withhold wages--the right to withhold which must itself depend either upon statute or upon an express term, in the relative contract; (iv) that in grave emergency it may be necessary for the safety of the servant or of the joint enterprise in which the parties are engaged, to order an employed person not to work at a particular time and/or place till further orders; (v) if a jurisprudential ground be "requisite, in order to support the view of an employer's right in the immediately foregoing regard, such a ground may be found in the notion that some such term may be

implied as something without which the particular contract in suit might prove unworkable in a business sense."

The learned author finally submits that:

"If a stoppage be necessary and in fact prove only temporary there would still be no right in the master to withhold wages, unless the servant himself was for the same reason unwilling to work at the time and place mentioned in the employer's prohibition. On the other hand if the stoppage be such as likely to extend over a prolonged period, either party might regard the contract as frustrated, with the results in India for which relative law has made provision."

The classical case in England is *Boston Deep Sea Fishing and Ice Co. v. Ansell* 1888 39 Ch D 339, C. A. Cotton L. J., said :

"Suspension is very different from dismissal. When a man is suspended from the office he holds it is merely a direction, that so long as he holds the office, and until he is legally dismissed, he must not do anything in the discharge of the duties of the office.

That is to say the employer is regarded as issuing an order, which because the contract is subsisting, the servant must obey; and that order, for so long as it remains in force, prevents the servant from performing his part under the contract, however ready and willing he may be to perform it. It is the master--always assuming that the contract between them invests him with such a power--who has chosen to prevent the servant from doing the work which the latter otherwise would be bound to do. The case in *Gurudeva Narayan Srivastava Vs. State of Bihar* and Another, relied on by learned counsel for the respondent was a case of Government servant and the power of Government to suspend an officer from performing the duties of the office pending an enquiry into charges levelled against him. The case is different in the case of other employers of labour. But even in the former case the learned Judges were relying on the English case just cited to say :

"Assuming that there is no statutory rule which empowers the Government to suspend an officer pending an enquiry yet even in the absence of a statutory rule Government have power to suspend an officer from performing the duties of his office pending an enquiry into the charges levelled against him. In this connection a distinction must be drawn between suspending the contract of service of an officer and suspending an officer from performing the duties of his office on the basis that the contract is subsisting. The suspension in the latter sense is always an implied term in every contract of service. When an officer is suspended in this sense it means that the Government merely issues a direction to the officer that so long as the contract is subsisting and till the time the officer is legally dismissed he must not do anything in the discharge of the duties of his office. In other words the employer is regarded as issuing an order to the employee which, because" the contract is subsisting, the employee must obey."

There is no provision in Ext. G order that the contract of service was kept on, in the full sense, apart from the petitioner's fulfilling the duties of his office, in the above view. There can be no doubt therefore that in issuing Ext. G order the Board were acting beyond their powers and that order should on this sole ground go.

8. It is unnecessary in the view I have taken of the validity and effectiveness of Ext. G order to consider the first question as to whether Ext. G is not a punitive order in itself. In the abruptness under which it was issued and in fact in the would context petitioner's contention appears to be well sustained. But I do not finally decide on this question. Nor do I decide the further question raised by learned counsel for the petitioner that the charges as actually framed are intended merely to lead the case against petitioner and are the effect of afterthought, viz., after issue of Ext. G notice and the filing of the petition herein and that in any event the members of the Board have rendered themselves unfit by their bias and otherwise, to conduct an enquiry at all against the petitioner or investigate into his conduct.

9. In the result, Ext. G order impugned is quash ed. The O. P. is thus allowed but in the circum stances without costs,