
(2001) 10 KL CK 0045
In the High Court Of Kerala
Case No : O.P. No. 11848/91

Alfred Vimal Kumar

APPELLANT

Vs

The Vice Chancellor, University of Kerala

RESPONDENT

Date of Decision : 23-10-2001

Acts Referred:

Kerala University Act, 1974 — Section 60

Citation : (2002) 1 ILR (Ker) 177

Hon'ble Judges : K.S. Radhakrishnan, J;K. Balakrishnan Nair, J

Bench : Division Bench

Advocate : D. Sreekumar, for the Appellant; C. Gopakumaran Nair and Thottathil B. Radhakrishnan and G. Unnikrishnan, for the Respondent

Final Decision : Allowed

Judgement

K. Balakrishnan Nair, J.—The point which arises for consideration in this Original Petition is whether a person who joined a private college in the cadre of Junior Lecturer under one educational agency is entitled to count his past service in a college under a different educational agency for the purpose of seniority. The facts necessary for the decision of the case are the following:

The petitioner joined the Christian College, Kattakada as Junior Lecturer on 14th October, 1977. He was promoted as Lecturer on completion of two years service on 14th October 1979. The fourth respondent who is the contesting respondent joined the C.M.S. College, Kottayam as Junior Lecturer on 6th September 1977. In the said college, she was promoted as Lecturer on 6th September 1979. While so, she was appointed as Junior Lecturer in Christian College, Kattakada on 4th October, 1979. Soon after joining duty, the fourth respondent moved the Registrar of the Kerala University by a representation Ext. P12 to convert her appointment as Lecturer with effect from the date she joined as Junior Lecturer in Christian College, Kattakada. In the said letter, she stated:

"Though I was appointment Junior Lecturer in History in the Christian College,

Kattakada, the management has given me the consent that the management has no objection to appoint me as Lecturer from the date of my appointment in the Christian College if the University gives sanction (copy of the consent letter enclosed)".

In the said representation she sought the following reliefs:

"1. Approving my appointment as Lecturer with effect from 4th October 1979 in the Christian College, Kattakada as has been done in the case of Mr. Thomas Philip whose case is also similar to mine, and

2. Protecting my pay which I was enjoying in the C.M.S. College, Kottayam before I took up appointment in the Christian College, Kattakada."

She has also given an undertaking in the last portion of the said representation to the effect that:

"I will not claim my seniority over others who are in service in the Christian College, Kattakada prior to my appointment."

The Registrar of the University forwarded the said representation along with another representation received from Smt. P. Prameela to the Government by a covering letter dated 23rd July 1980 (Ext. P10). In the said letter, the Registrar has pointed out that the teachers concerned shall not put forward any claim for seniority. The relevant portion in the said letter reads as follows:-

"The management of Christian College, Kattakada has no objection to the teachers being appointed as Lecturers giving weightage to their previous service in different managements, provided they will have no claim for seniority. The teachers have made it clear that they would not put forward any claim for seniority".

2. Subject to the above condition, the University sought permission of the Government to approve their appointments as Lecturers. In the meantime, the original order of appointment of fourth respondent as Junior Lecturer was approved by the Registrar as per Order dated 11th June 1981 (Ext.P9). She is serial No. 5 in Ext.P9. The said order shows that her appointment has been approved as Junior Lecturer in History with effect from 4th October 1979. It appears that Ext.P10 was followed up by the Registrar by another communication dated 23rd November, 1981. The Government by communication No. 30922/D1/80/H.Edn., dated 22nd March, 1982 have informed the University that the Government have no objection to approve the appointment of the fourth respondent and another directly as Lecturers in the Christian College, Kattakada "for direct payment of salary if the University agrees to approve the appointments in the category of Lecturers". The said order is produced as the second Annexure to Ext. P5 in the Original Petition. Pursuant to the said direction, the University passed Order No. AC.FV-1-1431/80, dated 18th November, 1982 approving the appointment of fourth respondent as Lecturer in History in a substantive post with effect from 4th October, 1979. It was also

ordered that she is eligible for the minimum pay in the Lecturer's scale pay of Rs. 700-1270 as on 4th October, 1979. The said order is the first Annexure to Ext. P5.

3. Apparently, the above modification of appointment permitted by the Government and approved by the University was only for drawing salary and not for claiming seniority. It appears, the petitioner was always treated as senior to the fourth respondent by showing his name above that of her in the Attendance Register, in the college calendar, etc. The petitioner has produced Ext.P11 seniority list of the teachers in the History Department as on 1st January 1986. It is not clear when the list was actually published, but it appears, the same has been published in 1990 in connection with the implementation of the U.G.C. Scheme in 1990 with retrospective effect from 1st January, 1986. In the said list, the petitioner is shown as serial No. 84 and the fourth respondent as serial No. 87. Apparently, dissatisfied with the said rank in the seniority list, the fourth respondent filed Ext.P5 before the Vice Chancellor of Kerala University claiming that she should be treated as Lecturer with effect from 4th October, 1979. The affected teachers including the petitioner filed objections as evidenced by Ext.P-6. The Vice Chancellor overruling the objections of the petitioner and others upheld the claim of the fourth respondent for seniority. Ext.P7 is the order issued by the Vice Chancellor upholding the claim of fourth respondent for seniority over the petitioner and others.

4. When the seniority dispute was pending before the Vice Chancellor, the Director of Collegiate Education by his communication No. U.G.C. Cell. I(2)/30031/91/Coll.Edn., dated 17th September 1991 (Ext. P4) has issued orders placing the petitioner among the teachers covered by the U.G.C. Scheme. The fourth respondent is not included in the placement of teachers in the History Department of the College. The said placement was made basing on the seniority position then existing. But, Ext. P7 has brought about a drastic change in the seniority list of teachers of the History Department of the College. So, the aggrieved petitioner challenged Ext. P7 by filing this Original Petition on various grounds.

5. Reliance is also placed by the petitioner, inter alia, on Ext. P2 communication of the Government to the University to sustain the challenge against Ext. P-7. The relevant portion of the said communication reads as follows:

"Promotion to the category of Lecturer is automatic on completion of 2 years of qualifying service required therefor. Therefore, seniority of a person in the category of Lecturer including Non-Cadre II Grade and I Grade Professors shall be determined with reference to his seniority in the category of Junior Lecturer. In other words persons appointed as Lecturers and Non-Cadre Professors direct are not entitled to get seniority over those Junior Lecturers/Lecturers who are already in service.

I am to request you to decide questions on inter se seniority on the above basis."

6. The first respondent has filed a counter affidavit stating that the service conditions of private college teachers are governed by the provisions in the Kerala University (Conditions of Service of Teachers and Members of non-teaching Staff) First Statutes, 1979. Reference is made to Sections 5(xiii), 19(2) (h) and 60 of the Kerala University Act, 1974 and Statute 64 of the Kerala University First Statutes, 1979. Relying on those provisions, it is submitted that Ext. P2 letter of the Government cannot affect the powers of the University to decide a seniority dispute. Ext. P1 contains the Rules governing seniority of private college teachers. Specific reference is made to Rule 3(a) of the Rules to support Ext. P7.

7. The fourth respondent has also filed a counter affidavit opposing the grant of reliefs to the petitioner. She heavily relies on the two Annexures to Ext.P-5 and submits that she has seniority in the cadre of Lecturer with effect from 4th October 1979 and the petitioner has seniority only from 14th October 1979. According to her, in view of the said Annexures to Ext. P5, the challenge made by petitioner to Ext. P-7 is bound to fail.

8. Petitioner has filed C.M.P. No. 14912/99 and 56426/2000 producing additional documents to support his case. He reiterates the stand that the Annexures to Ext. P5 will only enable the fourth respondent to draw the salary of a Lecturer with effect from her date of appointment and not give her seniority over petitioner.

9. We heard both sides. Respective contentions were reiterated. The only point which requires decision for the disposal of this case is whether the Order of the Government dated 22nd March 1982 and Order of the University dated 18th November, 1982 annexed to Ext. P5 will enable the fourth respondent to claim seniority over the petitioner. If we go by Ext. P-2, there will be no difficulty in deciding the question. But respondents 1 and 4 who heavily rely on the Government's letter dated 22nd March, 1982 to sustain the appointment of the letter as Lecturer directly with effect from 4th October 1979 in one voice condemn Ext. P2. For disowning Ext. P2, the first respondent places strong reliance on Sections 5(xiii), 19(2)(h) and 60 of the Kerala University Act. Section 5 deals with the powers of the University. Sub-section (xiii) of Section 5 says that the University has the following powers:

"With the previous sanction of the Government, to regulate the emoluments and pattern and the prescribe the duties and conditions of service of the teachers and non-teaching staff in private colleges."

Section 19 deals with the powers and functions of the Senate. Sub-section 2, Clause (h) thereof provides that the Senate can exercise the following power:

"With the previous concurrence of the Government, to regulate the emoluments and prescribing the duties and conditions of service of the teachers and non-teaching staff in private colleges."

Section 60 deals with conditions of service of teachers of private colleges. Sub-section (1) thereof provides that the conditions of service of teachers of private colleges shall be such as may be prescribed by statutes. The first statutes are to be prescribed by Government. In the light of Sections 5 and 19 of the Act, the contention that the Government have no business in the matter of service conditions of the private college teachers, cannot be countenanced. Even the fourth respondent was provided with the approval of her appointment as Lecturer after obtaining the concurrence of the Government by the University. Therefore, the University cannot ignore the directions contained in Ext. P2. Further it is a direction to cover all college teachers whether they are working in Government college or private colleges. Rule 3 of the Special Rules for Kerala Collegiate Education Service deals with the method of appointment to various posts borne on that service. Lecturer is category 4 under Clause I of Arts and Science College. The method of appointment prescribed therein is by transfer from among Junior Lecturers who have completed two years of service in that category. The note to the said Rule reads as follows:

"The promotion given to a probationer in the category of Junior Lecturer shall be temporary till the date on which he becomes approved probation in that category. The seniority of a person in the category of Lecturer shall be determined with reference to his seniority in the category of Junior Lecturer."

10. In view of the above statutory rule, the seniority of lecturers in Government Colleges is determined with reference to their seniority in the cadre of Junior Lecturer uninfluenced by the earlier or later promotion to the cadre of Lecturer. After the introduction of the direct payment system in private college and especially after the introduction of the U.G.C. Scheme, the principles governing seniority of teachers are uniform in both Government and private colleges. It cannot be disputed that Ext. P-2 direction of the Government will definitely apply to teachers of Government Colleges. In view of the provisions of the University Act mentioned above, the University cannot ignore Ext. P-2 letter of the Government while deciding seniority disputes of private college teachers.

11. Before considering the provisions of Ext. P1 seniority rules, it is fruitful to refer to Section 57 of the Act concerning appointment of teachers in private colleges. The relevant portion of the section reads as follows:

"57. Appointment of teachers in private colleges.-(1) Appointments to the lowest grade of teacher in each department of a private college shall be made by the educational agency by direct recruitment on the basis of merit.

(2) Appointments of principals shall be made by the educational agency by promotion from among the teachers of the college or of all the colleges, as the case may be, or by direct recruitment.

(3) Where the appointment of principal is made by the promotion, the educational agency shall make the appointment on the basis of seniority-cum-fitness.

(4) Appointments to the posts, other than those referred to in Sub-sections (1) and (2) shall be made by the educational agency by promotion from among the teachers of the college or of all the colleges, as the case may be, on the basis of seniority-cum-fitness, or if none among them is a fit for promotion, by direct recruitment."

A scanning of the above provisions would show that direct appointment is permissible only to the lowest grade of teacher which was Junior Lecturer at the relevant time and to the post of Principal. All other posts including that of Lecturer have to be filled up by promotion. Only in the absence of eligible hands for promotion as Lecturer, direct recruitment to that post will be resorted to in the light of Section 57(4). In the light of the above provisions, it can be seen that the fourth respondent's appointment directly can only be to the post of Junior Lecturer. Even assuming that her contention is accepted, ignoring our view of the effect of Ext. P5 and its annexures, that she has been regularly posted as Lecturer with effect from 4th October, 1979, it can only be by way of promotion, in the lights of Section 57. That is, she was appointed directly as Junior Lecturer on 4th October 1979 and with effect from the very same day she was promoted as Lecturer. So, in the promoted cadre of Lecturer, the seniority between the fourth respondent and the petitioner who was promoted to that cadre ten days later, will be governed by their inter se seniority in the post of Junior Lecturer which will be governed by their respective dates of appointment to that post. Further, the fourth respondent's appointment to the post of Lecturer cannot be treated as a direct recruitment made in the absence of suitable candidates for promotion. This is so, because there can arise no vacancy in the post of Lecturer with independent existence. A teacher joins a college as Junior Lecturer and after two years the very same post is upgraded as Lecturer. Thereafter, on completing a prescribed period of service, the very same post is upgraded as non-cadre II Grade Professor and still later, as non-cadre I Grade Professor. So, if a person vacates the post of Lecturer or II Grade non-cadre Professor or I Grade non-cadre Professor, the resultant vacancy will only arise in the post of Junior Lecturer and not in the post vacated by him. Therefore, the appointment of fourth respondent to the post of Lecturer could not be treated as a direct recruitment to that post, but only a promotion on the very same date in the light of Section 57 and also in the light of scheme of things existing at the relevant time. If direct recruitment to the post of Lecturer to be made, it can only be from a rank list prepared after public notification and selection in accordance with law. In the absence of any such steps, her appointment as Lecturer is only by promotion. Therefore, as stated earlier, for determining inter se seniority, the relevant date is their respective joining dates in the cadre of Junior Lecturer.

12. The Vice-Chancellor of the University has relied on Rule 3(a) of Ext. P1 Rules to hold that the fourth respondent can count her past service in C.M.S. College, Kottayam in reckoning seniority in Christian College, Kattakada. The said Rule reads as follows:

"3(a): Seniority of a teacher in the same cadre in the subject under a Management shall be decided with respect to the total period of service in that cadre in the subject, provided he/she is duly qualified or exempted by the competent authority from the possession of the minimum qualification prescribed for the post."

13. The plain reading of the Rule will show that the total period of service in the particular cadre in the particular subject must be under the same management. The Vice-Chancellor proceeded on the footing that the total period of service has to be taken by reckoning the service under some other management also. He would not have misread the said Rule, had he referred to Rules 7(a) and 9 of the said Rules. They are extracted for convenient reference:

"7(a): When a teacher having service in other institution(s) takes up appointment under a particular management, his/her service in that particular management alone shall be taken into account to fix her seniority".

"9. When a teacher working in a college under a particular management take up appointment in another college under a new management, he/she shall take his/her place as the junior most in the particular cadre in the Department concerned but he/she shall be entitled to the protection of the emoluments drawn by him/her earlier".

14. These are special provisions dealing with the appointment of teachers with past service under other managements. They will govern the seniority of the fourth respondent. Rule 3(a) is a general provision and in the light of the trite principle that the general shall not oust the special, fourth respondent cannot count her past service for seniority. Therefore, when Rules 3(a), 7(a) and 9 are harmoniously read, it is crystal clear that the service mentioned in Rules 3(a) can only be the service under the present management. Apparently, respondents 1 and 4 are trying to take shelter behind the fact that the words "under the same management" is absent after the words "the total period of service in that cadre in the subject". Our considered view is that such omission is of no consequence, in view of the special provisions contained in Rules 7(a) and 9. This interpretation given by us to Rule 3(a) can be sustained invoking a rule of interpretation called ironing out the creases. Lord Denning in *Seaford Court Estates, Ltd. v. Asher*, 1949 (2) All. E.L.R. 155 has held as follows:

"Whenever a statute comes up for consideration, it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A Judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the

Judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task to finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "force and life" to the intention of the legislature..... Put into homely metaphor it is this: A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases....."

15. The said decision has been quoted with approval by our Supreme Court in several decisions starting with *M. Pentiah v. Veera Mallappa*, AIR 1961 SC 11 . One of the latest decisions in which the above principle has again been quoted with approval, is *Ahmedabad Municipal Corpn. Another Vs. Nilaybhai R. Thakore and Another*, . If the draftsman of Rule 3(a) has come across the dispute in this case, he would have definitely clarified that the total period of service mentioned in that Rule is the service under the same management. Otherwise, Rules 7(a) and 9 will be laying down principles of seniority which are contrary to those contained in Rule 3(a). Therefore, in any view of the matter, the fourth respondent cannot count her past service. The contention of the said respondent that in the absence of a challenge against the Annexures of Ext.P-5, her seniority cannot be disturbed, is untenable, in view of the opinion we have expressed on the efficacy of those orders. They can only help her to draw the salary of a Lecturer. Further, it ill-comes from her mouth to claim otherwise. She has obtained those orders on the specific undertaking that she will not claim any seniority over existing teachers.

16. Therefore, we declare that the petitioner is senior to the fourth respondent and we quash Ext. P7. Petitioner is entitled to all consequential benefits except arrears of salary. The benefits due to the petitioner arising out of this Judgment shall be granted to him within two months from the date of receipt of a copy of this Judgment.

The Original Petition is allowed as above. No costs.