

(2005) 06 KL CK 0018

In the High Court Of Kerala

Case No : Writ Petition (C) No. 10527 of 2004 (C)

Dr. V.P. Mahadevan Pillai

APPELLANT

Vs

University of Kerala and Another

RESPONDENT

Date of Decision : 27-06-2005

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 15(4), 16, 16(4)
Kerala State and Subordinate Services Rules, 1958 — Rule 14, 15, 16, 17
Kerala University Act, 1957 — Section 7, 7(2)

Citation : (2005) 06 KL CK 0018

Hon'ble Judges : K.M. Joseph, J

Bench : Single Bench

Advocate : C.P. Sudhakara Prasad and Elvin Peter, for the Appellant; M.K. Chandramohan Das for Respondent No. 1 (University of Kerala) and K.P. Dandapani, for the Respondent

Final Decision : Allowed

Judgement

K.M. Joseph, J.—By Exhibit P-1 dated 3-10-2002 the University of Kerala issued a Notification calling for applications for various posts including the post of Professor in the Department of Opto-Electronics. The qualifications prescribed for the said post is as follows:

An eminent Scholar with published work of high quality actively engaged in research in a relevant field with 10 years experience in postgraduate teaching and/or research at the University/Industrial R & D/National Level Institutions including experience in guiding research at doctorate level

or

An outstanding scholar in a relevant field with established reputation who has made significant contribution to knowledge.

2. Petitioner made his application (Exhibit P-2) along with necessary documents. According to the Petitioner he is qualified to hold the post of Professor in Opto-

Electronics. He has passed M.Sc. Physics with First Class, M. Phil. securing "A" Grade in Physics and Ph.D. in Physics in Laser Raman Spectroscopy. He was also awarded Ph.D. Degree in the examination held in 1996 (Exhibit P-4). Petitioner was appointed as a Lecturer in Physics in St. Gregorious College, Kottarakkara on 1-10-1982. Thereafter he was appointed as Reader in Physics in the said college on 24-10-1996. He has got Postgraduate Teaching experience in Physics from 1999-2000 onwards. Thus the Petitioner has got 18 and 1/2 years teaching experience including two years Postgraduate Teaching experience in St. Gregorious College, Kottarakkara and it was with that experience he was appointed as Lecturer in Opto-Electronics in the University of Kerala on 17-5-2001. From 1-6-2001 onwards he was working as Head of the Department of Opto-Electronics. He would say that he started research work in Physics from 1991 when undergoing M. Phil. Course. Petitioner would contend that after completing the M. Phil. Course in 1992 he was registered as a Research Scholar by the University for doing Ph.D. on 4-3-2002. He would contend that while doing Ph.D. and after obtaining Ph.D. also, he was continuing his research work in the field of Opto-Electronics and he had got more than 12 years research experience at the time when he submitted his application besides the 3 and 1/2 years Postgraduate Teaching experience. He would contend that he was a known Scholar in Opto-Electronics. Petitioner has produced Exhibits P-7 and P-8 to show that the Petitioner had contributed research papers in the Journals in 1991 and 1992. He would say that excepting him no other applicant was a research guide which was recognised by the University from 2001 onwards.

3. The application of the Petitioner came to be rejected vide Exhibit P-10 dated 24-3-2003. It is stated therein that a Certificate showing 10 years of Postgraduate Training or research experience is not produced by him. By Exhibit P-11 dated 8-4-2003, he represented before the Registrar inter alia stating that he had 12 years research experience at the University level as is evident from the fact that he has published papers from 1991 upto the date of application. A certificate from the Supervising Teacher for M. Phil. Project and Ph.D. thesis was also produced. It is also stated in Exhibit P-11 that in Exhibit P-1 Notification it is not mentioned that research experience should be after Ph.D. Degree. Exhibit P-11(a) is the Certificate issued by Dr. V. Unnikrishnan Nayar, Professor and Head of the Department of Opto-Electronics certifying that the Petitioner has been doing research from 1990-91 academic year as a student of M. Phil. Degree course of the Physics Department, that the Petitioner started the research work in 1991 and published his first research paper in Journal of Raman Spectroscopy 22,1991,287-89, that he published another paper in 1992 in the same journal, 23, 1992, 235-37, that the Petitioner got his M. Phil. Degree in 1992 and continued his research for Ph.D. Degree which he obtained in 1996 that even after getting Ph.D. Degree he was continuing the research work, that the Petitioner has published several papers in Journals and Proceedings of Symposia and Conferences. It was ultimately certified that the Petitioner has got a total research experience of 11 years till 16-4-2001. Exhibit P-11(a) was followed by

Exhibit P-12 dated 28-6-2003 wherein it is stated that the application of the Petitioner is rejected for the reason that the Petitioner is not having the prescribed qualification, i.e., Postgraduate experience in teaching and/or research and guiding research at doctoral level. Petitioner addressed Exhibit P-13 dated 9-7-2003 which also stood rejected vide Exhibit P-14. Petitioner challenges Exhibits P-10, P-12 and P-14. He also seeks for a writ of mandamus declaring that Exhibit P-1 Notification to the extent it reserves the post of Professor in the Department of Opto-Electronics to Ezhava Community is illegal, unconstitutional and void ab initio.

4. Counter-affidavit has been filed by the first Respondent University to which Petitioner has filed his reply.

5. The second Respondent in this case has been screened and found qualified and selection is awaited. He has also filed a counter-affidavit to which also Petitioner has filed reply affidavit.

6. Learned Counsel for the Petitioner would raise two principal contentions. Firstly he would submit that this is a case where Exhibit P-1 notification brings about a reservation in terms of Rules 14 to 17 of the K.S. & S.S.R. This is impermissible on the basis of the dictum laid down by the Supreme Court in Post Graduate Institute of Medical Education and Research, Chandigarh Vs. Faculty Association and Others, , which has been followed by a Division Bench of this Court in Sathi v. Cochin University of Science & Technology 2000 (2) KLT 871. Petitioner would contend that the post in question is a Single Post Cadre as understood by the Apex Court. Secondly the counsel would contend that the rejection of Petitioner's application by the Screening Committee is insupportable for the reason that the Screening Committee was not constituted as required in law. According to the Petitioner he was the Head of the Department mentioned in Statute 4 of Chapter JJI of the Kerala University Statutes in the concerned subject. Therefore, obviously, he was disabled from participating in the screening of his own application. This is what is stated in the counter affidavit also. It was stated that accordingly Dr. Nadamohan v. Dean Faculty of Applied Science was brought in the place of the Head of the Department in the concerned subject as contemplated in the Statute. He would contend that it is incumbent upon the University to bring an expert in the concerned subject to the Screening Committee and the fact mat admittedly the person who was brought in the place of the Head of the Department of Opto-Electronics was styled as Professor from Applied Science would hardly suffice. In fact those who are screened and eliminated by the Screening Committee had no right to be considered by the Selection Committee. In other words, as right of an applicant would be destroyed at the hands of the Screening Committee, it is all the more necessary that it should be constituted as mandated in law. This is rather an unusual situation where the Head of the Department himself being an applicant disabled him to be in the Screening Committee. He would submit that in such circumstance the screening of the applications by a person, who is brought from a totally different

discipline would not be in a position to evaluate the qualifications of the applicants was clearly illegal and untenable. It is stated that the person was drawn from the Economics Department.

7. Learned Counsel for the first Respondent--University submits that all that is involved is screening of a candidate. It is submitted that the Petitioner did not raise any objection in regard to the illegality and impropriety of bringing up of a person who is not familiar with the discipline in question. Having cited all the evidence it was not for him to resale from a position, namely that he had accepted the competence of the person in question to rule on his qualifications and therefore it is binding on him. As regards the contentions raised by the learned Senior counsel for the Petitioner that the post in question is a Single Post Cadre and therefore there cannot be any reservation, it is the submission of the learned Counsel appearing for the second Respondent that factually it is not so. It is his contention that actually there are other posts also of Professors contemplated under the U.G.C. norms and at present the mere fact that there is only one post could not make that post a Single Post Cadre. In fact the learned Standing Counsel appearing on behalf of the University besides the statement being filed also sought instructions in the matter and it was confirmed before me that it is a Single Post Cadre. But then the learned Counsel for the second Respondent would submit that University must be governed by the actual averments in the affidavit. Even going by the averments in the affidavit, I take the view that the post in question is a Single Post Cadre. It may be true that in the future there may arise more posts of Professor in the Department of Opto-Electronics. But as things stands now, there is only one post of Professor in the Department in question. It is that post which is sought to be filled up by applying Rules 14 to 17 of the K.S. & S.S.R. on the basis of Section 7(2) of the Kerala University Statutes which, no doubt, provides that the rules of reservation embodied in Rules 14 to 17 are to be applied. It is their submission that actually the post, which is the subject-matter of controversy, was originally filled up by appointing a person from the open merit and upon his retirement this post is to be filled up by applying Rules 14 to 17 of the Rules. It is contended that it cannot be characterised as illegal or unconstitutional as it was understood by the Apex Court or by the Division Bench of this Court in the decisions cited supra. Learned Counsel on behalf of the Respondent drew my attention to paragraphs 32 and 33 of the decision of the Apex Court (supra) in an attempt to contend that the reservation that is resorted to in the facts of this case is not something which is frowned upon under the constitution or by the decisions of the Apex Court and this Court. It is stated in paragraphs 32 and 33 as follows:

There is no difficulty in appreciating that there is need for reservation for the members of the Scheduled Castes and Scheduled Tribes and other backward classes and such reservation is not confined to the initial appointment in a cadre but also to the appointment in promotional post. It cannot, however, be lost sight of that in the anxiety for such reservation for the backward classes, a situation should not be brought by which the chance of appointment is completely taken

away so far as the members of other segments of the society are concerned by making such single post cent per cent reserved for the reserved categories to the exclusion of other members of the community even when such member is senior in service and is otherwise more meritorious.

Articles 14, 15, 16 including Articles 16(4), 16(4A) must be applied in such a manner so that the balance is struck in the matter of appointments by creating reasonable opportunities for the reserved classes and also for the other members of the community who do not belong to reserved classes. Such view has been indicated in the Constitution Bench decisions of this Court in *M.R. Balaji and Others Vs. State of Mysore*, *T. Devadasan Vs. The Union of India (UOI)* and *Another*, and *Sabharwal's case* AIR 1995 S.C.W. 1371. Even in *Indra Sawhney's case* AIR 1992 S.C.W. 3682, the same view has been held by indicating that only a limited reservation not exceeding 50% is permissible. It is to be appreciated that Article 15(4) is an enabling provision like Article 16(4) and the reservation under other provisions should not exceed legitimate limits. In making reservations for the backward classes, the State cannot ignore the fundamental rights of the rest of citizens. The special provision under Article 15(4) must, therefore, strike a balance between several relevant considerations and proceed objectively. In this connection reference may be made to the decisions of this Court in *State of Andhra Pradesh v. U.S.V. Balaram and The State of Andhra Pradesh and Others Vs. U.S.V. Balram, etc.*, and *C.A. Rajendran Vs. Union of India (UOI) and Others*, . It has been indicated in *Indra Swahney's case* (supra) that Clause (4) of Article 16 is not in the nature of an exception to Clauses (1) and (2) of Article 16 but an instance of classification permitted by Clause (1). It has also been indicated in the said decision that Clause (4) of Article 16 does not cover the entire field covered by Clauses (1) and (2) of Article 16. In *Indra Sawhney's case*, this Court has also indicated that in the interests of the backward classes of citizens, the State cannot reserve all the appointments under the State or even a majority of them. The doctrine of equality of opportunity in Clause (1) of Article 16 is to be reconciled in favour of backward classes under Clause (4) of Article 16 in such a manner that the latter while serving the cause of backward classes shall not unreasonably encroach upon the field of equality.

However, paragraphs 35 and 36 are crucial. They read as follows:

In a Single Post Cadre, reservation at any point of time on account of rotation of roster is bound to bring about a situation where such single post in the cadre will be kept reserved exclusively for the members of the backward classes and in total exclusion of the general members of the public. Such total exclusion of general members of the public and cent per cent reservation for the backward classes is not permissible within the constitutional framework. The decisions of this Court to this effect over the decades have been consistent.

Hence, until there is plurality of posts in a cadre, the question of reservation will not arise because any attempt of reservation by whatever means and even with

device of rotation of roster in a Single Post Cadre is bound to create 100% reservation of such post whenever such reservation is to be implemented. The device of rotation of roster in respect of Single Post Cadre will only mean that on some occasions there will be complete reservation and the appointment to such post is kept out of bound to the members of a large segment of the community who do not belong to any reserved class, but on some other occasions the post will be available for open competition when in fact on all such occasions, a Single Post Cadre should have been filled only by open competition among all segments of the society.

8. The Division Bench of this Court in Sathi's case (supra) after considering the decision of the Apex Court (supra) considered the matter with reference to a contention that without there being a challenge to the provisions of Section 7 of the Act it would not be open to the said case to successfully challenge the process of reservation to the post in question. It was repelled. The Court also noted in the said case that reservation is impermissible in respect of Single Post Cadre.

9. I am of the view that the contention of the Petitioner deserves to be accepted. It is clear that the post in question is a Single Post Cadre as things stand today. The dictum laid down by the Apex Court, it is my view, is succinctly enunciated in what it is stated in paragraphs 35 and 36. When the principle of reservation in Rules 14 to 17 are made applicable, it can apply in different circumstances. It can arise in regard to Single Post Cadre or it can apply when there are plurality of posts. What is frowned upon by the Apex Court and the Division Bench of this Court is the application of the principle of reservation embodied in Rules 14 and 17 to a Single Post Cadre. As stated by the Apex Court at the point of time reservation takes place will have the effect of exclusive reservation.

10. The argument of the learned Counsel Shri K.P. Dandapani, appearing on behalf of the second Respondent, that having regard to the norms fixed by the U.G.C. there should be more than one post of Professors cannot be accepted for the reason, as things stand today, there is only one post of Professor available. I am, therefore, of the view that selection that was contemplated under Exhibit P-1 runs counter to the law laid down by the Apex Court (supra) and as followed by this Court in Sathi's case (supra). The authority must select the person in conformity with the law laid down by the Apex Court by making available the process of selection open to all candidates irrespective of the community to which they belong. There is a contention raised by the second Respondent that there was laches on the part of the Petitioner in approaching this Court after Exhibit P-10 order (24-3-2003). This is countered by the senior counsel for the Petitioner and stated that he was following up the matter before the authorities. Even though Exhibit P-10 is dated 24-3-2003, Petitioner addressed Exhibit P-11 representation supported by Exhibit P-11(a) Certificate. No doubt, that was rejected by Exhibit P-12. Petitioner again represented vide Exhibit P-13 which also stood rejected as per Exhibit P-14. According to the Senior Counsel, the

Petitioner has approached this Court within a reasonable time. The Writ Petition was filed on 25-3-2004. The question of laches is a question to be decided with reference to the facts of each case. In a particular case even the delay of a day may be fatal. In yet another case the delay of years would not result in the petition being dismissed on the ground of laches. In the facts of this case, even the contention of the learned Counsel for the second Respondent would appear to be that he had approached this Court earlier by filing W.P. (C) No. 4290 of 2004. The said Writ Petition was disposed of with a direction to expedite the process of selection. Admittedly, the second Respondent has not been selected. The Screening Committee eliminated the Petitioner as evidenced by Exhibit P-10 as culminated in Exhibit P-14. Under the Statute the next stage is the constitution of the Selection Committee which has to go into the question of selecting the candidate from among those found to be qualified by the Screening Committee. I do not think the mere fact that the second Respondent has been screened and found to be qualified, particularly in a case of palpably unconstitutional stand of the University as disclosed by resorting to selection which is in the teeth of the law laid down by the Apex Court and followed by this Court, should result in the dismissal of the petition on the ground of laches. Learned Counsel appearing on behalf of the second Respondent then contended that it is clear that the Petitioner is not qualified and no purpose will be achieved by interfering with this matter. It was contended that a perusal of Exhibits, P-10, 12 and 14 would show that he is not qualified. He further relied on the averments in the counter-affidavit filed by the University to contend that it is clear that the person brought in as the head was drawn from the Applied Science. I am of the view, particularly in the nature of the qualifications which necessitates a decision on the question as to whether the applicant is in possession of the qualification of research experience in the particular field which is a bone of contention, it is clear that inclusion of a subject expert was essential. This is all the more so when the decision of the Screening Committee is peremptory and beyond challenge in the sense, it is not as if a Selection Committee can sit in appeal over the decision of the Screening Committee. In other words, the Screening Committee is empowered to eliminate candidates and they are barred from being considered by the Selection Committee. In such circumstances, I am of the view that the rejection of the Petitioner by such a committee was illegal and arbitrary. I may hasten to add in the relief that I propose to give that this shall not be considered as my pronouncement upon the question whether the Petitioner was qualified or not. No doubt, the Petitioner has produced Exhibit P-11(a) Certificate. I am proceeding on the basis of the illegality in the procedure and arbitrariness and also not pronouncing upon the qualifications of the Petitioner. I am of the view that fresh selection has to be done without resorting to the reservation as was done in Exhibit P-11 take the risk of repeating that it shall be open to the Screening Committee which is properly constituted to decide the question as to whether the Petitioner is qualified. Exhibits P-10, 12 and 14 are liable to be quashed. Accordingly they are quashed. There will be a declaration that Exhibit P-1 Notification to the extent it

reserves the post of Professor in the Department of Opto-Electronics to Ezhava Community is illegal, unconstitutional and abinitio void. There will be a further direction to the University that the University shall fill up the post of Professor in the Department of Opto-Electronics caused by the retirement of Unnikrishnan Nair without reserving it for any Community.

Writ Petition is thus allowed.