
(2003) 04 KL CK 0035

In the High Court Of Kerala

Case No : O.P. No's. 21649 and 34274 of 2001

Johnson George

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 11-04-2003

Acts Referred:

Citation : (2003) 2 ALT(Cri) 176 : (2003) 2 KLT 676

Hon'ble Judges : K.K. Denesan, J

Bench : Single Bench

Advocate : B. Suresh Kumar, for the Appellant; Babu Varghese, M.K. Chandramohan Das and J. Harikumar, for the Respondent

Judgement

K.K. Denesan, J.—In these two original petitions the petitioners who are members of the teaching staff of private colleges have approached this Court with rival claims. Since the same question in the same set of facts arises for consideration, they are disposed of together.

2. Petitioner in O.P. No. 34274 of 2001 is aggrieved by the refusal by Kerala University to approve the inter-management/Inter-university transfer granted in his favour by the management based on the sanction accorded by the Director of Collegiate Education.

3. Petitioner in O.P. No. 21649 of 2001 has approached this Court opposing the aforesaid inter-management transfer and seeking directions not to approve that appointment.

4. A perusal of the proceedings issued by the management on 28.5.2001, copy of which is produced and marked as Ext.P5 in both the O.Ps. would furnish the basic facts forming the foundation of these cases. I therefore extract Ext.P5 in extenso:

"Vide the orders read above, the Director of Collegiate Education, Trivandrum has issued orders for the Inter-management transfer of Dr. V.S. Josekumar, Lecturer

in Zoology, Christ College, Irinjalakuda (Calicut University) to the Mar Ivanios College, Trivandrum (M.S.C. Management, Kerala University).

In the circumstances, Dr. V.S. Josekumar, Lecturer in Zoology, Christ College, Irinjalakuda is transferred and posted as such in the St. John's College Anchal, an institution under the M.S .C. Management as per the terms and conditions laid down in the Kerala University Statute w.e.f. 28.3.2001 in the vacancy caused due to the retirement of Sri. P.J. James, Lecturer (Del. tr) in Zoology, subject to the approval of the University of Kerala.

Dr. V.S. Josekumar will be the junior most teacher in the Department of Zoology under the M.S.C. Management. His rank in the gradation list will be fixed below Dr. Sunny Augustine, Lecturer.

The Principal, St. John's College Anchal will report the date of joining duty of the incumbent, immediately."

5. The approval sought for, pursuant to Ext.P5 has been declined by the Kerala University as per communication dated 17.9.2001, a copy of which is produced and marked as Ext.P6 in O.P. No. 34274 of 2001. Therefore Ext.P6 is under challenge at the instance of the petitioner in that O.P.

6. Petitioner in O.P. No. 21649 of 2001 has prayed for quashing the order of the Director according sanction for the inter-management/inter-university transfer as well as Ext.P5 proceedings issued in pursuance thereof.

7. Christ College, Irinjalakkuda, is within the jurisdiction of Calicut University. Mar Ivanios College, Trivandrum, is within the jurisdiction of the Kerala University. The issue to be decided is whether transfer of teachers from a college under a particular management affiliated to a particular university to a college under a different management affiliated to a different university is permissible and whether the action of the latter University refusing to approve that transfer is correct.

8. Petitioner in O.P. No. 21649 of 2001 and the Kerala University argued for the position that the transfer is not permissible whereas the petitioner in O.P. No. 34274 of 2001 and the management contended that the transfer is not against provisions of law and hence the University was not justified in refusing approval.

9. I have heard the counsel for the petitioners as also the counsel for the respondents in the above O.Ps.

10. Dr. Josekumar became a member of the teaching staff after due selection by the appropriate authority and his appointment was approved by the Calicut University. Previously he had worked as Lecturer in the College under the respondent-Management pursuant to approval of his appointment granted by the Kerala University. He has stated that he is qualified for appointment to the post of Lecturer in Zoology as per the qualifications prescribed for that post under both the Universities, namely, the Calicut University and the Kerala University.

Petitioner in O.P. No. 21649 of 2001 who got himself impleaded as addl. respondent No. 6 in O.P. No. 34274 of 2001 has averred, among other things, that Dr. Josekumar (Petitioner in O.P. No. 34274/01) does not possess the requisite qualifications. But he has neither demonstrated as to why Dr. V.S. Josekumar is not qualified nor done anything to substantiate that plea. Therefore the said bald averment cannot be acted upon. It is worth noticing that neither the Director of Collegiate Education nor the Kerala University has got a case that Dr. V.S. Josekumar is not qualified for the post of Lecturer in Zoology. I therefore find that Dr. V.S. Josekumar is fully qualified for appointment to the post of Lecturer in Zoology in the college where he is posted as per Ext.P5.

11. It is common case that there is no provision either in the Kerala University Act or the Statutes framed thereunder, expressly prohibiting inter-management/inter-university transfer of a teacher.

12. In support of Ext.P5 and against the refusal by the Kerala University to approve the transfer it was contended that similar inter-management/inter-university transfers of other teachers had been made in the past and the objection now raised lacks good faith and is arbitrary and discriminatory. Ext.P7 in O.P. No. 34274/01 (a copy of which has been produced as Ext.R3(a) along with the counter affidavit of the management) is cited as an instance of inter-university transfer. Other instances have been referred to in the counter affidavit filed by Dr. V.S. Josekumar who is respondent No. 7 in O.P. No. 21649/01. In that counter affidavit he has referred to the case of one Shri. Philip whose inter-management transfer was approved by the Kerala University as evidenced by Ext.R7(b). He has also referred to the case of one Shri. Antony Mathew which is another instance of inter-management transfer for which sanction was accorded by the Director of Collegiate Education. In support of the submission thus made by him he has produced Exts.R7(c) and R7(d) in the counter affidavit in O.P. No. 21649/01.

13. In response to the above submissions, the petitioner in O.P. No. 21649/01 would contend that those inter-management/inter-university transfers were passed illegally and there cannot be any equality in the matter of illegality. I am unable to accept the contention that the petitioner Dr. Josekumar is claiming equality in illegality because it is not shown that the transfers already granted as also the transfer involved in this case are contrary to any provision of law. Counsel for the Kerala University submitted that Ext.P7 order is not an order granting any inter-university transfer but the approval granted was in respect of a fresh appointment made by the management. But this submission does not appear to be correct.

14. Though there are provisions to regulate inter-management transfers in the colleges affiliated to the same University, no such provisions are made regulating or prohibiting inter-management/inter-university transfers. Referenced made to G.O.(MS) 145/200/H.Edn. dt. 19.9.1988 which was issued in the context of Pre-degree delinking and consequent deployment of staff. That is one of the

instances where inter-university transfers of excess staff had to be resorted to, in the exigencies of service and for protecting the interest of those teachers eligible for retention. The same educational agency may have colleges under the jurisdiction of different Universities in the State, for example, Kerala University, Calicut University and Mahatma Gandhi University. Materials available on record would show that the inter-management/inter university transfers were allowed by the respondent University in the case of other teachers, taking into account the sanction accorded by the Director of Collegiate Education. Under such circumstances, refusal by the University to approve the transfer of Dr. Josekumar, especially viewed in the absence of any provision of law prohibiting such transfers, is unjust and unfair. It is only reasonable to find that the request for transfer by Dr. Josekumar was agreed by the two managements, taking into account the favourable attitude shown by the University in the case of other teachers. The sanction accorded by the Director of Collegiate Education also has to be viewed, in the above perspective. Hence denial of the facility of inter-management/inter-university transfer to the petitioner in O.P.34274/2001 is arbitrary and discriminatory. For these reasons, I am of the opinion that the grievance of the petitioner in the above O.P. ought to be redressed, applying the principles of justice and equity. It is well accepted that this Court exercising the jurisdiction under Article 226 of the Constitution acts as a Court of equity also. Hence, in my view, the petitioner in O.P.34274/2001 is entitled to get similar treatment and consequential appropriate reliefs. Even assuming that there is justification on the part of the University in disallowing or discouraging inter-management/inter-university transfers, deviating from the attitude it had taken previously, fairness requires that it should bring that fact to the notice of the management as well as the teachers, so that the same can be acted upon for the future guidance of all concerned.

15. The management as well as the beneficiary of Ext.P5 contended that the grievance of Shri. Johnson George who is the petitioner in O.P. No. 21649/01 that the rights of existing teachers will be adversely affected is without any substance since there is absolutely no difference as far as the consequences flowing from inter-management transfers within the same University are concerned and inter-management transfers involving two different Universities are concerned. It was contended that the existing teachers have no right to oppose the inter-management/inter-university transfer ordered as per Ext.P5. It was also pointed out on behalf of the management as well as by the learned counsel appearing for the teacher who got the order of transfer as per Ext.P5, that the freedom or right to transfer a teacher from one college under a management to another college under a different management cannot be turned down or denied unless it is shown that such transfer was against the legitimate interest of the transferred teacher or other members of the teaching staff working in the concerned colleges. It is pointed out that Ext.P5 proceedings has taken care of the interest of the teachers in service under the respondent-management, by specifically providing that Dr. V.S. Josekumar will join in that

college as the junior most Lecturer.

16. It is pertinent to note that Dr. V.S. Josekumar has been appointed by transfer as per Ext.P5 specifically directing that he will be the juniormost among the teachers of the colleges under that management. As far as other teachers are concerned, it is immaterial whether he comes from a college under another management within the same University or a different University. Counsel for the University as well as counsel appearing for the petitioner in O.P. No. 21649/01 put forward a contention that Dr. V.S. Josekumar who has got previous service as Lecturer in the college under the respondent-management would be able to get the credit of that service for certain purposes, though he will be the junior most Lecturer. I am unable to appreciate the above contention because irrespective of the nature of appointment, the principles governing the reckoning of total service would be the same and the fact that the transferee has got previous service cannot form the foundation for a grievance for other existing teachers so long as that incumbent joins duty as the junior most. I therefore reject the contention that the petitioner in O.P. No. 21649/01 is entitled to oppose Ext.P5 on the ground that it would adversely affect his legal rights or those enjoyed by other teachers.

17. Now coming to the basic question relating to the right of the management to order inter-management transfers including managements having colleges within the jurisdiction of different universities and the right of teachers working in those colleges to seek for such transfers, I am of the view that such rights will be available to them unless taken away by specific provisions in the University Act or other regulations made under that Act. Of course, the Director of Collegiate Education or the University as the case may be, shall have the power to refuse sanction or decline approval if such transfers are made in violation of specific provisions of law or prejudicially affecting the legitimate right or interest of the teachers working in the colleges under the management concerned. An enacted law may broadly provide for matters concerning the subject matter of that enactment and for effectuating those matters may confer powers on certain authorities, as also rights and liabilities on certain others. As regards matters specifically dealt with in that enactment, it will be easier for the authorities to act upon. But difficulties arise in respect of matters which are not specifically covered by the provisions of the statute. This in turn gives rise to disputes requiring adjudication by judicial or quasi-judicial forums having jurisdiction. In the matter of resolving such disputes, it should be remembered that the enacted law cannot make provisions for everything concerning that subject matter. As far as matters which are not thus specifically covered by the provisions of that enactment or any other subordinate legislation brought into force as empowered by that enactment, certain principles will have to be followed to deal with issues or disputes arising in that area. One such principle is that in the absence of provisions expressly or impliedly curtailing any freedom or right otherwise enjoyed by the citizens or class of persons whose actions are intended to be controlled or regulated by the enacted law, the authorities under the Act shall not encroach

upon such existing freedoms or rights or interfere with the legitimate rights they are otherwise free to enjoy. Rights or freedom to do certain thing, enjoyed or enjoyable under the provisions the Constitution can be restricted or curtailed by a competent legislation intended to regulate such actions. Right or freedom that is not curtailed or restricted shall be available to the citizens, notwithstanding the statute law on the subject. Ext.P5 is not contrary to any of the provisions of law and it cannot therefore be held as illegal or unenforceable.

18. Learned counsel for the University put forward contentions with a view to sustain Ext.P6 order by which transfer was declined by the Kerala University stating that grant of approval by the University is invariably done only in respect of matters which are specifically provided and which are specifically enumerated, as though all those matters could be exhaustively listed. But the fact remains that the relevant Act of the State Legislature or the statutes framed thereunder does not contain any provision directing the University to grant approval only in such and such matters and in no other. I do not find any substance in the contention taken by the University that approval cannot be granted in the absence of a provision enabling the University to do so. In my opinion, even in the absence of a provision enabling the University to approve certain acts, the University has got the power to grant approval and also to decline approval depending upon the merits of the matter, provided such exercise of power is not prohibited by the provisions of law. Managers have got the basic right to transfer the staff, for, transfer is an incidence of service. Unless that right is taken away by a provision of law validly enacted or opposed to the provisions in any other manner, the said right shall be conceded. Needless to say that such powers have to be exercised by the Management and the University fairly and reasonably and not arbitrarily.

19. In the light of the discussions made by me above, I hold that the petitioner in O.P. No. 34274/01 is entitled to the reliefs prayed for by him. Accordingly, I quash Ext.P6 in that O.P. and direct the 5th respondent-University to consider afresh the question of approval of the transfer and posting ordered as per Ext.P5, in the light of the observations made in the foregoing paragraphs. Having regard to the fact that the petitioner, despite the service rendered by him is not paid any salary from 29.3.2001 onwards, for want of approval, I direct the respondent University to pass appropriate orders within one month from the date of receipt of a copy of this judgment. It follows that the petitioner in O.P. No. 21649/01 is not entitled to the reliefs prayed for by him.

O.P. No. 21649/01 is dismissed and O.P. No. 34274/01 is allowed as above.