

**(2014) 04 KL CK 0024**

**In the High Court Of Kerala**

**Case No : Writ Petition (Civil) No. 6234 of 2005**

Kassim Koya O.

APPELLANT

Vs

State of Kerala

RESPONDENT

**Date of Decision : 07-04-2014**

**Acts Referred:**

Constitution of India, 1950 — Article 14, 16

**Citation :** (2014) 2 KHC 691 : (2014) LabIC 3134

**Hon'ble Judges :** Alexander Thomas, J

**Bench :** Single Bench

**Advocate :** George Varghese, Perumpallikuttiyil, Sreelekha Puthalath and A.R. Dileep, Advocate for the Appellant; P.P. Padmalahan, Government Pleader, George Poonthottam, Standing Counsel, Kerala Uty and Kavitha Gangadharan, Advocate for the Respondent

## Judgement

Alexander Thomas, J.—The petitioner, who was regularised in service as full time Last Grade Servant in the 4th respondent aided college, with effect from 18/02/1981 as per Ext. P9 dated 22/06/1982, essentially prays in this Writ Petition (Civil) that directions are to be issued to the official respondents so as to regularise him in service in that post with effect from his initial date of appointment in service on 10/07/1972 or in the alternative with effect from 10/05/1977, etc.. The facts necessary for disposal of this matter are as follows. The petitioner claims that he was initially appointed as last grade peon (full time Last Grade Servant) in the 4th respondent-M.S.M. College, Kayamkulam, as per Ext. P1 dated 30/06/1972 and he had joined that post on 10/07/1972 and that he had continuous uninterrupted service in the said college from the said date upto his date of retirement. The 4th respondent-college and other similar private colleges affiliated to the 3rd respondent-University of Kerala, came under the purview of the Government's direct payment system pursuant to Ext. P2 G.O. dated 06/10/1972. The Government of Kerala and private colleges like the 4th respondent had arrived at an agreement for direct payment of salary to teaching and non-teaching staff of such colleges from the Government funds and pursuant

to this understanding, Ext. P2 G.O. was issued on 06/10/1972. Clause 2 of Part II of Ext. P2 stipulated that the pattern and number of teaching staff, which may be accepted for the purpose of direct payment of salary shall conform to the Rules laid down in that behalf by the Universities with the approval of the Government and Clause 3 thereof stipulated the method for determining the number of admissible posts of teaching staff in such colleges based on the workload norms. As per Clause 3 of Part 1 of Ext. P2 the date commencement of Ext. P2 Rules is 1st September, 1972. Clause 7 thereof empowered the 2nd respondent-Director of Collegiate Education to fix the number of posts admissible for non-teaching staff, in consultation with the University and determine admissible number of such posts of non-teaching staff and fix their pay etc. Later Ext. P3 G.O. dated 04/09/1973 was issued by the Government ordering that pending fixation of teaching staff pattern of the Universities, all the teaching staff, who were on the rolls of private colleges in vacancies other than leave vacancies on or before 01/09/1972 will be given the benefit of direct payment of salaries irrespective as to whether their appointments and their posts were approved by the University or not and that this will include payment of salaries to those personnel, who have been/will be declared supernumerary by the Universities and that such of those who are found later to be excess of the staff pattern will be declared as supernumerary hands and retained as such until they are absorbed in regular vacancies or till they retire or resign from the service of the college. But that they will be entitled to all benefits admissible to regular teaching staff and wherever such supernumeraries exist, future vacancies arising in that cadre shall not be filled up before absorbing all the supernumeraries. Ext. P5 G.O. dated 19/11/1975 was also issued by the Government, which had ordered that the Government after examining the recommendations of the University, have accorded their concurrence to the University to approve the appointments of teachers in the list appended to that G.O. on condition that those who are in excess by the approved strength will be declared as supernumerary hands to be absorbed against future vacancies simultaneously abolishing supernumerary posts and that the Director of Collegiate Education has been requested for arranging for direct payment of salary to such teachers concerned etc. It is also pointed out by the petitioner that as per Ext. P4 proceedings dated 06/09/1974, the 2nd respondent-Director of Collegiate Education has noted the subsequent direction of the Government in their letter No. 9396/S3/73/Edn. dated 26/05/1973, whereby the Government have directed to allow direct payment of salary to the non-teaching staff as the position stood on 31/07/1972 until further orders. But for the direction issued by the Government in the Government letter dated 26/05/1973 referred to in Ext. P4 dated 06/09/1974 only those personnel holding non-teaching posts, which were within the admissible sanctioned strength as per the University workload norms and who are in service as on 01/09/1972, alone would have been entitled for the benefit of direct payment of salary. But it appears from Ext. P4 that in view of the above said direction of the Government in their letter dated 26/05/1973, it has been decided by the Government to allow direct payment of salary to non-

teaching staff as the position stood on 31/07/1972 until further orders and that surplus posts already in existence on the basis of grant-in-aid Code will have to be declared supernumerary and abolished automatically as and when they become vacant due to resignation, retirement, promotion or otherwise. It is also pointed out that as per Ext. P6 Government order dated 03/10/1977, the Government on taking note of the fact that the staff pattern for private colleges provided for in the grant-in-aid Code did not contain provision for part time post in the last grade servants and that it envisages only full time post in the last grade service, decided that the part time contingent posts in Private Arts and Science Colleges existing on the rolls as on 01/09/1972 be brought under the direct payment system, subject to a maximum of three posts, depending upon the size of the college.

2. It is common ground that the petitioner was not occupying a post in the cadre of full time last grade servant in the college, which was within the admissible sanctioned strength of such post as per the University and Government norms. Since the petitioner's service commenced only on 10/07/1972, he was not entitled for the benefit of the Government direction referred to in Ext. P4 as that benefit was confined only to those full time last grade servants, who were in service as on 31/03/1972. More over as he was not occupying a post within the sanctioned admissible strength as on the date of coming into force of direct payment system, viz., 01/09/1972, he was obviously a supernumerary or excess hand. The 2nd respondent-Director of Collegiate Education as per proceedings No. NI-8714/74 dated 26/09/74 (produced along with the memo dated 25/03/2014 filed by the Government Pleader) and referred to in para 2 of Ext. P13, the Director of Collegiate Education directed the 4th respondent-college authorities to retrench nine excess hands in that college including the petitioner as they were all excess hands and were appointed much after the cut of date of 31/03/1972. It can be seen from the said proceedings dated 26/09/1974 that all the nine incumbents mentioned therein including the petitioner have been appointed in July, 1972. It was ordered therein that the above said nine incumbents including the petitioner should be retrenched and could be given appointment against future vacancies arising in the college. The petitioner submitted representations as can be seen from Exts. P7 and P8 and requested official respondents 1 and 2 that he has been uninterruptedly continuing in service of the college and that he should be ordered to be regularised with effect from at least 1977, which is with effect from the alleged occurrence of some vacancies. The official respondents 1 and 2 considered the request of the petitioner and disallowed the claim for retrospective regularisation, but decided to regularise the petitioner in a newly created vacancy with effect from 18/02/1981 in the 4th respondent-college as per Ext. P9 proceedings dated 22/06/1982. Aggrieved by Ext. P9 to the extent it disallowed the claim of the petitioner for retrospective regularisation in service, the petitioner submitted Ext. P10 representation dated 05/06/95, which was rejected by the Government as per Ext. P11 dated 18/11/99. The petitioner challenged the above rejection

orders by filing a Writ Petition as OP No. 2431/2000 before this Court. This Court as per Ext. P12 judgment dated 01/08/2003 disposed of OP No. 2431/2000 by holding that Ext. P11 order herein has been passed without hearing the petitioner and that is a bald and cryptic order without taking into account any of the relevant Government orders on the subject and that the matter requires serious re-consideration at the hands of the Government. Accordingly this Court as per Ext. P12 judgment quashed Ext. P11 herein and directed the Government to hear the petitioner and reconsider the claim of the petitioner and pass appropriate orders taking into account all the relevant materials placed before the Government etc. The Government after affording an opportunity of hearing to the petitioner again rejected the claim of the petitioner as per impugned Ext. P13 proceedings dated 01/12/2003 by holding that the petitioner was a supernumerary or excess hand, who could not claim the direct payment salary as he was not occupying the post within the sanctioned strength prior to 18/02/1981 and that there was no regular vacancy to accommodate the petitioner and that he was directed to be retrenched as an excess hand as per the aforementioned proceedings dated 26/09/1974 issued by the 2nd respondent Director and the claim of the petitioner for retrospective regularisation was thus rejected. It is challenging these orders rejecting the request of the petitioner for retrospective regularisation that the present Writ Petition has been filed.

3. The 2nd respondent-Director of Collegiate Education has filed a counter-affidavit dated 30/10/2012 resisting the claim and contentions of the petitioner. The 3rd respondent-University has also filed a counter-affidavit dated 01/12/2011 praying for dismissal of the prayers of the petitioner.

4. Heard the learned counsel for the petitioner, the learned Government Pleader and the learned Standing Counsel for the 3rd respondent-University.

5. The petitioner has mainly contended that the impugned order of rejection suffers from the vice of hostile discrimination prohibited by Articles 14 and 16 of the Constitution of India. The contention advanced on behalf of the petitioner at the time of arguments for projecting hostile discrimination are three fold. One that it amounts to hostile discrimination as between the non-teaching staff like the petitioner vis-a-vis the teaching staff covered by the benefits of Exts. P3 and P5. Secondly, that it is hostile discrimination vis-a-vis the full time last grade servants appointed on or before 31/03/1972, who were given the benefits referred to in Ext. P4. Thirdly, that the treatment given to non-teaching staff like the petitioner also is hostile discrimination vis-a-vis part time contingent employees who were given the benefits as per Ext. P6. The details of the contentions will be dealt with subsequently in this judgment.

6. The primary issue that arises for consideration is as to whether the impugned action of the official respondents fulfill the test of reasonable classification permitted by Article 14 of the Constitution of India. If it is held that it satisfies the test of reasonable classification, then the aforementioned contentions of the petitioner based on hostile discrimination essentially has to fail. In the case The

State of Gujarat and Another Vs. Shri Ambica Mills Ltd., Ahmedabad and Another, (p.p 1312 & 1313) the Apex Court held that equal protection of the law is a pledge of the protection of equal laws, but that the laws may classify and a reasonable classification is one, which includes all who are similarly situated and none who are not and to determine as to who all are included within the class of similarly situated persons, one must look beyond the classification to the purpose of the law and the purpose of law may either be the elimination of a public mischief or the achievement of some positive public good. It was held therein by the Supreme Court that a classification is under-inclusive when all are included in the class are tainted with the mischief, but there are others also tainted whom the classification does not include and that a classification is bad as under-inclusive when State benefits or burdens persons in a manner that furthers a legitimate purpose but does not confer the same benefit or place the same burden on others, who are similarly situated and that a classification is over-inclusive when it includes not only those who are similarly situated with respect to the purpose, but others who are not so situated as well etc. Article 14 guarantees equality before law and equal protection of the law and it does not prohibit reasonable classification. A State action laying down a classification can be said to have fulfilled the test of reasonable classification, if there is an intelligible differentia between those included in one group and those who are excluded therefrom and the intelligible differentia has a rational nexus with the objective sought to be achieved by the State action. It is implicit that the very objective sought to be achieved by the impugned State action should also be in consonance with a Constitutionally justifiable or tenable purpose. In the case Mohammad Shujat Ali and Others Vs. Union of India (UOI) and Others, , at page 1653 the Apex Court held that the doctrine of reasonable classification recognises that the Legislature may classify for the purpose of legislation, but that it requires that the classification must be reasonable and that persons or things similarly situated are all similarly treated etc. The contentions projected by the petitioner should be examined in the light of these well-established aspects regarding reasonable classification.

7. It is to be noted that initially by Ext. P2 Government order dated 06/10/1972, the Govt. had ordered the benefit of direct payment of salary to teachers of private colleges be granted, only if they had been occupying an admissible post and if they were in service as on 01/09/72, the date of coming into force of Ext. P2. But later, as per Exts. P3 and P5, the benefit of direct payment salary has been extended even to teachers who were not occupying the posts within the admissible staff strength, but who were even excess hands and continuing in service as on the date of execution of direct payment agreement. But in the case of non-teaching staff like the petitioner, they are entitled for salary only if they had been occupying the admissible posts as per the University norms. The only exemption that was made in that behalf appears to be the one referred to in Ext. P4, whereby even non-teaching staff, who were in service on or before 31/03/1972, have also been ordered to be given direct payment salary. Whether

this was a permanent arrangement or not is not evident from the materials on record or from the pleadings. As the petitioner was occupying the non-teaching post outside the sanctioned strength and as he was appointed as per Ext. P1 only in July, 1972, he was not entitled for the direct payment salary by the orders of the governing the field. So the issue is as to whether there is hostile discrimination as between non-teaching staff like the petitioner vis-a-vis supernumerary teaching staff, who were given the benefits as per Exts. P3 and P5. It is contended by the Government that the teaching staff and non-teaching staff belong to two different classes and that the major objective of the direct payment system was to ensure better teaching service to the students at large, who were the beneficiaries of private college system. Therefore, since teaching and non-teaching staff cannot be considered as equals, there is nothing wrong in giving the benefit of direct payment salary to supernumerary teaching hands while denying the same to the supernumerary non-teaching staff like the petitioner. I have no hesitation to hold that the teaching staff and non-teaching staff cannot be said to belong to the same equal class. The Government, as per their policy, found that better protection should be afforded to supernumerary teaching staff and the direct payment salary should be extended to such supernumerary hands, who come within the ambit of Exts. P3 and P5, notwithstanding the fact that initially the system was the one as per Ext. P2. The sheet anchor of the petitioner's case is based on the alleged hostile discrimination as between non-teaching staff like the petitioner vis-a-vis the teaching staff, who were the beneficiaries of Exts. P3 and P5. Since they do not belong to the same class for the purpose of classification made out in Exts. P3 and P5, I am of the considered opinion that no question of hostile discrimination arises in this case on this count and the impugned classification cannot be said to be unreasonable or unjust.

8. The second leg of the argument is based on the alleged discrimination that arises from Ext. P4. In Ext. P4 dated 06/09/1974 there is a reference to a Government direction issued on 26/05/1973 to allow direct payment of salary to non-teaching staff as the position stood on 31/03/1972 until further orders and that surplus posts will have to be declared supernumerary and abolished automatically as and when they become vacant due to resignation, retirement, promotion or otherwise. Whether the benefit referred to in Ext. P4 based on the Government letter dated 26/05/1973 was made a permanent affair or it was transient arrangement is not seen borne out from the pleadings or materials on record. Paragraph 4 of the counter-affidavit of the 2nd respondent avers that Ext. P4 does not confer any right to retain excess staff in the respective institutions. But it is not stated or asserted therein that the Government direction issued on 26/05/1973 was withdrawn later. Though a direction was issued by this Court to produce the copy of the Government letter dated 26/05/1973 referred to in Ext. PA, the same could not be produced by the Government Pleader before this Court due to the non-availability of records. Even if it is assumed that the Government direction issued on 26/05/1973 was a permanent affair, the question

is as to whether a case of hostile discrimination is made out on the basis of such a situation. The petitioner was obviously appointed only in July, 1972 as per Ext. P1 and that too as against a non-existing post. The benefit ordered to be given as per Ext. P4 is only for those non-teaching staff who were in service on or before 31/03/1972. The exact rationale of the said cut-of-date has not been disclosed in the pleadings. It is noted that 31/03/1972 was the end of the academic year 1971-72. During the course of the arguments the learned Government Pleader pointed out that the discussion between the State Government and the private managements in the early seventies on the then burning issue of direct payment salary to staff of private colleges was a matter of public discussion and that a strong possibility of arriving at a direct payment agreement between the Government and the college managements was in the offing and that many a private managements would have made lot of excess appointments even in the non-teaching service and that the Government in order to prevent it being overburdened with claims of salary for such huge excess non-teaching hands could have decided to place a cut-of-date of 31/03/1972 for the purpose of considering the issue of direct payment salary to supernumerary non-teaching staff. The argument of the Government Pleader appears to be quite credible especially on examining the proceedings dated 26/09/1974 produced along with the Government Pleader's memo dated 25/03/2014, which shows that about nine persons including the petitioner were appointed in July 1972 itself by the 4th respondent-M.S.M. College, Kayamkulam as non-teaching staff to posts outside the admissible staff strength. Therefore, to ensure that the Government and the public exchequer are not overburdened with the claims of direct payment salary to such large non-teaching staff, the Government would have ordered this restriction. It is reasonable to presume that many a private management in those times would have resorted to proliferation of excess appointments and that this would have led to the situation of overburdening of the public exchequer. The Government as a policy measure would have decided to limit the claims of such supernumerary non-teaching staff only in respect of those personnel who were appointed in private colleges on or before 31/03/1972. Such an objective is certainly in public interest and a classification made out on the basis of this cut-of-date cannot be said to be unreasonable or unfair or unjust. But at the same time, allowing some lee-way so as to protect interest of those personnel, who were appointed at least till the end of the academic year 1971-72 viz., 31/03/1972, which is the academic year immediately prior to the coming into force of Ext. P2 Rules dated 06/10/1972 for direct payment system, cannot be said to be arbitrary. Hence even if it is assumed that non-teaching staff, who were excess hands and were appointed on or before 31/03/1972, have been given the permanent benefit of direct payment salaries on the basis of the temporary order referred to in Ext. P4, I am of the considered opinion that there is no violation of reasonable classification in the facts and circumstances of this case on this count.

9. The third leg of the argument is hostile discrimination on the basis of the non-

extension of benefit to the petitioner as has been given to the part time contingent employees as per Ext. P6. As per Ext. P6, the Government have ordered that part time contingent employees in private colleges existing in the rolls as on 01/09/1972 be brought under the direct payment system subject to a maximum of three posts depending on the size of the college. The question is whether any case of hostile discrimination arises on account of the benefit extended as per Ext. P6. It is clear from the reading of Ext. P6 that the staff pattern for private colleges provided for in the grant-in-aid Code did not contain any provision for part time posts in the last grade service as the said Rules have taken its coverage only to full time posts. Therefore, the benefit given to part time contingent employees has been ordered for the first time in private colleges as per Ext. P6. It is also clear from the reading of Ext. P6 that the Government have consciously limited the number of such admissible posts of part time contingent post only to a maximum of three posts, that too, depending on the basis of the size of the college. So the said benefit ordered as per Ext. P6 is only limited to the number of persons occupying such admissible number of posts, which is limited to a maximum of three posts depending on the size of the college. The benefit is confined only to personnel occupying admissible post of part time contingent employees and the benefit is not given as per Ext. P6 in any manner to supernumerary hands occupying part time contingent posts, whereas the petitioner was an excess hand. The non-teaching staff are allowed to direct payment of salary only if they are occupying an admissible post as on 01/09/1972. As the benefit of Ext. P6 has been confined only to part time employees occupying admissible number of posts stipulated by the Government, there is no question of any discrimination as between the beneficiaries of Ext. P6 vis-a-vis the supernumerary non-teaching staff like the petitioner. Therefore, the argument based on hostile discrimination on this count also fails.

10. It is seen from the aforementioned proceedings dated 26/09/1974 issued by the Director of Collegiate Education that nine excess hands including the petitioner were directed to be terminated from service and all these nine excess hands were appointed in July, 1972 in the 4th respondent-college. For reasons only known to the petitioner and the 4th respondent, the petitioner would have continued in service even thereafter in spite of the direction issued on 26/09/1974 that all such supernumerary hands are liable to be terminated from service. Therefore, the petitioner continued in service thereafter upto 1981 only at his risk and the claim for salary from the Government funds is not a tenable proposition. Faced with this situation, the learned counsel for the petitioner also submitted that it has been pointed out in Exts. P8 and P13 that one Sri. Ahamed Koya, Store Keeper, had left the service of the college on long leave on 10/05/1977 and that another two employees occupying last grade service in the college, viz., Sri. K.K. Mytheen Kannu and Sri. Divakaran expired on 13/10/1977 and 17/11/1977 and that the petitioner should be ordered to be regularised at least with effect from 10/07/1972 as against any of these vacancies. At this distance of time, it is really difficult for the official respondents to counter this



argument on the basis of the alleged vacancies said to have been caused by the long leave of Sri. Ahamed Koya etc. But it can be seen that one Sri. K. Divakaran is serial No. 7, who is named in the aforementioned proceedings dated 26/09/1974 of the Director of Collegiate Education and he was appointed on 14/07/1972 and he was obviously an excess hand like the petitioner. So in any view of the matter, no regular vacancy could have been occupied by the said Sri. Divakaran and therefore, no consequential benefits could have enured to anyone including the petitioner. As regards Sri. Ahamed Koya and Sri. K.K. Mytheen Kannu, the Government cannot be burdened to counter this argument as they are not having the records of such incumbents relating to the year 1977 at this distance of time. Moreover, Sri. Ahamed Koya and Sri. K.K. Mytheen Kannu are not named either in impugned Ext. P9 or in the proceedings dated 26/07/1974. Even if they were receiving direct payment salary, it could be that they were temporary beneficiaries of the Government direction issued on 26/05/1973 referred to in Ext. P4 dated 26/09/1974. No contrary records are produced by the petitioner to conclusively establish before this Court that Sri. Ahamed Koya and Sri. K.K. Mytheen Kannu were occupying posts within the admissible sanctioned strength and it is only if such a case is established that the petitioner can have any strong contention in that regard. So, I am not in a position to accept the claims of the petitioner on this count. On the other hand, official respondent No. 2 has filed a counter-affidavit stating that the petitioner always continued to be an excess hand from the time of his initial appointment in 1972 upto his regularization in service as per Ext. P9 and further it is asserted in paragraph 7 of the said counter-affidavit that the petitioner's service was approved only in the newly created post with effect from 18/02/1981 as per Ext. P9 and that too in relaxation of the provisions of the University Statutes. Therefore, there are no circumstances to disbelieve the version of respondents 1 and 2 that there was no other posts to accommodate the petitioner upto the year 1981 and that he continued as an excess hand at his risk and that his service was approved only in the post which was newly created with effect from 18/02/1981 as per Ext. P9. Hence, I am of the considered opinion that no case of hostile discrimination is made out by the petitioner and the stand of the official respondents 1 and 2 that the petitioner cannot be given the benefit of retrospective regularisation with effect from either 1972 or 1977 is sound and tenable. In view of these reasons, the contentions of the petitioner has to be rejected and accordingly the Writ Petition stands dismissed. However, there will be no order as to costs.