

(2009) 12 KL CK 0046

In the High Court Of Kerala

Case No : Writ Petition (C) . No. 25123 of 2005

Mar Philexinos Vocational Higher Secondary School

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 09-12-2009

Acts Referred:

Kerala Civil Services (Classification, Control and Appeal) Rules, 1960 — Rule 2(4), 23, 7, 74, 75

Kerala Education Act, 1958 — Section 12A, 12A(1)

Citation : (2010) 1 KLT 176

Hon'ble Judges : T.R. Ramachandran Nair, J

Bench : Single Bench

Advocate : George Poonthottam, for the Appellant; Dileep Mohanan, Government Pleader and Sebastian Philip, for the Respondent

Final Decision : Allowed

Judgement

T.R. Ramachandran Nair, J.—The Manager of a Vocational Higher Secondary School is the petitioner herein. The question that is raised in the Writ Petition is about the legality of the direction issued by the Government in the impugned order, Ext.P16, to the Manager to initiate de novo disciplinary action against the third respondent as provided under Chap.XIV-AK.E.R.

2. Ext.P16 is the order passed by the Government in Ext.P15 appeal filed by the Manager against Ext.P14 order passed by the Director of Vocational Higher Secondary Education. In fact, in Ext.P14 order the Director was of the view that the petitioner/ Manager can terminate the appointment of the third respondent only after following the procedure contemplated in KCS (CC &A) Rules.

3. Therefore, the main question raised by the petitioner is whether the direction issued by the Government to comply with the provisions of Chap.XIV-AK.E.R. in regard to the disciplinary action taken against the third respondent, is correct or not on the ground that the provisions of Chap.XIV-AK.E.R. have not been made applicable in the case of Vocational Higher Secondary School Teachers. The facts

of the case in a nutshell, are the following:

4. The third respondent was appointed as a Lecturer in English in the non-vocational division and she joined service on 2.12.1995. She was granted leave without allowance as per Ext.P2 order passed by the Government, based on her application Ext.P1, for one year from 10.8.2001. She sought extension of leave as per Ext.P3, for a period of four years from 1.8.2002. The Manager informed her that the application cannot be recommended for want of sufficient teachers in the school and she was directed to rejoin duty. Accordingly, she rejoined duty on 9.8.2002 and continued upto 4.9.2002. As per Ext.P5 application, the third respondent requested for leave for five years from 5.9.2002 to 4.9.2007 for accepting employment abroad. The said application was not forwarded by the petitioner, but the third respondent left the school for joining employment abroad without waiting for sanction of the leave. This resulted in the Manager issuing Ext.P6 memo. It was stated in Ext.P6 that availing of leave by simply sending an application for leave is a case of unauthorized absence from duty, which is a serious misconduct. Therefore, she was directed to rejoin duty within two weeks from the date of receipt of the memo, failing which, it was informed that appropriate further action will be taken against her for unauthorized absence from duty and insubordination.

5. Ext.P7 is the reply submitted by the third respondent, wherein she requested the Manager to recommend her leave application to the Asst. Director, V.H.S.E., Chengannur for onward transmission to the Government. Ext.P8 is the notice issued by the Manager for taking action for unauthorized absence from duty and insubordination, which was replied by the third respondent as per Ext.P9. Ext.10 is the order issued by the Manager terminating her from service for unauthorized absence, and violation of Rules 7 and 23 of Chap.XIV-B K.E.R. This was forwarded to the Director by the Manager as per Ext.P 11 seeking permission to appoint another non-vocational English Lecturer in the permanent vacancy. Against Ext.P10, the third respondent preferred an appeal to the second respondent as per Ext.P12. Since there was no response from the second respondent after Exts.P10 and P11, the Manager sent Ext.P13 reminder. Thereafter the second respondent passed Ext.P14 order.

6. The crucial question herein is whether the action taken by the Manager is correct. Learned Counsel for the petitioner relied upon a decision of a Full Bench of this Court in Varghese v. Deputy Director of Education 2000 (2) KLT 109 (F.B.) and the decision of a learned Single Judge in Rajalakshmi Amma v. State of Kerala 1996 (1) KLT 750. It is contended that neither the KCS (CC & A) Rules nor the rules under Chap.XIV-A K.E.R. will apply in the case of Vocational Higher Secondary School Teachers. As no separate rules have been framed, there is only master and servant relationship to govern the matter. It is therefore submitted that as the third respondent continued to be in unauthorised absence, there was no other way for the Manager but to terminate her service. It is further submitted that the Director as well as the Government found that the action of

the third respondent in proceeding on leave without sanction, is irregular and hence she is liable to face disciplinary action. The question is only about the procedures to be adopted in the matter.

7. Learned Counsel for the third respondent submitted that herein the Manager acted illegally in not recommending the application for leave without allowance to the Government and in rejecting the same. It is pointed out that the Government alone has got the authority to sanction or refuse to sanction the leave. It is further pointed out that in Ext.P14, the Director issued a direction to the Manager to forward the application for leave without allowance, to the Government and the Government has also directed in Ext.P16, to forward the application to the Government even though the Government has directed to initiate a de novo disciplinary action against the teacher.

8. The order Ext.P16 whereby the Manager has been directed to take disciplinary action has not been challenged by the third respondent. Therefore, as regards the finding in Ext. P16 that she is liable to face disciplinary action is concerned, it has become final. The form of such action alone is the dispute.

9. Obviously, KCS (CC & A) Rules, 1960 will not apply herein, as the said rules have not been made applicable to Vocational Higher Secondary School Teachers. The Director has relied upon Rule 9 of Appendix XIIA of Part IK.S.R. which will apply only in respect of those employees covered by the same including Government employees, as the said rules have not been made applicable to Vocational Higher Secondary Department. There cannot be any dispute that the said rules will not apply in this case.

10. In Ext.P16, the provisions relied upon by the Government are Rules 74 and 75 of Chap.XIV-A K.E.R. whereby the previous sanction of the officer authorized by the Government in that behalf is required before imposing penalty of compulsory retirement, removal or dismissal from service. The question is whether the same would apply herein. Section 12A of the Kerala Education Act deals with the powers of Government over Teachers of aided schools. As per Section 12A(1) of the Act, the Government or such officer not below the rank of an Educational Officer, as may be authorised by the Government in this behalf, shall have power to take disciplinary proceedings against a teacher of an aided school. Chap.XIV-A applies to aided school teachers. Obviously the same have not been made applicable to Vocational Higher Secondary Schools. Therefore, the procedure prescribed in Rule 74 of Chap.XIV-A K.E.R. that the Manager should get previous sanction of the officer authorized in that behalf, before imposing a penalty, cannot be applied herein. As per Rule 74 of Chap.XIV-A, the Manager has got power to impose punishment only with the previous sanction of the Director in the case of teachers in the graduate teacher's scale and Headmaster of Secondary Schools and Training Schools and of the District Educational Officer in the other cases. There is an amendment to Rule 2(4) of Chap.I. K.E.R. containing the definition of "Director", which is to the following effect:

"Director" means the Director of Public Instruction or the Director of Higher Secondary Education or such other officer or officers who may from time to time be appointed by the Government to exercise all or any of the powers of the Director of Public Instruction or the Director of Higher Secondary Education, as the case may be.

But the Director of Vocational Higher Secondary Education, has not been included within its purview. Therefore, Rule 74 also cannot apply. In that view of the matter, Ext.P16 cannot be sustained. Therefore, the disciplinary action taken by the Manager also cannot be said to be illegal for want of previous sanction as provided in Rule 74 of Chap.XIV-A.K.E.R.

11. Then the question is whether the issue is governed only by the principle of master and servant relationship, as contended by the learned Counsel for the petitioner. The matter is no longer *res Integra*. In *Rajalakshmi Amma's case* 1996 (1) KLT 750 the very same question was considered. The contention raised therein was that as the provisions of K.E.R. are not applicable in the case of teachers of the Vocational Higher Secondary Schools are concerned, there is no power vested in the Government to order reinstatement of the teacher appointed by the Manager and the power of appointment takes in the power of suspension and dismissal also. While examining this question, the learned Single Judge held that the State has a pervasive control over the establishment and administration of the Vocational Higher Secondary Schools in the State and the Manager is not an independent autonomous authority. Accordingly, it was held that the Managers of the Vocational Higher Secondary Schools sanctioned by the Government also have to act fairly and conduct the school in such a manner only in accordance with well-accepted norms complying with principles of natural justice and fair play, even in the absence of any statutory rules or specific executive orders regarding the conditions of service of the teaching and non-teaching staff. It was held in para 13 thus:

In the matter of sanctioning of the Vocational Higher Secondary Schools, selection and appointment of teachers in the said schools and approval of those appointments are being made as directed by the Government in the manner provided by executive orders. The Manager of a Vocational Higher Secondary School is not an independent authority who can establish a Vocational Higher Secondary School at his discretion and make appointment of the teaching and non-teaching staff in the said school. But right of the Manager in establishing a school and conducting the same are subject to specific control and restrictions imposed by the Government. According to the first respondent, the entire expenses necessary for the conduct of the Vocational Higher Secondary Schools in the State are being met from a Central fund which was made available at the disposal of the Government. The amounts spent by the manager for providing the infra-structure for the conduct of the Vocational Higher Secondary School are being reimbursed by the Government, even though in the reply affidavit filed by the petitioner, it is stated that Government so far, had not reimbursed the said

amount to any Manager of the Vocational Higher Secondary School. But it is the definite case of the State Government that the entire money that may be spent by the management is reimbursable to the management by the Government under the scheme. Thus it is established that State has a pervasive control over the establishment and administration of the Vocational Higher Secondary Schools in the State and the Manager is not an independent autonomous authority to establish any Vocational Higher Secondary School in the State, conferring on the students who have undergone training any diplomas or certificates and in the matter of appointment of teaching and non-teaching staff of the said school. In the light of the above facts, it has to be declared that the Manager of the Vocational Higher Secondary School cannot act arbitrarily while dealing with members of the teaching and non-teaching staff. No such arbitrary power can be conferred on such managers also under the scheme. It is the Government who has to decide whether an aided school governed by the provisions of the Kerala Education Act and the Rules framed thereunder would be converted into a Vocational Higher Secondary School and it is on the basis of such a decision, the petitioner's school, K.S.M. High School also was converted into Vocational Higher Secondary School by the Government as per G.O.(MS). No. 163/92/G.Edn. dated 03.09.1992. Therefore, the Managers of the Vocational Higher Secondary Schools sanctioned by the Government also have to act fairly and conduct the school in such a manner only in accordance with well-accepted norms complying with principles of natural justice and fair play, even in the absence of any statutory rules or specific executive orders regarding the conditions of service of the teaching and non-teaching staff.

12. The further question to be decided therein was whether permission should be obtained from the Director of Vocational Higher Secondary Education, in the matter. In the said case, the Deputy Director of Education conducted an enquiry into the validity of suspension which was cancelled by the Government. The Government took the view that the Director alone will have jurisdiction in the matter. The ambit and extent of the power of the Manager was considered in para 14A and it was held thus:

The teaching and non-teaching staff were selected by a committee with the Director of Vocational Higher Secondary Education as the nominee of the Government in the said selection committee. The appointment of persons who were selected shall also be approved by the Director and the salary bills of those teachers have to be counter signed by the Assistant Director. Thus, it can be seen that the power of appointment of teachers conferred on the Manager is not without any restrictions. In so long as such a power is not absolute power, there is no justification to place a teacher also under suspension for any indefinite period as wrongly contended by the learned Counsel for the petitioner and that too even without permitting to conduct any enquiry by the Director of Vocational Higher Secondary Education as ordered by the Government. The theory of master and servant put forward by the manager is, therefore, only to be discarded in the case of the petitioner and the 4th respondent. There is no legal

or factual basis to substantiate the said contention.

13. The power of the Government to order an enquiry in the matter of suspension, by the Director, was also considered and it was held in para. 15 thus:

For a proper functioning and administration of the Vocational Higher Secondary Schools and to prevent any arbitrary action on the part of the Managers of the Vocational Higher Secondary Schools against the teaching and non-teaching staff working in the above schools, it has to be held that Government have such a power to order an enquiry by the Director of Vocational Higher Secondary Education by any other competent authority. By the said direction, none of the rights of the petitioner as manager of the school had been affected.

In para. 17 of the judgment, this Court pointed out the necessity to frame service rules for the staff of the Vocational Higher Secondary Schools attached to the aided schools and the Government was directed to prescribe service rules for the teaching and non teaching staff attached to the Vocational Higher Secondary Schools in the State as expeditiously as possible.

14. In Varghese's case 2000 (2) KLT 109 (F.B.), the question whether Deputy Director of Education has power or jurisdiction to initiate disciplinary proceedings against a teacher of Higher Secondary School, was considered. It was held that there is no specific power conferred under the K.E.R. in the matter and separate rules, especially service conditions and other connected matters have not been framed in the Special Rules. Accordingly, in para. 7 it was held thus:

Now the question that remains for further consideration is whether there would be no authority, who could take action in case of any misconduct. It is fairly accepted by counsel appearing for the parties that the Manager can take such action. But that is not really the end of the matter. Where the Manager does not take any action can the teacher be allowed to go scot free. As has been rightly pointed out by counsel for the State, action can be taken against the Manager if he does not take action against the concerned teacher.

After referring to Rajalakshmi Amma's case 1996 (1) KLT 750, the Full Bench observed that it would be desirable for the State Government to make statutory prescriptions to govern cases of staff of Higher Secondary Education. It is therefore, clear from the findings in para 7 that in the absence of any particular provision, the Manager can take disciplinary action and to that extent the view taken in Rajalakshmi Amma 's case (supra) that the theory of master and servant has to be discarded, stands modified. Herein, one thing is clear that with regard to Vocational Higher Secondary Schools, no Special Rules have been framed by the Government so far. This fact is clear from the averments in the counter affidavit also. It is averred in para 7 that Special Rules for the aided school staff of the Department have not yet been framed. There is an averment to the effect that the Special Rules in Government Sector, Kerala Education Rules and Kerala Service Rules are being applied in the case of aided school staff also, and that pending finalization of the Special Rules, the service matters of the said

staff are governed in accordance with Kerala Service Rules. The contention taken is that such statutory rules will apply.

15. Obviously, the same cannot be accepted as regards disciplinary action. In fact, going by the stand taken by the Government in Rajalakshmi Amma's case 1996(1) KLT 750, K.E.R. will not apply to Vocational Higher Secondary Schools. Merely because the service conditions of the aided school staff are to be governed by the K.S.R., that cannot automatically result in the application of KCS (CC & A) Rules in respect of disciplinary matters.

16. The Scheme for Vocational Higher Secondary Education had been introduced in the State in the year 1985 under a separate Directorate. As per GO. (MS)No.53/91/GEdn. dated 30.3.1991 Government appointed the Directors, Vocational Higher Secondary Education as the designated authority. Various provisions have been referred to by the learned Single Judge in Rajalakshmi Amma's case (supra). The Director is the competent authority to approve the appointments made by the manager to the teaching and non teaching staff. Therefore, the State has got a pervasive control over the establishment and administration of the Vocational Higher Secondary Schools and the Manager is not an independent autonomous authority, as held by the learned Single Judge in the above case.

17. The question therefore arises whether the action taken by the Manager is a fair one. Herein, the steps taken by the Manager before termination of third respondent shows that as per Ext.P6, the third respondent was directed to rejoin duty after pointing out that she is unauthorisedly absent from duty. Again, by Ext.P8 she was asked to show cause why action should not be taken for unauthorized absence. Finally, by Ext.P10 she was terminated from service. This termination is effected on the reason that the activity of the third respondent in absenting from duty for taking up employment abroad from 5.9.2002 onwards cannot be justified, That the third respondent left the school without waiting for the grant of leave, is an admitted fact. With regard to the same, in Ext.P 14 the Director was of the view that the action of the teacher in having proceeded on leave without getting the leave sanctioned is irregular. In Ext.P16 it was held by the Government also that the action of the teacher in having left the school and accepted employment, was irregular. Therefore, as regards the merits of the charges in the disciplinary action is concerned, the view taken is identical. It is, for that reason the Manager was directed to initiate de novo disciplinary action against the teacher for leaving the country and accepting job abroad without sanction from the Government, by Ext.P16. As already observed, the above order is not under challenge by the third respondent. Therefore, obviously she is liable for disciplinary action, but de novo disciplinary action is not necessary.

18. The Manager, going by the decision of the Full Bench in Varghese 's case 2000 (2) KLT 109 F.B., is entitled to take disciplinary action. But still, the question is whether the department should have some control in the matter, as otherwise if the unbridled power of the Manager is recognised, there may be

disastrous consequences. Hence, in the absence of any Special Rules, there should be some mechanism to oversee the action taken by the Manager resulting in punishment of a member of the staff. The view taken in Rajalakshmi Amma's case 1996 (1) KLT 750 therefore can be relied upon in this regard. Therefore, any disciplinary action taken by the Manager in respect of a member of the staff should be subject to scrutiny by the Director of Vocational Higher Secondary Education. The punishment imposed by the Manager can, therefore, be implemented only after getting permission from the Director, which will be a proper safeguard.

19. What remains therefore is only regarding the grant of permission by the Director of Vocational Higher Secondary Education to implement the order of termination. Actually, the Manager was also conscious of the above and it is in those circumstances the Manager forwarded the order of termination along with Ext.P11 to the Director seeking to accord sanction for appointment of another non-vocational lecturer in English in the said vacancy. Again, the Manager has requested for permission, as per Ext.P13 before the Director for effecting termination.

20. Therefore, the issue with regard to the grant of permission to effect the punishment has to be decided by the Director, in the light of the above findings. As separate rules have not been framed for taking disciplinary action, the question Of complying with the provisions of KCS (CC & A) Rules and rules of Chap.XIV-A.K.E.R. will not arise in this case.

21. Then the question is whether the plea raised by the learned Counsel for the third respondent that the application for leave without allowance should be forwarded by the Manager to the Government as directed in Ext.P16. Obviously, the power to reject the application is vested on the Government. Of course, the third respondent's request is to forward the same with due recommendation by the Manager. The third respondent cannot compel the Manager to forward the application with a request to sanction the leave. It is well settled that leave cannot be claimed as a matter of right. Therefore, to recommend the leave or not is the prerogative of the Manager. The direction by the Government in Ext.P16 to the Manager to forward the application with proforma details, etc. has to be understood in the light of the above position, and in the light of the view taken by the Government therein about her conduct.

22. Therefore, the Writ Petition is allowed. Exts.P14 and P16 to the extent to which the order of termination of the Manager is cancelled and the direction to the Manager to take fresh disciplinary action, are quashed. The second respondent Director of Vocational Higher Secondary Education will consider the application of the Manager as per Ext.P13 for granting permission to effect the termination in accordance with law and appropriate orders will be passed within a period of two months from the date of receipt of a copy of this judgment, after hearing the petitioner and the third respondent. As directed in Ext.P 16, the Manager will forward the application for leave without allowance of the third

respondent with the documents accompanying it, for enabling the Government to pass final orders with regard to the same. No Costs.