

(1999) 03 KL CK 0036
In the High Court Of Kerala
Case No : O.P. No. 13039 of 1998

Mercy Lukose

APPELLANT

Vs

The Vice Chancellor and Others

RESPONDENT

Date of Decision : 22-03-1999

Acts Referred:

Constitution of India, 1950 — Article 226

Mahatma Gandhi University Act, 1985 — Section 62(2), 62(2A)

Citation : (1999) 03 KL CK 0036

Hon'ble Judges : K.A. Abdul Gafoor, J

Bench : Single Bench

Advocate : A.N. Rajan Babu, for the Appellant; K. Gopalakrishna Kurup, for 1st and 2nd Respondents, Joseph Kodianthara, for 3rd Respondent and P.V. Asha, Govt. Pleader for Respondent 4, for the Respondent

Final Decision : Allowed

Judgement

K.A. Abdul Gafoor, J.—The Petitioner is a teacher discharged from service for continued unauthorised absence. She had been out of India to join her husband employed abroad. Later, she came to India and by that time, the Petitioner had been discharged from service, by an order passed by the management ousting her due to such long unauthorised absence. In spite of that, the Petitioner claimed employment. She was shown the order of discharge. She was also not preferred for the vacancies which had arisen next, in spite of her application, in another college under the same management. This resulted in two appeals before the University Appellate Tribunal. The Tribunal negated the contention of the Petitioner for re-appointment and also against the discharge order. The first one was challenged in an Original Petition and the later in a revision before this Court. Those were disposed of by Ext. P-1. The challenge against the discharge order finally failed before this Court as well. This Court also did not accept the contention of the Petitioner that appointment made in the vacancy which had arisen last which was claimed by the Petitioner could be set aside displacing the appointee, to give place to the Petitioner. But, it was declared that the Petitioner,

as no penalty had been imposed on her though she had been discharged due to unauthorised absence, will be entitled to claim for future appointment in any of the colleges under the management u/s 62(2)(b) of the Mahatma Gandhi University Act. In spite of that, no appointment was given, though a SLP seeking leave to the Appellant against Ext. P-1 judgment failed before the Supreme Court. The Petitioner moved contempt of Court case, but that did not succeed. The Petitioner's repeated request to fill up an existing vacancy of Physical Education Teacher which had arisen due to retirement of an incumbent also failed. It is in the above circumstances, the Petitioner has approached this Court with this writ petition mainly seeking a direction to the third Respondent "to appoint the Petitioner in the available retirement vacancy for the post of Physical Instructor in the B.C.M. College, Kottayam forthwith". Petitioner seeks incidental reliefs as well including arrears of salary payable by the management from the date of retirement of the incumbent in the post and from which date, according to the Petitioner, she is entitled to be appointed in terms of Ext. P-1 judgment.

2. The claim of the Petitioner is contested by the management, third Respondent, relying mainly on Ext. P-11 order issued by the Government banning appointment in private colleges against the existing vacancies because of delinking of Pre-degree courses, from the affiliated colleges. It is also contended by the counsel for the third Respondent that there is no specific direction to appoint the Petitioner in any vacancy. That is why the contempt of Court case taken up by the Petitioner had been dismissed as per Ext. R-3(6) judgment. When there is no direction, no writ of mandamus will lie against the management to appoint an incumbent. Moreover, the management is disabled to appoint any teacher because of the ban imposed by Government as already mentioned above. Moreover, the Petitioner is not qualified in terms of the regulations issued by the University Grants Commission for being appointed against the vacancy. It is also contended that, the right, the Petitioner has, in terms of Ext. P-1 judgment is the right available u/s 62(2)(a) of the M.G. University Act. That is a right for "preference in the matter of future appointments". So, such right will arise only at the time the management considering any incumbent for appointment. Merely because there is a vacancy, there arise no consideration of any preference being given. The preferential question arise only when the management intend to fill up the vacancy. Certainly, the management will give that preferential right, the counsel for the third Respondent contends.

3. The Petitioner relies mainly on two decisions, one of the Supreme Court and another of a Division Bench of this Court. The former one is the decision reported in K. Krishnarnacharyulu and Ors. v. Sri Venkateswara Hindu College of Engineering and Anr. AIR 1998 S.C. 295. This decision mainly deals with the maintainability of a writ petition under Article 226 of the Constitution of India in the matter of filling up of the vacancies in the, educational institutions though managed by the private individuals or agencies. It is stated that the imparting of education is a fundamental right so far as the public is concerned. Therefore, in the matter of sanctioning posts of teachers and appointment thereof, there is a

public element involving and therefore, in such circumstances, the Court can, under Article 226 issue appropriate direction to the authority concerned to serve that public interest.

4. The later decision is *Manager M.M.H.S. v. Deputy Director 1994 (1) KLT 321* concerning appointment in aided schools against the sanctioned vacancies. It is also contended by the counsel for the Petitioner, relying on Ext. P-20 that the ban in filling up the vacancies in the private colleges has been lifted so far as the claims u/s 62(2)(b) are concerned. Paragraph 3 of Ext. P-20 is categorical to that extent, the Petitioner submits. Paragraph 3 of Ext. P-20 reads as follows:

However where teachers who have been retrenched for want of vacancies and who have already acquired a right on future appointment as on 24th April 1997 are available, they may be appointed in such vacancies on a regular basis.

Therefore, on any count, the manager cannot keep the existing vacancies open to defeat the public interest and also the interest and right crystalised in the form of a judgment as per Ext. P-1 in favour of the Petitioner.

5. It is true that the right available to a teacher who had been sent out of service otherwise than in terms of the disciplinary action as held in Ext. P-1 judgment is only for "preference in the matter of a future appointment".

So, preference will arise only at the time of making appointment. But, when such preferential claim had been upheld by a Division Bench of this Court, the management cannot postpone the filling up of the vacancies so as to defeat the claim of the teacher concerned, which has been upheld by this Court in a case where the management itself was a party.

6. As per the scheme of the University Act, and Statutes, the posts are sanctioned to each of the private colleges, taking into account the curricula of study, strength of students, courses available in the college etc. The posts sanctioned will always be the minimum of the posts required. In none of the colleges, the University is granting or sanctioning any posts in any subject or discipline in excess of the minimum requirement. It is an admitted case before me by the management that there is a sanctioned post which is remaining vacant in the department of Physical Education in B.G.M. College, Kottayam, under the management. Necessarily that post is one among the minimum requirement to meet the need of the students and which has been sanctioned by the University. When one among such posts is not filled up, necessarily, the interest of the students which itself is a public interest at large, is defeated.

7. Educational institutions are run by the private management, not as a part of their duty, but because of the sanctioning order by Government or University as the case may be, to open a college. So, their duty is a public duty. Necessarily, they have the liability as well to fill up the minimum necessary posts sanctioned by the University to run the college properly to cater to that public need. If one among the posts is remaining vacant or kept open for long, necessarily, the

students will not get that minimum desired learning in any discipline. It is specifically pointed out by the Petitioner that there is no women incumbent in the Physical Education Department in B.C.M. College, Kottayam, which is a women's college. That will, certainly add to the public need to fill up the post.

8. The management does not have any reluctance to appoint the Petitioner. The only thing the management points out is Ext. P-11 order which contains ban on filling up of the vacancies in private colleges due to delinking of pre-degree courses. The lifting of the ban as contained in Ext. P-20 is applicable only to the teachers who have been retrenched for want of vacancies and who have already acquired a preferential right for appointment. The Petitioner is not a retrenched teacher. She was only discharged due to long unauthorised absence. Therefore, the Petitioner will not come within the category of paragraph 3 of Ext. P-20 extracted above and she is not a retrenched teacher.

9. Thus, it is clear that the ban imposed in Ext. P-11 had been lifted by Ext. P-20, so far as the teachers who have been retrenched for want of vacancies and who have acquired a preferential right for future appointment, the rights available to a teacher in terms of Section 62(2)(b) of the M.G. University Act.

10. In Ext. P-1 judgment, the Petitioner had been given "a declaration that she is entitled to claim preferential right u/s 62(2)(b) of the Act for appointment against future vacancies in posts for which she is qualified in accordance with law". Section 62(2)(b) reads as follows:

a teacher relieved from a private college on or after the 14th day of March 1974 due to the abolition of a course of study in that private college or the cessation of the period for which he was appointed or for any other reason except disciplinary action against him shall be given preference in the matter of future appointments in the private colleges or, as the case may be, any of the private colleges under the management of the educational agency within the University area.

This statutory provision does not differentiate the teachers retrenched from service or discharged from service. The statutory claim arising out of the said provision is one and the same in respect of the persons who are entitled to such preference. So, there arise no question of discriminating the claims under the said statutory provision as between those who are retrenched and those who are sent out otherwise than by retrenchment. The intention in Ext. P-20 is to lift the ban in respect of those who had statutory claim for reappointment, whether it is by discharge or retrenchment. Therefore, Ext. P-20 shall not stand in the way of appointing the Petitioner. There is no ban in appointment of any claimant u/s 62(2)(a) of the Act. As that claim of the Petitioner has been upheld in Ext. P-1, necessarily, the Petitioner shall be appointed.

11. When the parties had been on issue with regard to the claim of one among the parties as contained in Ext. P-1 judgment, necessarily, by one reason or other, the other party cannot postpone the implementation of judgment. That will defeat the rule of law. Therefore, it is incumbent on the third Respondent to fill

up the vacancy immediately in terms of the declaration already made in Ext. P-1. While filling up "the vacancies, the Petitioner"s preferential claim as upheld in Ext. P-1 judgment shall be considered of course, subject to the condition as observed by this Court that "she is qualified in accordance with law".

12. The Petitioner"s claim for salary with effect from the date of retirement of original incumbent to give rise to the vacancy concerned cannot be accepted because salary and allowances are to be paid to a person who had been appointed. The Petitioner has not so far been appointed. The Petitioner"s preferential claim has to be examined with reference to her qualification in terms of Ext. P-1 judgment at the time of filling up of the vacancy as directed above. The Petitioner is free, if her claim is upheld and if she has a contention that her claim has been defeated with effect from the eligible date, to seek appropriate remedy for re-compensating the loss, if any sustained by her.

The Original Petition is allowed to the above extent.