

(1969) 07 KL CK 0002
In the High Court Of Kerala
Case No : O.P. No. 2643 of 1969

Miss Achamma Thomas

APPELLANT

Vs

The Principal, St. Teresa's College, Ernakulam and another

RESPONDENT

Date of Decision : 01-07-1969

Acts Referred:

Constitution of India, 1950 — Article 29(2)
Kerala University Act, 1974 — Section 19(j), 30, 30(j), 32, 33

Citation : (1971) KLJ 606

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

Bench : Single Bench

Advocate : K. Chandrasekharan and T. Chandrasekhara Menon, for the Appellant; T.N. Subramonia Iyer and M. Pathrose Mathai for Respondent 1 and C.K. Sivasankara Panicker and P.G. Parameswara Panicker for Respondent 2, for the Respondent

Final Decision : Dismissed

Judgement

K.K. Mathew, J.—The petitioner was appointed as a Lecturer in Botany in the St. Teresa's College, Ernakulam, by Ex. P-1 communication dated 29-6-1967. Ex. P1 states that the appointment is on probation for a period of one year from 4th July, 1967 to 31st May, 1968. Even after the expiry of the period, she continued in the post for the academic year 1968-69. The 1st respondent issued Ex. P-2 notice on 11-4-1969 stating that the appointment of the petitioner for the academic year 1968-69 will cease on 31-5-1969.

2. The petitioner says that she has got a right to continue in the post as her appointment was in a substantive vacancy to a permanent post. She submits that she was appointed on probation, that on the expiry of the period of probation, the 1st respondent was bound to confirm her in the post, and that even if it be assumed that she was to be on probation for a period of two years as provided in the relevant Ordinance she has completed her probation; and so she is entitled to continue in the post as a permanent hand.

3. To appreciate this contention of the petitioner, it is necessary to refer to the relevant provisions in the Ordinance framed under the Kerala University Act, Act XIV of 1957. Section 19 (j) of that Act provides:

Powers of the Syndicate:--Subject to the provisions of this Act and the Statutes, the Executive Authority of the University including the general superintendence and control over the institutions of the University shall be vested in the Syndicate; and subject likewise, the Syndicate shall have the following powers, namely:--

(j) to fix the emoluments and prescribe the duties and the conditions of service of teachers and other employees in private colleges;

Clause 15 of Chapter XXXIV of the First Statutes provides:

Every College shall conform to and follow the provisions relating to recruitment, conditions of service, scales of pay, provident fund etc. prescribed by the Ordinances for teachers of colleges.

Clause 5(a) of Chapter LVII of the Kerala University Ordinance, as amended on 4-3-1967, provides that teachers appointed by direct recruitment shall be on probation for a period of two years within a period of 3 years, and that in exceptional cases the period of probation may be extended for a period not exceeding one year subject to the approval of the University. Clause 5(b) says that the management of the College may at any time before the expiry of the prescribed period of probation terminate at its discretion the probation of the probationer and discharge him from service if he is appointed by direct recruitment, revert him to his Original appointment if the appointment to the new post is by transfer on promotion, after giving him either a month's notice or a month's salary in lieu thereof and likewise a teacher may terminate his service in the college during the period of probation either by giving the management a month's notice in writing or by paying the management a month's salary in lieu thereof. Clause 5(c) provides that on satisfactory completion of the probation, the management of the college shall confirm the teacher in the post if the post is substantively vacant, and if the post is not substantively vacant or if the appointment is for a specific period, the teacher shall be allowed to continue for the remaining period of his appointment. It is clear from these provisions of the Ordinances, which are continued in force by virtue of section 75 (2) of the Kerala University Act, 1969, that on satisfactory completion of probation, a teacher shall be confirmed in the post, if the post is substantively vacant; and if the appointment is for a period, the teacher shall be allowed to continue for the remaining period of his appointment. These provisions can have no application to the petitioner as she was appointed on probation only from 4th July, 1967 to 31st May, 1968. In Clause 2(a) of Chapter LVII of the Ordinances, it is provided that it shall be competent for the management to appoint teachers for a specific period without advertisement and selection subject to the approval of the University. In this case, Ex. P-1 appointment itself appears to be for a specific

period, and the management says that that was continued after the expiry of the period till 31-5-1969 by an oral agreement. The use of the word "probation" in Ex. P-1 would not make the appointment of the petitioner a permanent appointment. The case of the 1st respondent, as already indicated, is that the petitioner was allowed to continue in the post for the academic year 1968-69 by an oral agreement. In the representation made by the petitioner before the Vice-Chancellor, Ex. P-5, she has stated that the appointment was originally for the period from 4th July, 1967 to 31st May, 1968 and that on satisfactory completion of the probationary period, she was asked to continue in the post for the next year also. The petitioner had no case then that her probation was extended by another year and that she has undergone probation for two years as required by the Ordinances. The character of the appointment itself being in dispute, it is difficult to spell out a clear duty on the part of the management to retain the petitioner in the staff of the college or a specific right on the part of the petitioner to be so retained so that the court may issue a writ or order of mandamus.

4. Counsel for the 1st respondent contended that no writ or order in the nature of mandamus can be issued against the Principal of a private college, even if it is affiliated to the University, and in support of that position the decisions in *Joseph Mundassery v. Manager. St. Thomas College, Trichur* 1853 L.L.T. 773 and *Dr. G.F. Papali v. The University of Travancore*, 1956 KLT 563 were cited. The decision in *Joseph Mundassery v. Manager, St. Thomas College, Trichur*, which was followed in the latter case can be distinguished on the ground that it was assumed in that case that there was no statutory duty on the private college in question there, which could be enforced by the issue of an order in the nature of mandamus. The assumption was made because no Statute or Ordinance of the Madras University which cast any such duty upon private colleges affiliated to that University was brought to the notice of the Court. This is what the Court said:

The laws of the University of Madras mean the rules laid down in the Madras University Act, 1923, and the Statutes, Ordinances and Regulations made thereunder, Sections 30, 32 and 33 of the Act show how statutes, Ordinances and Regulations of the University are made and it is impossible to say that the resolution passed by the Senate at its meeting on the 10th February, 1948 amounts to either a Statute or an Ordinance or a Regulation.

The situation here is different. Under the Kerala University Act, 1957, as also under the Kerala University Act, 1969, a private college when it is affiliated to the University has got certain obligations and duties, which spell in the realm of statutory obligations and duties. u/s 21 (1) of the Kerala University Act, 1969, the syndicate has power to affiliate institutions in accordance with the terms and conditions of such affiliation prescribed in the Act and the Statutes. Section 30 (j) of the Act provides that Statutes may provided for the conditions and procedure for affiliation of colleges. Chapter 57 of the Ordinances provides for the duties of a private college when affiliated. The College has a duty to confirm a teacher who

has satisfactorily completed his probation. The question whether a teacher has satisfactorily completed his probation might be a matter for the college to decide. But, when once it is proved that a teacher has satisfactorily completed his probation, a statutory duty is cast upon the college to confirm the teacher. Although a private-college may not be a statutory body, statutes or ordinances made under the Act may cast duties upon it, and if an applicant for mandamus shows that he is interested in the performance of a duty, I can see no reason why a writ in the nature of mandamus should not issue, in *Prage Tools Corporation v. Sri. C. A. Imanuel and others*, S.C.W.R. 503 the Supreme Court said:

Thus, an application for mandamus will not lie for an order of reinstatement to an office which is essentially of a private character nor can such an application be maintained to secure performance of obligations owed by a company towards its workmen to resolve any private dispute (See *Sohanlal Vs. The Union of India (UOI)*,). In *Regina v. Industrial Court & Ors.*--1965 1 Q.B. 377, mandamus was refused against the industrial court though set up under the Industrial Court Act, 1919 on the grounds that the reference for Arbitration made to it by a minister was not one under the Act but a private reference. "This Court has never exercised a general power" said Bruce, J., in *R.V. Lewishan Union*--1897 1 Q.B, 498, 501, "to enforce the performance of their statutory duties by public bodies on the application of anybody who chooses to apply for a mandamus. It has always required that the applicant for a mandamus should have a legal and a specific right to enforce the performance of those duties." Therefore, the condition precedent for the issue of mandamus is that there is in one claiming a legal right to the performance of a legal duty by one against whom it is sought. An order of mandamus is, in form, a command directed to a person, corporation or an inferior tribunal requiring him or them to do a particular thing therein specified which appertains to his or their office and is in the nature of a public duty. It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body. A mandamus can issue, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorising their undertakings. A mandamus would also lie against a company constituted by a statute for the purposes of fulfilling public responsibilities, (off. Halsburys" Law of England (3rd Ed.,) Vol. II p. 52 and onwards). The company being a non-statutory body and one incorporated under the Companies Act 3 there was neither a statutory or a public duty imposed on it by a statute in respect of which enforcement would be sought by means of a mandamus, nor was there in its workmen any corresponding legal right for enforcement of any such statutory or public duty.

5. It was argued that a private college owes no duty to a teacher and that he has no legal specific light to enforce the provisions in the Ordinances by applying for a mandamus, as the duty is owed by the college only to the University. It is

generally said that an applicant for mandamus must have a legal right or a special interest or sufficient interest, and that he must show that the duty which is sought to be enforced is owed to him. The question has arisen whether an equitable as distinguished from legal right would be sufficient to entitle an applicant to move for the writ; and the courts have held that an equitable right is sufficient. It is only necessary to refer to *R. V, Registrar of Titles ex. p. Moss* 1918 V.L.R. 411. The Court there observed:

The force however of the expression "legal specific right," I think lies mainly in the specific nature of the right, and not in whether it would be enforced in a court of law or equity--

Now, what is it that is meant when it is said that the applicant must have a legal right? In *R. v. Lewisham Union* 1897 1 Q.B. 498, which is referred to in the judgment of the Supreme Court in *Praga Tools Corporation v. Sri. C.A. Imanuel and others* 5 C.W.R. 503, the court said:

.....the applicant in order to entitle himself to a mandamus, must first of all show that he has a legal specific right to ask for the interference of the Court..... This court would be far exceeding its proper functions if it were to assume jurisdiction to enforce the performance by public bodies of all their statutory duties without requiring clear evidence that the person who sought its interference had a legal right to insist upon such performance.

It would seem that the term "legal right," is used here in the orthodox 1891 2 Q.B. 326 sense. In *R. v. Secretary of State for War* 1888 21 Q.B-D. 313 where an application for mandamus to compel the respondent to make an addition to the applicant's retired pay under a royal warrant was dismissed on the ground that the Secretary of State had "no legal duty towards the applicant". Lord Esher M.R., refused the grant of a mandamus on the ground that the respondent there was only responsible to the Crown and has no legal duty imposed upon him towards the subject. But in an earlier case, namely, in *R.V. Commissioner for special Purpose of income tax*, he said that a mandamus will lie on the application of a person interested in the performance of the duty. It will thus be seen that the authorities for the proposition that an applicant for mandamus must show that the duty sought to be enforced is owed to him, or in other words, that the applicant has a legal right", in the traditional sense of the term, may not fully accord with many of the cases on the point. The test is inherently weak since the effect of equating the interest required to support an application for mandamus with that of a plaintiff in an action for damages for breach of statutory duty owed to him is to render mandamus otiose, for, an alternative remedy would exist in every case, and the court would in general in the exercise of its discretion refuse an order of mandamus. The courts have frequently accorded standing to applicants whose interests fell short of a right, the disregard of which per se constitutes a legal wrong. Apparently, in many cases, the term "legal right" was used in the sense of an interest recognised by courts as worthy of protection. In some cases, the courts have used "special interest"

or "sufficient interest". Whether an applicant has sufficient interest is a matter of judicial discretion. When a statute imposes a duty on a public official for the benefit of a specific class of persons other than the general public, the position is clear. Any member of the class can enforce the duty, as he has a special interest in its performance. But when there is a general duty imposed for the benefit of the public, can any member of the public apply for a mandamus?, Since an application for mandamus is not an *actio popularis*, no member of the public has *locus standi* to apply for an order. Since, however, it is desirable that the failure to perform a public duty should not go unchecked, the the courts have conceded standing to any person who can show that he is prejudiced to a greater extent than the general public. In *R. v. Manchester Corporation* 1911-1 K.B. 560, it was held that the question whether an applicant is in a superior position vis-a-vis members of the public is a matter for the discretion of the courts. A local Government Board has been judicially recognised as competent to apply for mandamus to compel the guardians of a parish to appoint a vaccination officer (See *R. v. Leicester Guardians* 1899-2 Q.B. 632)

6. So, the question of the *locus standi* of an applicant for mandamus does not admit of any categoric answer. The employment of the traditional syntax of "legal right" to describe the requisite interest, coupled with the assertion that a mandamus applicant must show that the duty is owed to him personally, has established two particular points; on the one hand a strict rule limiting standing to a person who has a litigable right within the categories of private law, and on the other hand, the courts have, in the absence of such a litigable right, accorded standing to a person who made out a "special interest" in the performance of the duty sought to be enforced. The cases which say that an applicant should show that the duty, the performance of which is sought to be secured, is one owed to him personally may be discountenanced since they were designed to ring out the point that where the repository of the duty was a crown servant, it was imperative for the applicant to show that the duty was not one owed to the crown, but that it was imposed on the Crown servant as *Persona designata* and hence amenable to mandamus. I think, the weight of authorities is in favour of the more liberal "special interest" test under which the courts have accorded standing to persons who have a direct and substantial interest at stake. This is necessarily a matter of judicial discretion. Where the duty sought to be enforced is imposed on public official or a public body for the benefit of a specific class of persons, persons within the class are competent to apply for mandamus without any further showing of a legal right. Persons outside the class may have *locus standi* if they have a special interest in its performance. Where the duty sought to be secured is a general one, and not specifically imposed for the benefit of a particular class of persons, the mandamus applicant must satisfy the "special interest" test.

7. In "Judicial Review of Administrative Action" Second Edition, at page 571, S.A. De Smith says:

What meaning, then, can be attributed to the broader assertions that a legal right-duty relationship must be present between the applicant and the respondent? Sometimes, one suspects, they are nothing but tautologies: mandamus will lie to secure the enforcement of a legal duty on the application of one who is recognised by law as being entitled to apply for its enforcement by this method. In some contexts they may be understood to mean merely that the "duty" imposed on the respondent must be one recognised by law if it is to be enforceable in the courts or that it is not enough for the applicant to rely upon a private equitable right. If they are to be understood to mean that no application for mandamus for the enforcement of a legal duty may be brought except by one who has a right to bring an action for damages for breach of duty, they are manifestly wrong.

So that if in this case the petitioner had established the existence of a legal duty on the part of the college to confirm and retain her in service, she would have had "sufficient interest" in the performance of that duty and the Court would have issued the writ prayed for.

8. The question whether a writ in the nature of mandamus will lie against a private college was considered in *Jayasri v. Kakativa Medical College* 1967-1 A.W.R. 247. The court among other things said:

It is equally apparent that the Kakatiya Medical College, which is registered under the Societies Registration Act, 1350--F, is a legal person, brought into existence for fulfilling a public purpose, namely, imparting medical education to all those who satisfy the requirements of their rules.

It had to satisfy the requirements of All India Medical Council, and the Osmania University has to approve not only the academic qualification of the teachers but also the curricula etc. All these requirements leave little doubt in one's mind that the institution is serving a public purpose and that the persons who are discharging those duties are quasi--public, if not public, authorities, in as much as the very constitution provides for Government servants, namely, the District Collector, to be the President of the Executive Committee, and the Ministers of Government to be ex-officio members of the governing body. It may at this stage be useful to refer to a remark attributed to Lord Chief Justice Hale to the effect that "when private property is affected with a public interest, it ceases to be *juris privati* only.

The Court summarised the effect of the decision in *Munn v. Illinois* 94 U.S. 113 follows:

The property does become clothed with public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect, grants to the public an interest in that use for the common good to the extent of the interests he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use, he must submit to

the control

and continued:

In successive American cases, it is said that this principle in *Munn V. Illinois* 94 U.S 113, has never been modified. In this country also, there is authority for the aforesaid principle, viz., that where private bodies discharge public functions, they cease to be *Juris privati*. It is thus seen that the two requirements for entertainment of a petition for issue of a writ of mandamus, one of them, namely, the public character of the office and the institution, is in my view satisfied." (See *Jayasri v. Kakatiya Medical College*--1967 1. A.W.R. 247 at page 254).

9. It would appear that private college affiliated to the University and receiving aid out of State funds, although owned by a private individual or corporate body, has a public character. Art. 29 (2) of the Constitution provides that no citizen shall be denied admission into any educational institution maintained by the States or receiving aid out of State funds on grounds only on religion, caste, language or any of them. This might indicate the public character of such a college.

10. In this case, I need not express a definite opinion about this matter. As the terms of the appointment themselves are in dispute, the duty of the college to confirm the petitioner or to treat her as a confirmed teacher cannot be postulated. So, I decline the prayer for mandamus. The petitioner has prayed that the Vice-chancellor, the 2nd respondent, should be directed to dispose of her representation. I direct the 2nd respondent to dispose of the representation as early as possible, preferably within a month from today.

With the above direction, I dismiss the writ petition, but in the circumstances, make no order as to costs.