
(1988) 10 KL CK 0010
In the High Court Of Kerala
Case No : W.A. No's. 685 and 686/87

N.V. Jacob and Another

APPELLANT

Vs

K.P. Zacharia and Others

RESPONDENT

Date of Decision : 07-10-1988

Acts Referred:

Kerala University Act, 1969 — Section 55, 55(2), 55(4)

Kerala University Act, 1974 — Section 57(1), 57(3), 57(5), 57(6), 59

Citation : (1988) 10 KL CK 0010

Hon'ble Judges : V.S. Malimath, C.J.;V. Bhaskaran Nambiar, J

Bench : Division Bench

Advocate : C.K.S. Panicker and K.J. Joseph, for the Appellant; P.K. Balasubramaniam and S.B. Iyer for Respondent 1 and P. Gopalakrishnan Nair, for Respondent 3, for the Respondent

Final Decision : Allowed

Judgement

Bhaskaran Nambiar, J.—A claim for appointment to the post of a Principal of a private college asserted as early as May 1970, survives for consideration in these two appeals, even now, though the main claimant has retired from service. It is unnecessary to traverse the facts in detail as the controversy before us lies in a fairly short compass. We are also for that matter not referring elaborately to the two writ petitions and the two writ appeals disposed of earlier which required the Kerala University Appellate Tribunal to consider and reconsider the issue on more than one occasion.

2. The vacancy for the post of a Principal, B.A.M. College, Thuruthikadu, arose in 1970, when Prof. K.T. George retired from service on attaining the superannuation age, at the end of the academic year, 1969-70. Sri K.P. Zachariah, (whom we shall describe hereafter as the Respondent), a Lecturer in the College, was put in charge of the post of Principal till a permanent appointment was made to the post. The order dated 3rd May 1970, in the form of a letter, on which the main argument is advanced, is extracted below:

I am glad to inform you that the Governing Council which met on 2nd May 1970 has appointed you as Lecturer-in-charge of the duties of Principal till permanent appointment is made to the post.

On 26th May, 1976, he was relieved of his duties as the Principal and he was requested to hand over "the charge of the duties of the Principal to Sri K.A. George, Anr. Lecturer" and on the same day the management of the College resolved thus:

Sri K.P. Zachariah, Lecturer in the department of Mathematics holding charge of the duties of the Principal is hereby informed that he is relieved from the duties of the Principal from 27th May 1976.

3. On 28th May 1977, Sri N.V. Jacob, the Appellant in W.A. No. 685 of 1987 (whom we shall describe as the Appellant hereafter) was appointed as Principal on probation and this order is extracted below:

Sri N.V. Jacob, Nedumplackal, Mallappally is appointed as Principal on probation under this management in the scale of Rs. 710-40-750-50-1050-50/2-1200 and is posted as Principal in the Bishop Abraham Memorial College, Thuruthicad from 30th May 1977 to 31st May 1978 subject to provisions of the Kerala University Act and Statutes, Ordinances and regulations made thereunder and such other rules and orders issued from time to time by the University of Kerala.

4. When the College was upgraded as first Grade College the Appellant was promoted and appointed as Principal of that college on 18th July 1978 and this order runs thus:

Sri N.V. Jacob, Nedumplackal, Mallappally is promoted and appointed as Principal under this Management in the scale of Rs. 950-50-1350-50/2-1450 and is posted as Principal in the Bishop Abraham Memorial College (First Grade), Thuruthicad from 18th July 1978 subject to provisions of the Kerala University Act and Statutes Ordinances and regulation made thereunder and such other rules and orders issued from time to time by the University of Kerala.

5. The Appellant was subsequently confirmed Principal of the first Grade College on 10th January 1980 and the order stated thus:

Sri N.V. Jacob, Nedumplakal, Mallappally, is confirmed as Principal of B.A.M. College (I Grade), Thuruthicad with effect from 18th July 1979 subject to provisions of Kerala University Act and the Statutes, Ordinances and Regulations made thereunder and such other rules and orders issued from time to time by the University of Kerala.

6. The Respondent challenged the orders directing him to be relieved from the post of Principal by filing an appeal before the Kerala University Appellate Tribunal. The final decision of the Tribunal, after a series of remand by this Court, rendered on 28th July, 1986 was that though there was no appointment of the Respondent as Principal on 3rd May 1970, he was in fact "working" in a

substantive vacancy and he was treated as a Principal of the College by all concerned. Thus, according to the Tribunal, the Respondent is deemed to be a Principal within the explanation to Section 55(4) of the Kerala University Act, 1969. The Tribunal thus set aside the orders of the management directing the Respondent's relief from the post of Principal.

7. This order was challenged by the Appellant in O.P. No. 5606 of 1986 and by the management in O.P. No. 6102 of 1986. These writ petitions were disposed of by a learned Single Judge of this Court by judgment delivered on 3rd day of August, 1987. The learned Judge upheld the decision of the Tribunal. W.A. No. 685 of 1987 is against the decision in O.P. No. 5606 of 1986 and W.A. No. 686 of 1987 is against the decision in O.P. No. 6102 of 1986. Both the appeals are disposed of by this common judgment.

8. It admits of no doubt that the order issued on 3rd May 1970 did not appoint the Respondent as Principal or as Principal on probation. He was appointed only as "Lecturer in charge of the duties of the Principal" and he was so put in charge only "till permanent appointment is made to the post". The learned Single Judge, as we understand the judgment also, did not hold that the Respondent was appointed as Principal on 3rd May 1970. We may also clear yet another ground, namely, that it is no longer in dispute that the Respondent was qualified to be appointed as Principal on 3rd May 1970.

9. But the question for consideration before the learned Judge, as it is before us, is whether the Respondent could be deemed to be appointed under any statutory fiction. We shall, therefore, refer to the relevant statutory provisions. When the Respondent was appointed, the relevant provisions were contained in the Kerala University Act, 1969, and when he was relieved, it was the 1974 Act that applied. When the Appellant was appointed also it was the Kerala University Act of 1974 that was in force. That does not make any substantial difference though the corresponding provisions, in the two enactments throw a good deal of light on the controversy raised.

10. Teacher is defined in the 1969 and 1974 Act thus:

"teacher" means a Principal, Professor, Assistant Professor, Reader, Lecturer, Instructor or such other person imparting instruction or supervising research in any of the colleges or recognised institutions and whose appointment has been approved by the University:

11. The Kerala University Act, 1969, was amended by the University Amendment Act 13 of 1971 with effect from 10th day of December, 1970.

12. Section 55 of the Act, so far as it is necessary for our purpose and as amended read thus:

55. Probation-(1) Teachers of private colleges shall be on probation for a period of one year within a period of two years:

Provided that in exceptional cases the period of probation may be extended by a period not exceeding one year, subject to the prior approval of the Syndicate.

Explanation. Probation undergone by a teacher before the commencement of this Act shall be deemed to be probation for the purposes of this Sub-section, provided such probation is within a period of two years immediately before such commencement.

(2) The governing body or managing council, as the case may be, may, at any time before the prescribed period of probation, terminate the probation of the probationer for want of vacancy and discharge him from service if he was appointed by direct recruitment or revert him to his original appointment if the appointment to the new post was by transfer on promotion.

(3) Any probationer discharged or reverted under Sub-section (2) shall be given preference in the matter of future appointments to the same post.

(4) On satisfactory completion of probation, the educational agency or the corporate management, as the case may be, shall confirm the teacher in the post and if the vacancy is not a substantive vacancy, the teacher shall be allowed to continue in the post for the duration of the vacancy.

Explanation. All teachers who have been working in a substantive vacancy at or after the commencement of the Principal Act shall be deemed to have been on probation for the purposes of this Sub-section.

13. Section 59 of the 1974 Act relevant for our purpose, reads thus:

59. Probation. (1) Teachers of private colleges shall be on probation for a period of one year within a period of two years:

Provided that in exceptional cases, the period of probation may be extended by a period not exceeding one year, subject to the prior approval of the Syndicate.

Explanation. Probation undergone by a teacher before the commencement of this Act shall be deemed to be probation for the purposes of this Sub-section, provided such probation is within a period of two years immediately before such commencement

(2) Notwithstanding anything contained in any contract or other document, any teacher working in a substantive vacancy at or after the commencement of this Act shall be deemed to be on probation for the purposes of Sub-section (1).

(3) The educational agency may, at any time before the prescribed period of probation, terminate the probation of the probationer for want of vacancy and discharge him from service if he was appointed by direct recruitment or revert him to his original appointment if the appointment to the new post was by transfer or promotion.

(4) Any probationer discharged or reverted under Sub-section (3) shall be given preference in the matter of future appointments to the same post.

(5) On satisfactory completion of probation, the educational agency, shall confirm the teacher in the post and if the vacancy is not a substantive vacancy, the teacher shall be allowed to continue in the post for the duration of the vacancy.

(6) If, on the expiry of the prescribed period of probation, the educational agency decides that the teacher is not suitable for continuance in the post in which he is appointed, it shall discharge him from service or revert him to his original appointment, as the case may be, after giving him a reasonable opportunity of showing cause against the action proposed to be taken in regard to him.

(7) Where the post held by the probationer is substantively vacant and before the expiry of one month from the prescribed period of probation he is not confirmed under Sub-section (5) or is not discharged or reverted under Sub-section (6), he shall be deemed to have been confirmed in that post.

(8) A probationer who is discharged or reverted under Sub-section (6) or who is discharged or reverted before the prescribed period of probation otherwise than on the ground of want of vacancy shall be entitled to appeal against the order of discharge or reversion to the Appellate Tribunal and the provisions of Section 60 shall, mutatis mutandis apply to such appeals.

14. Thus it can be seen that teacher means a Principal whose appointment has been approved by the University. Teachers of private colleges are on probation for a period of one year within a period of two years. Before the prescribed period of probation the probation may be terminated and the teacher discharged for want of vacancy, or, he may be discharged if the educational agency finds that he is not suitable for continuance in the post. On satisfactory completion of probation, the educational agency shall confirm the teacher in the post if there is a substantive vacancy. If there is no substantive vacancy, the teacher shall be allowed to continue in the post for the duration of the vacancy. Vide Section 57(1), (3), (6) and (5).

15. But the 1974 Act provides for deeming provisions in Section 59(2) and Section 59(7). u/s 59(2) where any teacher was working in any substantive vacancy at or after the, commencement of the Act, namely, 19th August, 1974, the teacher shall be deemed to be on probation for purposes of Sub-section (1). If this teacher is not confirmed before the expiry of one month from the prescribed period of two years of probation, and the post is substantively vacant, he shall be deemed to have been confirmed in that post. The learned Single Judge, confirming the decision of the Tribunal held that the Respondent was working as a teacher on the date when the Act came into force, he was working in, a substantive vacancy, and therefore, he should be deemed on probation as Principal, and as he was not confirmed within the prescribed period, he should be deemed to have been confirmed. This teacher gets the benefit of the deeming provision twice.

16. The learned Judge stated thus:

The Petitioner was admittedly in charge of the duties of Principal as per Ext. P-1 at the time of commencement of the 1974 Act. If the performance by him of the duties as Principal, as per Ext. P-1 could be treated as working in a substantive vacancy at that time, Section 59(2) deems such working as to be on probation and under Sub-section (7) of Section 59, he shall be deemed to have been confirmed at the expiry of one month if he had not been confirmed or discharged or reverted meanwhile. This question has to be decided with reference to Ext. P-1 and the conduct of all the parties as laid down in the judgment in writ appeal No. 92 of 1986.

The learned Judge then proceeded to state that Section 59(2) was intended to act as a check against vagaries of managers who may appoint persons on periodical, contracts in substantive vacancies or put persons successively in temporary charge for years together and therefore to achieve this object, "an interpretation which deems a teacher as probationer whenever it is shown that he was worked in a substantive vacancy should be accepted. The learned, Judge, therefore, concluded that the Respondent was a probationer by a statutory fiction, even though he was not in fact, appointed as probationer.

17. With respect to the learned Judge, we are not prepared, to agree. If any teacher working in any substantive vacancy can be treated as a probationer and if the only question to be considered is whether the teacher was in fact "working" at the relevant time, it may not afford a sufficient check against the vagaries of the manager; instead it may give him a longer handle to make unpredictable manoeuvres in appointments. It would be sufficient for any manager to allow a teacher to work in any substantive vacancy in any higher category without any appointment order at all, so that the "favoured teacher" can be deemed to be a probationer under the Act in that higher category. The provision can also come to the rescue of any teacher who works even against the directions of the manager, at the relevant period. We have necessarily to avoid any unrealistic construction of the statutory provision which would lead to ridiculous results. It is therefore, necessary that the expression "working" in Section 59(2) has to be given a reasonable interpretation in consonance with the other relevant provisions and scheme of the Act.

18. Section 59(2) of the University Act, providing for deemed probation insists on three conditions-(1) the protection can be availed of only by a teacher; (2) the teacher should have worked, at or after the commencement of the Act and (3) the working should be in a substantive vacancy. The "teacher" under the definition can be a Lecturer; Instructor, Assistant Professor, Professor, Reader, Principal, etc. Probation is required for appointment to any of these categories. The teacher claiming protection u/s 59(2), to be a deemed probationer in any of these categories, has to be a teacher belonging to that category. When it is the Principal who claims protection of the deemed provision for probation under this Sub-section, an ordinary Lecturer cannot claim to be a probationer as a Principal simply because he was a "teacher" by definition at the relevant time. The teacher

who claims protection of a deemed probationer in any category should therefore be a teacher in that particular category on or after the commencement of the Act. A person does not become a teacher unless he is appointed. Without appointment, none can claim to be a teacher. This is the statutory prescription in the definition clause of the word "teacher" itself. Therefore, the teacher entitled to be a "deemed probationer", has to be appointed to that category in which he requires to be treated as a probationer. To satisfy, therefore, the first condition for attracting the deeming provision for probation in Section 59(2) of the Act, the claimant should be a teacher, appointed to the particular category in which he claims to be probationer. No person can qualify for probation unless he is appointed. It is not sufficient if that teacher is merely appointed, for, the second condition insists that he was working at the relevant time. An appointment order in the pocket of the teacher does not clothe him with any right to be a probationer. The appointment order has to take effect; the teacher should have worked pursuant to the appointment order in that particular category at the relevant period. But this working can not be in any casual, temporary or ad hoc vacancy, and therefore the third condition insists that the working should be in a substantive vacancy.

19. It seems to us to be clear, therefore, that Section 59(2) postulates an appointment of a teacher to a particular category before he can claim any deemed status for probation and the "working" contemplated under the provision is (a) working after an appointment; (b) working in the category of post where probation is required and (c) working in a substantive vacancy.

20. Moreover, the deemed probation under Sub-section (2) of Section 59 is "for the purposes of Sub-section (1)" of that section which fixes a period of one year within a period of two years. The deemed status marks the commencement of the probation and the deemed probationer also has to be on probation for the prescribed period. This deemed probationer cannot be on probation if he was not appointed to the post. Appointment to a particular category is thus a condition precedent for invoking the deeming provision in Section 59(2). This also reinforces our conclusion that the working contemplated u/s 59(2) is "working" after an appointment.

21. There may be permanent appointments to substantive vacancies where the relevant service regulations insist on probation for a particular period. No statutory fiction is contemplated in those cases. This is provided in Sub-section (1) of Section 59. Similarly there may be temporary appointments which do not call for any probationary period. But, if pursuant to that temporary, appointment, the teacher works in a Substantive vacancy, Sub-section (2) makes him by a statutory fiction a deemed probationer. In other words, an appointment which, does not require probation or lead to confirmation may, under Sub-section (2) of Section 59 confer valuable rights to the person so appointed when he fulfils the conditions prescribed therein, so that he attains the status of a probationer and deserves a possible confirmation. Thus, an appointment to the post is required to

attract the provisions of Section 59(2). A person who has no appointment in his favour, cannot aspire for a deemed status of a probationer u/s 59(2). Section 59(2) does not contemplate that a person is deemed to work in a particular category when he has not been appointed to that category or post.

22. Even accepting the reasoning of the learned Judge that Section 59(2) operates as a check against the vagaries of the managers in the manner of making appointments, it seems to follow that certain appointments are sought to be protected under Sub-section (2). If that is so, an appointment is implicit in the application of a deeming provision in Section 59(2).

23. Probation in service jurisprudence is a period of testing and trial for ascertaining the individual fitness or lack of fitness for his retention in the job to which he is already appointed. A deemed probation is a statutory fiction. The interpretative principle of a statutory fiction is best expressed in the classical exposition of the law by Lord Asquith in *East End Dwellings Co. Ltd. v. Finsbury Borough Council* (1952) A.C. 109 thus:

If you are bidden to treat an imaginary state of affairs as real, you must, purely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it...The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.

24. Bearing these principles in mind, in the present case, the Petitioner was not appointed as a principal. The 1970 order only appoints him a Lecturer in charge of the duties of the Principal. He was, therefore, "not a teacher" in the category of Principal who can claim protection of Section 59(2). He worked only as a Lecturer and not as a Principal. His work can only be traced to his appointment as Lecturer and he was, therefore, not "working" as a Principal during the relevant period to be treated as a Principal on probation. He did not satisfy the first two conditions mentioned in Section 59(2) and he was, therefore, not entitled to claim deemed probationary rights.

25. The Act provides for a double fiction. A person entitled to be a deemed probationer becomes a deemed confirmed teacher u/s 59(7) of the Act. This fiction at two stages of the same career of an individual who has no appointment to the post, cannot be imported to situations where the conditions stipulated under the very section are not satisfied. The scope of the statutory fiction does not thus admit in the present case of any liberal interpretation leading to grave injustice affecting several persons and many rights.

26. Section 59(2) does not curtail any rights of the management of private colleges but only creates certain rights to a limited class of teachers satisfying the conditions prescribed therein. It is, therefore, difficult to appreciate that the "vagaries of the management" in the matter of appointment have found a

statutory answer in Section 59(2).

27. This Court had in the earlier writ appeal, 92 of 1986, directed that the conduct of the parties shall also be taken into consideration to decide whether the Respondent was in fact working as Principal. The Respondent, has admittedly not been paid the salary of Principal at any time. He was paid only the salary of a Lecturer and an allowance of Rs. 40 per month. The Respondent had sent a communication as early as 1973 (Ext. P-8) in which he asserted "Since May 1970, I was working only as Lecturer in charge of the duties of the Principal". He himself took the invariable stand that he was only a Lecturer discharging the duties of the Principal till a permanent arrangement was made.

28. The Tribunal was, therefore, wrong in allowing the appeal of the Respondent and declaring that he was entitled to the protection u/s 59(2) of the, Act. We, therefore, allow these appeals, set aside the judgment of the learned Single Judge in O.P. No. 5606 of 1986 and O.P. No. 6102 of 1986, and setting aside the decision of the Kerala University Appellate Tribunal dated 28th July, 1986, we dismiss the appeal, A.S. No. 8 of 1976 filed by the Respondent Shri K.P. Zachariah, before the said Tribunal.

In the result, the appeals are allowed accordingly. No costs.