
(1990) 03 KL CK 0007

In the High Court Of Kerala

Case No : O.P. No"s. 10027/89 and 1230 and 1271/90

Sreekumara Pillai

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 16-03-1990

Acts Referred:

Kerala Education Rules, 1959 — Rule 13, 45
Kerala University Act, 1957 — Section 64, 64(1)
Mahatma Gandhi University Act, 1985 — Section 68

Citation : (1990) KLJ 800

Hon'ble Judges : V. Sivaraman Nair, J

Bench : Single Bench

**Advocate : M. Balagovindan, in O.P. No. 10027 of 1989, for the Appellant;
K.R.B. Kaimal, Government Pleader for Respondent Nos. 1 and 2, K.K. Usha and
N. Viswanatha Iyer, for the Respondent**

Judgement

Sivaraman Nair, J.—These Original Petitions relate to the validity of an order passed by the State Government in exercise of its appellate jurisdiction to decide disputes between the two teachers in colleges under the management of Sree Narayana Trust. Since the parties are common in these Original Petitions, I will refer to them as they are arrayed in O.P. No. 10027 of 1989. O.P. Nos. 1230 and 1271 of 1990 are filed by Respondents 4 and 3 respectively in O.P. No. 10027 of 1989.

2. The controversy is in very short compass. Petitioner commenced service as a Lecturer in Mathematics under the 3rd Respondent on 4th August 1958. He commenced continuous service in that category from 1st July 1959. The 4th Respondent commenced service as Lecturer in Mathematics in Fatima Matha National College, Quilon on 27th June 1956 under Ext. R-4(a) order. He was appointed as a Senior Lecturer under the 3rd Respondent on 14th August 1961 under Ext. R-4(b). He was promoted as officiating Professor with effect from 1st June 1962 under Ext. R-4(c) order. He was confirmed in that post under Ext. R-4(d) order dated 8th July 1965. In Ext. R-4(e) dated 23rd May 1978, he was

promoted as Principal with effect from 1st June 1978. He was further promoted as Grade I Professor under Ext. R-4(f) order dated 3rd October 1980. The extract of his service book containing the various entries is produced as Ext. R-4(h). Petitioner was shown as junior to the 4th Respondent in Ext. P-2 seniority list. Petitioner filed Ext. P-3 representation to the 3rd Respondent Manager on 12th July 1988 claiming seniority over the 4th Respondent.

3. The 3rd Respondent represent the Educational Agency of colleges affiliated to Kerala, Mahatma Gandhi and Calicut Universities. Section 64 of the Calicut University Act deals with transfer of teachers to other Universities and provides:

(1) Where an educational agency has colleges under the jurisdiction of the Calicut University and also under the jurisdiction of the Kerala University, the educational agency shall, within three months of the commencement of this Act or within such further period, not exceeding three months, as may be granted by the Government for sufficient reason, prepare a seniority list of the teachers of all such colleges.

(2) After the preparation of the list under Sub-section (1), the educational agency shall give a right of option to the teachers as to the University under the jurisdiction of which he opts to remain and the teachers shall be allotted to each University area in accordance with such option:

Provided that where the number of teachers who have opted to work Under the jurisdiction of the Calicut University or the Kerala University is more than the number required, allotment shall be made on the basis of seniority.

(3) Any teacher aggrieved by any entry in the list prepared under Sub-section (1) or by the allotment under Sub-section (2) may appeal to the Government within sixty days from the date of communication of the list or order of allotment to him, and the decision of the Government thereon shall be final.

(4) Where a teacher is allotted to a University area under this section, he shall not be transferred to a college affiliated to any other University.

(5) Nothing contained in this section shall apply in respect of principals of private colleges.

Section 68 of the Mahatma Gandhi University Act corresponds to the above provision. Section 64 of the Kerala University Act also is to the same effect.

4. Since these provisions were not implemented, the teachers of the managements of colleges affiliated to more than one University filed as series of Original Petitions seeking implementation of the provisions of the above section. Educational Agencies filed Anr. series of Original Petitions. The 3rd Respondent had filed O.P. 591 of 1988. The second batch of Original Petitions were dismissed on 13th July 1988. While dismissing those Original Petitions, this Court granted two months' time to the educational agency to comply with the provisions contained in Section 64(1) of the Kerala and Calicut University Acts. Since the

time was due to expire on 12th September 1988, the 3rd Respondent issued a seniority list of teachers as provided in Section 64 of the the Act on 9th August 1988. It also passed an allotment order in accordance with seniority in that list on 10th September 1988. In that seniority list also, the 4th Respondent was treated as senior to the Petitioner. Both having sought for allotment to the Kerala University and since only one could be accommodated, 4th Respondent, who was senior according to the list, was allotted to the Kerala University and the Petitioner was allotted to the Calicut University.

5. The State Government issued Kerala University (Inter University transfer of teachers of Colleges under Educational agencies having Colleges affiliated to Calicut and Mahatma Gandhi University) First Statutes, 1988, by notification dated 19th September 1988. A copy of the Statute produced as Ext. P-1. Clause 3 of the above Statue is provided for the preparation of a common seniority list of Arts and Science Colleges of personnel working under the Educational agency having colleges in other Universities. Sub-clause (2) of Clause 3 provided for communication of the list. The proviso thereto was to the effect that if an educational agency had already circulated among the teachers a seniority list after 21st day of November 1987 but before the commencement of the Statue as per Section 64 of the Kerala University or Calicut University Act or Section 68 of the Mahatma Gandhi University Act that would be deemed to be sufficient compliance with the provisions of Clause 3. Clause 4 enabled an aggrieved teacher to file a complaint before the Manager within fourteen days from the date of communication of the seniority list to him. Clause 5 requires the educational agency to publish the final list after disposing of the complaints within fourteen days from the last date fixed for the receipt of such complaint. Clause 7 enabled any teacher aggrieved by any entry, or rank assigned to him in the seniority list prepared in accordance with the Statute 5 to prefer an appeal to the Government within a period of sixty days. Clause 8 provided an option to teachers indicating the order of preference as to the University under the jurisdiction of which he/she opts to remain. Clause 9 provided for allotment of each teacher to the University in accordance with the option. In cases where the number of teachers who have opted to remain under the jurisdiction of a University exceeds the number of posts in the colleges affiliated to that University, the allotment shall be made on the basis of seniority. The order of allotment is covered by Clause 10. Clause 11 provides for the right of appeal to Government from the order of allotment. Clause 12 deals with principles for fixing seniority of teachers as envisaged in Statute 3(1):

That Clause reads thus:

12. Principles for fixing seniority of teachers as envisaged in Statute 3(1).-(1) For the purpose of fixing the seniority of teachers the rank obtained by the teacher in the selection list shall be adhered to.

(2) Where appointments are made on the basis of a select list, the seniority of teachers shall be determined on the basis of the rank allotted to each teacher in

the merit list and community list alternately irrespective of the date of appointment.

(3) In the absence of select list, the date of first entry in the service shall be the basis of fixing the seniority. The principle shall be first come last go.

(4) For the preparation of seniority list as envisaged in Statute 3(1) the overall seniority (department-wise) and not the cadre seniority shall be the basis.

The dispute which is involved in this case is as to whether overall seniority (department-wise) will take in service under other educational agencies. Petitioner had filed Ext. P-3 representation before the 3rd Respondent Manager against Ext. P-2 seniority list. But the new list was published on 9th August 1985, and the order of allotment was made on 10th September 1988. Petitioner filed an appeal under Clauses 7 and 11 to the State Government on 3rd October 1988. The Government passed Ext. P-4 order dated 8th November 1989 holding that the Petitioner was senior to the 4th Respondent in terms of Statute 3 of the first Statutes issued under Ext. P-1 notification, since he had entered service under the 3rd Respondent-educational agency earlier than the 4th Respondent. The Government, therefore, requested the 3rd Respondent-educational agency to allot the Petitioner to the Kerala University in preference to the 4th Respondent. In O.P. No. 10027 of 1989 the Petitioner seeks the issue of a writ of mandamus directing the 3rd Respondent to implement Ext. P-4. The reliefs sought in O.P. Nos. 1230 and 1271 of 1990 is issue of a writ of certiorari to quash Ext. P-4. The 3rd Respondent educational agency in O.P. No. 1271 of 1990 seeks a declaration that the Petitioner is not bound to draw up a fresh seniority list applying Statute 12 of 1988 1st Statutes in view of the proviso to Clause 3 of Ext. P-1 Statute.

6. It is evident from the details which I have mentioned above that the State Government was right in its conclusion that the Petitioner had longer service in the colleges under the management of the 3rd Respondent-educational agency. He commenced his continuous service as Lecturer in Mathematics under the educational agency from 1st July 1959. The 4th Respondent commenced service in the post of senior lecturer in the higher pay scale on 14th August 1961. It is true that the 4th Respondent was preferred for promotion as Professor Grade II, Professor of Grade I and Principal. It is also true that but for Clause 12 of Ext. P-1 Statutes, he would continue to be senior to the Petitioner. The two-questions, which I have to deal with, are (1) whether overall seniority (department-wise) means seniority with reference to service in other educational agencies as well and (2) whether the proviso to Clause 3 enables the 3rd Respondent-educational agency to deal with seniority of teachers as per Ext. P-2 list which it had published on 19th August 1988.

7. Counsel for the 3rd and 4th Respondents placed considerable reliance on Clause 2(h) of Ext. R-4(g) Kerala University (Conditions of Service of Teachers and Members of Non-teaching Staff) First Statutes, 1979. That clause defines service to mean "continuous service rendered in a college affiliated to any

university in the State or any service rendered in a college affiliated to the University of Travancore or the Madras University by a person who is at the commencement of these Statutes, working in any college affiliated to any of the Universities in this State". Counsel submits that that definition has to be adopted since there is no definition of service in Ext. P-1 Statutes relating to inter University transfer of teachers. Reference was also made to the provisions contained in Section 81(2) of the Calicut University Act which provides that.

The Statutes, Ordinances, Regulations, rules, bye laws and orders in force immediately before the commencement of this Act shall, in so far as they are not inconsistent with the provisions of this Act, continue to be in force until they are replaced by the Statutes, Ordinances, Regulations, rules, bye laws or orders made under this Act.

The submission is that "overall seniority (department-wise)" has to be understood in the context of the definition contained in Clause 2(h) of Ext. R-4(g).

8. There are more difficulties than one in accepting this submission. It is clear from a reading of Exts. P-1 and R-4(g) that seniority and service count only institution-wise or educational agency-wise. It is difficult to read Clause 2(h) of Ext. R-4(g) as comprehending service rendered in a college other than one under the educational agency which has to prepare seniority list in respect of service of teachers working in colleges under it.

9. An almost similar controversy with reference to the provisions of Rule 45 Chapter XIV-A of the K.E.R. came up for consideration before a Division Bench of this Court. Rule 45 provides that if there is a graduate teacher with B.Ed. or other equivalent qualification and has got at least five years experience in teaching after acquisition of B.Ed. degree, he may be appointed as Headmaster "provided he has got a service equal to half of the period of service of the seniormost under graduate teacher". The question which arose was whether the service rendered by an aided school teacher prior to his transfer to Anr. aided school could be counted as service for satisfying the requirements of the proviso extracted above. The previous service rendered by a teacher prior to his transfer has to be ignored. It is true that the appointment of the 4th Respondent as Senior Lecturer under the 3rd Respondent from 14th August 1961 was not subject to any limitation as contained in the provisions of Rule 13, Chapter XIV A of the Kerala Education Rules. The Principle is clear that service counts for seniority only if it is rendered in that institution and not in Ors. . I am of the opinion that in the absence of definition in Ext. P-1, overall seniority with reference to service has to be reckoned on the basis of the service in the educational agency and not on the basis of service elsewhere.

10. There is one other reason why the argument of Respondents 3 and 4 cannot be accepted. The claim of the 4th Respondent is that he was senior, even though he has lesser service under the management. He had longer service as Senior

Lecturer, 2nd Grade Professor, I Grade Professor and Principal than the Petitioner. In other words, the claim of Respondents 3 and 4 is that the 4th Respondent has cadre seniority in comparison with the Petitioner. Clause 12(4) of Ext. P-1 specifically stipulates that "for the preparation of seniority list as envisaged in Statute 3(1) the overall seniority (department-wise) and not the cadre seniority shall be the basis". What Respondents, seek in this Original Petition is that in spite of that specific prohibition, cadre seniority should count as between the Petitioner and the 4th Respondent. I do not find my way to accept that submission.

11. Counsel for the 3rd Respondent submits that pursuant to the judgment in O.P. No. 591 of 1988 rendered on 13th July 1988, it was obliged to publish a seniority list of teachers working in colleges affiliated to the different Universities before 12th September 1988. The 3rd Respondent published such seniority list on 9th August 1988 and issued an allotment order on 10th September 1988 on that basis. The proviso to Clause 3 of Ext. P-1 provides that any seniority list prepared and circulated among the teachers after 21st November, 1987 but before the commencement of those Statutes should be deemed to be sufficient as issued in compliance with the provisions of Ext. P-1 Statutes. The 3rd Respondent submits that the seniority list which the 3rd Respondent prepared and communicated to the teachers on 9th August 1988 is entitled to the benefit of the deeming provision and therefore there is no obligation for the 3rd Respondent to publish Anr. seniority list. I will assume that the 3rd Respondent is right in this submission. Even then, the teachers are entitled to file a complaint against any entry in Clause 4 of Ext. P-1 and the educational agency is obliged to publish a final seniority list in compliance with Clause 5. Even assuming that the deeming provision converts the list which the 3rd Respondent published on 9th August 1988 as a final list under Clause 5, that deeming provision cannot have the effect of negating the right of teachers to file an appeal under Clause 7 or against the allotment order under Clause 11 to the State Government. I will assume in favour of the 3rd Respondent that it complied with clauses 3 and 5 of Ext. P-1 Statutes by publication of seniority list on 9th August 1988 and by issuing the allotment order dated 10th September 1988. I do not understand the deeming provision to mean that the list which was deemed to have been published under Ext. P-1 Statutes shall be beyond the scope of appeal as provided under Clauses 7 and 11. It is axiomatic that a legal fiction should be confined to the terms thereof and cannot be stretched beyond. That must be more so in a case where such enlargement will impair rights of Ors. . It is therefore, obvious that there was no defect of jurisdiction in the Government in issuing Ext. P-4 order.

12. It is clear from the recitals contained in O.P. No. 1230/90 that the 4th Respondent was aware of the appeal which the Petitioner had filed on 3rd October 1988. The 4th Respondent had filed a detailed objection to that appeal before the 2nd Respondent. The appeal filed by the Petitioner is produced as Ext. P-11 in that original petition. Notes of argument which the 4th Respondent had

submitted is produced as Ext. P-12. It is also evident from the averments contained in O.P. No. 1271 of 1990 that before issue of Ext. P-4 order the 3rd Respondent-educational agency had submitted Ext. P-4 notes on 22nd August 1989 and that was specifically referred to in the Government order. In view of these facts the Respondents cannot successfully urge that there was any violation of principles of natural justice in the disposal of the appeal of the Petitioner by Ext. P-4 order of the 2nd Respondent.

13. I will now deal with the other contentions raised by the Respondents 3 and 4. The main contention urged by the Respondents is that the appellate authority erred in holding that the Petitioner was senior to the 4th Respondent and therefore he should be preferred for allotment to colleges affiliated to Kerala University. I will assume for the purposes of the present case that the view urged by the Respondents on the meaning of service and of seniority is one of the possible views. I am not persuaded to hold that the view which found acceptance of the Government is totally wrong and unsustainable. In other words, what the Respondents can urge is only that the Government could have taken a different view of the matter. It is difficult to hold that acceptance of one of the alternative views manifests an error of law apparent on the face of the record. Such an error can be apparent only if the view of the authority concerned be wrong. I am of the opinion that Ext. P-4 order in adopting a possible view of the law does not expose any error of law apparent on the face of the record. It is elementary that this Court in exercising its extraordinary and discretionary jurisdiction cannot interfere with orders of competent authorities for the reason that Anr. view was possible.

14. Counsel for Respondents 3 and 4 submitted that justice of the cause call for interference with Ext. P-4. They emphasise the fact that the 4th Respondent had been treated all along as senior to the Petitioner. He had been drawing higher pay and other emoluments. He was appointed as Principal with effect from 1st July 1978, when the Petitioner was only Grade II Professor. The 4th Respondent became a Grade I Professor on 3rd August 1980 whereas the Petitioner became one such only on 15th January 1985. It is also submitted that there is no justification to unsettle the ranks and seniority of the Petitioner and the 4th Respondent. Yet Anr. fact which counsel urged in support of the plea is that the 4th Respondent has 34 years of service whereas the Petitioner has only 32 years of service. Petitioner is due to retire from service on 31st May 1990 whereas the 4th Respondent, though older, is to continue in service for a longer time. The most I can find is that equities and compassionate consideration operate equally between the Petitioner and the 4th Respondent. When such considerations are not overwhelming in favour of one party, I will have no justification to refuse relief.

15. Counsel for the Petitioner submits that there is no justification for this Court to snatch away from the Petitioner what the law entitles him and what he got at bag end of his service career.

In this view I hold that Ext. P-4 in O.P. No. 10027 of 1989 does not require any interference by this Court and that the Petitioner is entitled to seek enforcement of that order. I direct that the 3rd Respondent shall give effect to Ext. P-4 order forthwith by posting the Petitioner in the place of the 4th Respondent.

I allow O.P. 10027/89 and dismiss O.P. Nos. 1230 and 1271 of 1990. The parties will suffer their respective costs.