
(2009) 10 KL CK 0083
In the High Court Of Kerala
Case No : W.A. No. 2529 of 2005

State of Kerala

APPELLANT

Vs

Arun George

RESPONDENT

Date of Decision : 07-10-2009

Acts Referred:

Citation : (2009) 4 KLT 972

Hon'ble Judges : Pius C. Kuriakose, J;Antony Dominic, J

Bench : Division Bench

Advocate : K.K. Ravindranath, Addl. Director General of Prosecutions, M. Saseendran and T.A. Shaji, for the Appellant; T.P. Kelu Nambiar Babu Varghese, Manju Antony, T.J. Thomas (Aluva), V.A. Mohammed, George Poonthottam and P.C. Joseph Pazheparambil, for the Respondent

Final Decision : Dismissed

Judgement

Antony Dominic, J.—The issue arising in these cases being common, the cases were heard together and are disposed of by this common judgment.

2. W.A. No. 2529 of 2005 is treated as the leading case and the pleadings in that case, along with the pleadings and documents in R.P. No. 101/08 are referred to, for convenience.

3. This appeal filed by the State of Kerala and others, arises from the judgment of the Learned Single Judge in W.P.C. 482 of 2005. Since the matter is being reconsidered consequent on our order in R.P. Nos. 101 of 2008 and 180 of 2008, in which several additional documents have been produced and affidavits filed, we consider it only appropriate that the facts and the documents are referred to in detail.

4. Respondents 1 to 7 are Lecturers appointed by the 8th respondent, the Manager, Malankara Orthodox Church Colleges, who is the Manager of Catholicate College, Pathanamthitta, Baselious College, Kottayam and K.G. College, Pambady. According to 8th respondent by Ext.P2, G.O.(Ms) No. 134/98/

H.Edn. dated 9.11.1998 and Ext.P2(a), GO. (Ms.) No. 162/99/H.Edn., dated 06.12.1999, in order to accommodate lecturers rendered surplus due to delinking of Pre-degree courses from Colleges, the Government accorded sanction for starting the new courses mentioned in the Appendix to the aforesaid Government orders during the academic years 1998-99 and 1999-00 respectively. Ext.P2, provided that the sanction was subject to the condition that there will be no additional financial commitment on the part of Government and Ext.P2(a) provided that the expenditure will not exceed the budget allotment for the purpose on any account. Respondents 1 to 8 submit that as per the aforesaid orders, the Catholicate College, Pathanamthitta was sanctioned PG courses in English, Physics and Chemistry and Baseliious College, Kottayam was sanctioned PG Courses in Physics and Economics and that in the K.G. College, Pampadi, PG course in Commerce was sanctioned. Thereafter, the University issued Exts.P3 and P3(a), conveying sanction of the Vice Chancellor subject to ratification by the Syndicate granting affiliation to the courses, clarifying that the same was without any additional financial commitment to the University/Government.

5. The University thereafter issued Annexures A13, 13A and 13B orders, fixing staff pattern of the aforesaid colleges. The courses sanctioned as per Exts.P2, P2(a) and Annexure A3 led to increase in the work load. Accordingly, in terms of the provisions contained in the University Statutes and the Direct Payment Agreement, proceedings for filling up the vacancies were initiated and statutory Selection Committees were constituted, by including the representatives of the Government and the University. Accordingly, selection was conducted and Respondents 1 to 7 were appointed as Lecturers in the aforesaid three colleges. Exts.P1(a) to P1(f) are the orders of appointment, which show that petitioners 1 and 2 were appointed with effect from 1.7.2002, petitioners 3 to 6 were appointed with effect from 7.1.2002 and the 7th petitioner was appointed with effect from 10.7.2002.

6. Subsequently, Ext.P4, proposals submitted to the University for approval of the appointments made was rejected by Ext.P4(a) on the ground, that the ban of fresh appointment imposed as per the provisions contained in Section 5 of the Pre-Degree (Abolition) Act, 1977 was still in force. It is stated that the ban imposed as above was for a period of 3 years from 3.6.1997 and expired on 2.6.2000 and that even after the said period, additional posts, commensurate with work load, were not sanctioned or appointments approved. In such circumstances, the 1st petitioner in R.P. No. 180 of 2008, the Kerala Private College Managements Association and the 8th respondent herein, filed O.P. No. 21268 of 2002 before this Court. The Original Petition was disposed of by Ext.P5 judgment, holding that after the expiry of the period when statutory ban created u/s 5 was in force, any executive order or circular issued by the Government banning appointment or its approval was invalid. It was directed that the University shall fix the strength of teaching staff in the colleges from the academic year 2000-2001 onwards and if appointments are made in accordance with the staff strength fixed, approval of appointments shall be considered by the

University in accordance with law and that if the appointments are in accordance with the provisions of the statutes and ordinances, the same shall be approved, ignoring the orders or circulars issued by the Government banning appointments and its approval.

7. It is stated that once the judgment was rendered as above, the 8th respondent again submitted Ext.P5(a) proposal for approval of the appointments. Subsequently, when the staff fixation orders for the years 2001 -2002 and 2002-2003 were issued, the student strength and work load of PG courses sanctioned as per Exts.P2 and P2(a) were not taken into account. This led to the filing of a contempt of court case in which notice was issued to the Vice Chancellor and Registrar of the University. Thereupon, some of the appointments thus far made were approved, but, however, the University issued Exts.P6 and P6(a) orders refusing to approve the appointment of respondents 1 to 7, for want of vacancies as per the staff strength fixed. Although the 8th respondent again moved the Government by filing Ext.P8 representation that did not evoke any response. It is in these circumstances, W.P.(C). No. 482/2005 was filed for quashing Exts.P6 and P6(a) and to direct the University to reconsider the staff fixation and to revise the same taking note of Exts.P9 and P10 series of work load statements and assessment and fixation of staff strength and on that basis to disburse salary with arrears.

8. Though the Government did not file any counter affidavit, on behalf of the University, a statement was filed in which they mainly relied on the condition incorporated in Exts.P2, P2(a), P3 and P3(a), which according to them absolved the Government and the University from any additional financial commitment on account of starting the courses. It is stated that it is for the management to raise resources and pay salary to the Lecturers appointed by them. The Writ Petition was heard and disposed of by judgment dated 12th August, 2005 and the learned Judge held that in view of the provisions contained in the University Act, Statutes and the Direct Payment Agreement between the petitioner and the Government, the obligation of the Government to pay salary to the lecturers, arises from a statutory contract and that the Government being one of the parties to the agreement, cannot commit breach of its obligations by imposing unilateral conditions. On that basis the learned Judge allowed the Writ Petition.

9. The reasoning adopted by the learned Judge as reflected in the judgment are;

(1) The colleges in which respondents 1 to 7 have been appointed by the 8th respondent are private aided colleges affiliated to the 1st respondent University.

(2) The lectures appointed are duly qualified and selection was strictly adhering to the procedure prescribed in the University Laws and the Direct Payment Agreement between the Government and the Management.

(3) There cannot be any denial of the fact that the Post Graduate Courses sanctioned by the Government and University resulted in increasing the work load in the colleges and that without sanctioning at least the minimum number of

teaching posts, the courses cannot be conducted.

(4) There was no dispute that the direct payment system is applicable to the colleges concerned.

(5) That for courses and posts sanctioned by the University, Direct Payment Agreement automatically comes into operation, by force of Statute 16(3) of Chapter 45B of the M.G. University Statute read with the Direct Payment Agreement.

(6) The obligation to pay salary to the teachers, arising under the direct payment system, cannot be indirectly done away with by imposing unilateral condition that the Government will not bear any additional financial burden on account of starting the courses.

(7) That the students were admitted, fee was collected and remitted in the treasury in the manner provided in the Direct Payment Agreement and that the Government have been accepting such remittances.

10. The learned Judge accordingly upheld the contention that the Government cannot be allowed to commit breach of the obligations undertaken by it in terms of the Direct Payment Agreement and allowed the Writ Petition. It is against this judgment that the State of Kerala has filed the Writ Appeal. The Respondents 1 to 8 pointed out that during the pendency of this Writ Appeal, by Annexure A1 order dated 19.10.2005 produced in R.P. No. 101 of 2008, appointment of respondents 1 to 7 have been approved and salary also has been disbursed on that basis.

11. In the Writ Appeal the appellants mainly relies on the conditions imposed by them in Exts.P2 and P2(a) orders that the courses were sanctioned without any additional financial commitment and that the expenditure will not exceed the budget allotment for the purpose. Government Pleader contended that so long as such conditions have been imposed by the Government and the courses were sanctioned on that basis", the 8th Respondent Manager, having accepted the said conditions, could not contend that for appointments made to meet the work load requirements arising out of the courses sanctioned as per Exts.P2 and P2(a), the Government is bound to pay salary and other allowances. It is contended that the courses were sanctioned as unaided/self financing courses and therefore it is the obligation of the management to pay salary and other allowances and that these courses are outside the purview of Direct Payment Agreement. It is therefore contended that the finding of the learned judge that the conditions imposed by the Government in Exts.P2 and P2(a) were in violation of the Direct Payment Agreement is illegal. The learned Government Pleader also relied on the judgment of this Court in W.P.(C). No. 7549/2004 rejecting identical contentions and it is pointed out that this judgment has been confirmed in the judgment in W.A. No. 1328 of 2005.

12. We have considered the submissions made. It is not disputed that the 8th

respondent has executed Direct Payment Agreement with the Government which provides for the appointments to be made, admission of the students, fee to be collected and remitted in the treasury etc. It is also not the case of the appellants that the 8th Respondent Manager has violated any of the terms of the agreement even in respect of the courses sanctioned as per Exts.P2 and P2(a) or that the courses sanctioned as per Exts.P2 and P2(a) were not in consideration of the delinking of the Pre-Degree courses, on the implementation of the Pre-degree (Abolition) Act, 1997 or that the vacancies to which respondents 1 to 7 were appointed did not arise as a result of the new courses which were commenced following Exts.P2 and P2(a) or that the selection was not conducted by the statutory Selection Committees which included the representatives of the University and the Government or that the fee collected from the students were not remitted in the Government Treasury, as-provided in the Direct Payment Agreement. On the other hand what is contended by the Government is that the courses in question were sanctioned subject to the conditions mentioned in Exts.P2 and P2(a) which absolved the Government from any additional financial commitment and therefore the work load arising there under cannot be reckoned while assessing the work load in the college or issuing staff fixation orders enabling the management to seek approval of the appointments made, in which event only the Government will be rendered liable for payment of salary and other allowances, as undertaken by them in the Direct Payment Agreement.

13. In the light of the above controversy, the main question which emerges for consideration and our answer, is whether the courses in question sanctioned as per Exts.P2 and P2(a), pursuant to which respondent 1 to 7 were appointed by the Corporate Educational Agency of which the 8th Respondent is the Manager, are aided courses or unaided courses. If our answer to this question is that the courses in question are aided courses, the provisions of the Direct Payment Agreement should automatically apply to the courses and the appointments made and by force of Statute 16(3) of Chapter 45B of the University Statutes, the respondents are bound to fix the work load and issue staff fixation orders on that basis and approve the appointments made. Further, in such a case, it was also not permissible for the Government to have incorporated unilateral conditions absolving itself from financial commitments arising out of the courses, and the view taken by the learned Single Judge that such conditions, are in violation of the Direct Payment Agreement, and hence illegal, will have to be upheld. In view of this, we shall proceed to examine whether, on the materials produced before us, the courses in question are aided courses or not.

14. It is not a matter of dispute that Exts.P2 and P2(a) orders sanctioning the courses provided that the courses were sanctioned subject to the condition that there will be no additional financial commitment on the part of the Government and that the expenditure will not exceed the budget allotment for the purpose on any account. However, Annexure A2 order dated 23.02.2008, issued by the respondent University states that as per Syndicate decision dated 21.08.2007, the courses sanctioned during 1998-2001 with the conditions "without additional

financial commitments/within budgetary limits/without additional financial commitments until the courses are stabilised" are purely aided courses. This order further states that the Syndicate Standing Committee on affiliation, in its meeting held on 14.12.2007, reiterated the aforesaid decision of the Syndicate. This order has been produced by Respondents 1 to 8 along with I.A. No. 121/2008 filed in R.P. No. 101/2008. Annexures A3 to A12B have been produced by Respondents 1 to 8, along with I.A. No. 470/2008 in R.P. No. 101/2008. Annexure A4 is an extract of the assurances given and decisions taken at the annual meeting of the Senate held on 2nd and 3rd August 2002, which shows that the Senate had passed a Resolution recommending to the Syndicate and the Government not to sanction unaided courses in Government/aided colleges. Similarly, Annexure A5 is the minutes of the meeting, the Chief Minister had with the representatives of the Private College Managers Association held on 28.02.2006, which shows that after detailed discussion, the Chief Minister proposed that the strength of teaching staff allowable in the Aided Colleges consequent on the delinking of Pre-degree courses will be reworked by considering the courses sanctioned from 1998-2001. Annexure A7, is the Cabinet note which indicates that for the courses sanctioned, consequent on delinking of Pre-degree, there was budgetary provision of Rs. 1 crore for starting new courses in the Government Colleges and an additional provision for Rs. 1 crore was to be included in the supplementary budget for the Aided Colleges. Annexure A8, is an application submitted before the State Public Information Officer, appointed under the Right to Information Act. In answer to Question Nos. 1 and 2, by Annexure A8(b), it is informed that Ext.P2(a) was issued on the basis of Cabinet decision on 24.11.1999, and that the new courses have been sanctioned in order to accommodate teachers rendered excess consequent on the delinking of Pre-degree courses. It is also stated that the new courses were sanctioned as there was budget provision. Question No. 3 was whether it was on self financing basis that the new courses were sanctioned as per Ext.P2(a). This was answered that the new courses were started in Government and Aided Colleges. Question No. 7 was whether any permanent appointment in private aided colleges against the vacancies which came into existence as a result of courses sanctioned as per Ext.P2(a) has been approved and Question No. 8, whether salary is disbursed to lecturers in the colleges mentioned therein, have been answered in the affirmative as per Annexure 8E.

15. Annexure A12 is an order passed by the Calicut University on 12.11.1998, according sanction for starting new courses in the colleges mentioned in column (2) of its Appendix, with the condition that there will be no additional financial commitment to the Government/University. One of the colleges to which sanction has been accorded for starting B .Com., course is Mercy College, Palakkad. Annexure 12B is an order passed by the Calicut University on 23.03.2007 which indicates that on the basis of a complaint received from a parent alleging collection of exorbitant fee, notice was issued to Mercy College, Palakkad, which was justified by the College on the ground that since the course was sanctioned

with the condition that there will be no additional financial commitment to the University/Government, the courses were not aided courses and therefore they were entitled to collect fee different from what was applicable for aided courses. It is stated that this explanation was considered and University issued an order informing the Manager that collection of higher rate of fee from the students of the Aided Courses, was irregular inviting action including withdrawal/suspension of affiliation.

16. Further, in the reply affidavit dated 22.08.2008 filed in R.P. No. 101/2008 it is stated by the 8th respondent that the colleges are aided colleges covered by Direct Payment Agreement with the Government and that the Management has fulfilled all its obligations under the agreement such as constitution of Selection Committee with University and Government representatives, collection of fee as prescribed for aided colleges, remittance of the same at the Government Treasury and admission of the students as per the terms of the agreement etc. Apart from the fact that these factual aspects are not disputed by filing an affidavit, according to the 8th Respondent, these facts have also been made known to the Director of Collegiate Education as per Annexures A14 and A15 letters. Annexure A16 is the Mahatma Gandhi University Diary 2004, which contains separate list of Aided Colleges and Unaided Colleges. It is contended that there is no third type of colleges such as "Aided Colleges with Unaided Courses" and that colleges of the 8th respondent are all Aided Colleges. Annexure A17 is the Academic Calendar of the University for 2008-2009 which shows the difference in reservation of seats in Aided and Unaided Colleges. Annexure A18, the extract of University Diary 2008, shows that separate fees has been prescribed for affiliation of Aided and Unaided Colleges. In the affidavit in I.A. No. 543 of 2008 filed for accepting additional documents, the 8th Respondent has produced as Annexure A19 series, the relevant pages of the application made by it for affiliation of the courses sanctioned as per Exts.P2 and P2(a) orders, which indicate that the applications were made for aided courses. Annexure A20 series are the application made by certain other colleges, for unaided courses which show that the said application and the procedure prescribed thereunder, are totally different from what is prescribed for aided courses. Annexure A20 and 21 (a) are the copies of the University orders, which shows the higher rate of fee prescribed for students undergoing courses in Self Financing/Unaided Colleges. It is on the basis of the above mentioned documents that the 8th Respondent Manager contends that the courses commenced on the strength of Exts.P2 and P2(a) are aided courses.

17. Respondents 1 to 8 have produced another set of documents to support their contention that even the Government do not have a consistent case and that the stand adopted against them is discriminatory. This contention is raised referring to the following materials. Question Nos. 7 and 8 in Annexure A8 application made under the Right to Information Act are whether any permanent appointment has been approved in private aided colleges against the vacancies which came into existence as a result of the courses sanctioned as per Ext.P2(a),

and whether salary is disbursed to the lecturers appointed. Answer to these questions are given in Annexure A8(e), in which, both these questions are answered in the affirmative. By Annexure A9 Government Order, at the request of Smt. Anitha Thomas, Lecturer in Mathematics in BAM College, Thuruthicad, who was appointed in similar circumstances, her appointment is ordered to be approved by the University on the finding that there was sufficient work load to accommodate the teacher. In pursuance to Annexure A9 order of the Government, the University by Annexure A9(a) order, approved the appointment. Annexure A10 is the judgment rendered by a Learned Single Judge of this Court in W.P.(C) No. 28525 of 2004, upholding the claim of two lecturers appointed in similar circumstances, for the approval of their appointment and payment of salary on that basis. It is stated that both the University and the Government have accepted the judgment and referring to Annexure A11 acquittance roll, Respondents submit, without being contradicted, that the petitioners in Annexure A10 judgment are being paid salary and allowances. In this context, it is also appropriate to make reference to para.6 of the affidavit filed in support of I.A. No. 543/2008 where reliance has been placed on Annexure A22, A23 and A23(a) orders as some of the cases where a different stand has been adopted by the authorities, in so far as EMEA College, Kondotty, MEASS College, Areacode, affiliated to Calicut University, are concerned. In fact when these cases were heard, we asked the learned Government Pleader, whether in view of their positive stand that the courses are unaided courses, the colleges have the freedom to collect fee at rates they fix and his answer was also in the negative.

18. It should be stated that the genuineness of the documents relied on by the petitioner or the facts stated therein are not disputed by the Government or the University. No affidavit also has been filed, contradicting the averments in the affidavits referred to above. In such circumstances and in the light of the materials available, we have no reason to conclude that the courses in question are not aided courses. If the courses are aided courses, and as admittedly, the colleges in question are governed by Direct Payment Agreement, necessarily the Government is bound to honour the Direct Payment Agreement and by imposing unilateral conditions the Government cannot absolve itself of the liabilities arising under such a statutory contract.

19. In *State of Kerala v. Devassy Manjooran* 1977 KLT 110 a Division Bench of this Court has held that it is discernable from the Direct Payment Agreement that the Government have undertaken the obligation therein as part of the scheme in relation to University education in the higher level evolved by the State, based on public policy in the discharge of a public duty, which every civilized state must undertake. It is also held that it is a matter of public policy is also clear from the fact that Government wanted to ensure that those who taught in those colleges received adequate remuneration without fail and regularly.

20. In fact a Division Bench of this Court in *Fr. Mathew Meleparambil v. State of Kerala* 2008 (4) KLT 643, has in the context of the Direct Payment Agreement

referred to above, held that it is trite that the parties to a contract shall be bound by the terms of the contract and that one of the parties to the contract cannot unilaterally enforce its own decision on the other party, especially, when none of the clauses in the agreement gives such an authority to either of them.

21. Further, in *Amina Vs. State of Kerala*, , a similar view has been taken by this Court, in the following words:

The plea of the Government arising rather out of financial strain, and the stand of the University, of course can be appreciated only if we stand in their shoes. Additional posts impose financial burden to the State exchequer, but the question is, could this be pointed out as a reason for avoiding statutory liability. The direct payment system had been introduced, and accepted by the parties concerned, and if that be so, the Government could not have resorted to stand that they still have unilateral right to repudiate the terms. The argument is thoroughly unacceptable. The obligation arises from a statutory contract. The import of a principle of policy, as suggested by the Government Pleader, has no place or relevance. If the Government finds such burden unbearable, appropriate measures could be resorted to as admissible under law. The Government have no case that the fee collected are not remitted to them, as is envisaged in the direct payment system.

22. In our view an argument against the above conclusion of ours, cannot even be raised by the Government for the reason that till this issue was raised, the Government and the University conducted themselves on the basis that the courses in question are aided courses. Otherwise statutory Selection Committees applicable to aided colleges would not have been constituted with the participation of the representative of the Government and the University for selecting and appointing the lecturers including Respondents 1 to 7, and for the courses sanctioned as per Exts.P2 and P2(a), admissions would have been made in the manner as provided in the Direct Payment Agreement, fee would not have been collected at the rate applicable to aided courses, fee would not have been remitted in the Treasury as provided in the Direct Payment Agreement and remittance in the Treasury would not have been accepted but for the fact it was pay able under the Direct Payment Agreement. Therefore, the Government and the University also had accepted that the courses in question are aided courses. Having done all these, there is no merit or grace in the offer now made by the learned Government Pleader that they are willing to refund the fee remitted by the Management.

23. If this be the position, the University is bound to reckon the additional workload and consider the proposal of the college for approval of the appointments made, having regard to the provisions contained in Statute 16 of Chapter 45B of the University Statutes. Therefore, we cannot find fault with the conclusion of the learned Judge that the Government was not justified in incorporating unilateral conditions in the order sanctioning the courses, in breach of the statutory Direct Payment Agreement and the provisions of the University

Act and the Rules.

24. Further, we also notice that, in *The Chandigarh Administration and Others Vs. Mrs. Rajni Vali and Others*, in an almost identical situation when equal pay was denied to teachers of educational institutions, on the ground that the courses were commenced with the condition that no grant in aid will be provided for any additional staff, the Apex Court held that the state administration cannot shirk its responsibility for ensuring proper education in schools and colleges on the plea of lack of resources and that it is for the authorities to find out ways and means of securing funds for the purpose as imparting proper education to students, which is a constitutional mandate that the State shall ensure.

25. We are not impressed by the contention of the learned Government Pleader that subsequently arising vacancies, except those on account of retirement or death or newly sanctioned posts, do not have the coverage of Direct Payment Agreement. A reading of C1.35 of the Agreement shows, even institutions subsequently established by the Managements which are signatories to the Agreements, are covered by the Agreement. If that be so, there is no substance in the contention that courses started subsequent to the signing of Direct Payment Agreement are not covered by the Agreement. Learned Government Pleader heavily relied on the judgment of this Court in W.P.(C) No. 7549 of 2004 confirmed in W.A. No. 1328 of 2005. However, a reading of the judgments show that the sustainability of the conditions imposed by the Government/University was not examined in those judgments. Therefore, those judgments are not of any assistance to the Appellants.

26. Finally, an objection was raised by the Learned Government Pleader that the 8th Respondent who accepted the conditional sanction of courses cannot now be allowed to turn around and contend that they will not abide by the conditions. Once we have concluded that the conditions relied on by the Government are in violation of the provisions contained in the Direct Payment Agreement and University Statutes, these conditions are ultra vires and illegal and if so, when these conditions are sought to be enforced, even in the absence of a formal challenge to those conditions, this Court will be justified in, ignoring those conditions. See in this connection the Apex Court judgment in *Bharathidasan University v. All India Council for Technical Education* (2001) 8 SCC 676.

27. For these reasons, we do not find any merit in this Writ Appeal and the Writ Appeal will stand dismissed.

28. In view of the above, W.P.(C). No. 30527/2005 and W.P.(C). No. 939/2006 will stand allowed. Ext.P7 in W.P.(C). No. 30527/05 and Ext.P13 in W.P.(C). No. 939/06 will stand quashed and it is clarified that the parties in these cases will be governed by the direction in the judgment in W.P. (C). No. 482/2005.