

(1964) 03 KL CK 0012
In the High Court Of Kerala
Case No : W.A. No. 52 of 1963

State of Kerala

APPELLANT

Vs

Kunhipacky and Another

RESPONDENT

Date of Decision : 03-03-1964

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1964) KLJ 832

Hon'ble Judges : M.S. Menon, C.J;M. Madhavan Nair, J

Bench : Division Bench

Advocate : K.V. Surianarayana Iyer For 1st Respondent, P.K. Kurien and K. Sukumaran For 2nd Respondent, for the Respondent

Final Decision : Allowed

Judgement

Madhavan Nair J.

1. In March 1958, in the History Department of the Women's College, Trivandrum, the post of a Professor, Grade II, fell vacant. Sri Kunhipacky, Lecturer, Brennen College, Tellicherry, was then the senior most Lecturer in History in the Government Colleges; and Smt. Saradamma was the senior most woman Lecturer in the Department. The Government ordered Smt. Saradamma to officiate in the vacancy from March 1958; and on November 11, 1958, appointed her provisionally to the place. On December 1, 1958 Shri Kunhipacky submitted a representation before the Government pointing out "that the old practice of reserving the vacancies in the Women's College for women had already been abandoned by the Government when Shri Seshadri, Lecturer in Philosophy of University College, Trivandrum was promoted and posted as Professor of Philosophy in the Women's College, as he was the senior most Lecturer in Philosophy Department", and claiming to be substituted in the place given to Smt. Saradamma; and followed it by another representation dated July 13, 1959; On February 25, 1960; the Government informed him of their reluctance to post him as a Professor in the Women's College, but assured him

higher rank over Smt. Saradamma when he would be appointed as Professor. A further representation by Shri kunhipacky suggesting transfer of Smt. Saradamma to the Training College, Tellicherry, and promotion and posting of himself in the Womens College, Trivandrum, met with no better success. His last representation accusing Government of gross violation of "all principles of natural justice" was not replied to. He then filed O.P. No. 668 of 1961 for a writ of certiorari to cancel the order of promotion of Smt. Saradamma, and for a mandamus to direct the Government to pass orders promoting him with effect from November 6, 1958, and giving him the salary of a Professor from such date.

2. In answer to that motion, the State contended that, when the College was under the Kerala University before, September 13, 1957, it was treated as a separate unit, and that the convention of appointing women only in Women's College, unless a qualified woman was not available was followed for some time even after the institution was brought under the control of the Government.

3. Vaidialingam J., held

the promotion of the 2nd respondent (Smt. Saradamma) should not be disturbed," declared Shri Kunhipacky

to be holding the post of Second Grade Professor in History as and from 4th April 1961 the date on which he filed the Writ petition in this Court.

and directed payment to him of salary and other emoluments of a Professor, with increments, from the aforesaid date. Hence this appeal by the State.

4. The jurisdiction of a High Court under Article 226 of the Constitution is only supervisory, and not appellate, the consequence of which distinction is that this Court cannot enter into the factual merits of an order passed by the Government or substitute its own order therefor. This Court may on finding an error of jurisdiction or an error of law or bias, review an executive action and quash the same, but has still to leave the exercise of the executive power to the proper authority, Veerappa Pillai Vs. Raman and Raman Ltd. and Others, , K.M. Shanmugam Vs. The S.R.V.S. (P) Ltd. and Others, , and page 300 of Judicial Review of Administrative Action by S.A. de Smith. The declaration made by the learned Judge of Shri Kunhipacky "to be holding" the place of a Professor from the date he came to this Court when he has not been appointed so by the Government, as also the direction to pay him the salary of a Professor from that date, cannot therefore be sustained.

5. The learned Judge has relied on the decision in Flora Hilda Wilson v State of Kerala (1960 KLT 257) to hold that at the relevant time a male Professor might well be appointed to act in the Women's College. Obviously, the fact that that decision was the subject of appeal in A.S. No. 144 of 1960 before a Division Bench, composed by the Chief Justice and Raghavan J., who took a different view, was not brought to the notice of his Lordship. In the appellate judgment it is observed:

As pointed out by the Supreme Court in *Parshotam Lal Dhingra Vs. Union of India* (UOI), an appointment to a post, permanent or temporary, on probation or on an officiating basis gives to the servant so appointed no right to the post unless his service had ripened into what is, in the service rules, called a quasi-permanent service.

It follows that we cannot interfere under Article 226 of the Constitution even though we are not prepared to say that the appellant had no justification for feeling aggrieved by Ext. P.1 and P.5.....We trust that the Government will look into the matter afresh and render the appellant (Miss Flora Hilda Wilson) such redress as she may deserve in the circumstances of this case.

It cannot therefore be said that in *Flora Wilson's* case, this Court has endorsed its approval to a supersession of the woman candidate by a senior male in the appointment of a Professor in the Women's College. This Court has only directed reconsideration of the matter by the Government. That case cannot therefore be taken as an accepted precedent on the matter; and the observations of the learned Judge based on *Flora Hilda Wilson v State of Kerala* (1960 KLT 257) have to be and are hereby set aside. We make it clear that we are not prepared to say that a convention of preferring women to men for appointments in the Women's College, if existent at the relevant time, was unreasonable.

6. However, the case of the Government has not been put positively before us. No affidavit of the authority who made the order of promotion in question, or of any person concerned in the passing of that order has been filed in the case to explain how or why the promotion was given to Smt. Saradamma while Shri Kunhipacky was her senior. The affidavit of a Superintendent who claims to be "conversant with the facts of the case as disclosed by the records thereof " (of the file relating to the case) cannot do duty for the statement of a person concerned in the impugned act; and the averments therein are couched as vaguely as may be possible. The rule under which the promotion was ordered is not told to us. We find the replies given by the Government to the representations submitted by Shri Kunhipacky also not expressive of any reason for the particular action in question, though it is conceded therein that Shri Kunhipacky is senior to her. It is elementary fairness that when his seniority was overlooked and his junior given the promotion he should be told the ground therefor, unless it is stated to be in the public interests not to divulge it. In the circumstances, we discharge the order under appeal, and direct the Government to consider the representations of Shri Kunhipacky, after giving an opportunity to Smt. Saradamma to present her case against them, and decide afresh either in confirmation or modification of the order of November 11, 1958.

The appeal is thus allowed; but we make no order as to costs here.