

(1971) 10 KL CK 0003

In the High Court Of Kerala

Case No : Original Petition No. 208 of 1971

The Rt. Rev. Dr. M.M. John

APPELLANT

Vs

Govt. of Kerala and Others

RESPONDENT

Date of Decision : 22-10-1971

Acts Referred:

Constitution of India, 1950 — Article 19(1), 30(1)

Kerala University Act, 1969 — Section 53(1), 53(2), 53(3), 53(5), 53(7)

Citation : AIR 1972 Ker 265

Hon'ble Judges : T.C. Raghavan, C.J;P. Narayana Pillai, J

Bench : Division Bench

Advocate : Menon and Pai, for the Appellant; C.M. Kuruvilla, M.P.R. Nair, P.F. Francis and Govt. Pleader, for the Respondent

Final Decision : Partly Allowed

Judgement

Raghavan, C.J.—In V. Rev. Mother Provincial, Congregation of Mother of Carmel, Carmelite Provincial House, Kovilvattam Road, Ernakulam, Cochin and Others Vs. State of Kerala and Others, . a Full Bench of this Court struck down, inter alia, Sub-sections (1). (2). (3) and (9) of Section 53 and Sub-sections (2) and (4) of Section 56 of the Kerala University Act 1969, since the said provisions were bad for offending Articles 19(1)(f) and 30(1) of the Constitution. And the Supreme Court, upheld this in State of Kerala, etc. Vs. Very Rev. Mother Provincial, etc., . There was a contention before the Supreme Court by the majority institutions that there was discrimination against them and in favour of the minority institutions under Article 14 of the Constitution. But, since the counsel of the Kerala State submitted that he had instructions to state that any provision held inapplicable to minority institutions would not be enforced against majority institutions also, the Supreme Court did not consider that question. The State filed a review petition (R. P. No. 45 of 1970) to review the judgment of the Supreme Court; and the Supreme Court observed:

"There appears to be some misunderstanding of the arguments, because we did

not consider the vires of Sub-sections (1), (2), (3) and (9) of Section 53 and Sub-sections (2) and (4) of Section 56 vis-a-vis Article 30(1) of the Constitution. We express no opinion in relation to these subsections vis-a-vis Article 30(1)".

2. This is sought to be used by the State to contend that the Supreme Court did not express any opinion regarding the vires of the aforesaid Sub-sections under Article 30(1) of the Constitution. Though the Supreme Court observed that they agreed with the High Court that Sub-sections (1), (2), (3) and (9) of Section 53 and Sub-sections (2) and (4) of Section 56 were ultra vires, this has to be understood in the light of their aforesaid observation in the order in the review petition--this is the contention of the State. However, it cannot be disputed that the Full Bench of this Court held the Sub-sections unconstitutional not only under Article 19(1)(f) but also under Article 30(1); and that was not set aside by the Supreme Court. The said decision is binding on us: and, for ourselves, we fail to see how, if the said Sub-sections were bad for offending Article 19(1)(f), they would not offend Article 30(1) too.

3. After the decision of the Supreme Court, it became necessary to amend the Kerala University Act; and for that purpose, the Kerala University (Amendment) Act of 1971 was passed, which received the assent of the Governor on 21st May 1971. Amendments were made to fill the lacuna caused by the striking down of some of the provisions of the parent Act; and the amendments were to be deemed to have come into force on 10th December 1970. In this writ petition, the prayer is to declare Sections 5, 7 and 8 of the amending Act as void and unconstitutional, being in violation of Articles 19(1)(f) and 30(1) of the Constitution. (Though the prayer was to quash the said provisions of the Ordinance which preceded the Act, the prayer was amended into one for quashing the corresponding provisions of the Act after the Ordinance was replaced by the Act). Sections 5 and 7 of the amending Act amend Sections 53 and 56 of the parent Act and Section 8 inserts a new section, Section 59-A, providing for the constitution of an Appellate Tribunal.

4. Sub-sections (1) to (3) of Section 53 made provision for the appointment of Principals of private colleges and Sub-section (2) provided that appointment to the post of Principal should be made from among teachers of the college or of all the colleges under the same management, as the case might be, or, if there was no suitable person in such college or colleges, from other persons. Sub-section (3) provided that such appointment should be made having regard to seniority and merit and should be subject to the approval of the Syndicate. The amended Sub-section (1) provides that Principals of private colleges shall possess such qualifications as may be prescribed by Regulations. Sub-section (2) reads:

"A vacancy in the post of Principal shall be filled up by the educational agency or the corporate management, as the case may be, by the appointment of a person possessing the prescribed qualifications from among the teachers of the college or colleges, as the case may be. If no such person is available, the educational agency or corporate management, as the case may be, shall recruit a qualified

person after due advertisement, as may be specified in the Statutes". And amended Sub-section (3) provides that the advertisement for the post shall; be in such form and be published in such manner as may be prescribed by Statutes, Another provision which has to be noted in this connection is the Explanation added to the new Sub-section (7), The Explanation reads:

"In this Sub-section, "fitness" shall mean the possession of qualifications prescribed by Regulations".

5. Now, the reasons that weighed with the Full Bench for striking down Sub-sections (1) to (3) of Section 53 appear in paragraph 38 of the judgment. The post of the Principal, in the opinion of the Full Bench, was of pivotal importance in the life of a college; around him wheeled the tone and temper of the institution; on him depended the continuity of its traditions, the maintenance of discipline and the efficiency of its teaching; and the right to choose the Principal was perhaps the most important facet of the right to administer a college: the imposition of any trammel on that right could not but be considered as a violation of the right guaranteed by Article 30(1) of the Constitution and also by Article 19(1)(f). This was the opinion expressed in an earlier case (*Aldo Maria Patroni and Another Vs. E.C. Kesavan and Others*, with reference to the Post of Headmaster of a school; and this was adapted as above by the Full Bench in the case of Principal of a private college. Raman Nayar, C. J., who wrote the judgment of the Full Bench, then observed that, for ensuring that only proper persons were appointed to the post of Principal, the qualifications necessary might be prescribed and the mode of selection for the purpose of securing the best men might also be laid down; but to go beyond that and place any further fetter on the choice would be an unreasonable interference with the right of management. In considering this question, the learned Chief Justice took care not to lose sight of the paramount importance and the prospects of advancement of the staff too; but His Lordship held that those considerations must yield to the right of the management to secure the services of the best person available for the post of Principal, The learned Chief Justice then proceeded to consider the provision contained in Sub-section (2), viz.. that an outsider would be selected only in the absence of a suitable person among the teachers of the college or colleges. His Lordship considered the provision in Sub-section (3) as to what should seniority and merit mean: and the learned Chief Justice made it clear that the expression "seniority cum-fitness" in Sub-section (7) meant that due and equal regard should be paid both to seniority and to fitness, and since fitness was a matter of a degree, a senior person could be overlooked in favour of a junior Who Was demonstrably more fit for the appointment than the senior. This meant two or three things that an unfit person was not entitled to promotion merely because he possessed the necessary qualifications; that, even among fit persons, one might be demonstrably more fit than another, though the former was junior to the latter; and that merit did not mean mere fitness but fitness of one in comparison with fitness of another, i. e., one being more fit than another.

6. in the light of this reasoning, which was approved by the Supreme Court too. the newly added Sub-sections (1) to (3) cannot be upheld. What Subsection (J) does is to give power to the University to prescribe qualifications for Principals in private colleges by Regulations. And the new Sub-section (2) is practically the same as the old Sub-section (2). which was struck down. in the guise of prescribing qualifications by Regulations and by providing that a vacancy in the post of Principal shall be filled up by the appointment of a person possessing the prescribed qualifications from among the teachers of the college or colleges, what was sought to be prevented by the Full Bench is sought to be brought back and perpetuated. in other words, the right to choose the best person as Principal which was protected by the Full Bench is sought to be interfered with under a guise. Undoubtedly therefore, the newly added Sub-sections (1), (2) and (3) of Section 53 cannot stand.

7. Regarding Sub-sections (4). (5), (6). (8) and (10). no serious objection is taken. But, Sub-section (7) is attacked. and more so the Explanation to the subsection. Since this Sub-section does not relate to the appointment of Principal (relates only to appointment to a post other than that of a Principal and that of a lowest grade teacher), the reasoning of the Full Bench touching the appointment of Principal cannot apply to this Sub-section. And in the light of the interpretation placed by the Full Bench on the expression "seniority-cum-fitness", this subsection, which is similar to old Sub-section (7) which was not struck down, has to remain. But. the Explanation to Subsection (7) stands on a different footing. in this Explanation, the term "fitness". Which was explained or interpreted by the Full Bench, is sought to be given another meaning, namely, "possession of qualifications prescribed by Regulations". As we have already indicated, "prescribing Qualifications by Regulations" under Sub-section (1) appears to be with a view to defeat the effect of the decision of the Full Bench; and the Explanation to Subsection (7) is another sly step in the same direction. The obvious attempt is to nullify the effect of the interpretation put by the Full Bench on the expression "seniority-cum-fitness" in the body of the Sub-section. Therefore, this Explanation cannot also stand. And we also make it clear that, since Sub-section (2) has been struck down, the reference to this Sub-section in Sub-section (5) becomes otiose.

8. Sub-section (9), as it originally stood, gave a right of appeal to an aggrieved teacher, aggrieved by an appointment to a post other than that of a Principal and that of a lowest grade teacher, to the Syndicate: in other words, the subsection gave a right of appeal against an appointment under Sub-section (7). The Full Bench felt that a body like the Syndicate would not be a proper appellate forum and that such an appeal, for that reason, would be an unreasonable interference with the right of management both under Article 19(1)(f) and under Article 30(1). The newly added Sub-section (9) provides for a right of appeal for an aggrieved teacher against the appointment of a Principal under Sub-section (2) and against appointments under Sub-section (7). This Sub-section has thus made a further inroad into the right of the management regarding the

appointment of a Principal against which there was no right of appeal provided in the parent Act. the only provision in Sub-section (3) thereof being the obtaining of the approval of the Syndicate to such appointment. For the reason that the newly added Sub-section (2) is to fall as unconstitutional, the right of appeal against such appointment of the Principal under Sub-section (9) must also fall. However, the right of appeal against an appointment under Sub-section (7), now that the forum for the appeal is not the Syndicate, does not appear to suffer from any infirmity.

9. in this connection, the decision of the Supreme Court in *D. A. V. College v. State of Punjab*. Writ Petn Nos 256, etc. of 1970 (reported in *D.A.V. College, Vs. State of Punjab and Others*), has been brought to our notice but we think that no separate or elaborate consideration of this decision is called for.

10. The result is that, in so far as amendments to Section 53 are concerned, Sub-sections (1), (2) and (3), the Explanation to Sub-section (7) and the right of appeal to the Vice-chancellor provided under Sub-section (9) against the appointment of Principal under Subsection (2) must all be held unconstitutional, since they violate Article 19(1)(f) and Article 30(1) of the Constitution.,

11. Now we come to the amendment of Section 56. As already stated, Sub-sections (2) and (4) of this section in the parent Act were declared to be unconstitutional. Sub-section (2) related to the dismissal, removal or reduction in rank of a teacher in a private college. The Sub-section provided that, without the previous sanction of the Vice-Chancellor, no teacher of a private college should be dismissed, removed or reduced in rank or placed under suspension for a continuous period exceeding fifteen days. The reason for striking down Subsection (2) appears in paragraph 41 of the judgment of the Full Bench; and Raman Nayar. C. J. observed that it would so affect disciplinary control as to be subversive of discipline and could hardly be regarded as a regulation or a restriction in the interest, of the institution or of the general public. The learned Chief Justice also pointed out that the Vice-Chancellor could hardly be expected to have the time to deal with such matters; and the long delay that would necessarily be involved would by itself render the Management's powers of disciplinary control largely ineffectual. And the learned Chief Justice suggested that the proper remedy against any abuse of the disciplinary power would be an appeal. And that, leads us to the provision for appeal contained in Sub-section (4), The appeal provided was to the Syndicate; and this Sub-section, the learned Chief Justice observed, suffered from the defect of the appeal being to a forum which seemed entirely unsuitable for the purpose. And for these reasons Subsections (2) and (4) were struck down.

12. Sub-section (2) newly added to Section 56 provides that no teacher of a private college shall be kept under suspension except when disciplinary proceedings are initiated against him. Sub-section (2-A) provides that, when a teacher of a private college is suspended for a period exceeding fifteen days, the matter together with the reasons for the suspension shall be reported to the Vice-

Chancellor. (We may observe that no serious objection is taken against this Sub-section). Sub-section (2-B) provides that any disciplinary proceeding initiated under Sub-section (2) shall be completed within a period of three months or within such further period as may be allowed by the Vice-Chancellor. An appeal is then provided to the Appellate Tribunal from the order of the Vice-Chancellor declining to extend the time. And such an Appellate Tribunal is provided u/s 59-A, the newly added section.

13-14. It is contended by the counsel of the petitioner that Sub-sections (2) and (2-B) should be struck down. The Government Pleader has contended that Sub-section (2) is intended to protect the staff; what it provides is only that no teacher should be kept under suspension except when disciplinary proceedings are initiated against him. The Government Pleader has argued that, but for such a provision, a teacher will not be protected, no disciplinary proceedings may be initiated against him and he may be put under suspension without any good reason. The argument of the petitioner's counsel against Sub-section (2-B) has been that the period of three months provided for the completion of the disciplinary proceedings is too short and, therefore, that section is also an undue interference with the right of management.

15. We do not think that this contention of the petitioner can be sustained. We feel that the provision, that a teacher could be kept under suspension only on initiating disciplinary proceedings against him, should be construed as one in the interest of the teacher as well as in the interest of the public. And we do not think that this provision will go to affect disciplinary control as to be subversive of discipline in the college. The period of three months provided in Subsection (2-B) may not also be unduly short. We are sure that no Vice-Chancellor, who knows or has experience of administrative delays, will be unreasonably chary in extending the time in appropriate cases: still, the time prescribed should be short, in the interest of the teacher and the public. Moreover, an appeal is also provided from the order of the Vice-Chancellor declining to extend time. Therefore, if the Appellate Tribunal, the ultimate authority, is properly constituted, we do not think that the provisions in Sub-sections (2) and (2-B) can be said to interfere with the right of management. The other subsections of the section provide for giving a reasonable opportunity to a teacher for showing cause, etc. in our opinion, none of these Sub-sections offends any constitutional right guaranteed to the management; and no objection is taken against them either.

16. The decision of the Supreme Court in *V.P. Gidroniya Vs. The State of Madhya Pradesh and Another*, pointing out the distinction between suspending the contract of service of a servant and suspending him from performing the duties of his office on the basis that the contract is subsisting has been brought to our notice. And the question as to what, in the light of this decision, will be the effect of putting a teacher under suspension has also been discussed. We do not think that we need express any opinion on that question in this case.

17. Section 59-A deals with", the constitution of an Appellate Tribunal. The Tribunal to be constituted consists of a Chairman, a judicial officer not below the rank of a District, Judge nominated by the Vice-Chancellor in consultation with the High Court, and two other members. One of the members is to be a person, who is neither a teacher nor a person connected with the management of a private college, to be nominated by the Syndicate from among the members of the Syndicate; and the other member is to be another person, who is or has been an officer of the Government, not below the rank of a Joint Secretary, to be nominated by the Government. There are also provisions fixing the term of office of the Chairman, etc.. etc. Such a Tribunal cannot be considered to be a Tribunal which will interfere with the right of management or a Tribunal which will not act judicially. in fact, the Petitioner has not objected to this.

18. in the result, we allow the writ petition in part and strike down the newly added Sub-sections (1), (2) and (3) of Section 53. We also strike down the Explanation to Sub-section (7) and the right of appeal provided under Sub-section (9) for a teacher against the appointment of a Principal under Sub-section (2). We point out further that, as a consequence of striking down Sub-section (2), the reference to this Sub-section in Sub-section (5) becomes otiose. And again as a consequence, the proceedings of the Syndicate mentioned in the Explanation to Sub-section (9). which will stand transferred to the Vice-Chancellor, will only be those proceedings other than proceedings against the appointment of Principal. However, we Pass no order regarding costs.