

(1987) 03 KL CK 0020
In the High Court Of Kerala

Thomas

APPELLANT

Vs

Manager, Bishop Moore College

RESPONDENT

Date of Decision : 10-03-1987

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1987) 2 LLJ 296

Hon'ble Judges : Sreedharan, J

Bench : Single Bench

Judgement

Sreedharan, J.—Petitioner is fully qualified to be appointed as Lecturer in Political Science in colleges affiliated to the University of Kerala. The 1st respondent is the Manager of a private college affiliated to the University of Kerala. That college receives 100 per cent grant for maintenance from the Government. The salary of the teaching and non-teaching staff of the college is being paid by the State. The 2nd respondent is the Principal of that College The 3rd respondent is one who, according to the petitioner, is un-officially engaged by respondents 1 and 2 to teach Political Science in the College. The petitioner seeks a writ in the nature of mandamus directing respondents 1 and 2 to appoint him in the vacancy of Junior Lecturer of Political Science which arose during 1986-87. He also prays for a writ of prohibition restraining respondents 1 and 2 from engaging the 3rd respondent to take classes in Political Science in the College.

2. The petitioner was employed as a Junior Lecturer in the College belonging to the 1st respondent from 1st September 1972 to 31st March 1973. This appointment was in a leave vacancy. It was approved by the University of Kerala. He was thrown out when the leave vacancy ceased to exist. During the year 1986-87, another vacancy occurred in the College. That vacancy was one likely to become permanent. The 2nd respondent advertised the post and invited applications from qualified persons. In pursuance to that, the petitioner applied for the post on the basis of his qualification and preferential claim as a thrown out teacher. By letter dated 11th September 1986, he was called for interview to

be held on 19th September 1986. He appeared for interview with all relevant documents on 19th September 1986. No. 1 interview took place on that day. By letter dated 20th September 1986, the petitioner was informed that the interview will take place on 26th September 1986. He appeared before the 2nd respondent on 26th September 1986. But he was told that the interview has been postponed indefinitely. The petitioner thereupon approached the 1st and 2nd respondents to get himself appointed on the basis of his preferential claim. Respondents 1 and 2 did not take any step to appoint the petitioner. It was then understood that they have engaged the 3rd respondent to take the classes. The petitioner then filed a representation before the 4th respondent, the Registrar of University of Kerala. The University then sent Ext. P-10 letter to the 1st respondent, directing him to appoint the petitioner in the Department of Politics on account of his preferential rights as a thrown out teacher. Ext. P-10 did not bring 1 out the desired effect. Hence this Original Petition with the prayers mentioned earlier.

3. The 1st respondent filed a counter affidavit in C.M.P No. 29107 of 1986. The averments made therein are that the 3rd respondent was 2 engaged by the Management as a temporary arrangement, that his salary is not disbursed by the Government, that he was engaged for the conduct of the classes during the leave vacancy of an existing lecturer until regular appointment is made as required by the University Acts and Statutes, that the said arrangement was made to safeguard the interest of the students, that the leave vacancy was expected to continue, that the petitioner was the only 3 applicant for the post notified, that the petitioner was over-aged, that he had 7 months of approved service from 1st September 1972 to 31st March 1973, that that service will not entitle him to claim the post on account of his overage, that a fresh advertisement will be made in the next academic year if the vacancy still persists and that all eligible candidates including the petitioner if he is eligible will be given opportunities to seek appointment.

4. A preliminary objection was raised by the learned Counsel appearing for the respondents regarding the maintainability of the Original Petition. According to the learned Counsel, the 1st respondent is the Manager of a private college and the private college is not an instrumentality amenable to the writ jurisdiction of this Court. In support of his argument, the learned Counsel relies on the decision reported in *Madhavan Pillai v. Balan and Ors.* 1979 KLT 220. A Full Bench of this Court took the view:

the college concerned is purely a private college, affiliated no doubt to the University but that would not make it a statutory body, nor give the teacher a statutory status. In the absence of these it has been well recognized by series of decisions that the aggrieved teacher would not be entitled to relief under Article 226.

5. The view taken by the Full Bench in the decision referred to cannot be considered to be good law in view of the pronouncements of the Supreme Court in *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, and *Manmohan*

Singh Jaitla v. Commissioner Union Territory Chandigarh and Ors. and Manmohan Singh Jaitla Vs. Commissioner, Union Territory of Chandigarh and Others, . In the first decision referred to earlier, a Constitution Bench summarized the tests gathered from the decision in the Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, for determining whether a Corporation can be said to be an instrumentality or agency of Government. One such test is "where the financial assistance of the State is so much as to meet almost entire expenditure of the Corporation, it would afford some indication of the Corporation being impregnated with Governmental character." In the instant case the salary of the entire staff of the College is paid by the State. The appointments of the members of the staff are to be approved by the University. The functioning of the College is regulated by the Kerala University Act and by the Statutes, Regulations and Ordinances promulgated by the University. The 1st respondent receives Government's grant for the maintenance of the College. In these circumstances it appears that the 1st respondent satisfies the test laid down by the Supreme Court. In the second decision. Their Lordships observed at page. 517 of Manmohan Singh Jaitla Vs. Commissioner, Union Territory of Chandigarh and Others, :

The matter can be viewed from a slightly different angle as well. After the decision of the Constitution Bench of this Court in Ajay Hasia v. Khalid Mujib Shrauardi (supra) the aided school receiving 95 per cent of expenses by way of grant from the public exchequer and whose employees have received the statutory protection under the 1969 Act and who are subject to the regulations made by the Education Department of the Union Territory of Chandigarh as also the appointment of Headmaster to be valid must be approved by the Director of Public Instruction, would certainly be amenable to the writ jurisdiction of the High Court. The High Court, unfortunately, did not even refer to the decision of the Constitution Bench in Ajay Hasia's case (supra) rendered on November 13, 1980 while disposing of the writ petition in 1983. In Ajay Hasia's case (supra), Bhagwati J., speaking for the Constitution Bench inter alia observed that "that financial assistance of the State is so much as to meet almost entire expenditure of the Corporation, it would afford some indication of the Corporation being impregnated with governmental character." Add to this "the existence of deep and pervasive State control" which may afford an indication that the corporation is a State agency or instrumentality. Substituting the words "public trust" in place of the "corporation" the reasons will mutatis mutandis apply to the school. Therefore also, the High Court " was in error in holding that the third respondent school was not amenable to writ jurisdiction of the High Court.

In the instant case it is specifically averred by the petitioner that the entire grant for the maintenance of the building is paid by the Government from the exchequer. It is further averred that the salary of teaching and non-teaching staff of the college is paid by the Government from its revenue. The appointments made by the Management have to be approved by the University and the Authorities appointed by the Government. The University Act, Statutes,

Ordinances and Regulations promulgated by the University are binding on these respondents 1 and 2. These facts are not disputed by the respondents. When from out of the tax-payers' money, maintenance grants and other financial aids are given to the management and salary to the staff are given by the exchequer, it cannot be said that the Management is not amenable to the writ jurisdiction of this court. In these circumstances, I over-rule the preliminary objection raised by the learned Counsel appearing for the respondents and hold that the private college management is an instrumentality of the State amenable to the jurisdiction of this Court under Article 226 of the Constitution.

6. Now the next question to be considered is whether the petitioner has got any legal right to claim an appointment to the vacancy which arose during the academic year 1986-87. It is not disputed that the petitioner is a fully qualified person to be appointed as Lecturer in Political Science. It is further agreed that the petitioner had approved service in the college of the 1st respondent during the period from 1st September 1972 to 31st March 1973. Statute 23(2) of the First Statutes of the Kerala University states:

A teacher duly appointed on probation or for a specific period if thrown out of service for reasons other than disciplinary action shall be given preference in the matter of future appointments in the private college or, as the case may be, any of the private colleges under the management of the Educational Agency within the University area.

As stated earlier, the petitioner was duly appointed for the period from 1st September 1972 to 31st March 1973. I emphasise the word "duly" because at the time when he got the earlier appointment he was within the age limit. He was given the appointment in strict conformity with all provisions of law governing the same. His appointment was approved by the University. He was paid his salary by the Government for that period. On the cessation of the leave vacancy, he was thrown out of service. Therefore, as per the Statute, he should be given preference in the matter of future appointments. In other words, the petitioner has got a legal right to be appointed in the future vacancy that has arisen during the academic year 1986-87. The fact that the petitioner is now over-aged for seeking fresh employment is not of any consequence. The only question to be looked into in the case of the petitioner is whether he was duly appointed earlier. When it is found that he was duly appointed earlier, he is entitled to be accommodated in the new vacancy. Corresponding to that right of the petitioner, the 1st respondent is duty bound to appoint the petitioner. This I emphasise on account of the fact the respondents have no case that there is any other person entitled to similar preferential claim under the Statute 23(2) of the First Statutes of the University of Kerala. It was in pursuance to that right the petitioner applied for the post when the vacancy was notified by the 2nd respondent. Respondents 1 and 2 have clearly erred in not appointing the petitioner in the vacancy for which the applications were invited.

7. Coming to the reliefs to be given to the petitioner, can this Court issue a writ

of mandamus directing the 1st respondent to appoint the petitioner? It is contended by the learned Counsel appearing for the respondents that this Court will not be justified in issuing a writ of mandamus against the 1st respondent. I fail to see any merit in this contention. In *State of Kerala Vs. Smt. A. Lakshmikutty and others*, . Their Lordships stated law in the following terms:

It is well settled that a writ of mandamus is not a writ of course or a writ of right, but is, as a rule, discretionary. There must be a judicially enforceable right for the enforcement of which a mandamus will lie. The legal right to enforce the performance of a duty must be in the applicant himself. In general, therefore, the Court will only enforce the performance of statutory duties by public bodies on application of a person who can show that he has himself a legal right to insist on such performance

In *The Comptroller and Auditor General of India, Gian Prakash, New Delhi and another v. K.S. Jagannathan and Anr.* 1987 LAB. I.C. 262, the Supreme Court observed:

There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the Government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such discretion mala fide or on irrelevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the Government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the Court may itself pass an order or give directions which the Government or the public authority should have passed or given had it properly and lawfully exercised its discretion.

8. Since the petitioner is found to have the right to get appointed in the vacancy that had arisen during the academic year 1986-87, this Court will be justified in issuing a direction to the first respondent to appoint the petitioner in the said vacancy. The respondents have gone wrong in engaging the 3rd respondent to take the classes in the College. It is stated in the counter affidavit that the University authorities and the Government were not told about this arrangement made by the first respondent. This is in clear violation of the provisions of the University Act and the Statutes. It, therefore, follows that the Management acted illegally in engaging the 3rd respondent to teach the students. Accordingly, direct respondents 1 and 2 not to engage the 3rd respondent to take the classes in Political Science hereafter in the vacancy which is due to the petitioner. They are

again directed to appoint the petitioner in the vacancy which arose during 1986-87 without delay.

In view of what has been stated above, the Original Petition is allowed as indicated above.

Issue photo-copy of the judgment to the parties on usual terms.