
(2014) 06 KL CK 0081

In the High Court Of Kerala

Case No : Writ Petition (Civil) No. 751 of 2012

University of Kerala

APPELLANT

Vs

K.K. Venu

RESPONDENT

Date of Decision : 18-06-2014

Acts Referred:

Kerala University Act, 1974 — Section 19(2)(3), 19(2)(e), 2(27), 2(28)

Citation : (2014) 3 KHC 149 : (2014) 3 KLJ 425

Hon'ble Judges : Antony Dominic, J; Alexander Thomas, J

Bench : Division Bench

Advocate : George Poonthottam, Standing Counsel, Advocate for the Appellant; P. Ravindran, Senior Advocate, M.R. Sabu and R. Ramadas, Advocate for the Respondent

Judgement

Antony Dominic, J.—This Writ Appeal is filed by respondents 1 to 3 in WP (C) No. 38323/2007, who are aggrieved by the judgment of the learned Single Judge, allowing the Writ Petition. That Writ Petition was filed by the 1st respondent herein, challenging Ext. P1 notification issued by the appellants and to quash the selection process for appointment to the post of Director, Department of Physical Education, University of Kerala. He also sought a declaration that the selection process for appointment to the post of Director is vitiated, since the selection committee was not constituted in terms of the provisions contained in the Kerala University First Statute, 1977. By the judgment under appeal, following the judgment of the Supreme Court in P.S. Ramamohana Rao Vs. A.P. Agricultural University and Another, , and the judgments of this Court in Sivasankara Kaimal Vs. University of Calicut, and Cochin University of Science and Technology Vs. Joseph James, , the learned Single Judge held that the post of Director, Department of Physical Education is a teaching post, attracting the provisions contained in Chapter III of the Kerala University First Statute, 1977 and that therefore the selection process completed by the University leading to the appointment of the 2nd respondent, now deceased, is illegal. On that basis, the learned Single Judge directed the University to constitute a selection committee

and to select a suitable candidate from among the candidates, who applied for the post in response to Ext. P1.

2. We heard the learned counsel for the appellants and the learned counsel appearing for the 1st respondent-Writ Petitioner.

3. The first issue that arises for consideration is whether the learned Single Judge was justified in concluding that the post of Director, Department of Physical Education, is a teaching post. The expressions, "teacher" and "teacher of the University" have been defined in Sections 2(27) and 2(28) of the Kerala University Act, 1974, which read as under:

"2(27) "teacher" means a principal, professor, associate professor, assistant professor, reader, lecturer, instructor, or such other person imparting instructions or supervising research in any of the colleges or recognised institutions and whose appointment has been approved by the University.

2(28) "teacher of the University" means a person employed as teacher in any institution maintained by the University."

A reading of Section 2(27) shows that "teacher" means principal, professor, associate professor, assistant professor, reader, lecturer, instructor, or such other person imparting instructions or supervising research in any of the colleges or recognised institutions and whose appointment has been approved by the University. This provision shows that the answer to the question whether one is a teacher as defined in the Act or not, depends more on the nature of duties that are discharged by the person concerned. Insofar as "teacher of the University" as defined in Section 2(28) is concerned, it means a person employed as teacher in any institution maintained by the University. Therefore, the expression, "teacher" occurring in Section 2(28) has to take its colour from Section 2(27) and if so understood, the status of a person as a teacher of the University will also depend, to a great extent, on the nature of duties that are discharged.

4. The definitions, "teacher" and "teacher of the University" occurring in the Calicut University Act, 1975, the Cochin University of Science and Technology Act, 1986, the Kannur University Act, 1996 and the Mahatma Gandhi University Act, 1985 are in pari materia with Sections 2(27) and 2(28) of the Kerala University Act. In *Sivasankara Kaimal Vs. University of Calicut*, the dispute that arose before a Division Bench of this Court was whether coaches appointed by the Calicut University for different games and athletics are teachers of the University. That issue was decided by the Division Bench of this Court in the light of the provisions contained in the Calicut University Act, 1975 and the principles laid down by the Apex Court in *P.S. Ramamohana Rao Vs. A.P. Agricultural University and Another*, and this Court held them to be teachers, in paragraph 11, stating thus;

"11. The petitioners were appointed as coaches to impart skill to the students selected for a particular category of game or athletic. They are appointed, even

admittedly in the counter-affidavit, to train the selected students. Necessarily, the duty that is enjoined on the coaches is to impart lessons in particular game or athletic and to train the students and to develop their skill so that they bring laurel to the University and to equip them to compete and win matches. Therefore, going by the definition contained in Section 2(28) read with Section 2(27), it has to be construed that, the coaches are appointed to impart instructions. Necessarily, such category comes within the definition of "teacher".

5. In *Cochin University of Science and Technology Vs. Joseph James*, , the question whether the Head of the Department of Physical Education in the Cochin University of Science and Technology is a teacher or not, was resolved by this Court, following the earlier judgments holding them to be teachers. In paragraph 7 of the said judgment, it was held thus:

"7. When the writ petitioner/first respondent is attached to a department and his duties are also to guide the students and instruct lessons in the games, necessarily, the difference in the definition considered by the Supreme Court with the definition in the Act does not make any difference in the position of the appellant, in any way, and it does not improve the case of the appellant/University. The Supreme Court also, in that case, had dealt with the duties assigned to an incumbent in the similar nature "to guide the students about the rules of the various games and sports" extracted in para. 9 of the Supreme Court judgment. That is also with reference to the word "guide" which is available in Ext. P1 as well. So, there is no reason to take a different view to that contained in *Ramamohana Rao's* case."

6. The appellants have no case that the duties discharged by the Director of Physical Education are in any manner different from what is dealt with by this Court in the aforementioned judgments. In such a situation, considering the statutory provisions, nature of duties discharged and the principles laid down in the earlier judgments, we fully endorse the view taken by the learned Single Judge that the Director of Physical Education under the 1st appellant is a teacher.

7. However, the learned counsel for the appellant University contended that in terms of the provisions contained in Section 19(2)(3) of the Kerala University Act, 1974, institution of professorships, readerships, lecturerships and such other teaching or research posts as it may deem necessary, is a power and function of the Senate. He also referred us to Statute 1 of Chapter III of the Kerala University First Statute, 1977, which also provides that Senate shall be competent to institute professorships, readerships, lecturerships and such other teaching and research posts required by the University on the motion of the Syndicate and/or on the proposals of the academic council. The learned counsel also invited our attention to the Schedule to the Kerala University First Ordinance, 1978, in which, among non-teaching posts, posts in the Department of Physical Education including that of Director, are included.

8. On the above basis, the contention raised by the learned counsel for the

appellants was that the post of Director was not created by the senate as contemplated either in Section 19(2)(e) or Chapter 111 of the First Statute and that therefore the post cannot be treated as a teaching post. He also sought to reinforce his contention by relying on the resolution of the syndicate dated 24/05/1969 declining to confer academic status of teacher to employees of the Department of Physical Education. We are unable to accept this argument. First of all, the factual contention that the post in question was not created as provided under Section 19(2)(e) read with the provisions contained in Chapter 111(1) of First Statute, 1977, has not been pleaded by the University either in the statement filed before the learned Single Judge or even in the memorandum of appeal filed before this Court. In such a situation, we are not obliged or persuaded to consider this factual contention raised for the first time before us. Even otherwise, considering the statutory provisions, nature of duties and the legal principles laid down by the Apex Court as also this Court, we have already held the post of Director, Department of Physical Education to be a teaching post. Therefore, even if it is assumed that the University has committed an irregularity in the creation of the post by not following Section 19(2)(e) read with Chapter III-1, that will not deprive the post of Director the status of teacher, which it is otherwise entitled to.

9. As far as the inclusion of the post of Director in the Schedule to the Kerala University First Ordinance, 1978 is concerned, contrary to the provisions of the Kerala University Act, 1974 even if the post of Director is so included, that also will not help the University to contend that the post is not a teaching post. A similar contention has already been repelled by this Court in *Sivasankara Kaimal Vs. University of Calicut*, by holding thus:

"12. xxxx xxxx xxxx

xxxx xxxx xxxx

Thus any Ordinance framed shall be subject to the provisions in the Act. In other words, any provision contained in the Ordinance cannot run contra to any of the provisions in the Act. The Schedule, a relevant provision in the Ordinance, categorise "coaches" into non-teaching category. We have already held that coaches come within the definition of teacher or teacher of the University as the case may be in terms of the Act. When in terms of the Act coaches are teachers, by making a provision in the Ordinance, such teachers cannot be categorised as members of non-teaching staff. The definition is contained in the plenary legislation, whereas the exclusion comes in subordinate legislation brought in as empowered by the plenary legislation. Necessarily, the plenary legislation will prevail over the subordinate legislation and whatever stated in the subordinate legislation contrary to the parent legislation, shall have no enforceability and has to be declared ultra vires. In the result, the prayer sought for by the appellants in that regard has to be allowed."

For the aforesaid reasons, we are unable to accept the contention raised by the

learned counsel for the appellants.

The learned counsel for the appellants lastly contended that once the learned Single Judge has held the selection illegal, the learned Single Judge should not have ordered that fresh selection to be undertaken by the University should be confined to the candidates, who had applied for the post in response to Ext. P1 notification alone. As we have already seen that Ext. P1 notification was issued in 22/05/2007 and more than seven years have lapsed since then. Therefore, today, if, the fresh selection is ordered to be confined to the remaining candidates who responded to Ext. P1, in that process, apart from restricting the field of choice, this Court will be depriving opportunity to many persons who would have subsequently become eligible to contest for the post of Director. However, at the same time, respondents 1 and 3, who had applied in response to Ext. P1 notification and still have a right to be considered in the selection cannot also be rendered ineligible. In such a situation, we feel that the most appropriate course to be adopted by the University is to re-notify the post inviting applications specifying that the persons who had validly submitted their applications in response to Ext. P1 will also be eligible and considered along with other candidates, who submit applications in response to such re-notification. It is directed that the University shall complete the selection process as expeditiously as possible, at any rate, within three months from the date of receipt of a copy of this judgment.

Writ Appeal is disposed of accordingly.