

Amina Vs. State of Kerala

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Court : Kerala

Decided On : Feb-04-2004

Reported in : 2004(1)KLT657

Judge : M. Ramachandran, J.

Acts : [Constitution of India](#) - Article 226

Appeal No. : W.P. (C) No. 18464 of 2003

Appellant : Amina

Respondent : State of Kerala

Advocate for Def. : V.K. Mohanan and; M.K. Chandramohan Das, Advs. and; Jose

Advocate for Pet/Ap. : P.C. Sasidharan, Adv.

Judgement :

M. Ramachandran, J.

1. The management of M.S.M. College, Kayamkulam had requested the Government that two teaching posts in the Department of Zoology were to be sanctioned as duly admissible. The teachers already started to work, in anticipation of such sanction. By Ext. P9 Government Order dated 9.5.2003, the

management, however, had been advised that since there was surplusage of teachers in private colleges, generally, and as steps are being taken for deploying them to other private colleges, the request was being rejected. The teachers who stand affected thereby have approached this Court by way of these proceedings.

2. Relying on a decision of this Court in O.P. No. 21268 of 2002, the petitioners submit that the objection as above is misconceived, if not illegal. On a perusal of the facts and the law that has to be applied, the contention appears to be sustainable, and the merits therefore could be examined.

3. The first respondent in the Writ Petition is the State represented by the Principal Secretary to Government, Higher Educational Department. The second respondent is the University of Kerala; the third respondent is the Deputy Director of Collegiate Education and the college management, is the 4th respondent.

4. The two petitioners had on an earlier spell been appointed as Junior Lecturers in Zoology in January, 1988. The appointments had been approved. Such appointments were against leave vacancies. They were retrenched thereafter. By virtue of such service, statutorily they came to possess a right for reappointment to the next arising vacancies, and this has led to the present claim.

5. The petitioners point out that when new course in M.Sc. Zoology was sanctioned to the 4th respondent, the petitioners were reappointed as Lecturers in substantial vacancies on 5.1.2000 by Exts. P4 and P5 orders. During the period concerned, the process of delinking of Pre-degree course had been in progress. Notwithstanding the above, the petitioners point out that during the academic year 2001-2002 there was sufficient work load justifying the retention of the petitioners. But, in spite of the existence of vacancies, the University had not taken any steps for approving such appointments. This led to a position that they were disabled from drawing the pay normally admissible. The matter had been taken up with the Government, and Ext. P9 came to be passed, which according to the petitioners, turned a blind eye to the statutory prescriptions. They argue that the entitlement for appointment is a statutorily recognised right and when vacancies had occurred there was nothing illegal or irregular on the part of the management to appoint them and so long as the work load justifies the approval, it should not have been

denied by the University.

6. The petitioners point out that even if there was a ban in operation at the time of their appointment, at least thereafter, no disabling circumstances could be urged. Because of the operation of Pre-Degree Course Abolition Act, 1997, the ban created by Section 5 about appointment was in operation for a period of three years, since the Act had come into force with effect from 3.6.1997. The ban had to be considered as no longer in existence from 3.6.2000. The objections highlighted in Ext. P9 were therefore without statutory backing, the counsel contends. Ext. P9 therefore is unwarranted and as the Kerala University Act governs the appointments, including the approval, executive orders which were later issued could not have interfered with the rights of the petitioners. Prayer therefore was for a direction to the University compelling them to approve the appointments of the petitioners leading to other consequential benefits.

7. A counter affidavit has been filed by the University. The Government also has taken a stand endorsing the view of the University, as highlighted in the counter affidavit and in defence of the order (Ext. P9) passed by them. The counsel submits that if the College management thought it necessary to have additional faculty members, engagement could have been given as Guest Lecturers. The appointment in anticipation, which presupposed imposition of liability was not a correct step, and only a pressure tactic. The petitioners could not have derived benefit by illegal steps taken by the 4th respondent, and they had no cause of action as against the Government.

8. It is further contended by the University that additional posts in the Department of Zoology, even if required could have been created only with the concurrence of the Government. The Government had informed the University that the proposal for creation of new posts was not to be taken notice of in view of the ban on creation of posts as per G.O.(P)No. 817/2001/Fin. dated 11.1.2001. It was not possible to approve the appointments as the College Management could not overrule or ignore Government orders. Therefore, though the statutory ban created by Pre-Degree Course (Abolition) Act, 1997 ended by 2.6.2000, in effect the ban continued at the time of appointment of the petitioners. Even thereafter, the fourth

respondent was obliged to follow Government directives which were in general terms. In short, the stand is that if the management of the institution was interested in starting the post-graduate course, measures had to be taken by way of their own arrangements. We will examine how far this is legal and acceptable.

9. The Government Pleader submits that the Government alone is the proper authority to sanction payments, and they had the discretion in the matter of creation of posts and since a policy decision had been taken that they are not prepared to shoulder the responsibility, it may not be possible for the University to approve such appointments. This Court may not be justified in examining the correctness or relevance of such policy decisions taken in administrative exigencies.

10. As regards the first objection, viz., the locus standi of the petitioners, I donot think that the respondents are entitled to successfully urge any contentions. Theorders directly affected them, and they have a right to challenge them in these proceedings.

11. The petitioners referred to the observations made in the judgment in O.P.No. 21268 of 2002, to which advertence had already been made. Almost identical contentions had been dealt with by the learned Judge. The categoric finding entered into was that in the matter of approval of appointments what is to be followed by the University is the statutory prescriptions. By Statute 16 of Chapter 45 of the M.G. University Statutes, 1997 the approval is to be made by the Syndicate subject to the condition that the appointment is in accordance with the staff pattern fixed by the University. The learned Judge had also referred to Statute 79 of Chapter 45 of the M.G. University Act, where there was authorisation conferred for inspection of the work load by the Director of Collegiate Education. The dictum appears to be that executive orders or circulars cannot override the statutory provisions in case of conflict. When the private college managements are competent to appoint teachers having prescribed qualifications in the vacancies of teaching posts in accordance with the work load prescribed, the Court held that the appointments made are liable to be approved by the University. Reliance had been placed by the Judge on *Cherian Mathew v. Principal, S.B. College*,

Changanacherry, 1998 (2) KLT 144. There is not much of difference in the law, as far as Kerala University also is concerned. Under Section 57 of the Act, the Educational Authority is conferred with the right of appointment of teachers, in the lowest grades, pertaining to each department. Chapter 2 of the 1st Statutes deals with conditions of services of teaching staff and Statute 14 refers to procedure for approval. It could be extracted herein below:-

14. Approval of appointment-

(1) Approval of every appointment to the teaching post shall be made by the Syndicate subject to the condition that the appointment is in accordance with the staff pattern fixed by the University and that the persons so appointed is fully qualified for the post.

(2) The Deputy Director of Collegiate Education concerned shall verify before making direct payment of salaries as to whether the post for which payment is claimed is in accordance with the staff pattern and work load fixed by the University. Doubtful cases shall be referred to the University for clarification and the correctness of direct payment ensured.

(3) In the case of those private colleges coming under the Direct Payment Scheme, the Director of Collegiate Education or the Officer authorised by him in this behalf shall verify in consultation with the University as to whether the teaching posts in private colleges are in excess of the posts sanctioned by the University. However, in the case of incumbents declared as supernumeraries by the University, the controlling officers shall ensure that no fresh appointment is made against future vacancies until all the supernumeraries are absorbed against those vacancies. The direct payment of salaries shall not be made to the persons appointed against fresh vacancies, before the absorption of supernumeraries.

12. The embargo as could be seen from statute 14(3) is that direct payment of salaries are not to be made in respect of personnel, appointed against fresh vacancies before absorption of supernumeraries.

13. Evidently, this does not deal with the alleged contingency of deployment of surplus staff in the aided colleges. Even Ext. P9 appears to be apologetic, as only the possibility of deployment of surplus teachers, as a temporary measure is being contemplated. This cannot be equated with a right for rejecting approval. Exercise of legal powers is different from exerting pressure on the vulnerable. That has been precisely the corner stone laid down by decision relied on by the petitioners.

14. 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 a 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.

15. There is no statutory ban in operation, after June, 2000. Executive orders therefore cannot operate to the disadvantage of an appointee. I hold that Ext. P9 cannot operate to annihilate the rights of the petitioners when their appointments are regulated by the Statutes. The University has expressed its difficulties, squarely on the circumstance that Government order dated 11.1.2001 imposes a ban. However, this cannot interfere with the rights of the petitioners or the College management, as of now.

16. One other objection comes from the Government Pleader. That is as to be nature of relief that is prayed for. He points out that only Ext.P9 has been subjected to challenge. There is no challenge coming as against G.O.(P) No. 817/2001/Fin, dated 10.1.2001, or any other similar orders which had been the basis for laying down the policy of the Government. The Government Pleader

submits that even if it be granted, that such orders will have to wilt if scrutiny as suggested is made, so long as they are there, unchallenged, the reliefs cannot be granted by this Court in exercise of powers under Article 226 of the [Constitution of India](#).

17. However, the contention appears to be retrograde in effect. The basic issue is as to whether the Government can pass self serving orders, authorising them to keep back recognition and benefits to the beneficiaries. Tested with Articles 14 and 16 of the Constitution, I am of the view that this will be nothing but discrimination. The State may have discretionary powers; but they are to be tested with the touch stones of judicial review as well as legislative fetters. The power of the Government can always be exercisable, with the requirement that the steps taken should be approvable and subservient to the governing statutory norms. The contra position would be to let open the field for abuse of administrative powers. Therefore, even though the debilitating orders are not individually challenged, so long as all of them have originated from the policy referred to as defence here to the extent they run counter to the principles as are explained above, they become unenforceable, at least as far as the petitioners are concerned.

18. Consequently, there will be a direction to the University to pass appropriate orders taking notice of the observations as above made. University has to take a decision without reference to G.O.(P) No. 817/2001/Fin. dated 11.1.2001 and any other orders of the class. The exclusive enquiry will be as postulated in statute 14 of Chapter 2 of the Kerala University First Statutes as well as Section 57 of the Act. Orders as to the eligibility of the petitioners for approval of appointments secured by them are therefore to be passed within a period of two months from the date of receipt of a copy of this judgment followed by consequential orders for determination of the monetary benefits in case it is found that the appointments are eligible to be approved.

The Writ Petition is disposed of with the above direction.