

State of Kerala Vs. Valsamma

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Court : Kerala

Decided On : Mar-09-2010

Reported in : 2010(2)KLT294

Judge : K. Balakrishnan Nair and; P.N. Ravindran, JJ.

Acts : [Constitution of India](#) - Articles 14, 16, 21, 37, 39, 39(3), 41, 46 and 226

Appeal No. : W.A. No. 1588 of 2009

Appellant : State of Kerala

Respondent : Valsamma

Advocate for Def. : Thampan Thomas, Adv.

Advocate for Pet/Ap. : P. Santhosh Kumar, Government Pleader

Disposition : Appeal allowed

Judgement :

P.N. Ravindran, J.

1. The appellants are the respondents in W.P. (C) No. 21854 of 2006. The respondents are the petitioners therein. The brief facts of the case are as follows.

2. The respondents are Teachers and Ayahs working in various Kindergartens run by the appellants. They commenced service in the Balavadies/Feeding Centres in the year 1984 after they were locally recruited otherwise than through the Employment Exchanges/Kerala Public Service Commission. Initially Teachers were being paid Rs. 500/- per mensem as honorarium and Ayahs were being paid Rs. 100/- per mensem as honorarium. Thereafter the honorarium was enhanced to Rs. 1,000/- and Rs. 500/- respectively for Teachers and Ayahs upon the Balavadies being upgraded as Kindergartens. They are presently being paid honorarium depending on their length of service. Teachers who are matriculates having five years of service are paid a honorarium of Rs. 2,000/- per mensem, Teachers who are matriculates having more than five years of service are paid a honorarium of Rs. 2,100/- per mensem and Teachers with ten years of service are paid a honorarium of Rs. 2,200/- per mensem. Teachers who are not matriculates and have less than five years of service are paid Rs. 1,400/- per mensem, Teachers who have more than five years of service are being paid Rs. 1,600/- per mensem and Teachers who have ten years of service are being paid Rs. 1,800/- per mensem as honorarium. The honorarium being paid to Ayahs has been revised from Rs. 500/- to Rs. 1,000/- per mensem.

3. The respondents had earlier filed O.P. No. 2408 of 2001 in this Court claiming regularisation in service as Nursery Teachers and Ayahs and the scale of pay of Nursery Teachers. By Ext.P5 judgment delivered on 13.8.2004 a learned single Judge of this Court disposed of the said Writ Petition with a direction to the Government to consider their grievances and to take a decision thereon. The respondents thereafter filed Ext.P6 representation before the Director, Scheduled Caste/Scheduled Tribe Development Department. The said representation was forwarded to the Government for disposal. The Government thereafter passed Ext.P7 order dated 1.3.2006 rejecting their claim for regularisation in service. The Government however, permitted the respondents to continue in service on a provisional basis, on humanitarian grounds. Aggrieved thereby the respondents filed W.P.(C). No. 21854 of 2006 seeking the following reliefs:

i) to issue a writ of certiorari or any other appropriate writ, order or direction, calling for the records in this case and quash Ext.P7 and all other connected proceedings.

ii) to declare the petitioners are nursery teachers entitled for the pay scale prescribed by the Government for the nursery teachers as that of the pay scale prescribed for Public Service Commission hands.

4. The respondents contended that as they have been working as Teachers/Ayachs in Kindergartens for the past more than 20 years they are entitled to be regularised in service. They also contended that while similarly placed Nursery School Teachers are paid higher salary, they are paid only a consolidated amount by way of honorarium and that it is discriminatory and arbitrary. The respondents contended that under Article 46 of the [Constitution of India](#) the State is bound to promote the educational and economic interests of the weaker sections of the people and in particular of the Scheduled Castes and Scheduled Tribes, that the Balavadies where they are working were established for catering to the educational needs of the persons belonging to Scheduled Castes and Scheduled Tribes and therefore they are entitled to be regularised in service. Relying on Article 39 they contended that they are entitled to the scale of pay of regular recruits as they are discharging the same functions.

5. The appellants resisted the Writ Petition contending, inter alia, that Balavadies-cum-Feeding Centres under the Scheduled Castes and Scheduled Tribes Department were started in the year 1979, that thereafter Nursery School Teachers and Ayachs were engaged on honorarium basis, that the Balavadies were later upgraded into LKG and UKG and the honorarium was increased to Rs. 1000/- and Rs. 500/- respectively by Government order dated 19.9.1995. It is also stated that all the Teachers were given training in Bala Sevika Training Institute, Trivandrum, where they had attended the orientation course for Nursery Teachers for a few days. It is also contended that only Nursery School Teachers and Ayachs appointed through the Kerala Public Service Commission and Employment Exchanges are given the scales of pay of those posts and that the respondents, who were locally recruited and engaged on contract basis, are entitled only to payment of honorarium. The appellants also contended that as the respondents were engaged on contract basis and were not engaged after a regular selection process, they are not entitled to be regularised in service. The appellants further contended that the respondents are not entitled to salary in the scale of pay of

regular Nursery School Teachers and Ayahs appointed through the Kerala Public Service Commission/Employment Exchanges.

6. By judgment delivered on 8.4.2009 the learned single Judge held that the respondents are entitled to regularisation in service with effect from 1.3.2006, the date of Ext.P7 order and that they are also entitled to salary and allowances and other benefits granted to temporary hands employed through Employment Exchanges with effect from 1.3.2006. It was also held that the respondents are entitled to the same service benefits which are extended to permanent employees recruited through the Kerala Public Service Commission from the date of regularisation of their services. Aggrieved thereby the appellants have filed this Writ Appeal.

7. We heard Sri. P. Santhosh Kumar, learned Special Government Pleader appearing for the appellants and Sri. Thampan Thomas, the learned Counsel appearing for the respondents. We have also gone through the pleadings and materials on record. It is not in dispute that the respondents were recruited locally and were engaged on contract basis. They were not recruited through the Employment Exchanges/Kerala Public Service Commission after following the prescribed procedure. The learned single Judge however, directed regularisation of their service relying on the decision of the Apex Court in U.P. State Electricity Board v. Pooran Chandra Pandey 2007 (4) KLT 513 (SC) : (2007) 11 SCC 92. The learned single Judge held that as the appellants have put in more than 25 years of service, the rejection of their claim for regularisation is arbitrary and unreasonable. The learned single Judge also held that as they are discharging the same duties and functions as regularly recruited Nursery School Teachers/Ayahs, they are entitled to the scale of pay of Nursery School Teachers/Ayahs recruited through the Kerala Public Service Commission.

8. A Constitution Bench of the Apex Court has, in Secretary, State of Karnataka and Ors. v. Umadevi and Ors. : (2006) 4 SCC 1 : 2006 (2) KLT SN 55 (C. No. 70) SC, held that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, it would not confer any right on the appointee. It was held that if the appointment is a contractual appointment, the

appointment comes to an end at the end of the contract and that if the engagement was on daily wages or casual basis, the same would come to an end when it is discontinued. The Apex Court also held that merely because a temporary employee or a casual wage worker is continued for a long time beyond the term of his appointment, he will not be entitled to be absorbed in regular service or made permanent merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged in the relevant rules. It was held that the High Court acting under Article 226 of the Constitution should not ordinarily issue directions for absorption, regularisation or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme.

9. In *U.P. State Electricity Board v. Pooran Chandra Pandey* 2007 (4) KLT 513 (SC) : (2007) 11 SCC 92, a Bench of two Hon'ble Judges of the Apex Court held that Umadevi's case (supra) cannot be applied mechanically and without advertent to the facts of the case as the slight difference in facts can make Umadevi's case (supra) inapplicable to the facts of that case. The Apex Court held that as others similarly placed had been given regularisation pursuant to the decision taken by the U.P. State Electricity Board on 28.11.1996 to regularise the workers working on daily wage basis before 4.5.1990 in existing posts, it would be arbitrary and discriminatory to deny the benefit of such regularisation to some others who were likewise working on daily wage basis before 4.5.1990. Later, a larger Bench of the Apex Court held in *Official Liquidator v. Dayanand* : (2008) 10 SCC 1 : 2008 (4) KLT SN 67 (C. No. 62) SC that the observations in *U.P. State Electricity Board v. Pooran Chandra Pandey* (supra) are obiter and that the same should neither be treated as binding by the High Courts, nor should they be relied upon or made the basis for bypassing the principles laid down by the Constitution Bench of the Apex Court in Umadevi's case (supra). It was reiterated by the Apex Court in *Indian Drugs & Pharmaceuticals Ltd. v. Workmen* : (2007) 1 SCC 408 that creation and abolition of posts and regularisation in service are purely executive functions and the court cannot create a post where none exists or issue directions to absorb or continue casual employees in service or direct payment to them of salaries of regular employees.

10. In Punjab Water Supply & Sewerage Board v. Ranjodh Singh and Ors. : (2007) 2 SCC 491, the Apex Court after a detailed analysis of the case law on the point held that the observation in para.53 of Umadevi's case (supra) that as a one-time measure, regularisation of employees can be made, was made, in relation to appointments which were only irregular in nature and not illegal appointments. It was held, relying on the decision of the Apex Court in National Fertilisers Ltd v. Somvir Singh : (2006) 5 SCC 493 that a mandamus to regularise an employee in service can be issued only if he or she has a legal right to continue in service. The very same view was reiterated by the Apex Court in State of Karnataka v. G.V. Chandrasekhar : (2009) 4 SCC 342. In Pinaki Chatterjee and Ors. v. Union of India and Ors. : (2009) 5 SCC 193, the Apex Court held that persons appointed on casual basis and not against any cadre post cannot claim regularisation in service especially when such appointment is not in compliance with Articles 14 and 16 of the [Constitution of India](#).

11. It is not in dispute that the respondents were not engaged after following the prescribed procedure wherein an equal opportunity was extended to others also to participate in the selection. The fact that the respondents were engaged only on contract basis is not in dispute. It is also not in dispute that the respondents were not appointed against sanctioned cadre posts. In our opinion the respondents, who were thus engaged only on a casual basis against non cadre posts without following the prescribed procedure and without a public advertisement inviting applications, cannot claim that they should be regularised in service merely for the reason that they have been working on contract basis for the past more than 25 years. We also notice that in the Writ Petition the respondents had not sought the relief of regularisation in service. In such circumstances we hold that the respondents are not entitled to claim regularisation in service.

12. We shall now deal with the claim of the petitioners for payment of salary and allowances at the rates paid to regularly appointed Nursery School Teachers/Ayachs. The qualifications prescribed for regular appointment as Nursery School Teacher is a pass in the SSLC Examination and Nursery School Training. The respondents, admittedly, do not possess the said qualification. Though some among them have passed the SSLC Examination, they have not undergone the

Nursery School Training. They have only attended and undergone the Orientation Course for Nursery School Teachers/Ayachs of a short duration of less than one week at the Balasevika Training Institute. The respondents were also not regularly appointed after following the prescribed procedure, namely through the Kerala Public Service Commission/Employment Exchanges. Though in *Kishori Mohanlal Bakshi v. Union of India* : AIR 1962 SC 1139, the Apex Court had held that the principle of equal pay for equal work for men and women embodied in Article 39(3) is not capable of being enforced, later, the Apex Court in *Randhir Singh v. Union of India* : (1982) 1 SCC 618 held that the principle of 'equal pay for equal work' is not an abstract doctrine and can be enforced by reading it into the doctrine of equality enshrined in Articles 14 and 16 of the Constitution. The Apex Court has however, held that similarity in designation or quantum of work is not determinative of equality in the matter of pay scales and that factors like the source and mode of recruitment/appointment, qualifications, nature of work, responsibilities etc, have to be considered while considering the question whether the principle of equal pay for equal work should be applied. (See the decisions of the Apex Court in *State of Haryana v. Jasmer Singh* : (1996) 11 SCC 77 and *Official Liquidator v. Dayanand* : (2008) 10 SCC 1 : 2008 (4) KLT SN 67 (C. No. 62) SC. It has been held that there may be differences in educational or technical qualifications which may have a bearing on the skills which the holders of jobs bring to their job although the designation of the job may be the same. In *Official Liquidator v. Dayanand* : (2008) 10 SCC 1 : 2008(4) KLT SN 67 (C. No. 62) SC , it was also held that any direction to compel the Government to pay the salary and allowances as was being paid to regular employees to casual employees will compel the Government to sanction additional posts so as to facilitate payment of salaries and allowances and that cannot be achieved by applying the principle equal pay for equal work.

13. The Apex Court has in *Indian Drugs & Pharmaceuticals'* case (supra) held as follows:

49. Before parting with this case, we would like to state that although this Court would be very happy if everybody in the country is given a suitable job, the fact remains that in the present state of our country's economy the number of jobs are limited. Hence, everybody cannot be given a job, despite our earnest desire.

50. It may be mentioned that jobs cannot be created by judicial orders, nor even by legislative or executive decisions. Jobs are created when the economy is rapidly expanding, which means when there is rapid industrialisation. At present, the state of affairs in our country is that although the economy has progressed a little in some directions, but the truth is that this has only benefited a handful of persons while the plight of the masses has worsened. Unemployment in our country is increasing, and has become massive and chronic. To give an example, for each post of a peon which is advertised in some establishments there are over a thousand applicants, many of whom have M.A., M.Sc, M.Com or MBA degrees. Recently, about 140 posts of primary school teachers were advertised in a district in Western Madhya Pradesh, and there were about 13,000 applicants i.e. almost 100 applicants for each post. Large-scale suicides by farmers in several parts of the country also show the level of unemployment. These are the social and economic realities of the country which cannot be ignored.

51. One may be very large hearted but then economic realities have also to be seen. Giving appointments means adding extra financial burden to the national exchequer. Money for paying salaries to such appointees does not fall from the sky and it can only be realised by imposing additional taxes on the public or taking fresh loans, both of which will only lead to additional burden on the people.

52. No doubt, Article 41 provides for the right to work, but this has been deliberately kept by the Founding Fathers of our Constitution in the directive principles and hence made unenforceable in view of Article 37, because the Founding Fathers in their wisdom realised that while it was their wish that everyone should be given employment, but the ground realities of our country cannot be overlooked. In our opinion, Article 21 of the Constitution cannot be stretched so far as to mean that everyone must be given a job. The number of available jobs are limited, and hence courts must take a realistic view of the matter and must exercise self-restraint

14. In *Executive Director, I.T. School Project v. Saranya* 2009 (3) KLT 824, a Division Bench of this Court, to which one of us (K. Balakrishnan Nair, J.) was a party, while considering the question whether a writ in the nature of mandamus

can be issued directing the Government to create adequate posts of qualified teachers in Government/ Aided High Schools to impart education and training to the students in the subject 'Information Technology', held as follows:

9. The directions issued in para. 16 also could not have been issued by this Court while exercising its power under Article 226 of the [Constitution of India](#). It is for the Government to take a decision in these matters. Whether the existing scheme for imparting Information Technology education in the schools should be revised etc. are matters exclusively within the realm of policy of the Government. In this context, it is apposite to quote the following words of Benjamin N. Cardozo in his 'Judicial Process':

The Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life'.¹⁰ If the directions of the learned single Judge are implemented, the same will have ramifications on the budget allocations already made. This Court cannot issue any direction which will have such effect, See the decision of the Apex Court in *State of Himachal Pradesh and Anr. v. Umed Ram Sharma and Ors.* : AIR 1986 SC 847, wherein it was held as follows:

21. There are detailed instructions regarding the preparation, submission etc. of applications, for re-appropriation. The sum and substance of the said requirement are that total sanction of bill for a project is within the domain of the Legislature and the executive has no power to exceed the total sanction without the consent or assent of the Legislature and the court cannot impinge upon that field of Legislature. The executive, however, on the appreciation of the priorities can determine the manner of priorities to be presented to the Legislature. The court cannot also, in our opinion, impinge upon the judgment of the executives as to the priorities.

22. ...So far as the additional grant of the sum was required, it is entirely in the domain of the Legislature to sanction it or not. The members of the Legislature know the needs of the people, Under the Constitution, they are authorised and entitled to fix the priorities for the expenditure to satisfy the basic needs of the people, upon the judgment and recommendation of the executive.

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27,...but it is primarily within the domain of the Legislature and the executive to decide the priority as well as to determine the urgency. Judicial review of the administrative action or inaction where there is an obligation for action should be with caution and not in haste.

(emphasis supplied)

11. Recently, this Court had occasion to consider about the issuance of directions to the Government, which will result in affecting the budget allocations made for various subjects, in Cannanore District Muslim Educational Association v. State of Kerala 2008 (2) KLT 879. In the said decision, it was held as follows:

11. The sanctioning of new schools as mentioned earlier will always come within the realm of policy. Even if there is educational need, the Government can decide not to sanction any schools, having regard to its financial position. The resources of the Government are limited. There are several competing claims for allotment of funds. A person working in the field of health would like to have the maximum funds allotted for the said field, so that all the Government hospitals are run properly and new hospitals are opened wherever necessary, A person interested in literature would like to see the Government to allot more funds to encourage literary activities and support the activities of Sahitya Academy etc. Likewise, a person interested in education would like to have the maximum funds allotted for education in every year's budget. But, the Government has to do a balancing act, taking into account the competing claims of various sectors, While considering the point whether this Court can interfere with the fixation of priorities in the matter of allotment of funds, we think, it is appropriate to refer to the decision of the Court of Appeal in R.V. Cambridge Health Authority, ex.p B (1995) 2 All.E.R. 129. It was a

case concerning the validity of the decision of the Health Authority not to allot funds for the treatment of a child, as the chances of success of treatment were remote and there were other claimants for the limited funds available with the Authority. Though the Divisional Court interfered with the decision of the Health Authority, the Court of Appeal reversed it. In the said decision Sir Thomas Bingham, Master of Rolls stated as follows:

I have no doubt that in a perfect world any treatment which a patient or a patient's family, sought would be provided if doctors were willing to give it, no matter how much it costs, particularly when a life was potentially at stake. It would however, in my view, be shutting one's eyes to the real world if the court were to proceed on the basis that we do live in such a world. It is common knowledge that health authorities of all kinds are constantly pressed to make ends meet. They cannot pay their nurses as much as they would like; they cannot provide all the treatments they would like; they cannot purchase all the extremely expensive medical equipment they would like; they cannot carry out all the research they would like; they cannot build all the hospitals and specialist units they would like. Difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgment which the court can make.

(emphasis supplied)

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If this Court directs the Government to sanction a Higher Secondary School to the petitioner, it may impinge upon the budgetary allotment of funds. Further, if the Government takes a policy decision not to allot any funds for some time to a particular field, it is not a matter, normally, for the courts to interfere. In that case, the appeal would lie to 'the ballot and not to the courts'. Ours is a Government of people and not of courts. The courts which are not answerable to the Legislature, are not supposed to interfere with executive decisions and functions, unless they are shown to be illegal or ultra vires. By keeping itself within the four corners of the law, the Government can take a wise or a foolish decision. The courts are not authorised to correct the unwise decisions of the Government. The normal mode

to get an unwise policy changed in democracies is by building up enlightened public opinion and not by approaching the court.

12. Concerning framing policies by Courts, while deciding a case between two parties, Abraham Lincoln in his first inaugural speech, in his inimitable style, commented:

At the same time, the candid citizen must confess that if the policy of the Government upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their own Government into the hands of that eminent Tribunal. The right of the people to govern themselves and not by the Courts, articulated felicitously by Lincoln, is relevant for all times, in democracies. The Court, which is not answerable to the Legislature, though composed of very learned and erudite Judges, cannot enter the field of framing policies for the people, in view of the Constitutional limitations.

15. In *National Fertilizers Ltd. v. Somvir Singh* (supra) the Apex Court held as follows:

23. The contention of the learned Counsel appearing on behalf of the respondents that the appointments were irregular and not illegal, cannot be accepted for more than one reason. They were appointed only on the basis of their applications. The Recruitment Rules were not followed. Even the Selection Committee had not been properly constituted. In view of the ban on employment, no recruitment was permissible in law. The reservation policy adopted by the appellant had not been maintained. Even cases of minorities had not been given due consideration.

24. The Constitution Bench thought of directing regularisation of the services only of those employees whose appointments were irregular as explained in *State of Mysore v. S.V. Narayanappa*, *R.N. Nanjundappa v. T. Thimmiah* and *B.N. Nagarajan v. State of Karnataka* wherein this Court observed:

16. In *B.N. Nagarajan v. State of Karnataka* this Court clearly held that the words 'regular' or 'regularisation' do not connote permanence and cannot be construed so as to convey an idea of the nature of tenure of appointments. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to methodology followed in making appointments.²⁵ Judged by the standards laid down by this Court in the aforementioned decisions, the appointments of the respondents are illegal. They do not, thus, have any legal right to continue in service.

26. It is true that the respondents had been working for a long time. It may also be true that they had not been paid wages on a regular scale of pay. But, they did not hold any post. They were, therefore, not entitled to be paid salary on a regular scale of pay. Furthermore, only because the respondents have worked for some time, the same by itself would not be a ground for directing regularisation of their services in view of the decision of this Court in *Umadevi*.

16. The pleadings and the materials on record disclose that there are 32, 268 Anganwadies under the Social Welfare Department. Every Anganwady has one Teacher and one Ayah who are presently engaged on payment of honorarium. If the claim of the respondents for payment of salary and allowances applicable to regularly appointed Nursery School Teachers and Ayahs is upheld, the State will be burdened with the liability to extend the said benefit to all the 32,268 Anganwady Teachers/Ayahs thereby casting a huge financial burden on the State. Tested in the light of the principles laid down by the Apex Court in *Indian Drugs & Pharmaceuticals'* case (*supra*) and by this Court in *Executive Director, I.T. School Project v. Saranya* (*supra*), this Court will not be justified in directing regularisation of the respondents in service and payment of salary and allowances to them in the scale of pay applicable to persons regularly appointed and other benefits as it will cast very heavy financial burden on the State Exchequer. As noticed by the Apex Court in *Official Liquidator v. Dayanand*, the State will be compelled to sanction that a large number of additional posts in order to facilitate payment of salary and allowances to them thereby putting considerable financial burden on the exchequer. Further, as noticed earlier, the respondents do not possess the qualifications prescribed for regular appointment as Nursery School

Teachers/Ayahs. Therefore, in principle also they cannot claim payment of salary in the scale of pay applicable to regular appointees. We are therefore, of the considered opinion that the directions issued by the learned single Judge to regularise the respondents in service and to pay them salary and allowances and other benefits applicable to regular appointees cannot be sustained.

In the result we allow the Writ Appeal, reverse the judgment of the learned single Judge and dismiss the Writ Petition. The parties shall bear their respective costs.

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