

(2009) 05 KL CK 0111

High Court Of Kerala

Case No: WP (C) No. 11759 of 2006 (Y)

Toji Joseph and Prema Toji

APPELLANT

Vs

State of Kerala, The Director of
Public Instruction, The Corporate
Manager and The Principal

RESPONDENT

Date of Decision: May 21, 2009

Acts Referred:

- Constitution of India, 1950 - Article 226
- Industrial Disputes Act, 1947 - Section 2
- Kerala Education Act, 1958 - Section 2(8), 3
- Kerala Education Rules, 1959 - Rule 22

Citation: (2009) 3 ILR (Ker) 54

Hon'ble Judges: P.R. Ramachandra Menon, J

Bench: Single Bench

Advocate: Anil k. Narendran, for the Appellant; Devan Ramachandran, for the Respondent

Judgement

P.R. Ramachandra Menon, J.

Can there be a Writ of Mandamus to interfere with the Disciplinary proceedings or Transfer of a Teacher ordered by the Management of an "Unaided School", is the "Bulls Eye" to be pierced in the instant case.

2. The main challenge involved in this Writ Petition is against the termination of service of the first petitioner ordered by the third respondent/Management of the unaided school as per Ext. P14 and the subsequent Ext. P21 resolution, declining to effect the proposed reinstatement. The grievance of the second petitioner, who is none other than the wife of the first petitioner, is against her transfer from the present school to another school belonging to the very same Management . Knowing the fact that the third respondent is an "unaided school", the petitioners

have placed reliance on the decision rendered by the Apex Court in K. Krishnamacharyulu and Others Vs. Sri Venkateswara Hindu College of Engineering and Another, and also on the decision rendered by a Division Bench of this Court in Suter Paul Vs. Sobhana English Medium High School, to contend that the Writ Petition is very much maintainable against such private Management in view of the law declared therein.

3. The sequence of events, according to the first petitioner is that while working as an Accountant under the 4th respondent/School managed by the third respondent, having obtained appointment as Accountant in 1998 and regularised in the year 2000, he was served with Ext.P1 show cause notice stating that he was unauthorisedly absent on the 2nd and 3rd of December, 2004 and abstained from "sports duty" in connection with the Sports Meet in the School in spite of the clear instruction given in this regard, whereby negligence and deliberate insubordination were attributed, besides the unauthorised absence. The first petitioner submitted Ext. P3 explanation stating that he was having the "additional charge" of Accountant in another school, owned and managed by the third respondent itself at Thachampara; that he had reported for duty on 02.04.2004 in the above school as certified by the Principal of the said school vide Ext.P2 and that he had already informed the position to the Principal orally. The 1st petitioner has also got a case that on 03.12.2004 , in view of some eye ailment, he was advised by the Doctor to avoid from being exposed to direct sun light.

4. Presumably before submitting the reply, the Management vide Ext. P4 placed the petitioner under suspension pending enquiry, referring to four specific instances of misconduct as referred to therein. Immediately, the petitioner submitted Ext. P5 reply explaining the actual facts and figures and seeking to forgive him. However, the Management apparently, was not satisfied with the explanation, which led to the domestic enquiry and Ext.P10 enquiry report.

5. When a copy of the enquiry report was served to the first petitioner along with Ext.P11 forwarding letter, asking for his explanation, it was replied vide Ext. P13, also pointing out that the charges levelled against him, as referred to in the opening page of Ext.P10 enquiry report and the charges on which finding of guilt was arrived at by the Enquiry Officer in the last paragraph of the very same report, were totally different and unconnected with each other. It is also stated that the statement of the Management witnesses were taken behind the first petitioner and that he was never given an opportunity to cross examine the said witnesses. Observing that the explanation offered by the first petitioner was not satisfactory, he was terminated from the service as per Ext.P14 order passed by the third respondent. Aggrieved by this, the first petitioner preferred Ext.P16 representation before the second respondent, which was directed to be considered and finalised as per Ext.P17 judgment passed by this Court in W.P.(C) No. 20881 of 2005. Pursuant to the said verdict, the Hearing was attended by the first petitioner as well as a representative

of the third respondent/Management. During the course of hearing, it was pointed out from the part of the Management that the matter of reinstatement of the first petitioner in service was under active consideration of the Management, on specific conditions, simultaneously adding that the Principal had already filed a statement before the second respondent in this regard. After considering the subsequent developments and the limited extent of dispute subsisting, the second respondent directed the third respondent/Management to re-examine the matter so as to reinstate the 1st petitioner in service on specific conditions.

6. It is seen that the Management issued Ext. P19 order of reinstatement to the 1st petitioner, subject to the conditions specified therein. However, the 1st petitioner vide Ext.P20 retorted, putting some riders from his side, instead of tendering apology as required in Ext.P19. This made the Management to retract, which led to issuance of Ext.P21 stating that Ext.P20 reply of the petitioner was not at all satisfactory and hence they were not in a position to consider his reinstatement for the time being ("at present"). Simultaneously, the Management issued Ext. P22 order, transferring the service of the second petitioner (the wife of the first petitioner) who was also working in the very same school, where the first petitioner was working, to Kuttapuzha School belonging to the very same Management. The case of the petitioners is that Ext.P14 order of termination from the service and Ext.P21 order refusing to reinstate the first petitioner, despite the assurance given before the second respondent, as evident from Ext. P18 and Ext.P22 order transferring the service of the second petitioner to Kuttapuzha School, allegedly as a retaliatory measure to harass the petitioners, are not proper or sustainable and hence are sought to be interfered by this Court.

7. The respondents No. 3 and 4 have filed a counter affidavit rebutting the averments and allegations raised against them; simultaneously questioning the maintainability of the Writ Petition stating that the third respondent being an unaided school, is not amenable to the writ jurisdiction of this Court. Non-compliance with the relevant provisions of the rules of disciplinary proceedings (Ext.P12) and violation of principles of natural justice have been denied from the part of the Management, who contends that the misconducts committed and proved are very serious and that the Management had no other alternative, but to put an end to the service and further that the opportunity given to the first petitioner to reinstate him in service was not properly availed by the first petitioner, by refusing to comply with the conditions. It is also stated that the transfer of the second petitioner ordered by Ext.P22 was only because of the administrative exigencies and not to harass the petitioners in any manner as alleged. With reference to the interim order dated 28.04.2006 passed by this Court directing the concerned respondent to grant all eligible leave to the second petitioner if she applied for the same, it is stated in the counter affidavit that the second petitioner, though took charge in the School, is absconding from duty without any reason or authority. The petitioners have filed a reply affidavit challenging the contents of the

counter affidavit and also producing certain new documents, particularly Ext.P24 to show that the new case foisted against the petitioners as to the missing of certain books/registers was only a false story and that the said books/registers had been handed over by the Management to the Auditors, who in turn had surrendered the same before the Police along with Ext.P24 statement, thus asserting that the case put forth by the Management in this Court and the complaint filed before the police are totally wrong and ill motivated.

8. Though this Court does not propose to go into the minute factual aspects as to the issue involved, this Court cannot but make the following observations for effective adjudication of this case:

- i) The alleged misconducts as borne by Ext.P4 and as extracted in the opening page of Ext.P10 enquiry report, substantially differ from the points on which the finding of guilt has been arrived at in the last paragraph of Ext.P10 enquiry report. In other words, many of the proven charges do not find a place in the Charge Sheet.
- ii) The first charge regarding the alleged unauthorised absence on 02.12.2004 has been explained by the first petitioner asserting that he was having additional charge of Accountant in another school at Thachampara, belonging to the very same Management and that he had attended that school on that day as evident from Ext.P2, certified by the Principal of the School at Thachampara, which aspect has not been properly adverted to by the Enquiry Officer or dealt with by the respondents No. 3 and 4 anywhere in the counter affidavit.
- iii) The second charge in Ext.P4 as to the unauthorised absence on 03.12.2004 and the refusal to attend the sports duty has been answered by the 1st petitioner in Ext. P5 explanation, stating that he was advised by the doctor to avoid direct sunlight because of his eye infection and that, this was orally conveyed to the Principal, as in the case of first charge the prescriptions were enclosed along with Ext.P5 explanation, which is not denied by the respondents No. 3 and 4 in their counter affidavit.
- iv) The third charge in Ext.P4 is with respect to the non submission of any explanation to the show cause memo, which by itself cannot constitute any misconduct, but for enabling the Management to draw adverse inference. However, in view of Ext.P5 explanation, which is admittedly stated as received, this charge cannot have significance any further.
- v) The fourth charge in Ext.P4 is that the first petitioner was unauthorisedly absent from 08.12.2004 and did not hand over the accounting details to the Division Evaluation Team on 09.12.2004, which rather appears to be conceded in Ext. P5 explanation stating that it was not wilful but because of the mental disturbance and hence was sought to be forgiven.

vi) After culmination of the enquiry, the first petitioner was found guilty of being deliberately absent and had disobeyed the orders and instructions of the Management . He was also found guilty under other Heads like 3,4 and 5 (for involvement in side business like working for LIC, Moral dis-behaviour in the dealings with a co-worker by name Anitha and Missing of some Account Books), which do not find any place in Ext.P4 charge sheet.

vii) The scope of enquiry was very much known to the Enquiry Officer, despite which he arrived at the finding on guilt on points No. 3, 4 and5 in Ext.P10, simultaneously mentioning in Point No. 4 that it was being so rendered "though not mentioned in Terms of Reference". In other words, there is considerable force in the contention of the first petitioner that the charges levelled against him in the enquiry as borne by Ext.P4 and the misconducts stated as proved in the Commission of Enquiry, (based on which the punishment of termination of service was imposed vide Ext.P14 order), are mostly differing from each other.

viii). There is a specific case for the first petitioner in paragraph Nos. 10, 12 and elsewhere in the W.P(C) that the examination of the Management witnesses was behind the first petitioner and that no opportunity was given to him to cross examine the said witnesses. The said assertion has not been specifically denied by the respondents No. 3 and 4 in their counter affidavit.

ix) The petitioners have put forth a specific case in paragraph No. 13 of the Writ Petition as to the violation of the relevant rules regarding the disciplinary proceedings, as provided in Ext.P12. This has not been properly answered from the part of the respondents No. 3 and 4, but for a vague averment that the enquiry was conducted in accordance with the rules.

x) Even though the respondents No. 3 and 4 have questioned the maintainability of the Writ Petition , they have no such case with respect to Ext.P17 judgment passed by this Court earlier in W.P.(C) 20881 OF 2005 (though at the admission stage) and Ext.P18 order passed by the second respondent directing the Management to re-consider the issue. In other words, having passed Ext.P19 order in compliance with Ext.P18 order passed by the second respondent as referred to therein, the respondents No. 3 and 4 have conceded to the jurisdiction and power of superintendence exercised by the second respondent, since Ext.P18 order passed by the second respondent was never chosen to be challenged and let to have become finalised.

9. Now, coming to the maintainability of the Writ Petition, the learned Counsel for the petitioners submits that the reliefs prayed for are liable to be granted in view of the rulings rendered by the Apex Court in K. Krishnamacharyulu and Others Vs. Sri Venkateswara Hindu College of Engineering and Another, and by a Division Bench of this Court in Suter Paul Vs. Sobhana English Medium High School, , holding that Writ Petition is maintainable against the Manager of a "recognised unaided school".

10. It is true that the Division Bench of this Court as per the decision in Suter Paul Vs. Sobhana English Medium High School, has held that a Writ Petition is maintainable against the Manager of a recognized unaided school, in view of the public duty involved as made clear by the Apex Court in Andi Mukta Sadguru Shree Muktajee Vandana Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others, and AIR 1998 SC 295. (K. Krishnamacharyulu and Ors. v. Sri Venkateswara Hindu College of Engineering and Anr.). The term "recognised school" is defined u/s 2(8) of the Kerala Education Act and the factum of establishment and recognition of schools is dealt with u/s 3. Rules 1 to 3 of Chapter XIV-AA of the Kerala Education Rules (which Chapter was introduced in March 1990) refers to the pervasive control being exercised by the Government over the "recognised unaided schools". It is more so discernible from Rule 22 of Chapter V specifying the situation under which, the recognition granted to a school can be withdrawn by the Government. Even though the maintainability of the Writ Petition was answered in the positive by the Division Bench of this Court in Suter Paul Vs. Sobhana English Medium High School, , interference was declined, holding that the petitioner failed to substantiate how or under what authority the D.E.O. was entitled or empowered to hold an enquiry of his own to find out whether a delinquent teacher of a recognised unaided school was guilty or not (paragraph No. 40). In the instant case, the position remains to be the same and the authority of the departmental authorities to find out whether the petitioner is guilty or not, is not connected to any of the statutory provisions. That apart, it is also not stated whether the respondents" school is a "recognised school" or not, coming within the meaning of Section 2(8) of the Kerala Education Act. As such, the reliance placed by the petitioners on the above decision is not correct or sustainable.

11. With regard to the emphasis put on the dictum in K. Krishnamacharyulu and Others Vs. Sri Venkateswara Hindu College of Engineering and Another, , it is to be noted that interference was made in the said case, on the basis of a specific finding that parity of pay of the teachers in similar private institutions was already ordered by the Government as per the executive instructions and hence that a teacher duly appointed to a post in a private institution was very much entitled to seek enforcement of the orders issued by the Government . In the instant case, the reliefs sought for by the petitioners are not for enforcement of any such orders issued by the Government, but for enforcing the private rights available to the petitioners by virtue of their contract of service with the third respondent/Management. It has been held by the Apex Court in Binny Ltd. v. Sadasivan 2005(4) KLT 315 (SC) that there is no "public element" involved in such matters and this has been relied on by a Single Bench of this Court for declining interference in such matters, as per the decision in Sophiamma v. Council of Indian School Certificate Examination 2008(2) KLT 589, where, the decision passed by a Division Bench of this Court in Suter Paul Vs. Sobhana English Medium High School, has been referred to and distinguished. In short, though there cannot be any dispute that Writ Petition is maintainable

under Article 226 of the Constitution of India even against a private Management for enforcing the " public duty" cast upon them, it cannot be said that the same is available also for enforcing the terms and conditions of service of the Teachers/Employees. For this reason, no positive relief can be granted to the petitioners in the instant case.

12. However, this does not mean that the petitioners can only curse their fate. In view of the specific instances of discrepancies/short comings as referred to by this Court in the earlier paragraphs, the first petitioner, is very much entitled to pursue the matter by filing appropriate Civil Suit before the competent Civil Court, claiming compensation for the wrongful termination of service, on the basis of the specific pleadings and evidence to be adduced. It is also for the first petitioner to think about his remedy, if any, available under the I.D. Act, he being an "Accountant" of the Management School, particularly when raising of the dispute by the first petitioner invoking the relevant provisions of the I.D. Act stands conceded from the part of the respondents No. 3 and 4 who produced Ext.R3 (1) notice dated 27.07.2006 issued by the D.L.O., Palakkad, ie., after issuance of Ext.P21. Further, it is to be noted that the first petitioner was working only as an "Accountant" and not as a "Teacher", (to be ousted from the definition of the term "worker" u/s 2(s) of the I.D. Act).

13. While declaring the law and the remedies as above, this Court also feels that the extent/magnitude of the dispute which originally existed between the Management and the first petitioner got watered down in the course, which made the Management to submit before the second respondent that they were proposing to reinstate the first petitioner on conditions, as taken note of by the second respondent in Ext.P18 order, directing the Management to reconsider the issue. It was accordingly that the Management issued Ext.P19 order of reinstatement on conditions, which was responded from the part of the first petitioner subject to some riders as added by him vide Ext.P20, which made the Management to turn down the proposal as per Ext.P21, stating that the reinstatement could not be considered for the time being ("at present"). It appears that the first petitioner has realized this mistake and submitted an "unconditional apology" (as required to be effected vide Ext.P19), as borne by Ext.P25 dated 29.08.2008 (produced along with I.A. No. 15275 of 2008, though wrongly marked as Ext. "P15" in place of Ext "P25").

14. Considering the sequence of events, the relative merits and demerits on either side and also the fact that the Management was prepared to reinstate the first petitioner on conditions as specified in Ext.P19, (which offer was temporarily ("at present") withdrawn as shown in Ext.P21 for not fully acceding to the conditions) and further since the situation has taken a different turn upon the first petitioner's submitting Ext.P25 dated 29.08.2008 tendering "unconditional apology", this Court feels that it would only be appropriate for the Management to reconsider the issue in the light of Ext.P18 direction given by the second respondent (which is not

challenged from the part of the Management) particularly when, the first petitioner has come down, expressing his willingness to obey the conditions stipulated from the part of the Management for enabling him to get reinstated.

15. In the above circumstances, the petitioners may approach the third respondent for re-consideration of the matter as above, in the light of Ext.P25 and to have the matter settled once and for all, within a period of three months . It is also made clear, if the petitioners are not satisfied with the course as aforesaid or if aggrieved by the order to be passed by the third respondent/Management, it is open to them to approach the competent Civil Court or such other appropriate forum for redressal of their grievances, including to get Ext. R3 proceedings pursued by the D.L.O, Palakkad finalised. Interference on merits is declined except to the above extent and the matter is disposed of accordingly.