

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

WEDNESDAY, THE 1ST DAY OF JULY 2015/10TH ASHADHA, 1937

W.A.No. 1703 of 2013 IN WP(C).17399/2011

AGAINST THE JUDGMENT IN WP(C) 17399/2011 of HIGH COURT OF KERALA DATED 24-06-2013

APPELLANT/PETITIONER:

DR.K.P.JAYA
W/O.DR.K.R.GOPIDAS, TC:64/426(7), SNEHAPURI ROAD
KARUMOM P.O., TRIVANDRUM - 695 002.

BY ADVS.SRI.P.K.IBRAHIM
SMT.A.A.SHIBI

RESPONDENTS::

1. UNIVERSITY OF KERALA
KARYAVATTOM
THIRUVANANTHAPURAM REPRESENTED BY ITS REGISTRAR - 695 034.
2. THE STATE OF KERALA,
REPRESENTED BY THE SECRETARY
DEPARTMENT OF EDUCATION, SECRETARIAT
THIRUVANANTHAPURAM - 695 001.
3. DR. C.S.SUCHIT,
LECTURER, DEPARTMENT OF HINDI, UNIVERSITY OF KERALA
KARYAVATTOM, TRIVANDRUM - 695 034.
4. THE TAHSILDAR,
THIRUVANANTHAPURAM - 695 001.

R1 BY ADV. SRI.BECHU KURIAN THOMAS, SC, UNIVERSITY OF KERALA
R3 BY ADV. SRI.T.RRAVI
R BY GOVERNMENT PLEADER SRI.PFAZIL.
R BY SRI.GEORGE POONTHOTTAM, SC, KERALA UTY.

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 01-07-2015, ALONG WITH
WA. 1506/2013, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S ANNEXURES:

ANNEXURE A1: TRUE COPY OF THE ORDER ISSUED BY THE UNIVERSITY DATED 31.1.2014.

ANNEXURE A2: TRUE COPY OF THE LETTER DATED 14.2.2014.

ANNEXURE A3: TRUE COPY OF THE CERTIFICATE DATED 24.10.2013 ISSUED BY SNDP YOGAM, KUDAVOOR BRANCH.

ANNEXURE A4: TRUE COPY OF THE COMMUNICATION DATED 26.11.2013 OF THE STATE PUBLIC INFORMATION OFFICER OF THE DIRECTORATE OF BACKWARD COMMUNITY DEVELOPMENT DEPARTMENT (BCDD).

ANNEXURE A5: TRUE COPY OF THE LEGAL OPINION.

// TRUE COPY //

P.A.TO JUDGE

ANTONY DOMINIC & SHAJI P.CHALY, JJ.

Writ Appeal Nos.1506 & 1703 of 2013

Dated this the 1st day of July, 2015

JUDGMENT

Antony Dominic, J.

These writ appeals are filed by the petitioner in the Writ Petition Nos.11184/11 and 17399/11.

2. Since the issues raised are connected, the cases were disposed of by a common judgment and for that same reason, these cases were heard together and are being disposed of together.

3. We shall first deal with WA.1703/13. The appellant was working as a Lecturer in S.N.College, Kollam affiliated to the first respondent University. While so, on 3.2.2003, the first respondent University issued Ext.P1 notification inviting applications for various posts. One of the posts notified was that of Lecturer (Hindi) and it was reserved for candidates belonging to Ezhava community. The last date specified for submitting the application was 10.4.2003. Among others, appellant and the third respondent were also candidates. The interview was conducted on 26.4.2005 and in the rank list the appellant was No.1. Accordingly, she was appointed as Lecturer in the University on 12.5.2005 and resigning her job

in the S.N.College, Kollam she joined the post. While continuing so, she was promoted as Reader in 2006.

4. In the meantime, W.P(C)15330/05 was filed by the third respondent challenging the process of selection undertaken by the University, which led to the appointment of the appellant. The writ petition was disposed of by Ext.P4 judgment rendered on 2.2.2010. By the judgment, this Court set aside the selection and appointment of the appellant and directed the University to reassign the marks to the candidates after excluding the marks awarded to the candidates for the additional qualifications obtained by them after the last date for the submitting applications. It was also directed that on that basis the first rank holder in the select list should be appointed. The University challenged the judgment of the learned Single Judge in WA.409/10. The appellant also filed WA.403/10 against the judgment. Both these appeals were dismissed by this Court. Thereafter, the appellant approached the Honourable Supreme Court by filing SLP(Civil)No.(S) 11248/10 and that also was dismissed.

5. Accordingly, a fresh process was undertaken by the University and in that process, the third respondent was assigned rank No.1. On that basis, by Ext.P6 order dated 8.4.2010, he was appointed as Lecturer.

6. According to the appellant, subsequently she came to know that it was on the strength of Ext.P9 Gazette Notification dated 17.11.1996, by which the third respondent himself to be an Ezhava candidate, Ext.P11 caste certificate issued by the Tahsildar and Ext.P17 non creamy layer certificate produced by her that she asserted her claim as an Ezhava and secured employment at the University. Contending that these certificates were fraudulent, appellant submitted representations to the University and to the Government and also prayed that she shall be accommodated in the University atleast on a supernumerary basis. These requests of the appellant did not find any positive response from the University and it was in such circumstances, the appellant filed Writ Petition No.17399/11. In the writ petition, she sought to quash Exts.P6, P9, P11 and P17 mentioned above and sought a declaration that the caste certificate produced by the third respondent

claiming his caste as Ezhava based on the above documents is illegal and that therefore the appointment obtained by him against the seat reserved for Ezhava is illegal. Her reinstatement in service was also sought for in the writ petition.

7. In so far as W.A.1506/13 is concerned, the main prayers in W.P. (C)11184/2011 are as follows:

“ 1. Declare that petitioner is entitled to be absorbed in the service of the first respondent University and get all service benefits including continuity of service holding her termination as bad and illegal being violative of Article 21 and 19(1)(g), depriving her livelihood for no fault of hers or in alternative.

2. Issue a writ of mandamus commanding the respondents to make good the loss of her employment with S.N.College, Kollam by paying compensation for the mental and financial loss sustained by her to the tune of Rs.3.67 crores.”

8. By the common judgment under appeal, though the learned Single Judge declined to grant the prayers in the writ petition, it was held that it shall be open to the appellant to submit a representation to the University with the materials relied on and further ordered that if such a representation is made, University shall conduct an enquiry into

the allegations raised by the appellant and pass appropriate orders thereon. In so far as Writ Petition No.11184/11 is concerned, the learned Single Judge dismissed the Writ Petition. It is these judgments, which are under challenge before us.

9. We heard the counsel for the appellant, Standing Counsel for the University, Government Pleader for the official respondents and also the learned counsel appearing for the third respondent in W.P.(C) 17399/11.

10. The first contention raised by the counsel for the appellant is regarding the alleged illegality of Exts.P9, P11 and P17. According to the appellant, Ext.P9 Gazette notification, Ext.P11 caste certificate and Ext.P17 non creamy layer certificate are illegal for the reason that the third respondent is not an Ezhava candidate. Therefore, Ext.P6 order appointing him to the post reserved for an Ezhava candidate is also illegal. It is on that basis, the appellant is seeking reliefs in W.P.(C) 17399/11, against the judgment of which W.A.1703/13 is filed.

11. The alleged illegality of Exts.P9, P11 and P17 is sought to be substantiated by the appellant by referring us to Exts.R1(a), R1(b), R1

(c) and P23 and P24 Government Orders. Ext.R1(a) dated 23.3.1961, is a Government Order dealing with the caste status of the offspring in an inter caste marriage between persons belonging to a forward community and a backward community. Similar is the case in Exts.R1 (b) and R1(c) also. In so far as Ext.R1(c) dated 24.4.1979 and Ext.P23 are concerned, these orders clarify that orders governing the caste status of the children of intercaste married couple among whom one belongs to a forward community and the other to a Scheduled Caste, would also eligible for all benefits admissible to Other Backward Classes. In so far as Ext.P24 issued on 22.3.2005 is concerned, by this Government Order Exts.R1(b) and P23 were cancelled by the Government.

12. Pointing out that these are the Government Orders that were relied on by the Tahsildar to issue the caste status to the third respondent, contentions raised by the appellant are two fold. First is that the concession that was made available by Exts.R1(a) to R1(c) and P23 is available only to a case where in an intercaste marriage in which one belongs to a forward community and the other belongs to

Scheduled Caste/Scheduled Tribe, as the case may be. According to the appellant, this case will not apply to the case of the third respondent as both his parents belong to O.B.Cs and therefore, the Government Order do not contemplate a case as the one of the third respondent.

13. The other contention raised is that by the time interview for the post in question was held on 26.4.2005, in view of Ext.P24 order dated 22.3.2005, cancelling Exts.R1(b) and P23, the third respondent had ceased to be eligible for any concession available under the Government Orders. Therefore, according to the appellant, the basis on which the third respondent has claimed to be an Ezhava candidate entitled to be appointed in the post in question is totally untenable and the University should have cancelled the appointment as sought for by him Ext.P12 representation made on 29.7.2010.

14. We are unable to accept these contentions raised by the appellant. It is true that the Government Orders referred to above are issued in the context of children born in intercaste marriage where one in the couple belong to forward community or the other belongs to Scheduled Caste or Scheduled Tribe, as the case may be. In such a case,

as per the earlier law, unless otherwise proved, the children will take the case status of the father. However, this position has subsequently been clarified by the Apex Court that the above principle is not an inflexible one and that on evidence it can be established that the caste of the mother is the caste of the child provided the child has been accepted by that community and is brought up and living according to the tenets of that community.

15. In so far as the case of the third respondent is concerned, his father is a Hindu Nadar and the mother is an Ezhava. Thus, both the parents belong to OBC. In so far as his case is concerned, having born to OBC parent, he is an OBC and the only question is whether his caste is that of his father or that of his mother. In either case, his status as an OBC candidate cannot be doubted. The competent authority to issue a community certificate, admittedly is the Tahsildar of the Revenue Department. It is his case that his SSLC book originally did not contain his caste status. But however, the competent authority has issued Ext.P11 certificate dated 19.11.1996 certifying that his caste is Hindu Ezhava. The competent authority also has issued Ext.P17 non creamy

layer certificate dated 25.3.2003. In the meantime, on 17.12.1996, the third respondent also published a Gazette notification (Ext.P9), declaring that his caste shall be Hindu Ezhava. The official act done by an official of the Revenue Department is entitled to have the presumption that it has been legally done. Before this Court, there is no material whatsoever to prove that the contents of Exts.P11 and P17 are incorrect. In such a situation, until Exts.P11 and P17 are proved to be illegal, the authorities are bound to accept Exts.P11 and P17 and act upon it. If that be so, on the materials available, we are not in a position to accept the contention of the appellant regarding the alleged illegality of Exts.P11 and P17. If that be so, the prayer of the appellant to set aside Ext.P6 order appointing the third respondent as Lecturer (Hindi) in the University in a post reserved for Ezhava also cannot be allowed. Therefore, the judgment of the learned Single Judge, in W.P(C)17399/11 is to be confirmed.

16. In so far as W.A.1506/13 is concerned, as we have already stated the first prayer in the writ petition is to declare that the appellant is entitled to be absorbed in the service of the first respondent

University and to get all service benefits including continuity of service holding that her termination as bad and illegal and is violative of Article 21 and 19(1)(g). Second prayer is to direct the University to make good the loss of her employment in S.N.College, Kollam by paying her compensation for the mental and financial loss sustained to the tune of Rs.3.67 crores.

17. In so far as the first prayer for declaration is concerned; appellant contends that she having been validly appointed in the University in a permanent vacancy, her service can be dispensed with only in terms of the provisions of the University Act and the Statutes. She, therefore, contends that her termination from service amounts to violation of Article 19(1)(g) and Article 21 of the Constitution of India and that therefore she is entitled to be reinstated in service. In order to substantiate this contention, counsel referred us to judgments of the Apex Court in ***Parshotam Lal Dhingra v. the Union of India [AIR 1958 SC 36]***, ***Olga Tellis and others v. Bombay Municipal Corporation and others (1985) 3 SCC 545***.

18. In our view, the contention that the termination of the service of the appellant being otherwise than in accordance with the provisions of the University Act and Statutes amounts to deprivation of her fundamental rights and therefore is invalid, to say the least, is plainly untenable. This contention is raised by the counsel forgetting the fact that in the judgment in W.P.(C)15330/05, in which case, the appellant was impleaded as third respondent, this Court had held her selection to be illegal and quashed the minutes of the Syndicate dated 12.05.2015 by which her selection was approved and also her appointment. As we have already stated, the appellant and the University challenged this judgment of the learned single Judge in WAs.403 and 409/11 and these writ appeals were dismissed on 8.3.2010. This judgment was confirmed by the Apex Court in SLP 11248/10 filed by the appellant vide order dated 23.4.2010. Thus, the judgment of this Court quashing the appointment of the appellant attained finality. When this Court quashed the order appointing the appellant, it was not even necessary for the University to terminate her case and in any case even if an order of termination was issued in pursuance to the judgment of this Court, it

cannot be argued when the said termination, effected otherwise than in accordance with the provisions of the University and Statute, is illegal being violative of the fundamental principles.

19. Second part of the prayer made by the appellant is that she is entitled to be absorbed in the service of the University. According to the appellant, provisions of Sections 5, 19, 21, 23, 23(a) and 73 of the Kerala University Act and the various provisions of Chapter III of the University Statutes empower the University to make appointments even without conducting a selection. It is true that the Act and the Statutes confer power on the University to create posts and make appointments. But the manner in which such appointments are to be made, are also provided in the University Act and Statutes. No provision of the University Act or Statutes empower the University to retain in service, either on a regular basis or in a supernumerary post or otherwise, a person whose appointment was held by this Court to be illegal. Therefore, in the absence of any statutory power conferred on the University to make appointments, otherwise than in accordance with the Act and the Statutes, this Court cannot require the University to

absorb the appellant nor can this Court find fault with the University in having not acceded to the request of the appellant to that effect.

20. It is true that the learned counsel for the appellant referred us to the judgment of the Apex Court in ***Uday Singh v. State of U.P. (2002) 7 SCC 79*** to contend that in that case the Supreme Court ordered that the petitioner therein shall not be replaced. We have gone through this judgment and reading of the entire judgment leads us to the conclusion that the said judgment was rendered in the peculiar facts of this case and in exercise of the powers of the Apex Court under Article 142 of the Constitution of India. Therefore, we are unable to see any binding principles laid down in that judgment to be followed as a precedent in this case.

21. The other relief sought for in the writ petition is compensation for the loss of employment. It is true that the appellant had resigned her job in S.N.College and joined University, when she was appointed in May 2005. It is also true that on the basis of the findings of this Court in the judgment in W.P(C)15330/05 the appellant lost her employment. The question is whether the University can be ordered to

compensate the appellant. No finding has so far been entered by anyone of the authorities that the actions of the University which led to her loss of employment was either negligent or vitiated by malafides. In fact in this case, the University selected her giving credit to the additional qualifications acquired by the appellant subsequent to the last date for submission of the applications in response to Ext.P1 notification. This action of the University, according to her, also was consistent with the settled practice thus far followed by it. This method adopted by the University was disproved by this Court in the judgment mentioned above and that judgment of this Court has been confirmed by the Apex Court also.

22. In such a case, University can be made liable to compensate the appellant, which is possible only if it is found that the actions of the University were either malafide or vitiated by negligence. As we have already stated, there is no such finding. The principle of tortious liability for misfeasance in public office, approved by the Apex Court in ***Lucknow Development Authority v. M.K.Gupta (1994) 1 SCC 243***, can be invoked to order damages, only for malicious and injurious wrong

doing. This principle has been reiterated again by the Apex Court in its judgment in *Common Cause v. Union of India and others (1996) 6 SCC 530* and in *Shivsagar Tiwari v. Union of India and others (1996) 6 SCC 588* also. Therefore, unless malicious, deliberate or injurious wrong doing is made out, damages can not be awarded, much less in a writ petition. According to us, these grounds are not made out in this case.

23. In such circumstances, we are unable to find anything illegal with the judgment of the learned Single Judge.

Appeals therefore fail and are accordingly dismissed.

Sd/-

**ANTONY DOMINIC
JUDGE**

Sd/-

**SHAJI P. CHALY
JUDGE**

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