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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

THURSDAY, THE 16TH DAY OF JULY 2015/25TH ASHADHA, 1937

WA.No. 1889 of 2010 ( ) IN WP(C).21968/2010

AGAINST THE JUDGMENT IN WP(C) 21968/2010 DATED 21-07-2010

APPELLANT(S)/PETITIONER :-

N.K.RAJAPPAN, NELLITHANATHU,
MOONNILAVU P.O., KOTTAYAM DISTRICT.

BY ADVS.SRI.K.RAMAKUMAR (SR.)
SRI.GEORGEKUTTY MATHEW

RESPONDENT(S)/RESPONDENTS :-
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1. THE STATE OF KERALA REPRESENTED BY SECRETARY
LABOUR & REHABILITATION DEPARTMENT
THIRUVANANTHAPURAM.

2. THE WELFARE FUND INSPECTOR,
TODDY WORKERS WELFARE FUND BOARD, KOTTAYAM.

3. SASIKUMAR, S/O.SAHADEVAN,
VACKATTUKULAM, PULLENCHATHANNOOR P.O., KUNISSERY
ALATHOOR, PALAKKAD.

4. THE DEPUTY TAHSILDAR,
REVENUE RECOVERY, PALAI, KOTTAYAM DISTRICT.

5. THE VILLAGE OFFICER,
VILLAGE OFFICE, MOONILAVU, KOTTAYAM DISTRICT.

BY SR.GOVERNMENT PLEADER SRI.P.I.DAVIS
BY SRI.K.D.BABU, SC, KTWWFB

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 16-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

jvt

WA.NO.1889 OF 2010

APPENDIX

APPELLANT'S EXHIBITS :-

ANNEXURE A :- TRUE COPY OF THE MEMORANDUM OF THE W.P.(C) No.5933/2010 DATED 22.2.2010.

ANNEXURE B :- TRUE COPY OF THE COUNTER AFFIDAVIT DATED 11.6.2010 FILED BY THE 2ND RESPONDENT IN W.P.(C)No.5933/2010.

ANNEXURE C :- TRUE COPY OF THE NOT PRESSED MEMO DATED 9.7.2010 FILED BY THE PETITIONER IN W.P.(C) 5933/2010.

ANNEXURE D :- TRUE COPY OF THE PETITION DATED 20.9.2010 FILED BY THE PETITIONER UNDER THE RIGHT INFORMATION ACT BEFORE THE 1ST RESPONDENT.

ANNEXURE E :- TRUE COPY OF THE LETTER DATED 29.9.2010 ISSUED BY THE 1ST RESPONDENT IN REPLY TO ANNEXURE D APPLICATION.

RESPONDENT'S EXHIBITS :- NIL.

//TRUE COPY//

P.A. TO JUDGE

'CR'

ASHOK BHUSHAN, C.J &
A.M. SHAFFIQUE, J.

W.A. No.1889 of 2010

Dated this the 16th day of July 2015

J U D G M E N T

Ashok Bhushan, CJ

Heard Sri.K.Ramakumar, the learned Senior Counsel appearing for the appellant, the learned counsel appearing for the 2nd respondent as well as Sri.P.I.Davis, the learned Senior Government Pleader.

2. This writ appeal has been filed against the common judgment dated 21.7.2010 in W.P.(C) Nos.5933 & 21968 of 2010. Both the writ petitions were dismissed by the learned Single Judge with a total cost of ₹5,000/-. Brief facts giving rise to the writ petition are :-

The Welfare Fund Inspector, Toddy Workers Welfare Fund Board had issued an order dated 30.1.2001 finally determining the liability of the workers in Toddy Shop Nos.191 and 192 in Erattupetta Range and the liability of payment was fixed on Sasikumar, the licensee and the petitioner. The petitioner, against the said order, filed an appeal dated 5.6.2001 before the Government under Sec.8(5) of the Kerala Toddy

Worker's Welfare Fund Act, 1969. O.P.No.22201 of 2001 was also filed by the petitioner in the High Court, which was disposed of on 30.7.2001 directing the Government to consider the appeal dated 5.6.2001 and pass appropriate orders, after affording an opportunity of being heard to the petitioner as well as Sasikumar, at any rate, within three months from the date of receipt of a copy of the said judgment. Until then, Exts.P4 and P5 were kept in abeyance. Exts.P4 and P5 were the recovery notices issued for recovering the amount as determined by the Welfare Fund Inspector. The appeal was decided by the State Government on 23.10.2001. The said order has been brought on record in the counter affidavit filed by the 2nd respondent as Ext.R3(a) in W.P.(C) No.5933 of 2010. The said writ petition was withdrawn by memo filed by the petitioner with copy of the order of the appeal dated 23.10.2001.

3. Thereafter, W.P.(C) No.21968 of 2010 was filed by the petitioner challenging Ext.P2, the Assessment Order dated 30.1.2001, Ext.P4, the Revenue Recovery Notice dated 12.7.2001, Ext.P5, the notice dated 16.7.2001, Ext.P9, the letter dated 30.1.2010 issued by the 4th respondent as well as Ext.P10, the order dated 23.10.2001. A mandamus was also sought for

directing respondents 1 and 2 to recover the dues towards the toddy workers welfare fund regarding the toddy shops bearing No.191 and 192 from the 3rd respondent. The writ petition was heard by the learned Single Judge and held that the appeal filed by the petitioner against the order of the Welfare Fund Inspector dated 30.1.2001 had already been rejected on 23.10.2001 by the appellate authority, ie; the State Government, in which, the appellant/petitioner had appeared through counsel and the statement filed to the effect that he did not receive any notice in the appeal is totally false. The learned Single Judge also noticed the submission of the petitioner that the case is covered by the judgment of the Apex Court in **Joseph Joseph** v. **State of Kerala** [2002 (1) KLT 827 (SC)]. The learned Single Judge, however, did not enter into any finding regarding the said judgment and took the view that in view of the contention that the petitioner did not receive notice of hearing has been proved to be false and on the finding that the course and conduct of the petitioner dis-entitled him from any relief, the writ petition was dismissed with a total cost of ₹5,000/-.

4. Sri.K.Ramakumar, the learned Senior Counsel appearing for the appellant contended that the appellant did not

receive any notice in the appeal nor the notice was served. It is submitted that the petitioner had made an application under the Right to Information Act on 20.9.2010, for which, reply has been sent by the State Government that since the records are destroyed, he is unable to obtain the details of the appeal. It is also stated that the petitioner appeared along with the counsel. He has brought on record the reply dated 29.9.2010 sent by the State Government informing that the application was received on 22.9.2010 and since the records pertaining to order dated 23.10.2001 were destroyed, information sought cannot be furnished. The submission of the learned counsel for the appellant is that, had the appellant been aware of the order of the appellate authority, he ought to have immediately challenged the same because he had already filed an appeal and was contesting his financial liability. It is further submitted that the issue is fully covered by the judgment of the Supreme Court in **Joseph Joseph's case (supra)** and as the issue being covered by the said judgment, the appellant was clearly entitled for the relief by the learned Single Judge.

5. It is lastly contended by the learned Senior Counsel that in the counter affidavit filed by the 2nd respondent in W.P.(C)

No.5933 of 2010, there was mention about the final determination order dated 31.1.2001. That amount was already collected except an amount of ₹1,772/- towards the interest. Since the amount had already been paid, the revenue authorities cannot recover any amount from the petitioner, which has already been received by them.

6. Learned counsel appearing for the 2nd respondent submits that the petitioner was issued notice by the Welfare Fund Inspector and after proper enquiry, the assessment order was passed. He submits that before the Inspector, witnesses were examined and the petitioner filed his objection and took time for cross examining the witnesses, for which, notice was issued on 15.1.2001, which was served on 22.1.2001 informing that enquiry was posted on 29.1.2001. The petitioner did not appear on that date before the Inspector and hence, the assessment order was finalised. It is submitted that the appellate authority passed the order after hearing the petitioner. Hence, no ground was made out to interfere with the order.

7. Sri.P.I.Davis, the learned Senior Government Pleader opposing the submission of the learned counsel for the petitioner, contends that the appellate order clearly indicates that the

petitioner appeared along with the counsel. Hence, the court has to accept the observation made in the order of the appellate authority that the petitioner was present and the submission of the appellant that no notice was served became inconsequential. The judgment of the Apex Court in **Joseph Joseph's case (supra)** does not help the appellant in the present case since, in the said case, the Apex Court has already held that unless there are materials to prove that the persons were employed by the principal employer, who were paid by him, it is the licensee of the shop who was held liable. But, in the present case, there are discussions based on material that it was the petitioner/appellant who conducted the shop and hence, his liability is fully proved as per the judgment of the Apex Court. He further submits that the Apex Court judgment in no way help the petitioner.

8. We have considered the submissions of the parties and perused the records.

9. The submission, which has been pressed by the learned counsel for the appellant is that in the appeal, no notice has been served to him and the appeal was decided ex parte. Admittedly, the appeal was filed by the appellant on 5.6.2001 against the assessment made by the Welfare Fund Inspector dated 30.1.2001.

After filing of the appeal, O.P.No.22201 of 2001 was filed by the petitioner before this Court, which petition was disposed of by judgment dated 30.7.2001, the operative portion of the said judgment is to the following effect :-

> "The 1st respondent shall consider Ext.P3 appeal and pass appropriate orders after affording an opportunity of being heard to the petitioner as well as the 3rd respondent at any rate within three months from the date of receipt of a copy of this judgment. Until then, Ext.P4 and Ext.P5 shall be kept in abeyance."

10. After the above judgment of this Court, although on the same day the petitioner, by Ext.P7 letter dated 30.7.2001 informed the Deputy Tahsildar that this Court in O.P.No.22201 of 2001 has stayed recovery, but in the writ petition, there are no details given by the appellant that steps were taken by him with regard to disposal of the appeal, whereas, this Court has directed the appeal to be decided within three months. Since the judgment dated 30.7.2001 was obtained by the petitioner himself, it was incumbent on him to submit a copy of the judgment. No details or any pleading regarding the above proceedings were given by the petitioner. The appellate authority in its order dated 23.10.2001 has made the following observation :-

> "Notice was issued to the Appellant, the 1st respondent in the Appeal, ie. the Welfare Fund Inspector and the 2nd respondent Shri.Sasikumar for hearing by the Appellate Authority on 23/10/2001. The Appellant with his counsel, and the Welfare Fund Inspector were present. Shri.Sasikumar was not present. The Counsel to the Appellant reiterated the contentions. The Welfare Fund Inspector also discussed the matter in detail. The report and records of the Welfare Fund Inspector were also examined."

The authority thus, has recorded the clear finding that notice was issued to the appellant, first respondent in the appeal and Sasikumar on fixing the hearing date on 23.10.2001. It was observed by the appellate authority that the appellant with his counsel and the Welfare Fund Inspector were present and Sasikumar was not present. It was also noted that the counsel for the appellant reiterated the contentions and the Welfare Fund Inspector also discussed the matter in detail. We have no reason to disbelieve the above observations by the appellate authority.

11. Learned counsel for the appellant sought to refute the said observation on the basis of the reply obtained from the Government under the Right to Information Act dated 29.9.2010 that since the records have been destroyed, the information sought cannot be furnished. But the fact that the appellant could

not obtain any information under the Right to Information Act with regard to the order passed on 23.10.2001 cannot be a basis to disbelieve the specific finding recorded in the appellate order that the appellant was present along with the counsel. It is well settled that when the court or authority records any finding with regard to the parties and/or any factual observation, the higher court is not to disbelieve the said and the remedy open for the aggrieved party is to apply for review before the said court or authority, challenging the statement made in the judgment. In this context, reference is made to the judgment of the Apex Court in **Hari Vishnu Kamath** v. **Ahmed Ishaque** [AIR 1955 SC 233].

12. We, thus, are of the view that the submission of the appellant that the appeal was decided without notice to him cannot be accepted. Submission has also been pressed by the learned counsel for the appellant that since the merits of the case being covered by the Apex Court in **Joseph Joseph's case (supra),** initial liability could not be imposed on the appellant merely on the order passed by the Welfare Fund Inspector and appellate authority. He submits that the learned Single Judge although in his judgment did not advert to the merits, chose to dismiss the writ petition with costs.

13. The judgment of the Apex Court in **Joseph Joseph's case (supra)** was a case, where, the Apex Court had occasion to consider the issue of liability under the Kerala Toddy Worker's Welfare Fund Act, 1969. The assessment was made against the appellant treating to be the employer of the workers in the Welfare Fund Board. The writ petition was filed, which was dismissed and the matter was taken before the Apex Court. In the counter affidavit, it was mentioned that one other person, by name Joy Kurian was the licensee of the toddy shop. It was further mentioned that the licensee had run the business. It is useful to quote the averments made in the counter affidavit, which are to the following effect :-

> "In the counter affidavit filed on behalf of the respondent No.2 it is conceded that the aforesaid Joy Kourian was the licensee of the toddy shop. In the inquiry conducted by the Inspector under the Act, the workers and the Trade Union Officers had deposed that the shop was bid in auction by the respondent No.4 and that the actual business of the shop was being conducted and wages paid to the workers by V.T.Chacko, fifth respondent, C.T.Michael, second petitioner, Sunny Kurien, fourth petitioner, Joseph and Joseph, first petitioner and Joseph Sebastian, third petitioner."

The Apex Court, considering the provisions of Sec.2(c) as well as the pleadings, held that the principal employer had come with a case that since he employed the workers, the intermediary persons could not be held to be the employer of the workers and no liability can be imposed on the appellants. In this context, the following observation was made by the Apex Court in the said judgment :-

> "A perusal of S.2(c) shows that it refers to the person who employs any person, whether directly or through any other person or whether on behalf of himself or any other person, as employer. The employment by any person can be for himself or for any other person. Merely because the person is associated with the conduct of the business of an establishment or shop, it cannot be said that he had employed the workers on his own behalf. There may be cases where it can be shown that besides the owner any other person conducting the business of the said shop may employ workers on his own behalf and not on behalf of original owner. But in the absence of proof to the contrary, particularly in view of the statement of principal employer that he had employed the workers, the intermediary persons could not be held to be the employer of the workers who were employed for the conduct of the business in the shop covered under the Act. Law presupposes the conduct of a legal business and cannot be interpreted in a manner which frustrates the object of the Act and results in not only miscarriage of justice but violation of the statutory provision of law. If, under the Rules, the licensee was not authorised to lease out or sub-let the whole or any portion of the

> privilege or licence granted to him for conducting the Abkari business, holding the appellants as employer with respect to the licensee's shop would amount to facilitate the violation of the Kerala Abkari Shops Act, and the Rules framed thereunder. Such an interpretation is not called for as it is against the public policy. In any particular case, where the authorities find that besides the licensee any other person conducting the business in a licenced premises under the Abkari Act and the Rules framed thereunder is also liable to contribute to the fund under the Act, they are under the legal duty to assert and positively hold that such persons were the employers vis-a-vis the workers and that they were conducting the business either with the legal authority of the licensee or the licensing authority. The High Court has taken a general view of the matter without reference to the purpose and object of the Act and the law under which the licence to run the shop was granted. The impugned judgment is thus not sustainable."

In the above circumstances, the appeal was allowed by the Apex Court.

14. From the facts as noted above, the principal employer, who was the licensee had claimed that he has employed the workers. The Apex Court also clearly held in the above paragraph that in any particular case, where the authorities find that besides the licensee any other person conducting the business in a licenced premises under the Abkari Act and the Rules framed

thereunder is also liable to contribute to the fund under the Act, they are under the legal duty to assert and positively hold that such persons were the employers vis-a-vis the workers and that they were conducting the business either with the legal authority of the licensee or the licensing authority. Thus, the Apex Court clearly envisaged that the person actually conducting business can also be held to be liable if there are materials to that effect. In the present case, it has come on record that the actual licensee Sasikumar has taken a contention that he is not conducting any shop and the shop is being conducted by the petitioner. The workers of the shop made a statement before the Inspector reiterating that it was the petitioner, who was conducting the shop and given wages. Thus, in the present case, the liability has rightly been fixed on the petitioner and the judgment of the Apex Court in **Joseph Joseph's case (supra)** in no manner supported the petitioner's contention and the submission of the learned counsel for the appellant that the case is covered by the Apex Court judgment cited supra cannot be accepted.

15. Now, coming to the last submission that in paragraph 9 of the counter affidavit filed by the 2nd respondent it is stated that certain amount towards interest outstanding for the year 1999-

2000 has been paid and an amount of ₹1,772/- is due. We are of the view that this aspect has to be looked into by the authority and in any event the amount has been deposited, there is no occasion to insist for depositing the said amount again. The petitioner shall be at liberty to submit objection before the 4th respondent, who, before proceeding further with the revenue recovery proceedings, will consider the said objection.

16. Learned counsel for the appellant submits that the cost imposed was not required since the appellant has been contesting the matter through out and filed appeal, which did not give him any benefit. We are of the view that the cost imposed by the learned Single Judge can be deleted. Accordingly, the direction to deposit cost of ₹5,000/- is deleted.

Subject to above, this writ appeal is dismissed.

Sd/-
ASHOK BHUSHAN
CHIEF JUSTICE

Sd/-
A.M. SHAFFIQUE
JUDGE

Jvt