IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.R.RAMACHANDRA MENON
&
THE HONOURABLE MR. JUSTICE BABU MATHEW P.JOSEPH

MONDAY, THE 29TH DAY OF JUNE 2015/8TH ASHADHA, 1937

WP(C).No. 2464 of 2010 (G)

PETITIONER:

SRI.V.P.BABY, AGED 50, S/O.LATE PAILY,
VEMBILLY HOUSE, THAMARACHAL, KIZHAKKAMBALAM P.O.
PIN-683 562, KUNNATHUNADU TALUK, ERNAKULAM DISTRICT.

BY ADVS.SRI.K.C.ELDHO
SRI.JIJO THOMAS

RESPONDENTS:
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1. STATE OF KERALA, REPRESENTED BY
SECRETARY TO THE GOVERNMENT
DEPARTMENT OF LABOUR & REHABILITATION
GOVERNMENT SECRETARIAT, TRIVANDRUM.

2. THE DISTRICT EXECUTIVE OFFICER,
KERALA MOTOR WORKERS WELFARE FUND BOARD, ERNAKULAM.

R1 BY SENIOR GOVERNMENT PLEADER SRI. E.M. ABDUL KHADER
R2 BY ADV. SRI.P.RAMAKRISHNAN, SC,KMTWF BOARD

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 29-06-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

W.P(C) NO. 2464 OF 2010

APPENDIX

PETITIONER'S EXHIBITS :

EXT. P1 : A TRUE COPY OF THE PARTNERSHIP DEED CONSTITUTED BY THE PETITIONR AND OTHERS DATED 25.04.1998

EXT. P2 : A TRUE COPY OF THE COMMUNICATION DATED 27.03.2002 ISSUED BY THE RTO, ERNAKULAM.

EXT. P3 : A TRUE COPY OF THE WRITTEN STATEMENT DATED 31.03.02 SUBMITTED BY THE PARTNERS IN EXHIBIT P1

EXT. P4 : A TRUE COPY OF THE ASSESSMENT ORDER OF THE 2ND RESPONDENT DATED 17.12.2004

EXT. P5 : A TRUE COPY OF THE APPEAL PETITION DATED 15.01.2005 SUBMITTED BY THE PETITIONER AGAINST EXHHIBIT P4

EXT. P6 : A TRUE COPY OF THE STAY ORDER DATED 28.01.2005 IN EXHIBIT P5 ISSUED BY THE 1ST RESPONDENT.

EXT. P7 : A TRUE COPY OF THER RECEIPT DATED 28.03.2005 EVIDENCING THE PAYMENT OF RS. 10,743/-

EXT. P8 : A TRUE COPY OF THE ARGUMENT NOTE DATED 01.12.2009 SUBMITTED BY THE PETITIONER IN EXHIBIT P5 APPEAL.

EXT. P9 : A TRUE COPY OF THE ORDER DATED 12.01.2010 OF THE 1ST RESPONDENT REJECTING THE APPEAL OF THE PETITIONER.

/TRUE COPY/

P.A. TO JUDGE

P.R. RAMACHANDRA MENON
&
BABU MATHEW P JOSEPH, JJ.
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W.P (C) No. 2464 of 2010
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Dated, this the 29h day of June, 2015

JUDGMENT

Ramachandra Menon, J.

The assessment finalized by the assessing authority under the Kerala Motor Transport Workers Welfare Fund Act, by passing Ext. P4 order dated 17.12.2004, mulcting the liability upon the shoulders of the petitioner who happens to be the registered owner of the vehicle bearing No. **KL6 3799,** which has been confirmed in appeal, as per Ext. P9 order passed by the first respondent, is under challenge in this writ petition.

2. The Writ Petition has been filed by the petitioner virtually against the State of Kerala and the District Executive Officer of Kerala Motor Workers Welfare Fund Board, Ernakulam (though the description of the first respondent has been wrongly shown as State Bank of Kerala on the Docket, Index as well as in the Synopsis). The matter is placed before this Court pursuant to the 'reference order' dated 06.02.2015 passed by a learned single Judge of this Court,

doubting correctness of the decision of another learned Judge in **Rajendran Nair Vs. State of Kerala [2002 (3) KLT 76].**

3. Heard the learned counsel for the petitioner as well as the learned standing counsel for the second respondent, besides the learned Government Pleader appearing on behalf of the first respondent/State.

4. Before proceeding with the issue which is sought to be referred, it is necessary to have a look into the factual details so as to ascertain the sequence of events. The petitioner joining hands with three other persons (who are stated as his cousins) started a partnership firm in the name and style as 'M/s Priya Travels' for running and operating stage carriage bearing No. KL6 3799 and the terms of agreement were put into writing as per Ext. P1 partnership deed dated 25.04.1998. It is stated that the petitioner and the said partners purchased the aforesaid bus pursuant to Ext. P1 and started operating the same on the basis of the temporary permit obtained, in the route Aluva - Muvattupuzha. Because of some unforeseen adverse circumstances the bus was subsequently sold in the year 2002, as borne by Ext. P2 communication dated 27.03.2002 issued by the RTO, Ernakulam. After sale of the

vehicle as above, the petitioner was proceeded against for assessment in respect of the years 1998 - 2002 by the second respondent; finally leading to Ext. P4 order dated 17.05.2003, fixing liability upon the petitioner. This was sought to be challenged by filing an appeal under Section 8 (5) of the Act before the Government and after considering the matter, the first respondent/Government passed an order dated 07.08.2004 whereby the impugned order was set aside and the case was remanded, directing the assessing authority to reconsider the matter after giving an opportunity of hearing to the petitioner.

5. Based on the said order, notice of hearing was issued, when the petitioner produced the copy of Ext. P1 partnership deed; communication issued by the RTO as to the sale of the vehicle vide Ext. P2 and also Ext. P3 statement made by other partners as to their connection with the stage carriage and the nature of operation. However, without any regard to the actual facts and figures, the assessing authority passed Ext. P4 order dated 17.12.2014. Being aggrieved of the said order, the petitioner moved the first respondent by filing Ext. P5 appeal. After considering the same, the first respondent initially passed Ext. P6

order granting interim stay, subject to satisfaction of Rs.10,743/- (presumably 20% of the disputed amount), which is stated as satisfied, as borne by Ext. P7. Appeal was finally heard by the first respondent, who passed Ext. P9 order declining interference on merit and dismissing appeal, which made the petitioner to approach this Court by filing the present writ petition.

6. It appears that the main contention raised before the learned single Judge was that, in view of the partnership, there could not have been any assessment, as there was no employer-employee relationship. The defect, if any, as to non registration of the partnership deed cannot place any hurdle in getting the merit considered in this regard. In paragraph 4 of the judgment reported in **2002 (3) KLT 76** (cited supra), there is an observation to the effect that, merely because the partnership deed has been written on a stamp paper, not sufficiently worth in terms of the Stamp Act, it cannot be taken that the incumbent is not a partner. It is also mentioned that, for that reason, he cannot be termed as a 'workman' and it was accordingly, that the impugned proceedings were set aside holding that no liability could be fastened upon the petitioner in the said case. Correctness of the

said finding was doubted by a learned single Judge, when the present matter came up for consideration on 16.12.2012, thus leading to the reference.

7. We heard both the sides in detail, particularly with regard to the point referred and required to be clarified and also as to the merit involved.

8. During the course of hearing, the learned counsel for the petitioner concedes that Ext. P1 partnership deed was not registered before the Registering forum. But non registration of the firm before the concerned Registrar cannot mean to say that partnership was not in existence. It is asserted that the petitioner is always at liberty to establish the factual aspects as to the existence of the partnership and this could not have been ignored by the original authority as well as the appellate authority, where they have gone wrong. Reliance is sought to be placed on the decision rendered by the Apex Court in **V. Subramaniam Vs. Rajesh Raghuvandra Rao [AIR 2009 SC 1858].**

9. This Court finds that there is considerable force in the submission made by the learned counsel for the petitioner with regard to the effect of non registration. The consequences of non-

registration are clearly mentioned by the Apex Court in the decision cited supra and that non-registration of the firm in terms of the Partnership Act cannot lead to an inference that there was no partnership at all. This is more so, in view of the fact partnership deed is not a document which is liable to be compulsorily registered as contemplated under Section 17 of the Registration Act. The question is whether the petitioner has discharged the duty in establishing the facts and figures, as to the existence of the partnership before the concerned authority, so as to arrive at an inference that the stage carriage was being operated by the partners mentioned in Ext. P1, in their capacity as partners, sharing the profit and not in the capacity as employer and employee.

10. The term 'employee' as defined under Section 2 (d) of the Act reads as follows :

> "(d). "employee" means a person who is employed for wages in a motor transport undertaking directly or through an agency to work in a professional capacity on a transport vehicle or to attend the duties in connection with the arrival, departure, loading or unloading of such transport vehicle and includes a driver, conductor, cleaner, station staff, line checking staff, booking clerk, cash clerk, depot clerk, time keeper, watchman or

attendant."

11. There is a contention for the petitioner that the most crucial factor is not as to who was the registered owner of the vehicle, but the person who was having control over the vehicle. This according to the learned counsel for the petitioner is upon the firm; where the petitioner is the Managing Partner. The factual position in this regard was sought to be asserted by the other partners as well; who have given Ext. P3 statement before the assessing authority to the effect that the establishment was being run as a partnership firm and as such there could not have been any employer-employee relationship and in turn, assessment under any circumstances. The learned standing counsel appearing for the 2nd respondent points out that Ext. P1 partnership deed itself shows that establishment was being run by deploying partners 2 and 3 by name **V.A. Antony** and **George Joseph**, as workers of the bus, on the strength of **driver's badge** and the **conductor's badge** possessed by them. **Clause 19** of the partnership deed specifically refers to the nature of the engagement also pointing out that the partners will stand engaged as workers in the capacity as driver and conductor for wages and that such persons will be

entitled for wages in accordance with the Payment of Fare Wages Act. The aforesaid clause is extracted below for convenience of reference. :

> "19. The 2nd partner who is holding a driving licence with licence No. E 88/78 and Badge No. EA 343/81 will act as a driver of the stage carriage and the 3rd partner who is having a conductor licence with licence No. EP 112/92 will act as a conductor of the stage carriage and the 1st and 4th partners will also work in the stage carriage operation as employees. The partners who are working in the stage carriage operation shall be entitled to wages in accordance with the provisions under the Payment of Fair Wages Act 1972."

From the above, it is evident that the version of the petitioner that it was a partnership firm of four persons simply sharing profit among them is not liable to be accepted.

12. Some other incriminating circumstances are also seen; which stand very much against the version put forward by the petitioner as it appears from Clauses 11, 13, 14, 17 and 18 of the partnership deed, which are also extracted below :

> "11.. The Managing Partner being the registered owner of the stage carriage bearing Reg. No. KL 6/3799 shall be

entitled to do such act or deed for the purpose of carrying the business and such acts and deeds done in the course of business of Firm shall be binding all other partners as if they are parties to such act or deed.

12. *******

13. Account of the Firm may be opened in the name of the Firm in any bank or banks as the partners may agree upon and such accounts shall be operated by the Managing Partner and Second Partner jointly.

14. The Managing Partner shall maintain true and proper accounts of transaction, income expenses and assets and liabilities effecting the business of the Firm and such account shall be opened for inspection by all partners either in person or by authorised representative at any time during the office hours.

15. ********

16. ********

17. The Managing Partner shall be represented in Civil and Criminal Proceedings, and before any statutory Authorities under and law for time being in force, for and on behalf of the firm.

18. The Managing Partner being the registered owner of the stage carriage shall have right to alienate the stage carriage for the best interest of the firm, after giving one month written notice to the other partners and the

> other partners shall not have any manner of right to object such alienation. "

It is very much relevant to note that the entire business was being managed by the petitioner, as the Managing Partner of the firm, who himself was the registered owner of the vehicle as well. Absolute power was vested with the petitioner, who even was permitted to have the vehicle sold and that no objection whatsoever could have been raised by other partners with regard to the power of alienation as stated in Clause 18 of the Partnership Deed. This being the position, this Court does not find any difficulty at all in holding that the petitioner is a person who was having absolute control over the vehicle and as such, he is liable to be proceeded against in terms of the relevant provisions of the Statute.

13. The next question to be considered is whether the petitioner has discharged the duty in establishing the alleged fact that the business was being run by way of partnership, sharing the profit. Clause 13 of the partnership deed clearly stipulates that the firm had to start an account in any bank in the name of the firm and the accounts, particularly with regard to the income and

expenditure and such other aspects had to be clearly shown [as stated in Clauses 13 and 14]. But for the production of Ext. P1 document, there is no case for the petitioner that any other document such as passbook, accounts or such other materials were brought to the notice of the assessing authority i.e. second respondent or even before the first respondent/appellate authority. No such document has been produced before this Court as well. This being the position, despite the opportunity given to establish the factual aspects, the burden cast upon the petitioner has not been satisfactorily discharged. As such, there is no material to support the case projected by the petitioner to infer that the operation of the stage carriage was in the capacity as partnership, sharing the profit and not as employer and employee.

14. With regard to the reference made by the learned Single Judge as per order dated 16.02.2014, paragraph 4 of the verdict passed by another learned single Judge as reported in **2002 (3) KLT 76** (cited supra) is relevant which is extracted below :

> "As is seen from Ext. P1, he is a partner. Merely because the partnership deed has been entered into in a stamp paper, not sufficiently worth in terms of the Stamp Act, it cannot be taken that he incumbent

> is not a partner. For that reason, he cannot be termed as a workman. Therefore, Exts. P6 and P7 are quashed. The preparedness shown in Ext. R5(b) will not in any way fasten any liability on the petitioners."

15. This Court finds that the observation made by the learned single Judge in the decision cited supra does not lay down any question of law, so as to have the effect of a binding judicial precedent to be followed by the department or such other authorities with regard to fixation of liability. It only says, merely for the reason that the partnership deed has been executed on a stamp paper of requisite value as per the Registration Act, it cannot be said that the incumbent is not a partner. It is also stated, for the very same reason, that a person cannot be automatically termed as a worker. This is only a general declaration and various other aspects have to be considered to ascertain actual facts and figures, which may vary from case to case. Said declaration is almost similar to the extent that, merely for the reason that the partnership deed is not registered under the relevant provisions of Partnership Act, it cannot be said that there is no partnership. It is always open for the parties concerned, who are stated as partners of the establishment, to establish the existence of the partnership

with reference to the relevant documents, including the registration, passbook, accounts and such other details, which has not been satisfied in the instant case. Interference made by the learned single Judge in **2002 (3) KLT 76** (cited supra) setting aside the impugned orders cannot have a bearing with regard to declaration of law, so as to be termed as a governing precedent, as the same stands confined only to the particular case dealt with by the learned single Judge in the decision reported in **2002 (3) KLT 76** (cited supra).

16. Yet another important aspect to be noted is, the alarmingly increase in number of instances seeking to avoid liability under the Act referring to existence of partnership attracted the attention of the Government. It was accordingly, that the law was amended as per the Amendment Act 23 of 2005, whereby Section 2 (ja) was introduced. The said provision reads as follows :

> "(ja) "self-employed person" means a person other than an employee who is engaged in the profession of a motor transport undertaking by actually operating the vehicle and depending mainly on such a motor transport undertaking for his livelihood."

By virtue of the amended provision on law, it is now clear that the liability has to be satisfied irrespective of the fact that the person concerned is a partner or not. In the instant case, the assessment is in respect of the year 1998 - 2002. Ext. P1 partnership deed itself was executed only after commencement of the organization on 24.04.1998. This Court finds that there is absolutely no reason to interfere with the orders passed by the assessing authority in appeal. Interference is declined and the writ petition is dismissed.

17. The learned counsel for the petitioner submits that, apart from satisfaction of the condition imposed by the appellate authority vide Ext. P6, the petitioner has satisfied a further sum of Rs.10,000/- towards the disputed liability, pursuant to the interim order dated 28.01.2010. In the said circumstances, considering the persuasive submissions made by learned counsel, we permit the petitioner to clear the balance amount by way of 'three' equal monthly installments; the first of which shall be effected on or before the 30th of July 2015, followed by similar installments to be effected on or before the 30th of the succeeding months. Subject to this, recovery proceedings, if any, preferred against the petitioner shall be kept in abeyance. It is made clear that, if any default is there with regard to the satisfaction of liability, it will be

open for the concerned respondent to proceed with further steps for realization of the entire amount in lump from the stage where it stands now.

sd/-

P. R. RAMACHANDRA MENON,
JUDGE.

sd/-

BABU MATHEW P. JOSEPH,
JUDGE.

kmd