

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

THURSDAY, THE 20TH DAY OF AUGUST 2015/29TH SRAVANA, 1937

WA.No. 1843 of 2015 () IN WP(C).21194/2015

(AGAINST THE ORDER/JUDGMENT IN WP(C) 21194/2015 of HIGH COURT OF KERALA DATED 16-07-2015)

APPELLANT/1ST RESPONDENT IN WRIT PETITION:

THE DIRECTOR, LISIE HOSPITAL
KOCHI - 682 018.

BY ADVS.SRI.M.PATHROSE MATTHAI (SR.)
SRI.A.V.XAVIER

RESPONDENT(S)/PETITIONER & RESPPONDENTS 2 AND 3: WRIT PETITIONER:

1. ANSON FERNANDEZ
GENERAL WORKER UNDER SUSPENSION RESIDING AT MADAVANA HOUSE
THRIKKAKAARA P.O., ERNAKULAM.

2. JIMMY GEORGE PLACHERY
ADVOCATE, ENQUIRY OFFICER, PACHALAM P.O.
KOCHI - 682 012.

3. THE DEPUTY LABOUR COMMISSIONER
CIVIL STATION, KAKKANAD - 682 030.

BY SR. GOVERNMENT PLEADER SHRI M. MOHAMMED SHAFI.
BY SMT.SHAMEENA SALAHUDHEEN

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 20-08-2015,
ALONG WITH WP(C)Nos. 18259/2015 AND 21194/2015 & W.A.No.1856 OF 2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

(CR)

**P.R. RAMACHANDRA MENON
&
BABU MATHEW P. JOSEPH, JJ.**

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**W.A.Nos.1843 & 1856 OF 2015
&
W.P.(C)Nos.18259 & 21194 OF 2015**
.....

Dated this the 20th day of August, 2015

J U D G M E N T

P.R. Ramachandra Menon, J.

These writ appeals arise from the interim orders dated 16.07.2015 and 10.08.2015 passed by the learned Single Judge in the concerned writ petitions, whereby interim stay has been granted against the disciplinary proceedings taken and is being pursued by way of domestic enquiry being conducted by the concerned enquiry officer, who happens to be an advocate. Maintainability of the writ petitions is under challenge in the writ appeals filed by the Management establishment against the the interim orders. It was accordingly, that the writ petitions have been called for, to be posted along with these appeals, to consider the nature of challenge involved, so as to be dealt with

accordingly.

2. Heard Mr. M. Pathrose Matthai, the learned Sr. Counsel appearing for the appellants, Mr. A.K. Srinivasan, the learned Counsel, who entered appearance on behalf of the enquiry officer, Mr. V.N. Sankerjee and Smt. Shameena Salahudheen, the learned Counsel appearing for the writ petitioners and also the learned Government Pleader.

3. The factual position revealed from both the cases is almost identical. It is seen that the Management hospital came across some delinquency on the part of concerned workers and accordingly, disciplinary proceedings were ordered to be initiated. In the course of further proceedings, since the explanation offered from the part of the employees was found as not satisfactory, an enquiry officer was appointed , who issued notice to the parties. The enquiry is going on.

4. In the course of the enquiry proceedings, the workmen concerned filed an application before the enquiry officer seeking for permission to be represented through the Vice

President of a particular Union in which the workers are stated as members. The request was turned down as per Ext. P8 (in W.P.(C)21194 of 2015 and Ext.P11 in W.P.(C)No.18259 of 2015) issued by the enquiry officer, stating that the request was not liable to be acceded to. The stand of the enquiry officer as revealed from the proceedings is that the workmen could be permitted to be represented through any co-worker of his choice and that the objection was only with regard to the engagement of the Vice President of the Union, who was not a member or an employee of the Management establishment in any manner, being a total stranger in all respects. The course pursued by the enquiry officer is sought to be challenged by filing the concerned writ petitions.

5. The learned Counsel for the writ petitioners submits that the challenge raised from the part of the appellants as to the maintainability of the writ petitions is not correct or sustainable; that the hospital is discharging a public function and hence there is a corresponding public duty, by virtue of which the writ

petitions are maintainable. It is further stated that the cause of action pursued by the enquiry officer without permitting the workers to be represented by the office bearers of the particular Union is totally against the relevant provisions of the certified Industrial Employment (Standing Orders) Act. The learned Counsel places reliance on Clause 17 (4)(ba) of the Schedule I of Model Standing Orders of the Kerala Industrial Employment (Standing Orders) Rules 1958, which stipulates that delinquent employee is entitled to be represented either by himself or could be sought to be represented by any office bearer of the Union in which he is a member. It was accordingly, that Ext.P6 application was submitted by the petitioner in W.P.(C)No.18259 of 2015, which was turned down by the enquiry officer as per Ext.P11. The writ petitioner contends that no certified Standing Orders are in existence in so far as the Management Establishment is concerned and as such, the Model Standing Orders will govern the field. It is in the said circumstance, that reliance is sought to be placed on the provisions of the Model

Standing Orders and on the justifiability of the submission made from the part of the worker to be represented by the office bearers of the concerned Union. The learned Counsel also places reliance on the decision rendered by a Larger Bench of this Court in **2015(2) KLJ 410** (**Association of Milma Officers' Ksheera Bhavan vs. State of Kerala**) and also in **2015(1)KLT SN 141 (Case No.171)**(**Kerala Roller Skating Association v. Ernakulam District Roller Skating Association**) and **(2015) 3 SCC 251** (**Board of Control for Cricket in India vs. Cricket Associatiion of Bihar and others**) in support of their contention that the writ petition is maintainable.

6. The learned Sr. Counsel appearing for the Management submits that the idea and understanding of the writ petitioners is thoroughly wrong and misconceived and totally alien to the scheme of the statute, particularly by virtue of effective alternate remedy as provided under the relevant provisions of the Industrial Disputes Act and the Standing Orders Act. The reliefs sought for in the writ petitions are also referred to, which

virtually seek to quash the proceedings issued by the enquiry officer by issuance of a writ of certiorari and to direct the concerned enquiry officer to act in the manner as desired by the employee, with reference to the provisions of the Standing Orders Act. The learned Sr. Counsel points out that the circumstances, under which 'writ of certiorari' could be issued are discernible from the celebrated decision in **T.C. Basappa vs. T. Nagappa (AIR 1954 SC 440)**. Similarly, issuance of a 'writ of mandamus' would be warranted only if there is failure on the part of the authorities concerned in discharging the public duty, which is also stated as conspicuously absent in the instant case.

7. For convenience of reference and to appreciate the rival contentions, the prayers raised in the concerned writ petitions require to be looked into. The prayers are more or less similar in both the cases. The prayers sought for in W.P.(C) No.18259 of 2015 are extracted below:

“a) issue a writ of certiorari or any other writ, order or direction quashing Exhibit P11 order after calling for the records leading thereto;

b) issue a writ of mandamus or any other appropriate writ, order or direction commanding the 1st respondent to permit the petitioner to engage the Vice President of her Trade Union, viz., Lisie Hospital Employees' Union Reg. No.07-37-94, to represent her in the domestic enquiry being held by the 1st respondent; and

c) pass such other orders as this Honourable Court deems fit and proper in the facts and circumstances of the case.”

8. Writ of mandamus is sought for against the second respondent, who is a lawyer, of course functioning in his capacity as enquiry officer. The question is whether a writ of mandamus will lie against the said respondent, so as to enable the writ petitioners to have the reliefs sought for, particularly for being represented by the Vice President of the concerned Union in the enquiry proceedings.

9. Despite hearing at length, no factual or legal position is brought to the notice of this Court from the part of the writ petitioners, to the effect that the enquiry officer appointed by the Management, which is a private establishment, is

discharging any public duty with regard to the conduct of domestic enquiry; which is being done in respect of some misconduct/delinquency on the part of the concerned worker. The worker concerned has been engaged/appointed by the Management establishment to discharge the duties cast upon him, by virtue of the terms of contract, which is nothing but a private affair governed by the principles of contract.

10. In the course of such service, if any action or inaction on the part of the concerned worker gives rise to a cause of action involving misconduct, it is liable to be enquired into and if the same is proved, appropriate punishment has to be imposed so as to maintain discipline. In the course of such process, no public duty of any nature is involved, in the fact finding exercise being done by the enquiry officer in connection with the delinquency/misconduct committed by the employee. This being the position, no writ of mandamus can be issued to the second respondent, even though the wording under Article 226 takes in the words 'any person' as well, while considering

the scope of the said provision.

11. The circumstances under which a writ of 'certiorari' could be issued have already been made clear by the Supreme Court in AIR 1954 SC 440 , as mentioned herein before . Whether the course pursued by the enquiry officer is correct or not is a different matter . Going by the nature of the grievance projected by the writ petitioners, the act pursued by the concerned enquiry officer is not in conformity with the mandate of the Model Standing Orders, which is to be followed in the absence of certified Standing Orders in the Management establishment. With reference to the mandate of Section 13A of the Industrial Employment (Standing Orders) Act, 1946, it is contended by the Management that, if there is any dispute with regard to the application or interpretation of the provisions of the said Act, it is always open for the employees to move the concerned Industrial Court (Labour Court or Industrial Tribunal, as the case may be) and this does never come within the purview of Article 226 of the Constitution. We find considerable force in the said

submission.

12. Even otherwise, the matter can be approached, considered and appreciated in a different angle. The delinquency on the part of the concerned employee is being enquired into by way of domestic enquiry ordered by the Management. If there is any procedural lapse or violation of principles of natural justice in conducting enquiry or if any binding provisions of any statute, which is relevant, is given a go-bye, by the enquiry officer or by the Management, it is always open for the worker/Union to raise a dispute and get it referred by the appropriate Government to the Industrial Court for adjudication. The nature of relief available is very much discernible from the provisions of the I.D.Act which is a self contained code. Even if the enquiry is set aside for some or other reason including violation of principles of natural justice, if any opportunity has been sought for by the Management to give a chance to establish the guilt on the part of the delinquent worker, as pleaded in the written statement at the earliest opportunity, it is liable to be acted upon and a

further opportunity has to be given to the Management by the Labour Court/Industrial Tribunal, as the case may be. Such a course is still available to the writ petitioners; as and when the time comes.

13. Yet another aspect to be noted is that, there may be some compelling circumstances under which an enquiry cannot be conducted or completed by the Management. The circumstance under which such a course could be pursued by the Management, justifying the disciplinary action taken against an employee, has been well recognised by the Apex Court as well, though as a matter of exception. This Court does not mean to say that such a circumstance is available in the present case, but this is only to mention that disciplinary action may be sustainable against delinquent employees in appropriate cases, even without enquiry. That apart, even if the Management of an institution takes any disciplinary action without conducting an enquiry, it still forms a matter, which could be challenged by the worker/Union by resorting to the remedy under the I.D.Act. It

does not give rise to any vested right to approach this Court directly, by filing a petition under Article 226 of the Constitution of India.

14. Coming to the decisions cited by the learned Counsel for the writ petitioners; the issue dealt with by the Larger Bench in **2015(2)KLJ 410** (**Association of Milma Officers' Ksheera Bhavan vs. State of Kerala**) was mainly with regard to maintainability of writ petition against co-operative societies. Reference to the Larger Bench was necessitated because of various pending/ongoing litigations as to the nature and duties being performed by a co-operative society. Earlier, way back in the year 1987, a case came to be considered by a Full Bench of this Court, wherein an observation was made to the effect that no writ will lie against a co-operative society. See, **1987 (2) KLT 903(FB)**(**Bhaskaran & others vs. Addl. Secretary & others**). In several cases, which came up subsequently, it was sought to be pointed out that the observation in the said case was liable to be treated as an '*obiter dictum*' because it was never

an issue specifically pleaded, argued or considered . In the course of time, the scope of issuance of a writ, in a proceeding under Article 226 came to be considered by the Apex Court as well in the decision in **Anadi Mukta Sadgam S.M.V.S. J.M.S Trust vs. V.R. Rudani** (AIR 1989 SC 1607). The Apex Court observed that a writ will be maintainable if there is a 'public duty' upon the concerned respondent and if there is any failure in discharging such public duty. It was also made clear by the Apex Court in several other decisions as well, that so as to invoke jurisdiction of the High Court under Article 226, it was not a prerequisite for the respondents **to be a State** within the meaning of Article 12 of the Constitution of India. The said decision was referred to by a learned judge of this Court while arriving at a finding that no writ will lie against a private hospital (same Hospital) in relation to the termination of service of a doctor in **1998(2)KLT 33 (Dr.Pitchiah vs. Lisie Hospital)**.

15. As mentioned above,the issue involved in various cases which came to be filed before this Court, as to the

maintainability of a writ petition, where a co-operative society was involved, ultimately came to be referred to a Larger Bench and the said question was answered by the Larger Bench as per the decision cited from the part of the writ petitioners before this Court. Reliance sought to be placed by the petitioners is only to '*paragraph 18*' of the particular decision, which has been extracted in *paragraph 10* of the decision rendered by the Larger Bench of this Court in **2015 (2) KLJ 410** sought to be relied on by the petitioners. The decision referred to and extracted therein is **AIR 1966 SC 81 (Dwarkanath vs. Income Tax Officer)**. The factual position and the nature of duty upon the concerned respondents/departmental authorities in the said case stand entirely on a different pedestal, which in no way come to the rescue of the petitioners in any manner. It is the said decision i.e. **AIR 1966 SC 81** that has been referred to by a Division Bench of this Court in **2015 (1) KLT SN 141 (Case No.171) (Kerala Roller Skating Association v. Ernakulam District Roller Skating Association)** which again

is sought to be relied on by the learned Counsel for the writ petitioners. There also, the finding is only to the effect that when the function entrusted to a private body is regulated by a statute and the body is obliged to perform the function, the said function is in the nature and character of 'public function', which can be made subject matter of an issue of a writ proceeding. Similarly, the public function which is being done by the BCCI, an autonomous non-Governmental private body formed under the T.N. Registration of Societies Act, 1975 and the 'public duty' cast upon them was held as enough so as to sustain a writ petition under Article 226 of the Constitution of India, as per the decision rendered by the Apex Court in **Board of Control for Cricket in India vs. Cricket Association of Bihar and others** [(2015) 3 SCC 251], which also cannot be pressed into service by the writ petitioners in view of black and white difference between the cause of action and nature of reliefs sought for .

16. For the reasons already discussed hereinbefore, as to

the course of action being done by the concerned enquiry officer in relation to the delinquency of the worker concerned, this Court finds that no public function is assigned to the enquiry officer and no public duty is being performed by him in conducting the domestic enquiry. As such, Ext.P11 order, rejecting the request made by the writ petitioners seeking for permission to be represented by the Vice President of the Union is not a matter which comes within the writ jurisdiction of this Court.

17. After hearing both the sides, this Court finds that the writ petitioners, if at all aggrieved as to the course followed by the enquiry officer in conducting the domestic enquiry with reference to violation of any principles of natural justice or any other provisions of law, they are at liberty to have the same raised by way of appropriate proceedings in the course of time, by raising an industrial dispute, if so necessitated and to be got adjudicated by the concerned Labour Court/Industrial Tribunal, in the due course. Writ Petitioners are not at all justified in

*W.A.Nos.1843 & 1856 OF 2015 &
W.P(C)Nos.18259 AND 21194 OF 2015*

17

approaching this Court directly, invoking the discretionary jurisdiction of this Court under Article 226 of the Constitution, for redressal of the so called grievance. Interference is declined. Both the writ petitions are dismissed accordingly. Both the appeals are allowed. No cost.

**P.R. RAMACHANDRA MENON,
JUDGE**

**BABU MATHEW P. JOSEPH,
JUDGE**

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