

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

THURSDAY, THE 18TH DAY OF JUNE 2015/28TH JYAISHTA, 1937

WP(C).No. 16202 of 2012 (A)

PETITIONERS : -

1. KERALA STATE COIRFED EMPLOYEES CONGRESS
(INTUC), COIRFED, ALAPPUZHA 12,
REPRESENTED BY ITS PRESEIDENT A.A. SHUKKUR,
KURUMPELIL HOUSE, SEA VIEW WARD, ALAPPUZHA.
2. O. ABDUL RAHIM, SENIOR ACCOUNTANT,
COIRFED SHOW ROOM, CHARUMMOODU,
ALAPPUZHA DISTRICT.

BY ADVS.SRI.K.KARTHIKEYA PANICKER
SMT.DAYA K. PANICKER

RESPONDENTS : -

1. THE DIRECTOR OF COIR DEVELOPMENT,
DIRECTORATE OF COIR DEVELOPMENT,
THIRUVANANTHAPURAM 695001.
2. KERALA STATE CO-OPERATIVE COIR MARKETING FEDERATION LTD
(COIRFED), ALAPPUZHA, REPRESENTED BY ITS MANAGING DIRECTOR,
COIRFED, ALAPPUZHA 688012.
3. THE MANAGING DIRECTOR,
KERALA STATE CO-OPERATIVE COIR MARKETING
FEDERATION LTD (COIRFED),
ALAPPUZHA 688012.

ADDL. R4 & R5

ADDL.R4. COIRFED EMPLOYEES ASSOCIATION (CITU),
CITU DISTRICT COMMITTEE, ALAPPUZHA,
REPRESENTED BY PRESIDENT K.V. DEVADAS
(ADDL. R4 IS IMPEADED AS PER ORDER DATED 18.06.2015 IN
I.A. No. 17467/2013)

ADDL.R5. ALLEPPEY COMMERCIAL & INDUSTRIAL STAFF ASSOCIATION
(AITUC), COIRFED UNIT, SUGATHAN MEMORIAL HALL, ALAPPUZHA.
(ADDL. R5 IS IMPEADED AS PER ORDER DATED 18.06.2015 IN
I.A. No. 7244/2014).

R2,3 BY ADV.SRI.K.S.HARIHARAPUTHRAN, SC, COIRFED
R2,R3 BY ADV.SMT.V.P.SEEMANDINI (SR.)
R2,R3 BY ADV.SRI.JOBY CYRIAC, SC, COIRFED
R1 BY ADV.SRI.GEORGE MATHEW
BY GOVERNMENT PLEADER SRI. A.J. JOSE AEDAIODI
ADDL.4&5 BY ADV.SRI.C.K.SAJEEV

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
18-06-2015, ALONG WITH WPC. 25848/2012, WPC 11448/2014, WPC
23077/2014, WPC 21981/2014 AND WPC. 23110/2013, THE COURT ON THE
SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONERS' EXHIBITS :

EXHIBIT P1 : TRUE COPY OF THE ORDER IN I.A. No. 97/2008 IN ARC No.110/08
ISSUED BY ARBITRATION COURT, THIRUVANANTHAPURAM
DATED 11.11.2008.

EXHIBIT P2 : TRUE COPY OF THE JUDGMENT DATED 29.07.2011 IN WP (c) No.
20690/2011 OF THE HIGH COURT OF KERALA.

EXHIBIT P3 : TRUE COPY OF THE AWARD DATED 22.2.2012 IN ARC No. 110/2008
ISSUED BY ARBITRATION COURT, THIRUVANANTHAPURAM.

EXHIBIT P4 : TRUE COPY OF THE JUDGMENT DATED 13.3.2012 IN WP (C) No.
10893/2011 OF THE HIGH COURT OF KERALA.

RESPONDENTS' EXHIBITS :

EXHIBIT R2(a) : TRUE COPY OF THE MINUTES OF THE MEETING HELD ON
01.06.2010.

EXHIBIT R2(b) : TRUE COPY OF THE ORDER GO (MS) No. 80/2011/1D DATED
01.03.2011.

EXHIBIT R2(c) : TRUE COPY OF THE SAID GOVERNMENT ORDER No. GO (MS)
61/2001/1D DATED 24.03.2001.

EXHIBIT R2(d) : TRUE COPY OF THE LETTER DATED 13.12.2013 No.CS2/4435/2013.

EXHIBIT R2(e) : TRUE COPY OF THE LETTER No. 24747/E2/2012/Ind. OF THE
SECRETARY INDUSTRIAL DEPARTMENT STATE OF KERALA
DATED 19.11.2013.

// TRUE COPY //

P.A. TO JUDGE

DMR/-

C.R.

DAMA SESHADRI NAIDU, J.

**W.P.(c) Nos. 16202 and 25848/2012,
23110 of 2013, 11448, 21981
and 23077 of 2014**

Dated this the 18th day of June, 2015

JUDGMENT

The petitioner in W.P.(C)No.23110/2013, the Co-operative Coir Marketing Federation, an entity under the Kerala State Co-operative Societies Act, 1969, has assailed Exhibit P12 judgment of the third respondent Tribunal; whereas in the rest of the writ petitions, the employees—some retired and some in service—sought implementation of Exhibit P9 Award, as affirmed in Ext.P12 judgment of the third respondent Tribunal.

2. The first petitioner in WP(C)No.16202/2012 is an Employees' Union, while the second petitioner is an employee, apart from being member of the said Union. The petitioners in the rest of the writ petitions are the employees working in Kerala State Coir Marketing Federation Ltd., the petitioner in W.P.(C) No.23110/2013

and respondent in all other writ petition.

3. Since the issue is common in all the writ petitions, in some cases conversely though, all the writ petitions, involving the same respondent, are taken up for consideration together and disposed of through a common judgment. For ease of reference and elucidation, I take as the basis for discussion the facts narrated and documents placed in W.P.(C)No.23110/2013.

4. The petitioner is the Apex Federation of Coir Co-operative Societies in the State of Kerala. It is governed by the provisions of the Kerala Co-operative Societies Act ("the Act" for brevity), and also the Rules made there under. Initially, the fifth respondent, working as an Upper Division Clerk, filed A.R.C.No.110/2008 seeking a declaration that the employees of Coirfed are eligible for and entitled to Dearness Allowance in terms of Rule 189(3) of the Co-operative Societies Rules (the 'Rules' for brevity) at the rate applicable to the Government employees. He has also sought a consequential declaration that the settlement entered into between the management and employees of Coirfed to the extent of limiting the

employees' Dearness Allowance (DA) is void *ab initio* and not binding on the employees.

5. When A.R.C.No.110/2008 was allowed by the Co-operative Arbitration Court through Exhibit P9 judgment dated 22.02.2012, the petitioner filed a statutory appeal before the Kerala Co-operative Tribunal ('the Tribunal' for brevity) in Appeal No.75/2012 and invited Exhibit P12 judgment. In fact, the Tribunal has affirmed the findings of the learned Arbitrator, thereby confirming the right of the employees to claim the benefit of Dearness Allowance at a variable rate in terms of Rule 189(3) of the Rules. Aggrieved thereby, the petitioner has approached this Court.

Submissions:

(A) Petitioner Federation in W.P.(C)No.23110/2013:

6. The learned Standing Counsel for the petitioner Coirfed has taken me through the statutory scheme—the subordinate rules as well as the principle Act—to contend that application of Rule 189(3) of the Rules is circumscribed by two factors: (1) by operation of law in terms of Rule 181 of the Rules, and (2) voluntary waiver.

7. In expatiation of his submissions, the learned Standing Counsel would contend that the Government has the power to exempt any registered society or class of such societies from any of the provisions of the rules. According to him, through Exhibit P16 the Coirfed has been exempted from paying the Dearness Allowance to its employees on a par with the government servants, in terms of Rule 189(3) of the Rules.

8. The learned Standing Counsel, in the alternative, has submitted that the employees of the Coirfed are not governed by any specific service regulations. In his submission, the Board of the Coirfed has entered into long term agreements with the employees providing certain service benefits, including the pay revision. It is the singular contention of the learned Standing Counsel that since the employees of the Coirfed, including the petitioners in the other writ petitions, have agreed to forego the benefit of variable Dearness Allowance in terms of Rule 189 (3) of the Rules, the petitioner Board has extended to them many other service benefits.

9. According to the learned Standing Counsel, having drawn all the additional service benefits, now the employees are estopped from insisting on the enforcement of Rule 189(3) of the Rules. In support of his submissions, the learned counsel has also referred to Section 101 of the Co-operative Societies Act (the 'Act' for brevity), which is a substantive provision concerning the power to exempt any society or any class of societies from any of the provisions of the Act.

10. The learned Standing Counsel has contended firstly that Exhibit P16 has not been challenged by the employees; secondly that the employees have voluntarily waived their right to the benefit of Rule 189(3) of the Rules for securing better service conditions in terms of pay revision. Under these circumstances, the employees cannot, avers the learned Standing Counsel, be heard saying that they have been deprived of any statutory benefit.

11. Placing reliance on **Bashesar Nath v. Commissioner of Income-tax, Delhi and Rajasthan**

and another¹, the learned Standing Counsel has contended that where a right or privilege guaranteed by the Constitution rests in the individual and is primarily intended for his benefit and does not infringe on the right of others, it can be waived, provided such waiver is not forbidden by law and it does not contravene public policy or public morals.

12. According to the learned Standing Counsel, the action of the employees in contracting themselves out of the purview of Rule 189(3) of the Rules is not forbidden by law, nor has it been in contravention of any public policy or public morals. Further, placing reliance on **Abdul Rahuman v. State of Kerala**², the learned Standing Counsel would contend that there is an intentional relinquishment amounting to waiver of an existing legal right on the part of the employees of the Coirfed when they entered into long term periodical agreements with the Board of the Coirfed for securing certain service benefits in lieu of the variable Dearness Allowance in terms of Rule 189(3) of the Rules.

¹ AIR 1959 SC 149

² 2009 (2) KLT 718

13. With specific reference to Exhibit P9 award passed by the learned Arbitrator, as has been affirmed by the learned Tribunal in Exhibit P12 judgment in appeal, the learned Standing Counsel would contend that though the petitioner Coirfed has raised various issues, including certain pertinent questions of law, both the fora, according to him, have not considered them in the right perspective, thereby misdirecting themselves into rendering an erroneous finding concerning the applicability of Rule 189 (3) of the Rules in favour of the employees.

14. The learned Standing Counsel has drawn my attention to paragraph 13 of Exhibit P12 judgment rendered by the learned Tribunal. The declaration in the said paragraph is to the effect that the periodical agreements entered into between the Coirfed and the employees to the extent of limiting the benefit of Rule 189(3) of the Rules concerning the Dearness Allowance to the employees is void in terms of Section 23 of the Contract Act. In that regard, the learned Standing Counsel would contend that if at all any portion of the contract—in this case additional Exhibits P13 to P15—is void, the entire contract shall be

declared void and inoperable as per Section 24 of the Indian Contract Act. In other words, it is the contention of the learned Standing Counsel that the Tribunal ought not to have declared only one portion of the contract concerning the Dearness Allowance alone void as having been opposed to public policy, leaving aside the rest of the terms of the contract intact.

15. It is the singular contention of the learned Standing Counsel that if the long-term service contracts were to be declared void in terms of Section 23 of the Contract Act, the employees would not be entitled to any other service benefits, including the periodical pay revisions. He has, therefore, urged this Court to allow the writ petition by setting aside Exts.P9 and P12 award and judgment respectively. It is, however, a fact that Ext.P9 has stood merged with Ext.P12.

(B) Petitioners in W.P.(C)Nos.23077, 21981 and 11448 of 2014:

16. Sri.P.N. Mohanan, the learned counsel for the petitioners in W.P.(C)Nos.23077/2014, 21981/2014 and 11448/2014 has submitted that some of the petitioners in

those writ petitions have retired from service, whereas some are still continuing. In the first place, the learned counsel would contend that the petitioner Coirfed is governed by the Kerala State Co-operative Societies Act, wherein Chapter 15 deals with establishment. Taking me through Rules 182 to 189 of the Rules, the learned counsel has strenuously contended that the provision concerning Dearness Allowance in 189(3) of the Rules is a socio-economic measure for the benefit of the employees; *ipso facto*, it cannot be taken away by any executive action such as a mere agreement even with the consent of the employees, who always suffer a disability having a weak bargaining power. In support of his submissions regarding the inviolability of Rule 189(3) of the Rules, the learned counsel has placed reliance on **Cochin Co-operative Hospital v. Annamma**³, **Raman v. Registrar of Co-operative Societies**⁴, **Sunil Kumar S.S. v. Rajendran Pillai and others**⁵ and **Institute of Brothers of St. Gabriel v. State of Kerala and others**⁶.

³ 1998 (1) KLT 801

⁴ 1978 KLT SN Case No.46

⁵ 2007 (2) ILR Kerala 215

⁶ 2008 (4) ILR Kerala 373

17. To counter the submissions of the learned Standing Counsel that there is a clear exemption of certain societies from the provisions of 189 of the Rules, the learned counsel, referring to Exhibit P16, has contended that the said proceedings were issued in terms of sub-section (6) of Section 80 of the Act, only classifying the societies. According to him, during the course of classification of societies, the service conditions have been specified. He has also contended that, if at all the Government has exercised its power under Rule 181 of the Rules, it ought to have issued particular governmental orders published through a gazette notification, specifically stating the grounds that have weighed with the government for exempting certain societies from the beneficial provisions, such as Rule 189(3) of the Rules. According to the learned counsel, there cannot be any derogation from a beneficial provision by mere implication.

18. With reference to paragraph 6 of the pleadings in W.P.(C)No.23077/2014, the learned counsel would contend that the Coirfed has extended the variable Dearness Allowance to about 11 retired employees in terms of

Section 189(3) of the Rules, but now tries to deny the same benefit to the other employees, which action, according to him, falls foul of Article 14 of the Constitution.

19. It is also the contention of the learned counsel that even among the serving employees, two persons have been extended the benefit. The learned counsel has also referred to Exhibit P4 memorandum of settlement entered into between certain officers and the management, where under the benefit of variable Dearness Allowance under Rule 189(3) of the Rules has been extended to those officers.

20. At this juncture, the learned Standing Counsel has tried to explain away Exhibit P4 by contending that those officials, instead of taking recourse to arbitration proceedings, have directly approached this Court and invited a judgment, whereby this Court directed the Coirfed to extend the benefit. When the intra-court appeal was pending, the management entered into a settlement with those officials, as has been recorded in Exhibit P5 judgment. Summing up his submissions, the learned counsel for the petitioners in W.P.(C)Nos.23077/2014,

21981/2014 and 11448/2014 has contended that the action of the Coirfed is arbitrary and illegal.

(C) Petitioners in W.P.(C)Nos.25848 & 16202 of 2012:

21. W.P.(C)No.25848/2012 was filed by a retired employee, who initially filed A.R.C.No.110/2008, whereas W.P.(C)No. 16202/2012 was filed by employees union. The learned counsel for the petitioners in those writ petitions has submitted that the union has initially filed W.P.(C) No.453/2007, which was later appealed against in W.A.No.444/2008 by the union. This Court has, however, concurrently held that it is open for the employees of the union to avail themselves of the statutory remedy, instead of invoking Article 226 of Constitution. Under those circumstances, the petitioner in W.P.(C)No.25848/2012 initiated the arbitration proceedings.

22. It is the singular contention of the learned counsel that the Coirfed cannot conflate the mandatory pay revision with the benefit of variable dearness allowance, which is a statutory benefit. Even otherwise, the action of the Coirfed, contends the learned counsel, in extending the benefit of Rule 189(3) to certain officers, while denying the same to

other employees, is totally indefensible. In support of her submissions, the learned counsel has placed reliance on **Praveenchandran v. State of Kerala**⁷.

23. The learned counsel has eventually contended that the settlements that have been entered into between the employees and the management are in contravention of Section 101 of the Act.

24. Summing up her submissions, the learned counsel would contend that Exhibit P12 judgment rendered by the Appellate Tribunal is eminently sustainable, and that this Court, while exercising its powers of judicial review, would not sit in appeal over the merits of the matter.

(D) Additional Respondents in W.P.(C) Nos.16202 & 25848 of 2012 and W.P.(C) No.23110/2013:

25. The learned counsel for the additional respondents in W.P.(C)Nos.16202/2012 and 25848/2012 and 23110/2013 has contended that none of the service agreements relied on by the learned Standing Counsel has been filed before either the Arbitration Court or before the Appellate Tribunal. According to him, those service

⁷ 2008 (1) KLT 478

agreements cannot be looked into, much less relied on, for any adjudicatory purpose. To bolster his submission that those agreements have not been placed before the lower Tribunals, the learned counsel has drawn my attention to the Annexure to the Exhibit P12 judgment, wherein the Appendix does not reflect the agreements as being part of the record.

26. Eventually, all the learned counsel representing the employees in various writ petitions have submitted that W.P.(C) No.23110/2013 is required to be dismissed, while the rest of the writ petitions are allowed, with a further direction to the Coirfed to pay to the employees the differential amount of variable Dearness Allowance as per Rule 189(3) of the Rules.

27. Heard the learned Standing Counsel for the petitioner Federation, the learned counsel for the respondents, and the learned counsel for the petitioners in the other writ petitions, apart from perusing the record.

Issues:

1. Whether Ext.P12 impugned judgment of the Tribunal suffers from any legal infirmities to be subjected to

judicial review under Article 226 of Constitution of India?

2. Do the employees of the Petitioner Federation have forgone waiver their rights to Variable Pension in terms of Rule 189 (3) of the Rules by entering into long-term service agreements with the Federation?
3. Is there any voluntary waiver of rights on the part of the employees of the petitioner Federation?
4. Has Ext.P16 been issued by the Government in exercise of its powers under Section 101 of the Kerala State Co-operative Act?
5. Does absence of challenge on the part of the employees of the petitioner Federation against Ext.P16 is fatal to their claim to Dearness Allowance on a part with the Government employees?
6. Does the declaration of the Tribunal that the long-term service agreements are void under Section 23 of the Contract Act render the whole agreements void, thereby depriving the employees all other benefits under those agreements? And
7. Can the petitioner Federation be allowed to place reliance on service agreements for the first time

before this Court without placing them before the primary and appellate Tribunals?

In re, Issue No.2 & 3:

28. The fulcrum of the case is Rule 189(3) of the Kerala State Co-operative Societies Rules. As such, it is apposite to examine the said provision, which reads as follows:

“Rule 189. Remuneration and allowances:-

(3) All employees of societies shall be eligible for Dearness Allowance at the rates allowed by the Government to their Employees.”

29. It is not the case of the petitioner Federation that Rule 189(3) of the Rules does not apply to its employees; its only plea is that the employees have bargained away the said benefit for better service prospects or additional benefits. Thus, *ipso facto*, the applicability of the said provision does not, to conclude, fall for consideration. Once that is accepted, the consequential question to be answered is whether the employees have waived their right to benefits under Rule 189(3) of the Rules.

30. *Basheshar Nath* (supra), relied on by the learned counsel for the petitioner Federation, is a judgment

rendered by a Constitution Bench of the Hon'ble Supreme Court. On the issue of waiver, it is held that where a right or privilege guaranteed by the Constitution rests in the individual and is primarily intended for his benefit and does not impinge on the right of others, it can be waived provided such waiver is not forbidden by law and does not contravene public policy or public morals. In *Abdul Rahuman* (supra) this Court followed the same principle, but on facts held conversely that there was no waiver on the part of the petitioner. Unquestioned as the proposition of law laid down by the Constitution Bench of the Apex Court is, we will examine whether the ratio fits into the present factual matrix.

31. This Court on more than one occasion interpreted the statutory significance of Rules 181 and 189(3) of the Rules. In *Praveenchandran* (supra), this court has observed that the government, while invoking Rule 181 of the rules, cannot pick and choose between different employees of a cooperative society for the purpose of exemption. The power is to grant exemption, it is held, for institutions—that is, a particular society or a class of societies.

32. It is pertinent to observe that the learned Standing Counsel has placed reliance on Section 101 of the Act, as well as Rule 181 of the Rules, to contend that the petitioner Federation has been exempted from the rigours of Rule 183(3) of the Rules. The distinction is that Section 101 exempts societies from the application of any of the provisions of the Act; on the other hand, Rule 181 saves the societies from the rigours of any of the Rules. Here, the issue being whether the petitioner Federation stands exempted from Rule 183(3) of the Rules, I focused in the discussion more on Rule 181, rather than Section 101, though the same reasoning applies in either eventuality.

33. In *Raman* (supra), while interpreting Rule 189(3) of the rules, this Court has held that the said provision does not limit the DA to the rates which the government employees were getting at the time when the rules came into force. The employees of the societies are, in fact, entitled to the enhanced DA whenever the Government raises the DA.

34. In *Institute of Brothers of St. Gabriel* (supra), the finding is to the effect that once a statutory provision

comes into force, the Executive cannot suspend the operation of statutory provision through an executive order. The ratio in *Annamma* (supra) is to the effect that Rule 189 (3) is applicable not only to classified Societies, but also to all other societies registered under the Act.

35. Since the fulcrum of the petitioner's submissions is that the employees have contracted out or waived their rights under Rule 189(3) of the Rules for better service benefits, we may examine the legal significance of 'waiver'.

WAIVER:

36. Black's Law Dictionary (9th Edn.) defines waiver as the voluntary relinquishment or abandonment—express or implied—of a legal right or advantage. It states that the party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it. The lexicon, inter alia, quotes from William R. Anson, *Principles of the Law of Contract* 419 (Arthur L. Corbin edn., 3rd Am. ed. 1919) that the term *waiver* is one of those words of indefinite connotation in which our legal literature abounds; like a cloak, it covers a multitude of sins.

37. In *Banning v. Right (Inspector of Taxes)* [1972] 2 All ER 987, the House of Lords has defined the term 'waiver' as follows:

"In my view, the primary meaning of the word "waiver" in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted."

38. *Halsbury's Laws of England*, 3rd edn., vol. 14 (1956), as quoted in *Banning* (supra), defines the term thus: "[t]he abandonment of a right A person who is entitled to the benefit of a stipulation in a contract or of a statutory provision may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist ..."

39. Lastly we may refer to what Lord Diplock, drawing a line of distinction between waiver and estoppel, had to say in **Kammins Ballroom Co v Zenith Investments**⁸:

'Waiver' is a word which is sometimes used loosely to describe a number of different legal grounds on which a person may be debarred from asserting a substantive right which he once possessed or from raising a particular defence to a claim against him which would otherwise be available to him. . . . If he has knowledge of the facts which give rise in law to these alternative rights and acts

⁸ [1971] AC 850

in a manner which is consistent only with his having chosen to rely on one of them, the law holds him to his choice even though he was unaware that this would be the legal consequence of what he did. He is sometimes said to have 'waived' the alternative rights... but this is better categorised as 'election' rather than as 'waiver'... The second type of waiver which debars a person from raising a particular defence to a claim against him arises when he either agrees with the claimant not to raise that defence or so conducts himself as to be estopped from raising it... The ordinary principles of estoppel apply to it.

40. Waiver being a voluntary and intentional relinquishment of a known right or privilege, the conduct of the person waving or relinquishing must warrant an inference therefor. It, therefore, assumes the existence of an opportunity for a choice or election between relinquishment and enforcement. It is a waiver by election. A waiver, of course, can be express or implied as could be gathered from the conduct, for a person's action inconsistent with his known right may, at times, lead to an inference of waiver.

41. If we examine the conduct of any of the employees of the petitioner Federation, especially those who are before this Court, it is difficult, nay impossible, to come to a conclusion that there has been any conscious,

deliberate relinquishment of their right under Rule 189(3) of the Rules. In the first place, the only reason put forward by the petitioner Federation is that the employees' Union has, time and again, entered into long-term agreements with the petitioner to have certain additional service benefits in lieu of the variable pension under Rule 189(3) of the Rules on a par with government employees. It may be pertinent to observe that, obviously, the parties cannot contract against the statutory provisions. (vide **A.V.M.Sales Corpn. v. Anuradha Chemicals (P) Ltd.**)⁹.

42. In *Sunil Kumar S.S.* (supra), this Court has tellingly observed that the statutory benefits under any welfare legislation cannot be contracted out. The observation of this court in the said judgment bears reproduction:

"8. The contention raised by the petitioner that since the employees have relinquished their rights under the Act, the petitioner cannot be compelled to pay the contribution under the Act is without substance. The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 is a social welfare legislation. A person, either the employer or employee, cannot contract out of the provisions of the Act. Even the beneficiary cannot relinquish his rights as provided under the Act. Any such relinquishment would be against public policy and therefore void. . ."

⁹ (2012) 2 SCC 315 at 317

43. Before proceeding further, I may, briefly though, have to address the issue whether the petitioner Federation can rely on Exts.P3, P5, P13, P13(a), P14 and P14(a) service agreements and proceedings based on the service agreements, which have admittedly not been filed before the Tribunals below—both primary and appellate. This issue, having been addressed separately, I hold for the present discussion that they can be looked into.

44. Conceding that they can be looked into, we may examine those documents. If we illustratively take Ext.P14 service agreement, compromise terms 1 & 4 speak of 'variable DA' to be given to the employees. Though term no.4 prescribes at what rate the variable DA is to be given, nowhere has the said agreement specifies or even implies that this arrangement is in the face of certain additional benefits granted to the employees in lieu of DA as per Rule 189(3) of the Rules. Once the employees have not been consciously put to any election as to their rights, I do not see any ground to hold that there is any waiver on the part of the employees by way of election.

In re, Issue No.4 & 5:

45. Ext.P16 is the order passed by the Government purportedly under Section 101 of the Act, based on the report of the Committee on the implementation of Section 80 in the Coir, Handloom, Beedi, Cashew, Handicrafts, and other SSI Industrial Co-operative Societies in Kerala.

46. As can be seen, Section 80 concerns itself with 'establishment' of the organisation. The Government is required to classify the societies in the State according to their type and financial position. It can fix or alter the number and designation of the officer and servants of the different classes of societies; it can make rules, either prospectively or retrospectively, regulating the qualification, remuneration, allowances and other conditions of service of the officers and servants of the different classes of societies. It is further apposite to examine Rule 181 of the Rules, which reads as follows:

181. Power to exempt from Rules:- The State Government may, by general or special order and subject to such conditions as they deem fit, exempt any *exempt any registered society or class of such societies from any of the provisions of these Rules or may direct that such provisions shall apply to such society or class of societies with such*

modifications as may be specified in the order.

(emphasis added)

47. The contention of the learned counsel for the petitioner is that Ext.P16 was issued in terms of Rule 181 exempting the petitioner Federation from the provisions of the Act. Indeed, if we examine Rule 181, it does empower the Government to exempt any society or any class of societies from any of the provisions of the Rules or direct that such provisions shall apply to such society or class of societies with such modifications as may be specified in the order. Indisputably, Ext.P16 does not specify the provisions the petitioner Federation has been exempted from; on the other hand, it has not even specified that the petitioner Federation is one society that has been exempted by name.

48. Exhibit P16 reads to the effect that the government had constituted a committee for reviewing the service conditions of the co-operative employees and for the implementation of section 80 of the Act in Coir, Handloom, Beedi, Cashew, Handicrafts, and other SSI Industrial Co-operative Societies in Kerala. The committee has recommended classification of societies based on their

type and financial position, as well as the staff pattern and the structure, and for the implementation of the relevant rules. It is thus not for exempting any society from any of the rules, but, without dispute, to implement the very rules. Concerning the DA, Ext.P16 only states that any further increase will be made only with the concurrence of the Government.

49. It needs no elaboration to hold that to have a society or a class of societies exempted from any of the provisions of the Rules, in the first place the order under Rule 181 shall specify the said provisions, and also has to provide the reasons why the particular society or the class of societies has been exempted from the provisions. Any other interpretation would lend support to the proposition—in my view a preposterous one—that a statutory mandate can be nullified wholesale with an executive fiat, which is impermissible, to say the least. I am, therefore, to hold that Exhibit P16 is not in order issued under Rule 181 of the Rules, or Section 101 of the Act, either.

50. Since it is held that Exhibit P16 is not issued under Rule 181 of the Rules or Section 101 of the Act, the

employees of the Federation laying a specific challenge against the said order does not arise.

In re, Issue No.6:

51. The learned Tribunal did declare in paragraph 13 of Exhibit P12 judgment that the service agreements entered into between the employees of the petitioner Federation are void. The learned tribunal has reasoned that any contract depriving the workmen any benefit, which is otherwise due to them under a social welfare legislation cannot but be opposed to public policy in terms of section 23 of the Contract Act. In this context, the learned counsel for the petitioner has argued that the employees of the petitioner Federation will not be entitled to any service benefits, as the whole contract, in terms of Section 24 of the Contract Act, becomes void. The argument, I am afraid, is far-fetched. Nevertheless, we may examine the contours of section 24 of the contract act, which reads thus:

24. Agreements void, if considerations and objects unlawful in part.—If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

52. In *Halsbury's Laws of England*¹⁰ it has been stated that a contract will rarely be totally illegal or void and certain parts of it may be entirely lawful in themselves. The celebrated commentary has further stated that, where severance is allowed, it must be possible simply to strike out the offending parts but the court will not rewrite or rearrange the contract. The commentary only warns against the striking out of portions resulting in the alteration of the scope and intention of the agreement. The contract, shorn of the offending parts, must retain the characteristics of a valid contract, so that if severance will remove the whole or main consideration given by one party the contract becomes unenforceable. Otherwise, the offending promise simply drops out and the other parts of the contract are enforceable.

53. Referring to the above commentary and also to *Chitty on Contracts*, the Hon'ble Supreme Court in *Shin Satellite Public Co. Ltd. v. Jain Studios Ltd.*, has held thus:

15. It is no doubt true that a court of law will read the agreement as it is and cannot rewrite nor create a new one. It is also true that the contract must be read as a whole and it is not open to dissect it by taking out a

¹⁰ 4th Edn. Vol.9, p.297, para 430

part treating it to be contrary to law and by ordering enforcement of the rest if otherwise it is not permissible. But it is well settled that if the contract is in several parts, some of which are legal and enforceable and some are unenforceable, lawful parts can be enforced provided they are severable.

54. The above authoritative pronouncement of the Apex Court leaves no manner of doubt that the declaration by the Appellate Tribunal, contrary to the contentions of the learned counsel for the petitioner, in my view, has the impact of nullifying only the severable term of the contract dealing with the issue of DA, but not the rest of the terms, which are not only distinct but also disparate.

In re, Issue No.7:

55. The learned counsel for the employees has contended that none of the service agreements on which the petitioner has placed reliance have been placed either before the learned Arbitration Court or before the learned appellate Tribunal. According to him, those documents which have been filed before this court for the first time shall not be looked into.

56. Indeed, in an appeal, revision, and more particularly in a judicial review, the Court cannot look into

fresh material filed for the first time. In an appeal arising within the procedural precincts of the Code of Civil Procedure, there are specific provisions for the said purpose, such as Order 41, Rule 27. In revision, even under CPC, there does not seem to be any provision enabling a party to bring on record additional evidence, for the revision is essentially aimed against the interlocutory orders, the validity of which has to be determined based only on the material considered by the primary authority or court. In statutory appeals or revisions too, the position may not be much different; it is essential that there ought to be an express provision for the purpose of placing additional evidence at that stage.

57. In judicial review, where the procedure is largely self-regulated, placing the additional evidence in the form of documents without the leave of the court is impermissible. I have, however, taken the said service agreements into account, so as not to jettison the cause of a state-owned Federation on technical grounds. It may be treated as leave of the Court, post-factum.

In re, Issue No.1:

58. It pays to keep in mind that the nature of present adjudication is not an appeal, statutory or otherwise, and not even a revision; it is, in fact, a judicial review of a quasi-judicial order under a writ of *certiorari*. The parameters of judicial review, especially those of *certiorari*, are too well fixed to be cavilled about. It is, essentially, an exercise in rectifying jurisdictional errors, and other errors which are apparent on the face of record. If the decision of the tribunal is based on considerations that cannot lawfully be taken into account, or, conversely, by not taking into account the considerations which ought to have been taken into account, the decision is said to be vitiated. A decision can also be reviewed when it is based on no evidence at all; differently put, if there is perversity of findings, applying the test of reasonable man's view.

59. In **Surya Dev Rai v. Ram Chander Rai**¹¹, the Hon'ble Supreme Court has exhaustively dealt with the issue and, after referring to various other judgments, has summarised the principles thus:

¹¹ (2003) 6 SCC 675

10. Article 226 of the Constitution of India preserves to the High Court the power to issue writ of certiorari amongst others. The principles on which the writ of certiorari is issued are well settled. It would suffice for our purpose to quote from the seven-Judge Bench decision of this Court in *Hari Vishnu Kamath v. Ahmad Ishaque*¹². The four propositions laid down therein were summarized by the Constitution Bench in *Custodian of Evacuee Property v. Khan Saheb Abdul Shukoor*¹³ as under: (AIR p. 1094, para 15)

“[T]he High Court was not justified in looking into the order of 2-12-1952, as an appellate court, though it would be justified in scrutinizing that order as if it was brought before it under Article 226 of the Constitution for issue of a writ of certiorari. The limit of the jurisdiction of the High Court in issuing writs of certiorari was considered by this Court in *Hari Vishnu Kamath v. Ahmad Ishaque* and the following four propositions were laid down —

(1) Certiorari will be issued for correcting errors of jurisdiction;

(2) Certiorari will also be issued when the court or tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice;

(3) The court issuing a writ of certiorari acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the court will not review findings of fact reached by the inferior court or tribunal, even if they be erroneous;

(4) An error in the decision or determination itself may also be amenable to a writ of cer-

¹² AIR 1955 SC 233

¹³ AIR 1961 SC 1087

tiorari if it is a manifest error apparent on the face of the proceedings, e.g., when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by certiorari but not a mere wrong decision."

60. Going by the above principles, Ext.P12 does not suffer from any adjudicatory vice pointed out in *Surya Dev Rai* (supra).

I do not, in the facts and circumstances, see any valid ground to interfere with Ext.P12 judgment of the learned Appellate Tribunal. Consequently, this Court dismisses W.P. (C) No.23110/2013; while allowing the W.P.(C) Nos.16202/2012 and 25848/2012, 11448/2014, 21981/2014 and 23077/2014, thereby confirming Ext.P12 judgment of the third respondent. No order as to costs.

**DAMA SESHADRI NAIDU
JUDGE**

DMR/-