

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

TUESDAY, THE 27TH DAY OF JANUARY 2015/7TH MAGHA, 1936

W.P.(C).No.17030 of 2009 (W)

(I.D.NO.94 OF 1995 OF THE LABOUR COURT, KOLLAM).

PETITIONER(S):-

THE PRESIDENT,
MANGALODAYAM HANDLOOM WEAVERS' CO-OPERATIVE SOCIETY,
MANGALODAYAM, KATTACHALKUZHI P.O., BALARAMAPURAM,
THIRUVANANTHAPURAM.

BY ADVS.SRI.N.D.PREMACHANDRAN
SRI.D.AJITHKUMAR
SMT.LALIZA.T.Y.

RESPONDENT(S):-

1. SMT. R. SUDHA,
SUDHA BHAVAN, KATTACHALKUZHI P.O., VIA BALARAMAPURAM,
THIRUVANANTHAPURAM.

2. THE LABOUR COURT,
KOLLAM.

R1 BY ADVS. SRI.GOPAKUMAR R.THALIYAL
SRI.P.R.PRATEESH
BY ADV. SRI.N.P.PRAJEESH
R2 BY GOVERNMENT PLEADER SRI.T.J.MICHAEL.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
19-01-2015, THE COURT ON 27.01.2015 DELIVERED THE FOLLOWING:-

APPENDIX

PETITIONER'S EXHIBITS:-

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|---------|---|
| EXT.P1 | COPY OF THE CLAIM STATEMENT DATED 3.9.96. |
| EXT.P2 | COPY OF THE APPLICATION DATED 21.2.97. |
| EXT.P3 | COPY OF THE WRITTEN STATEMENT DATED 3.4.97. |
| EXT.P4 | COPY OF ADDITIONAL WRITTEN STATEMENT DATED 15.5.97. |
| EXT.P5 | COPY OF REPLICATION DATED 17.9.97. |
| EXT.P6 | COPY OF THE AWARD DATED 9.9.2002. |
| EXT.P7 | COPY OF THE JUDGMENT IN OP.5161/2003 DATED 13.12.07. |
| EXT.P8 | COPY OF THE APPLICATION DATED 10.11.08. |
| EXT.P9 | COPY OF OBJECTION DATED 14.11.2008. |
| EXT.P10 | COPY OF THE ORDER ON CMP.NO.213 OF 2008 IN
ID.94/1995 DATED 18.11.2008. |
| EXT.P11 | COPY OF THE PRELIMINARY AWARD DATED 3.1.09. |
| EXT.P12 | COPY OF THE AWARD PASSED BY THE LABOUR COURT
DATED 31.1.2009. |
| EXT.P13 | COPY OF THE EXTRACT OF THE SCHOOL ADMISSION REGISTER
ISSUED BY THE SCHOOL AUTHORITIES. |

RESPONDENT'S EXHIBITS:-

NIL.

Vku/-

(true copy)

K.Vinod Chandran, J.

W.P.(C).No.17030 of 2009-W

Dated this the 27th day of January, 2015

JUDGMENT

The management, a Co-operative Society, impugn Exhibits P10, P11 and P12 orders of the Labour Court, Kollam. Exhibit P10 is an order rejecting an application filed by the management, for permission to adduce evidence, in support of the charges levelled against the worker. Exhibit P11 is a preliminary award, finding the enquiry conducted by the management to be in violation of the principles of natural justice. Exhibit P12 is the award passed, wherein the question as to the maintainability raised by the management, on the ground of the worker being not covered under Section 2(s) of the Industrial Disputes Act, 1947 [for brevity “the ID Act”] and the sustainability of the dismissal of the worker was negated as per order dated 25.02.1994.

2. The 1st respondent herein, who was the Secretary of the management-Society, was proceeded against for misconducts alleged of misappropriation of funds. The management is said to have conducted a domestic enquiry, which ended in the finding of

guilt against the worker, on the charges levelled and as a consequence, in her dismissal. The justifiability of such dismissal was the issue referred for adjudication to the Labour Court. The management remained *ex-parte* in the proceedings and the Labour Court took the evidence of the 1st respondent and finding the enquiry to be bad, directed reinstatement with backwages. The management challenged the same in an Original Petition before this Court, which concluded with Exhibit P7, ordering a remand.

3. Before this Court in the Original Petition, the management contended that the finding of the Labour Court with respect to the enquiry being improper and the consequent finding of punishment to be unjustified, was without any basis. This Court found that the enquiry report was not gone into by the Labour Court. It was held that without even seeing the enquiry report, it was not proper for the Labour Court to have held it to be one conducted improperly. On such findings, the award was set aside and the Industrial Dispute was restored back to the file of the lower Court. The Labour Court was directed to afford opportunity to the parties to adduce evidence and dispose of the case within a period of four months.

4. Before the Labour Court, the management filed Exhibit P8 application, contending that the enquiry files are missing. The specific plea taken was that the enquiry files were, at the earlier point of time, entrusted with the Advocate who was engaged in the matter. The Advocate had not appeared in the proceedings; nor were the enquiry files produced. This, in fact, resulted in the management being set *ex parte* and an award being passed without the Labour Court having an opportunity to go through the enquiry files. The management, hence, sought for leading evidence in the matter in support of the charges, which was rejected as per Exhibit P10.

5. In Exhibit P10, the Labour Court found that though the management had filed a written statement and additional written statement to meet the claim made in the claim statement of the worker, no specific prayer was made to lead evidence in support of the charges; in the contingency of the enquiry being set aside. This was attempted to be explained by the management as a *bona fide* omission on the part of the management and its earlier counsel. The Labour Court relying on the decisions in ***Karnataka State Road Transport Corpn. v. Lakshmiddevamma*** [(2001) 5

SCC 433] and ***Edayar Ksheerolpadaka Sahakarana Sangham v. Industrial Tribunal* [2007 (2) KLT 613]** found that the management has to seek for opportunity at the first time and that having not been done, no permission to adduce evidence can be granted on a subsequent application.

6. The preliminary question with respect to the sustainability of the enquiry proceedings were then gone into. The enquiry files and report not being available with the Labour Court, definitely the question could not be examined as directed by this Court in Exhibit P7. However, the said situation occurred only because of the management having failed to produce the enquiry report. The allegations of the worker in the claim statement, were specific against the enquiry being defective. The Labour Court elaborately considered the issue on the basis of the averments and found that the enquiry was not properly held. This Court does not find fault with the findings, since in any event in the absence of the enquiry report and in the absence of examination of the Enquiry Officer, the Labour Court would not had any option but to find the enquiry to be not proper. On the allegation of impropriety of the enquiry conducted, it is the duty of the management to

substantiate its validity by producing the enquiry files and examining the Enquiry Officer. That, allegations of impropriety were raised in the claim statement itself, is undisputed. Having found the enquiry to be defective by Exhibit P11, the Labour Court in Exhibit P12 considered the issue of the petitioner not being a “workman” [worker] as defined under the ID Act and held against the management. The enquiry having been set aside and there being no evidence adduced, the necessary consequence was an order of reinstatement with backwages, which was ordered by Exhibit P12.

7. The learned counsel for the petitioner-Society would in fact seek to bring the case of the petitioner within the ambit of the concurring judgment in ***Lakshmiddevamma*** (*supra*). The concurring judgment of two Judges of the Hon'ble Supreme Court, the learned counsel would submit, in paragraph 45, held that the observance of rules of natural justice in proceedings before the Labour Court/Tribunal is mandatory and despite strict rules of evidence being not applicable to such proceedings; the power to call for any evidence at any stage of the proceedings, if the facts and circumstances of the case demand the same, to meet the

ends of justice in a given situation was not to be discounted. It is also pointed out that the Larger Bench decision in ***Lakshmiddevamma*** (*supra*) affirmed the three Judge Bench decision in ***Shambhu Nath Goyal v. Bank of Baroda*** [(1983) 4 SCC 491], which held so:

“If a separate application is made, it would be open to the Labour Court/Industrial Tribunal to examine the question whether it should be granted or not depending upon the stage when it is made, the omission to claim the relief in the initial pleading, the delay and the motivation for such delayed action. Without being specific it can be said that such an application has to be examined as if it is an application for amendment of original pleadings keeping in view all the aforementioned considerations and if it does not appear to be bona fide or has been made after a long unexplained delay”.

8. In examining this issue, the decision of the learned Single Judge of this Court in ***Edayar Ksheerolpadaka Sahakarana Sangham*** (*supra*) is relevant. This Court had traced the history of the judicially recognised opportunity to adduce evidence to prove the charges before the Labour Court/Tribunal; where the enquiry is found to be defective. Further, the caveat

regarding the additional observations made in the concurrent judgment in **Lakshmiddevamma** (*supra*) was also specifically noticed and it was stated so in paragraph 14:-

"I am of the opinion that the observations in the concurring judgment of Shivraj Patil, J. followed in Divyash Pandit's case [(2005) 2 SCC 684] do not lay down any different law, but only reiterates the power of the Tribunal/Labour Court to call for any evidence at any stage of the proceedings, which power has to be exercised by it, if the facts and circumstances of the case demand the same to meet the ends of justice in a given situation and do not confer any right on the management to make the request for adducing additional evidence at a later stage without making the request in the written statement in an I.D. or in the rejoinder statement in proceedings under S.33".

9. A reading of the afore-cited decisions of the Hon'ble Supreme Court would indicate that the management has to, at the first point, take an alternative contention with respect to the enquiry, insofar as seeking an opportunity to adduce evidence for independently establishing the charges before the Labour Court/Tribunal; if the enquiry is found defective. This is also on the premise that the workman would have, at the first point, raised

such contentions against the enquiry in the claim statement filed. The management definitely has the opportunity to first seek upholding of the enquiry itself, and, if upheld, the Labour Court's jurisdiction would be narrowed down to examining whether the findings recorded by the Enquiry Officer are borne out from the evidence on record. It would be then difficult for a reasonable view to be interfered with.

10. In the event of the enquiry being held to be defective, then necessarily the management would have to substantiate the charges on the basis of the evidence adduced before the Labour Court/Tribunal and invite the Labour Court/Tribunal to speak on the guilt or innocence of the delinquent employee, on the basis of such evidence adduced. The fact that such opportunity has to be sought at the first point of time has been reiterated even in ***Shambu Nath Goyal*** (*supra*).

11. After the afore-extracted portion, the Hon'ble Supreme Court stated so in ***Shambu Nath Goyal*** (*supra*):

"The observation was not made to lay down a proposition of law that as and when it suits the convenience of the employer at any stage of the proceedings, it may make an application seeking such

opportunity and the Labour Court/Industrial Tribunal was obliged to grant the same”.

12. **Lakshmiddevamma** (*supra*) too, in the concurring judgment, held so:

“... the management has to seek leave of the court/tribunal in the written statement itself to lead additional evidence to support its action in the alternative and without prejudice to its rights and contentions. But this should not be understood as placing fetters on the powers of the court/tribunal requiring or directing parties to lead additional evidence including production of documents at any stage of the proceedings before they are concluded if on the facts and circumstances of the case it is deemed just and necessary in the interest of justice”.

13. Hence, the proposition that the management would have to seek for adducing evidence at the first opportunity cannot at all be disputed. There could be facts and circumstances which would warrant the Labour Court/Tribunal to call for further evidence, to meet the ends of justice, if the facts and circumstances of the case warrant the same. It has also been unequivocally held in the afore-cited decisions, that in fact that

does not confer any right on the management to seek for adducing evidence at any stage of the proceedings without having sought such leave in the written statement, at the first instance.

14. In the present case, the Labour Court definitely did not call for such evidence; but, however, the challenge in the writ petition is also with respect to Exhibit P10 order, of the Labour Court, which declined permission to adduce evidence on an application made by the management.

15. Admittedly in the present case the delinquent worker had challenged the conduct of the enquiry itself in the claim statement and the management in their written statement did not seek for adducing evidence; if the enquiry is set aside. The management filed a written statement, in which it was asserted that the enquiry was held properly and in compliance with the principles of natural justice. The finding of guilt in the enquiry was urged to be justified, and the gravity of the offence sufficient to impose the punishment of dismissal. However, the enquiry files were not produced before the Labour Court.

16. An award passed was challenged before this Court in O.P.No.5161 of 2003, which was concluded on

13.12.2007, by Exhibit P7. Even there, no allegations as raised in Exhibit P8 were raised. The factum of the enquiry files having been entrusted to the Advocate, who did not produce it before the Labour Court, was not a contention urged when Exhibit P7 was passed. The management, who was the petitioner in the writ petition, assailed the award of the Labour Court on the ground that the enquiry was proper and that the Labour Court's award without looking into the enquiry files, was not sustainable.

17. A reading of Exhibit P7 would indicate that this Court went on the premise that the enquiry files were available for production before the Labour Court. The writ petition was allowed on 13.12.2007 and the application before the Labour Court was filed only after about 11 months, on 10.11.2008, seeking permission to adduce evidence, on the ground that the enquiry files were lost. It is for the first time in Exhibit P8 such a ground was raised. Exhibit P10 order was passed in the application on 18.11.2008. The management did not choose to challenge the same and the management challenges the same in the present proceedings. It is trite that a preliminary order, which set aside an enquiry, could be challenged along with the final award. But, that is

not to say that an order passed in an application made for adducing evidence, could be left for challenge with the final award. In such circumstance, Exhibit P10 also has to be found to have acquired finality.

18. In any event, going by the above precedents this Court does not find any reason to interfere with Exhibit P10 and in that context, Exhibit P11 also has to be upheld, since it is a preliminary order setting aside the enquiry, the files of which were not produced before the Labour Court. Exhibit P12 is a necessary consequence, wherein the worker was ordered to be reinstated with backwages and continuity in service.

19. A further contention raised against the proceedings is the fact that the maintainability issue was considered in Exhibit P12, after the findings in the preliminary order. This Court does not find any infirmity in the same. Though the maintainability could be considered as a preliminary issue, the Labour Court/Tribunal confined the preliminary consideration to the issue of whether the enquiry is to be upheld or not. On such preliminary order being passed, the maintainability was considered and even if the enquiry itself was set aside, the same would be of any consequence if

eventually the workman is found to be one not entitled to invoke the provisions under the ID Act. In the present case, if the maintainability question was held against the worker, definitely the Labour Court would have restrained itself from interfering with the order of dismissal.

20. The question with respect to the worker being a Secretary and, hence, not covered under the definition of “workman” under the Act was elaborately considered by the Labour Court. The essential argument raised by the management was that the Secretary of a Co-operative Society, under the Kerala Co-operative Societies Act, 1969 and the Rules framed thereunder, is the Chief Executive Officer with administrative powers; even to take disciplinary proceedings against subordinate employees. The respondent being the Chief Executive Officer of the Society, could not be considered to be “workman” as defined under Section 2(s) of the ID Act, was the contention.

21. The Labour Court examined the bye-law of the Society, which was marked as Exhibit M19. As per the bye-laws, it was found that the President of the Society has over all powers of administration and powers of appointment too, was conferred on

the President. The power to proceed against the employees, except the Secretary, and to suspend and impose punishment was also found to be exclusively with the President. The Secretary was found to be subordinate to the President and acting under the supervision of the President. On an examination of the various provisions of the bye-laws, it was found that the Secretary of the petitioner-Society could not be said to be a supervisory staff and specifically the salary of the worker was found to be below Rs.1,600/-. The fact of the Secretary being conferred with the power to sue, for and on behalf of the Society, is not at all relevant, as found by the Labour Court, to decide the question of the respondent's entitlement to be considered as a workman under the ID Act.

22. The Hon'ble Supreme Court in ***Prem Sagar v. S.V.Oil Company*** [AIR 1965 SC 111] laid down the broad parameters under which the question of coverage under the Madras Shops and Establishments Act, 1947 had to be decided. It was held that a consideration as to whether a particular employee exercising managerial powers would have to be looked at specifically examining the nature of work he/she is engaged in.

The test which could be reasonably applied in deciding such question was also laid down. **Anand Regional Coop. Oil Seedsgrowers' Union Ltd. v. Shaileshkumar Harshadbhai Shah [(2006) 6 SCC 548]** laid down that an undue importance to a designation of the employee or the nature assigned and the class to which he belongs would not be proper and the primary duties are to be looked at. Going by the binding precedents, this Court does not find any reason to interfere on the maintainability issue also.

For all the above reasons, the writ petition would stand dismissed. Parties are left to suffer their respective costs.

Sd/-
K.Vinod Chandran
Judge

vku/-

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