

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

WEDNESDAY, THE 11TH DAY OF FEBRUARY 2015/22ND MAGHA, 1936

WP(C).No. 28761 of 2007 (Y)

PETITIONER:

**SHOUKATH.C.K.,S/O.KUNJU MOHAMMED,
CHIRAPARAMBIL HOUSE, P.O.KIZHIPALLY KARA,
THRISSUR DISTRICT.**

**BY ADVS.SRI.PHILIP T.VARGHESE
SRI.THOMAS T.VARGHESE**

RESPONDENT(S):

- 1. THE WELFARE FUND INSPECTOR NO.II,
OFFICE OF THE TODDY WELFARE FUND INSPECTOR,
THRISSUR.**
- 2. STATE OF KERALA, REPRESENTED BY THE
JOINT SECRETARY, LABOUR AND REHABILITATION (S),
GOVERNMENT OF KERALA, THIRUVANANTHAPURAM.**
- 3. THE DEPUTY TAHSILDAR (REVENUE RECOVERY),
THRISSUR - 20.**
- 4. THE VILLAGE OFFICER, KIZHIPALLYAKARA,
THRISSUR DISTRICT.**

**R1 BY SRI.RENIL ANTO, SC
R2 TO R4 BY GOVT. PLEADER SRI.BIJU MEENATTOOR**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 11-02-2015, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:**

mbr/

APPENDIX

PETITIONER'S EXHIBITS:

- EXHIBIT P1 : TRUE COPY OF THE ORDER DATED 27.5.2006 ISSUED BY THE
1ST RESPONDENT TO THE PETITIONER.
- EXHIBIT P2 : TRUE COPY OF THE MEMORANDUM OF APPEAL DATED 10.8.2006
FILED BY THE PETITIONER BEFORE THE 2ND RESPONDENT.
- EXHIBIT P3 : TRUE COPY OF THE NOTICE IN FORM NO.1-RR-611/03 DATED 25.9.2006
ISSUED BY THE 3RD RESPONDENT TO THE PETITIONER.
- EXHIBIT P4 : TRUE COPY OF THE NOTICE IN FORM NO.10-RR-611/03 DATED NIL
ISSUED BY THE 3RD RESPONDENT TO THE PETITIONER.
- EXHIBIT P5 : TRUE COPY OF THE JUDGMENT IN W.P(C)NO.27860/2006
DATED 26.6.2007.
- EXHIBIT P6 : TRUE COPY OF G.O.(RT) NO.2063/07/LBR DATED 29.6.2007 ISSUED BY
THE 2ND RESPONDENT.
- EXHIBIT P7 : TRUE COPY OF THE NOTICE IN FORM NO.16 NO.RRI-611/03 DATED NIL
ISSUED BY THE 3RD RESPONDENT.
- EXHIBIT P8 : TRUE COPY OF LETTER NO.A 1157/2007 DATED 11.6.2009 ISSUED BY
THE 3RD RESPONDENT.

RESPONDENT'S EXHIBITS:

- EXT.R1(A) : TRUE COPY OF DEPOSITION OF WORKER C.V.BALAN.
- EXT.R1(B) : TRUE COPY OF DEPOSITION OF WORKER K.V.PRABHAKARAN.
- EXT.R1(C) : TRUE COPY OF DEPOSITION OF E.O.JOSE OFF. ACCOUNTANT.
- EXT.R1(D) : TRUE COPY OF DEPOSITION OF T.K.MADHAVAN UNION REP..
- EXT.R1(F) : TRUE COPY OF DEPOSITION OF K.K.PRAKASAN & K.A.RAJAN.

/TRUE COPY/

P.S. TO JUDGE

mbr/

"CR"

K.VINOD CHANDRAN, J.

W.P.(C) No.28761 of 2007

Dated this the 11th day of February, 2015

JUDGMENT

After a long drawn out litigation, the petitioner herein, is again before this Court challenging the joint and several liability cast on the petitioner under the Kerala Toddy Workers Welfare Fund Act, 1969 (for brevity Welfare Fund Act). The assessment was passed with respect to 75 toddy shops coming within Anthikkad Rage, having TS Nos. 97 to 171, for the period from 17.4.1999 to 4.6.1999. Admittedly the said shops were licensed to one A.S.Santhoshkumar, by the Excise Department, under the Abkari Shops Department Management Rules, 1972. Proceedings were taken against the petitioner on the ground that the petitioner was the *de-facto* Manager of the shops, despite the licensee being another.

2. The original determination order made under the Act was challenged in O.P.No.1206 of 2000 which was disposed of;

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directing the petitioner to file an appeal. In appeal there was a remand order and again the revised determination order was passed on 31.3.2003 holding that the petitioner was the *de-facto* employer of the toddy shops. The contributions were determined, interest levied and liability fixed jointly on the petitioner and the licensee. An appeal filed against the said determination order went in favour of the petitioner on the strength of the dictum in ***Joseph Joseph Vs. State of Kerala*** [2002 (1) KLT 827]. The said appellate order is not produced here. However, the documents produced herein would indicate that the appeal filed was allowed on the basis of the afore cited judgment of the Honourable Supreme Court and the matter remanded for *de-novo* consideration.

3. The fresh proceedings initiated and the determination order passed thereon, is under challenge herein. Notices were issued to the employees, unions, the licensee and the petitioner herein and their depositions were taken, based on which Ext.P1 determination order has now been passed. At the outset it is to be noticed that Ext.P1 order specifically records the fact that the

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licensee had appeared before the Officer and unequivocally declared that he had been conducting the shop and there was none other involved in the management. However, the determination officer found that the petitioner along with the licensee and one N.K.Vijayan, who was the Manager of the said shops were jointly and severally responsible for the welfare fund contributions due under the Act. The appeal filed against such determination order stood rejected by Ext.P6, against which the present writ petition is filed.

4. Ms.K.R.Monisha, learned counsel appearing for the petitioner contends that, for the relevant period, the shops were admittedly under the management of a licensee, who was entrusted such management under the Abkari Shops Department Management Rules, 1972; specifically by Rule 4. The licensee being the agent of the Excise Department, the principal employer would be the department and not any other, is the specific contention raised. The evidence adduced at the enquiry did not at all reveal any involvement by the petitioner, in the management of the toddy shop. There was absolutely no material to mulct the

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liability on the petitioner. The determination order at Ext.P1 and appellate order at Ext.P6 deserves to be set aside by this Court, contends the learned counsel.

5. Sri.Renil Anto, the learned standing counsel for the Board relies on the deposition of various witnesses, the employees and union leaders, at the enquiry to urge that the determination order is to be sustained. The petitioner is revealed to have actively involved in the management of the toddy shops during the said period, according to the workers and office bearers of the unions. Such depositions are also said to be produced along with the statement filed on 9.2.2015. **Joseph Joseph** (*supra*) was relied upon to contend that though the Honourable Supreme Court held that there should be evidence to hold an intermediary person to be the employer of the workers under the Welfare Fund Act; the mere fact that the licensee was prohibited under the Kerala Abkari Act and Rules framed thereunder to transfer the management to any third party, would not restrict the Board's right to proceed against any such *de-facto* employer. The learned standing counsel would also place reliance on **Ouseph Aly v.**

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Welfare Fund Inspector [1989 (1) KLT 26], **Asokan v. State of Kerala** [1996 (2) KLT 796] and **Kelan v. State of Kerala** [2007 (2) KLT 933]; to further sustain the order impugned herein.

6. One has to first look at the legal aspect of the liability under the Welfare Fund Act. The licensee under the Abkari Act, 1077 (Kerala) who has been so licensed to carry on the business in toddy, in ascertainable shops licensed to him/her, is prohibited from transferring the management to any other third party. Hence the privilege to vend toddy granted to a licensee cannot be transferred to another. This Court has in **Kelan** (*supra*) after looking at the provisions of the Abkari Act and the Kerala Abkari Shops Disposal Rules 2002, found that the responsibility in respect of the toddy shops, including the liability to pay the welfare fund of the employees, is squarely on the licensee. The Abkari Act, the Rules framed thereunder and the Welfare Fund Act were found to be complementary laws. The licensee's liability as the principal, even if a third party actually conducts the business was emphasised.

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7. The definition of employer under the Welfare Fund Act however defers substantially from the concept of a licensee under the Abkari Act. The definition is extracted hereunder.

2(c) "Employer" means any person who employs, whether directly or through another person, or whether on behalf of himself or any other person, one or more employees and includes any person who has a licence for the manufacture, distribution, storage or sale of toddy under the Abkari Act for the time being in force.

Hence any person who is in *de-facto* management also would be liable along with the licensee for the contributions due under the Welfare Fund Act. The Abkari Act by its provisions, also take into account, the liability of a licensee under the Welfare Fund Act, since a defaulter under the Welfare Fund Act is disabled from bidding in auction, for a licensee.

8. **Joseph Joseph** (*supra*) was a case in which, identical to the facts herein, the licensee conceded his liability and contended that there was none other in management of the shop. In the enquiry conducted by the Inspector under the Welfare Fund Act, the workers and the trade union officials contended that, the

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actual business was conducted by third parties despite the license having been granted in favour of the second respondent therein. Despite the admission of the licensee, with respect to his liability under the Welfare Fund Act, the Inspector found third parties also to be liable for the contributions under the Act. The High Court upheld the assessment against which the alleged *de-facto* employer of one of the shops was before the Honourable Supreme Court.

9. The Honourable Supreme Court, held that, merely because a person is associated with the conduct of business; that cannot by itself be evidence of the workers having been employed on his own behalf. The decision drew a distinction between management and actual employment of workers. Hence the thrust was to highlight the factum of employment of employees, being done by anyone, other than the licensee. It was noticed that there may be cases where workers are employed by a third party, on his own behalf and not on behalf of the original owner, meaning the licensee. In the absence of proof to the contrary, particularly in view of the statement of the

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employer, the licensee, that he himself had employed the workers, the intermediary person could not be held to be the employer of the workers, employed for the conduct of the business; was the categoric finding. It was found that any transfer by lease or otherwise, of a license granted under the Abkari Act, being prohibited under the Act there cannot be any interpretation contrary to the statutory provision, which would frustrate the very object of the Act.

10. Hence, no third party could be said to be the *de-facto* licensee of a shop, when such transfer from the original licensee is prohibited under the Act. In particular instances where a third party is found to be in *de-facto* management and also found to be liable to contribute to the welfare fund, then their legal duty would have to be ascertained and asserted by the Department on reliable, cogent evidence. There should be a positive finding, that such persons are the employers vis-a-vis the workers. The general view taken by the High Court, to sustain the liability against a third party, was found to be unsustainable.

11. **Ouseph Aly** (*supra*) only places a departmental

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management agent in the same position as a licensee; with respect to the liability to make contributions under the Welfare Fund Act. The said decision would not apply in the facts of this case, since a third party is sought to be mulcted with the liability of an employer under the Welfare Fund Act. **Asokan** (*supra*) was a case in which again a third party was sought to be mulcted with the liability under the Welfare Fund Act. There the alleged *de-facto* employer refused to answer the summons of the officer of the Board. The licensee went on record to say that he had been only a toddy worker and the *de-facto* employer had in fact taken the license in his name. The union leaders and the workers also deposed to that effect. There was no challenge to their deposition. This Court held that the question of, who actually conducted the shop, during the relevant period is purely a question of fact and two authorities having found the petitioner therein to be the employer, there was no warrant for any interference under Article 226 of the Constitution. The evidence led therein, which is not revealed from the judgment; except for the uncontraverted deposition, was held to be sufficient to uphold

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the determination against a third party.

12. **Kelan** (*supra*) found that there was acceptable evidence that a third party was running the shop under the authority of the licensee and hence there was a joint and several liability on the licensee and the *de-facto* employer. **Kelan** (*supra*) is authoritative insofar as declaring the licensee's liability, under the Act, as the principal, even when third parties are found to be in management.

13. It cannot at all be disputed that there should be evidence, to the contrary, especially in the context of the licensee asserting and conceding his liability under the Welfare Fund Act before the determination officer. At the risk of repetition it has to be reiterated that as in **Joseph Joseph** (*supra*) in the present case also the licensee conceded his liability and asserted that none other was involved in the conduct of the shop or in employing workers. One other fact which assumes significance is that, on a specific query made, as to why the licensee was not impleaded, it was submitted by both parties that the licensee is no more.

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14. True the departmental agent, appointed under the Rules of 1972 would have the same liabilities as a licensee would have. The agent so appointed would be responsible for remitting contributions under the Welfare Fund Act; the employees contribution, after deduction from the wages paid to the employees. Rule 4 prescribes that the Excise Inspector of the range concerned shall be responsible to appoint an agent to run an abkari shop under departmental management. Though such agent would be liable to comply with the conditions enjoined upon a licensee under the Abkari Act, he does not stand in the status of a licensee as against the Department. The agency conferred on a person under the Rules of 1972 definitely contemplates an amount of control by the Department on the operations conducted by the agent. The Department, which is the principal employer has a responsibility to see that there is scrupulous compliance of the statutory mandate; especially as in the present case, where, the welfare of the employees in the unorganised sector is sought to be protected by a welfare legislation. It cannot but be observed that the licensee herein

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being an agent appointed under the Rules of 1972, the Department would be the principal employer who has a primary responsibility to ensure statutory compliance.

15. Definitely going by the binding precedents referred to above that would not deviate from the liability under the Welfare Fund Act being cast on any other person, if there is sufficient evidence to show that the workers were employed on his behalf. The evidence which has been discussed in Ext.P1, then becomes relevant. Reliance placed is only on the oral evidence, sworn to before the quasi-judicial authority, by the workers and the union leaders. The petitioner herein, who is alleged to be the *de-facto* employer, appeared before the authority and gave sworn statement declining any involvement in the management of the shops. The evidence of the workers and the union leaders were seriously contested in cross examination. One witness, Sri.N.K.Vijayan, admitted to his being the Manager of the shops. This fact was admitted by the other witnesses also. Sri.N.K.Vijayan categorically deposed that the petitioner had no connection with the business. It is pertinent that the said

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Vijayan, was also mulcted with joint and several liability under the impugned order. This Court would not speak on such liability being mulcted on the said witness, since there is no challenge in the writ petition against that. Suffice it to say that, the evidence of the admitted Manager supported the petitioner.

16. A close examination of the deposition of the various witnesses as extracted in the impugned order, would indicate that they merely asserted that the petitioner was involved in the management. The petitioner was said to have participated in the discussions with the union leaders on various labour issues arising between the employer and the employees. The said assertion has to be taken with a pinch of salt, since admittedly liability now determined is for a period of less than two months ie: between 17.4.1999 to 4.6.1999. It is not clear as to what discussions could have transpired in that period.

17. Be that as it may, no documentary evidence was produced. The documentary evidence which was produced with respect to a settlement had only the signature of the licensee. There was no warrant for the determination officer, to believe the

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evidence of the union leader that the licensee had signed the same on behalf of the petitioner. The evidence referred to in the determination order at Ext.P1, according to this Court, falls short of what is required in ***Joseph Joseph*** (*supra*). The self-serving statements made by the union leaders or workers themselves cannot substitute the tangible evidence required to mulct such liability on a third party.

18. The Board has chosen to produce the deposition of certain witnesses along with a statement filed on 9.2.2015. It is to be noticed that those depositions are of the year 2001 and the present determination is on the basis of a remand order in an appeal, based on which the *de-novo* enquiry was conducted in 2005. Various depositions referred to in Ext.P1 order are also of the year 2005. The depositions produced are not relevant to the enquiry, which is the subject matter of the writ petition. This Court is of the opinion that the evidence does not indicate that the petitioner, who is alleged to have acted as an intermediary person and *de-facto* employer was involved in any manner with the management of the shop or had employed the workers.

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19. The enquiry which was conducted was confined to the examination of witnesses, by the determination officer. The officer has not attempted, even during the period in which the business was carried on, or at a proximate time immediately thereafter, to verify as to who actually carried on the operation of the shops. There is also no enquiry made, with the Department; who going by the Rules of 1972 and the appointment made of an agent, would take the status of the principal employer. In such circumstances, this Court is of the opinion that the evidence adduced is not sufficient to find an intermediary - the petitioner herein to be the employer under the Welfare Fund Act. There is nothing to prove that the petitioner had engaged in the operation of the license of the subject shops, during the relevant period. Orders at Exts.P1 and P6 hence would stand set aside.

20. The learned counsel for the petitioner submits that the petitioner had furnished a bank guarantee during the pendency of the appeal, as per the interim order granted in I.A.No.7224 of 2009, in the above writ petition. The writ petitioner would be granted release of the bank guarantee within a period of three

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months from today.

The writ petition stands allowed. The parties to suffer their respective costs.

Sd/-

**K.VINOD CHANDRAN,
JUDGE.**

rkc.