

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.V.RAMAKRISHNA PILLAI

WEDNESDAY, THE 20TH DAY OF MAY 2015/30TH VAISAKHA, 1937

WP(C).No. 29933 of 2008 (L)

PETITIONER(S) :

- 1. BINANI ZINC EMPLOYEES' MULTIPURPOSE
CO-OPERATIVE SOCIETY LTD., NO.E.343, BINANIPURAM,
ALUVA, ERNAKULAM DISTRICT, REPRESENTED BY ITS
SECRETARY.**
- 2. THE BOARD OF DIRECTORS, BINANI ZINC EMPLOYEES'
MULTIPURPOSE CO-OPERATIVE SOCIETY LTD., NO.343,
BINANIPURAM, ALUVA, ERNAKULAM DISTRICT,
REPRESENTED BY ITS PRESIDENT.**

**BY ADVS.SRI.N.K.SUBRAMANIAN
SRI.S.ANANTHAKRISHNAN**

RESPONDENT(S) :

- 1. LIZY RAJAN, W/O.V.T.RAJAN,
VELLOOR HOUSE, MUPPATHADOM P.O., ALUVA-10**
- 2. APPELLATE AUTHORITY UNDER SHOPS AND
COMMERCIAL ESTABLISHMENTS ACT,
(THE DEPUTY LABOUR COMMISSIONER), ERNAKULAM.**

**R1 BY ADV. SRI.K.S.AJAYAGHOSH
R2 BY SR. GOVERNMENT PLEADER SMT.SAREENA GEORGE**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 03-03-2015, THE COURT ON 20-05-2015 DELIVERED
THE FOLLOWING:**

Msd.

APPENDIX

PETITIONER(S)' EXHIBITS

- EXHIBIT P1: TRUE COPY OF ORDER DATED 27.08.2008 IN S.A.NO.5/02.**
- EXHIBIT P2: TRUE COPY OF ENQUIRY REPORT DATED 12.12.2000.**
- EXHIBIT P3: TRUE COPY OF ORDER OF DISMISSAL DATED 06.01.2001.**
- EXHIBIT P4: TRUE COPY OF RESOLUTION IN APPEAL DATED 29.08.2002.**
- EXHIBIT P5: TRUE COPY OF APPEAL IN S.A.NO.5/2002.**
- EXHIBIT P6: TRUE COPY OF STATEMENT OF OBJECTIONS DATED 05.03.2003.**
- EXHIBIT P7: TRUE COPY OF PRELIMINARY OBJECTION DATED 20.01.2003.**
- EXHIBIT P8: TRUE COPY OF ORDER DATED 14.07.2003 BY R2.**
- EXHIBIT P9: TRUE COPY OF JUDGMENT DATED 19.07.2004 IN
W.P.(C).NO.24695/2003.**
- EXHIBIT P10: TRUE COPY OF JUDGMENT DATED 21.12.2004 IN W.A.NO.1734/2004**
- EXHIBIT P11: TRUE COPY OF ARGUMENT NOTES FILED BEFORE R2.**
- EXHIBIT P12: TRUE COPY OF APPLICATION DATED 23.01.2008 FILED BEFORE R2**
- EXHIBIT P13: TRUE COPY OF JUDGMENT IN W.P.(C).NO.35324 OF 2005
DATED 19.08.2009.**

RESPONDENT(S)' EXHIBITS

- EXHIBIT R1(A): A TRUE COPY OF THE ORDER DATED 15.11.2005 ISSUED BY
THE ADDITIONAL SECRETARY TO GOVERNMENT
CO-OPERATION (C) DEPARTMENT.**
- EXHIBIT R1(B): A TRUE COPY OF THE REPRESENTATION DATED 08.06.2001
SUBMITTED BY THREE OF THE THEN BOARD MEMBERS OF
THE PETITIONER-SOCIETY.**
- EXHIBIT R1(C): A TRUE COPY OF THE ORDER DATED 20.05.2002 OF THE
JOINT REGISTRAR (SC/ST), OFFICE OF THE REGISTRAR OF
CO-OPERATIVE SOCIETIES, KERALA.**
- EXHIBIT R1(D): A TRUE COPY OF THE ORDER DATED 27.10.2005 OF
THE 2ND RESPONDENT IN I.A.NO.8/2005 IN S.A.NO.5 OF 2002.**

WP(C).No. 29933 of 2008 (L)

EXHIBIT R1(E): TRUE COPY OF THE ARGUMENT NOTES DATED 24.05.2008.

//TRUE COPY//

P.S.TO JUDGE.

Msd.

A.V.RAMAKRISHNA PILLAI, J

WPC No. 29933 of 2008

Dated this the 20th day of March, 2015

JUDGMENT

Under challenge in this writ petition is Ext.P1 order dated 27.8.2008 in Appeal No.5/2002 passed by the Appellate Authority under the Kerala Shops and Commercial Establishments Act, 1960 setting aside the punishment and dismissal of the first respondent from service and ordering to reinstate her in service with the benefit of 3/4th of backwages with immediate effect or to pay compensation of ₹4,50,000/- in lieu of re-employment and backwages within 30 days from the date of receipt of a copy of the order.

2. The first respondent was a Junior Clerk of the petitioner which is a Primary Co-operative Society registered under the Kerala Co-operative Societies Act, 1969. A dispute arose between the petitioner society and the first respondent and disciplinary proceedings

were initiated against the first respondent. An enquiry officer was appointed and a domestic enquiry was conducted. Thereafter the first respondent was dismissed from service on 6.1.2001 with retrospective effect i.e. from the date of suspension. The first respondent society preferred an appeal before the Board of Directors under Rule 198(4) of the Kerala Co-operative Societies Rules, 1969 (for short KCS Rules) which was dismissed. The entire proceedings including the domestic enquiry was challenged by the first respondent by filing an appeal under Section 18 of the Kerala Shops and Commercial Establishments Act before the second respondent. The second respondent by Ext.P1 order allowed the appeal and the petitioners were directed to reinstate the first respondent or to pay compensation of ₹4,50,000/-. The petitioners are challenging Ext.P1 in this writ petition on various factual as well as legal grounds. The petitioners also challenged the jurisdiction of the second respondent to pass Ext.P1 order in the light of the amendment introduced to the

Kerala Co-operative Societies Act which came into force with effect from 2.1.2000.

3. The first respondent as well as the second respondent filed separate detailed counter affidavits justifying Ext.P1.

4. The definite stand taken by the respondents is that this Court in the judgment in Writ Appeal No.1734/2004 has held that the Kerala Shops and Commercial Establishments Act, 1960 is applicable to the present case and hence, the contention of the petitioners that Section 69 of the Kerala Co-operative Societies has to be applied is unsustainable. It was also contended that the action of the second respondent was in accordance with the powers as contemplated under the Act and Rules.

5. I have heard Mr.N.K.Subramanian, the learned counsel for the petitioners and Mr.K.S.Ajayaghosh, the learned counsel for the first respondent and the learned Senior Government Pleader in the matter.

6. Admittedly, disciplinary proceedings were

initiated against the first respondent. Altogether 8 charges were levelled against the first respondent of which she was found guilty by the enquiry officer on charge Nos.4, 5 and 6. The enquiry officer found that charge Nos.1 and 2 were proved in part. However, the first respondent was found not guilty of the charge Nos.3, 7 and 8. Against the dismissal of service of the first respondent, she preferred an appeal under Section 198(4) of the Kerala KCS Rules to the Board of Directors of the Society. The appeal was heard by the earlier committee and took a decision on 17.5.2001 which was rescinded by order dated 20.5.2002 of the Joint Registrar of Co-operative Societies. The first respondent has a case that the appeal ought to have been heard and disposed of by the new committee. Instead, the new committee without affording an opportunity of hearing the first respondent, dismissed the appeal on 29.8.2002 confirming the order of dismissal by the President. The matter was taken again in appeal before the second respondent.

7. It was argued by Mr.N.K.Subramanian, the learned counsel for the petitioners that as per Rule 3(2) of the Kerala Shops and Commercial Establishment Rules, the statute only contemplates a summary procedure on hearing the appeal. It was argued that in this case, there is no finding as to the enquiry is defective in any manner known to law and justice and in such circumstances, the second respondent should have dismissed the appeal after hearing the appeal in a summary manner as contemplated under Rule 3(2) of the Rules. It was also submitted that it is well settled that where the enquiry was conducted properly and the findings entered cannot be characterised as perverse, there cannot be an interference by the appellate authority. It was argued that the enquiry in the present case cannot be characterised as perverse or otherwise not proper. It was also pointed out that the second respondent has also not entered into such a finding. It was pointed out that in this case, there was a domestic enquiry by an independent and impartial enquiry officer

and there is no finding by the second respondent that the enquiry was in any manner defective.

8. As per Section 18(2) of the Kerala Shops and Commercial Establishments Act, 1960 (Shops Act for short), any employee whose services are dispensed with may appeal to such authority and within such time as may be prescribed either on the ground that there was no reasonable cause for dispensing with his services or on the ground that he was not guilty of misconduct as held by the employer. It is a provision to challenge the order of dismissal by the employer/establishment coming under the purview of Shops Act. The appellant preferred the Shop Appeal before the second respondent on 19.9.2002. The petitioners herein raised a preliminary objection with respect to the maintainability of the shop under the Shops Act before the second respondent. Thereafter the petitioners preferred O.P.No.12457/2003 before this Court seeking a direction to dispose of the preliminary objection by the second respondent. On the basis of the said direction, the

second respondent heard the matter in detail and after affording both sides an opportunity of being heard held that the appeal under Section 18 of the Shops Act is maintainable even though the first respondent had filed an appeal under Section 198(4) of the KCS Act. Against such a decision, the petitioners preferred WPC No.24695/2003 before this Court and this Court by Ext.P9 judgment dated 9.7.2004 upheld the decision of the second respondent and dismissed the writ petition. The petitioners challenged Ext.P9 judgment in Writ Appeal No.1734/2004 which was considered by a Division Bench of this Court and held that the Shop Appeal was maintainable. The petitioners took the matter as SLP before the Apex Court which also dismissed the same. Therefore, Mr.Ajayakhosh would point out that the maintainability of the Shop Appeal is a concluded chapter now.

9. The learned counsel for the petitioners per contra would argue that the reference to the observations made in Ext.P9 judgment is no more

relevant in the light of the fact that the petitioners have participated in the proceedings. It was pointed out that the legal question was raised in the light of Act 1 of 2000, the Amendment Act to the KCS Act and Rules and in fact the question has not been considered in the light of the said amended Act.

10. The question now raised by the petitioner is in the light of the amendment made to Section 69 of the KCS Act which was given effect to from 2.1.2003 by notification.

11. It is crucial to note that the first respondent has preferred the Shop Appeal as early as on 19.9.2002. The petitioner is raising the aforesaid contention for the first time in this writ petition. Such a contention has never been raised by the petitioners in earlier preliminary objections. Since the Act came into force from 2.1.2003, the petitioners could have raised this point at the earliest opportunity, but they have not opted to do so. After unsuccessfully fought the question of maintainability of the Shop Appeals at different levels,

now, the petitioners are sticking to the question of referring the matter to the Arbitration Court.

12. This Court is of the definite view that there is no need to refer the matter for adjudication to Co-operative Arbitration Court at this point of time.

13. A Division Bench of this Court in ***Thodpuzha Taluk General Marketing Co-operative Society v Michael Sebastian*** (2010(1) KLT 938 (D.B.) has observed that amendment to Section 69 cannot have an overriding effect over the provisions of the Industrial Disputes Act and both the Courts have concurrent jurisdiction to deal with the industrial disputes. The Shops Act is a state enactment relating to the regulation of conditions of work and employment in shops and commercial establishments of State of Kerala which came into force on 1.3.1962 under notification and the bill as passed by the Legislative Assembly received the assent of the President on 16.12.1960. The amended provision for the formation of the Co-operative Arbitration Court, it cannot have an overriding effect on

the provisions of the Shop Act.

14. As the Appellate Authority under the Shops Act has concurrent jurisdiction to deal with the labour/industrial disputes, referring the matter to the Co-operative Arbitration Court at this point of time would be an exercise in futility.

15. Though it was strenuously argued by the learned counsel for the petitioners that the powers of the appellate authority while hearing a shop appeal under the Shops Act is limited, a Division Bench of this Court in ***Parameswaran Elayidam v Mutual Aid Bankers*** (1999(2) KLT 322(DB) has observed that the appellate authority under the Shops Act can re-hear the matter completely and can come to its own conclusion, after re-appreciation of evidence or entertaining additional evidence. As the Appellate Authority is a fact finding body, the finding by the appellate authority on factual issues are final and that cannot be re-agitated in a proceeding under Article 226 of the Constitution of India.

16. The jurisdiction of this Court under Article 226 and 227 against the orders/awards of the Authority/Tribunal/Labour Court dealing with labour matters is very limited and the re-appreciation of facts are not possible unless there is an error of jurisdiction or the findings are so perverse or not based on legal evidence.

17. A perusal of Ext.P1 reveals that the appellate authority has considered the rival contentions, enquiry report and other materials on record and after re-appreciating the evidence have come to the conclusion that the first respondent who was the appellant in the Shop Appeal was not guilty of the charges. It was also found that the management while dismissing the first respondent was acting without any *bona fides*. It was found that the first respondent was victimised by the management. It is true that the second respondent has made a passing observation that there was some kind of negligence on the part of the first respondent while writing the accounts and records and payment of the

loans. A negligent way of dealing a matter cannot by itself be termed as misconduct and it should be coupled with such other acts which reveals a motive of the delinquent.

On a consideration of the entire materials now placed on record, this Court is of the definite view that the petitioner is not entitled to the reliefs as prayed for.

In the result, this writ petition fails and accordingly, it is dismissed.

**sd/- A.V.RAMAKRISHNA PILLAI
JUDGE**

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true copy

P.S.TO JUDGE