IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

&

THE HONOURABLE MR. JUSTICE GOPINATH P.

TUESDAY, THE 01ST DAY OF DECEMBER 2020 / 10TH AGRAHAYANA, 1942

WA.No.964 OF 2020

AGAINST THE JUDGMENT IN WP(C) 11891/2020(J) OF HIGH COURT OF KERALA DATED17/6/2020

APPELLANT/PETITIONER:

MANGALAM PUBLICATIONS (INDIA) PVT. LTD.
S.H MOUNT P.O, KOTTAYAM 686 006
REPRESENTED BY ITS DIRECTOR.

BY ADVS.
SRI.V.KRISHNA MENON
SMT.P.VIJAYAMMA
SMT.J.SURYA
SRI.PRINSUN PHILIP

RESPONDENT/RESPONDENT:

SAJU GEORGE
REPRESENTED BY THE SECRETARY,
KOTTAYAM JILLA SHOP AND OTHER
ESTABLISHMENT MAZDOOR (BMS)
T.B JUNCTION, M.L ROAD, KOTTAYAM 686 039

R1 BY ADV. SRI.GOPAKUMAR R.THALIYAL

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 05-11-2020, THE COURT ON 01-12-2020 DELIVERED THE FOLLOWING:

J U D G M E N T

Dated this the 1st day of December, 2020

Shaffique, J.

This appeal is filed by the petitioner in WP(C) No. 11891/2020 challenging judgment dated 17/6/2020 of the learned Single Judge. The writ petition has been filed challenging an award passed by the Industrial Tribunal, Idukki in ID No.5/2015. By virtue of the said award, a reference was answered, inter alia holding that there was denial of employment to the workman and the management was directed to reinstate him in service with continuity of service and 50% backwages.

2. The short facts of the case would disclose that the workman was employed as an Assistant Photographer w.e.f. 1/9/1984, was promoted as Photographer on 9/1/1986 and Chief Photographer on 1/8/2002. He was transferred to Mumbai on 1/8/2011, which came to be challenged by him by initiating ID No.28/2012. It was found that his transfer was not justifiable and he was directed to be reinstated with 50% backwages and continuity of service. Subsequently he was reinstated in service

and he was again transferred to Delhi. He worked at Delhi for some time and thereafter he had to come back. Disciplinary action was initiated against him alleging unauthorized absence from duty from 19/6/2014, but the said action was not continued. Alleging denial of employment, he sought for conciliation and since the matter was not resolved, the matter was placed before the Government and the Government as per order dated 25/4/2015 referred the following dispute for adjudication:-

> *"Whether the denial of employment to Sri.Saju George, Chief Photographer by the management of Mangalam Publications (India) Private limited, S.H.Mount P.O., Kottayam is justifiable? If not, what relief the workman is entitled to?".*

3. The workman was represented by the union and after taking evidence in the matter, the Industrial Tribunal having come to the conclusion that there was denial of employment passed an award which is impugned before the learned Single Judge. The learned Single Judge did not interfere with the order passed by the Industrial Tribunal.

4. The learned counsel for the appellant would submit that the workman was reinstated in service and the only question that remains for consideration is regarding direction to pay 50%

of the backwages. First of all, it was contended that the dispute has not been raised at the instance of the union and no material had been produced to prove that the Kottayam Jilla Shop and Other Establishment Mazdoor (BMS) has espoused the cause of the workman. Secondly, it is contended that the workman complained that he was not permitted to join duty in the branch office at Delhi and therefore, the Industrial Tribunal had no jurisdiction to entertain the above reference. Thirdly it was contended that this is a case in which the workman had abandoned his duty and hence the Tribunal erred in directing payment of 50% backwages.

5. It is true that in the objection a contention was raised that the union had not espoused the cause of the workman concerned. According to the management, while the workman was employed in their establishment, he was not part of the BMS union and therefore the said union had no right to appear before the Tribunal on behalf of the workman. But it is relevant to note that the workman had produced the membership card to prove that he was a member of the union. Still the contention urged by the management is that a mere membership will not suffice and

it has to be proved that the cause of the workman had been taken up by the union. Counsel relied upon a judgment of the Apex Court in ***J.H.Jadhav v. Forbes Gokak Ltd*** [(2005) 3 SCC 202]. In that case, the Apex Court after referring to the decision in ***Workmen of M/s Dharampal Premchand (Saughandhi) v. M/s.Dharampal Premchand (Saughandhi)*** [1965 (3) SCR 394] held at paragraphs 5, 7 and 8 as under:-

> *"**5.** The definition of "industrial dispute" in Section 2(k) of the Act shows that an industrial dispute means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of the employment or with the conditions of labour, of any person. The definition has been the subject-matter of several decisions of this Court and the law is well settled. The locus classicus is the decision in Workmen v. Dharampal Premchand (Saughandhi) [(1965) 3 SCR 394 : AIR 1966 SC 182] where it was held that for the purposes of Section 2(k) it must be shown that: (1) The dispute is connected with the employment or non-employment of a workman. (2) The dispute between a single workman and his employer was sponsored or espoused by the union of workmen or by a number of workmen. The phrase "the union" merely indicates the union to which the employee belongs even though it may be a union of a minority of the workmen. (3) The establishment had no union of its own and some of the employees had joined the union of another*

establishment belonging to the same industry. In such a case it would be open to that union to take up the cause of the workmen if it is sufficiently representative of those workmen, despite the fact that such union was not exclusively of the workmen working in the establishment concerned. An illustration of what had been anticipated in Dharampal case [(1965) 3 SCR 394 : AIR 1966 SC 182] is to be found in Workmen v. Indian Express (P) Ltd. [(1969) 1 SCC 228 : AIR 1970 SC 737] where an "outside" union was held to be sufficiently representative to espouse the cause."

*"**7.** As far as espousal is concerned there is no particular form prescribed to effect such espousal. Doubtless, the union must normally express itself in the form of a resolution which should be proved if it is in issue. However, proof of support by the union may also be available aliunde. It would depend upon the facts of each case. The Tribunal had addressed its mind to the question, appreciated the evidence both oral and documentary and found that the Union had espoused the appellant's cause.*

***8.** The Division Bench misapplied the principles of judicial review under Article 226 in interfering with the decision. It was not a question of there being no evidence of espousal before the Industrial Tribunal. There was evidence which was considered by the Tribunal in coming to the conclusion that the appellant's cause had been espoused by the Union. The High Court should not have upset this finding without holding that the conclusion was irrational or perverse. The conclusion reached by the High Court is therefore unsustainable".*

6. Yet another judgment relied upon was that of a learned Single Judge of Delhi High Court in ***Management of Hotel***

Samrat v. Government of NCT and Others [(2007) 2 LLJ 950]. In the said case, after referring to a few of the judgments, it was held at paragraph 13 as under:-

> *"13. In the instant case, there is no evidence on record of espousal of the dispute of the petitioner. There was no evidence that either the aggrieved workman had approached the union and asked the union to take up his cause or that union, at any point of time, or any appreciable number of employees, had taken up the cause of the workman with the management. If the union had passed a resolution or appreciable number of workmen had approached the union and raised the demand in respect of regularization of the workmen, it could be said that there was an espousal of the cause of the workman. Espousal can be expressed in many ways. The secretary of the union, who appeared as a witness has not uttered a single word that the union or any appreciable number of workmen had espoused the cause of the workmen. He simple stated that he had met the management (in his individual capacity). Under these circumstances, it could not be held that an industrial dispute existed between the employer and the workmen to enable the appropriate Government to make an order under Section 10 of the Industrial Disputes Act for referring it for adjudication to the Labour Court."*

7. None of these judgments will have application to the factual aspects involved in the present case. There is no doubt about the fact that the workman was a member of the concerned

union. According to the workman, the cause of the workman was undertaken by the union even at the initial stage. Apparently, there was no objection from the side of the management during the relevant time. Thereafter, the matter was considered and ultimately the dispute had been referred for consideration by the Tribunal. Once a reference had been made at the instance of the union, it is not open for the management to contend at this stage of the proceedings that the cause of the workman had not been espoused by the union.

8. As far as territorial jurisdiction is concerned, such issues cannot be raised by the appellant at this late stage. The complaint had been given alleging denial of employment by the union before the competent authority within the jurisdiction, where the Head Office of the appellant is functioning and pursuant to which, the conciliation had taken place. It is also pointed out that the union represented the workman during conciliation and since the conciliation failed, the matter was referred to the Government based on which the dispute had been referred for adjudication to the Tribunal. When denial of employment is sought by the workman, though he was

transferred to Delhi, a complaint alleging denial of employment can be raised where the management has its Head Office and it need not necessarily be the place where the workman was actually working. Cause of action would arise even at a place where the Head Office of the management is situated. Now coming to the merits of the contentions, learned counsel for the workman had placed reliance on the following judgments:-

(i) ***Malwa Vanaspati and Chemical Company Ltd. v. Rajendra*** [(2009) 12 SCC 490].

(ii) ***Manager, K.V.S.S.Mandawar and Another v. Mukesh Kumar Sharma*** [(2010) 12 SCC 487].

(iii) ***Oil and Natural Gas Commission v. Oil and Natural Gas Commission Contractual Workers Union*** [(2008) 12 SCC 275].

(iv) ***Prem Narain v. Swadeshi Cotton Mills*** [(2017) 11 SCC 325].

(v) ***Nandram v. Garware Polyster Limited*** [(2016) 6 SCC 290].

9. It is settled law that the writ Court should not interfere in matters decided by the Tribunal on factual consideration of the

materials placed on record. In the case on hand, the Tribunal had come to the conclusion that there is denial of employment based on the evidence adduced in the matter. Evidence of the management witnesses as well as that of the workman had been considered and the Tribunal had arrived at a finding that there was denial of employment. Facts disclose that the workman while working at Delhi was not given the full salary and as a result of which he had to come back and there was a demand for salary. He also had a complaint that a proper camera was not given to him for taking necessary photographs. Being the Chief Photographer, he was not expected to take photographs with a camera which would not give sufficient effect to the photographs which he may take. The Tribunal having considered all these matters have arrived at a conclusion that there is denial of employment. The learned Single Judge also did not feel it necessary to interfere with the said finding of fact.

10. Under such circumstances, we will not be justified in again reconsidering the factual aspects especially when no perversity is found out in the fact finding by the Tribunal.

11. As already stated, the workman had been reinstated in

service and the only other question that arises for consideration is regarding payment of backwages. The Tribunal had only directed payment of 50% of backwages. A person who was denied employment is entitled for continuity in service and also backwages. The Tribunal having taken into consideration the fact that the workman was not working in the establishment during the said period, had granted a reduction of backwages taking into account the factual circumstances and the nature of dispute involved in the matter.

We do not think that we will be justified in interfering with such finding of fact. In the result, this writ appeal is dismissed, however, without any order as to costs.

Sd/-

A.M.SHAFFIQUE

JUDGE

Sd/-

GOPINATH P.

JUDGE

Rp

APPENDIX

APPELLANT'S EXHIBITS:

ANNEXURE A	**TRUE COPY OF THE PAY SLIP FOR THE MONTH OF APRIL, 2014.**
ANNEXURE B	**TRUE COPY OF THE PAY SLIP FOR THE MONTH OF MARCH, 2020**
ANNEXURE C	**TRUE COPY OF THE PAY SLIP FOR THE MONTH OF APRIL, 2020**
ANNEXURE D	**TRUE COPY OF THE PAY SLIP FOR THE MONTH OF MAY, 2020**
ANNEXURE E	**TRUE COPY OF THE PAY SLIP FOR THE MONTH OF JUNE, 2020**

True Copy

PS to Judge

Rp