(1993) 10 KL CK 0037

High Court Of Kerala

Case No: O.P. No. 1104 of 1989

Fatima Co-op. Credit Society Ltd.		APPELLANT
	Vs	
Deputy Labour Commissioner and Another		RESPONDENT

Date of Decision: Oct. 14, 1993

Acts Referred:

- Kerala Shops and Commercial Establishment Act, 1960 - Section 18, 18(1), 18(4)

Citation: (1994) 1 LLJ 615

Hon'ble Judges: Mathews P. Mathew, J

Bench: Single Bench

Advocate: N. Subramaniam, for the Appellant; M. Lalitha Nair and M.V. Joseph, for the Respondent

Judgement

Mathews P. Mathew, J.

All the three original petitions are filed by a co-operative society registered under the Kerala Co-operative Societies Act, 1969, represented by its Secretary. The first respondent in these petitions is the appellate authority appointed under the Kerala Shops and Commercial Establishments Act, 1960, and the second respondents in all these petitions were former employees (peons) of the petitioner-society. The second respondent in O.P. No. 1104 of 1989, Shri P.I. Shaju was appointed by the petitioner-society with effect from January 18, 1984, the second respondent in O.P. No. 1105 of 1989, Shri A.J. Dolphy was appointed by the petitioner-society with effect from January 12, 1984, and the second respondent in O.P. No. 1123 of 1989, Shri P.D. Paul was appointed by the petitioner-society with effect from June 21, 1984, all on daily wages of Rs. 10. The services of all these daily-rated peons were terminated with effect from February 24, 1986. No advance notice of termination was served on any of them. Neither was any reason given for the termination of their services. Therefore, the respondents whose services were terminated filed appeals before the first respondent u/s 18 of the Kerala Shops and Commercial Establishments Act,

1960, and those appeals were disposed of by a common judgment marked as Exhibit P-1 in each of the original petitions.

2. From a reading of Exhibit P-1, it is clear that the first respondent appellate authority has proceeded on the wrong assumption that in every case of termination of the services of an employee covered by the provisions of the Shops and Commercial Establishments Act, there should be an enquiry. The Kerala Shops and Commercial Establishments Act does not stipulate an enquiry to precede each and every termination of employment of an employee as wrongly understood by many. Section 18 of the Kerala Shops and Commercial Establishments Act, 1960, lays down as follows:

"18. Notice of dismissal. (1) No employer shall dispense with the services of an employee employed continuously for a period of not less than six months, except for a reasonable cause and without giving such employee at least one month''s notice or wages in lieu of such notice, provided however that such notice shall not be necessary where the services of such employee are dispensed with on a charge of misconduct supported by satisfactory evidence recorded at an enquiry held for the purpose.

(2) 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 had not been guilty of misconduct as held by the employer.

(3) The appellate authority may, after giving notice in the prescribed manner to the employer and the employee, dismiss the appeal or direct the reinstatement of the employee with or without wages for the period he was kept out of employment or direct payment of compensation without reinstatement or grant such other relief as it deems fit in the circumstances of the case.

(4) In directing the reinstatement of an employee, the appellate authority shall also direct the payment of such amount of compensation as may be specified by him in case the employer fails to reinstate the employee in accordance with the directions.

(4A) In directing the payment of compensation under Sub-section (3) or Sub-section (4), the appellate authority may include as part of the compensation the wages of the employee for the period he was kept out of employment.

(5) The decision of the appellate authority shall be final and binding on both the parties, not be liable to be questioned ip any court of law and be given effect to within such time as may be specified in the order of the appellate authority.

(6) Any compensation required to be paid by the employer under Sub-sections (3) and (4) but not paid by him shall be recoverable as arrears of land revenue under the provisions of the Revenue Recovery Act for the time being in force."

3. An enquiry is contemplated only in such circumstances wherein the services of an employee are dispensed with on a charge of misconduct. In other cases, an enquiry is not at all contemplated by the provisions of the Act. It is plain common sense that an enquiry could be of no use whatsoever in cases where the services of an employee is terminated for reasons like closure of business or any other reasonable cause contemplated by the Act. In cases where the services of an employee are dispensed with for a reasonable cause except on disciplinary grounds, all that is required by the employer is to give an employee at least one month''s notice or wages in lieu of such notice. Therefore, the finding that the termination of services of the second respondent in each of the cases is wrong and illegal because of the absence of framing of charges of misconduct and conducting a domestic enquiry is unsustainable in law and as such the said finding is hereby set aside. It is clear from the pleadings that the defence put forward by the management in essence is to the effect that the services of the employees concerned are terminated for a reasonable cause and not for any misconduct The appellate authority appointed under the Kerala Shops and Commercial Establishments Act ought not to have adverted to the latter provision of Section 18(1) of the Act, viz., framing of charges and enquiry which are contemplated by the statute only in such cases which are confined to acts of misconduct.

4. Exhibit P-1 further proceeds on the basis that there was no valid notice or payment of wages in lieu of notice as contemplated by the Act. That finding appears to be correct, as the management has no case that one month''s notice was given or wages in lieu of such notice was paid to any of the employees. The non-observance of a condition precedent as contemplated by Section 18(1) of the Act would technically make any termination of employment illegal. That does not, however, follow that in every case of such technical breach of the statutory provision, the employee concerned is entitled to reinstatement in service". Nor is he entitled to compensation fixed arbitrarily in lieu of reinstatement. Whether an employee would be entitled to reinstatement or not will depend upon the proper adjudication of the question as to whether there was a reasonable cause available for the employer for terminating the services of the employee concerned. In the present case, the management has put forward the plea that there was no valid, legally established relationship of master and servant between the society and any of the second respondent-employees. According to the petitioner-management, the society is empowered under the provisions of the Kerala Cooperative Societies Act to appoint only such number of employees in such categories as is permissible under the rules contained in Appendix III of the Kerala Co-operative Societies Rules framed under the said Act. According to the management, the second respondent in each of these cases were appointed wrongly in excess of the sanctioned quota in the category of peons. It is further submitted that there is no provision at all for the employment of daily-rated peons. As such their appointment is non est in law and, therefore, there cannot be any termination of a non-existing employer-employee relationship.

Learned counsel for the petitioner drew my attention to the decision in Koodaranji Service Co-operative Bank Ltd. v. M.M. Lissy (1993) 83 FJR 479 (Ker) , wherein a Division Bench of this Court has taken the view that the termination of service of an employee appointed under daily wages in a co-operative society against the rules will not amount to retrenchment. The question considered by the Division Bench was one coming under the Industrial Disputes Act. The principles adopted by the Division Bench in deciding that case are equally applicable in the present case also. As a matter of fact, before the first respondent-appellate authority, a contention was raised by the management relying on the decision in Eranalloor Service Co-operative Bank Ltd. Vs. Labour Court and Others, to the effect that the services of an employee appointed against the statutory rules in a cooperative society can be terminated, even without any notice as contemplated under the Industrial Disputes Act. The first respondent has however distinguished that decision on the basis that that decision was rendered in a case dealing with the Industrial Disputes Act, and that the same is not applicable in cases coming under the Kerala Shops and Commercial Establishments Act. I do not find any substance in the interpretation given by the first respondent-appellate authority in this regard. As laid down by the decision in Narmada Building Materials(P) Ltd. v. K.V. Devassy (1991) 79 FJR 591 (Ker), whether it is the Industrial Disputes Act or whether it is the Shops and Commercial Establishments Act dealing with the termination of employment of specified categories of employees/workmen, the existence of a jural relationship of master and servant from the very inception is a matter basic to the entire question of deciding the enforceable claims of an employee as against the employer and as such, there can be no distinction whether the provisions sought to be applied is one coming under the Industrial Disputes Act or under the Kerala Shops and Commercial Establishments Act, and the principle adopted by this Court should apply in both cases with equal force. This legal position is fortified by the decision in National Engineering Industries Ltd. Vs. Shri Kishan Bhageria and Others,

5. However, in the present case, the employees have a definite case that there is nothing on record to show that the petitioner-society has adopted the staff pattern contemplated by the rules framed u/s 80 of the Act. According to learned Advocate, Shri M.V. Joseph, appearing for the second respondent in each of the cases, until and unless the petitioner-society specifically adopts the rules concerning staff pattern framed u/s 80, those rules will have no application to the case of the petitioner-society. The management has produced Exhibit P-2 in each of the cases which is a communication from the Deputy Registrar of Co-operative Societies indicating that the staff pattern applicable to the society is as described in Appendix III to Rules 1 and 2 of the Rules framed u/s 80 of the Kerala Co-operative Societies Act. However, neither Exhibit P-2 nor any other document to establish that the petitioner-society has adopted the staff pattern under the rules framed u/s 80 was produced before the first respondent; In the absence of evidence adduced in this respect, the first respondent cannot be blamed for not arriving at a clear finding on

this question. However, in order to effectively adjudicate upon the question as to whether the termination of the services of the employee was legal or not, a proper adjudication of this issue is essential, particularly to see whether the decision in Koodaranji Service Co-operative Bank Ltd. v. M.M. Lissy, (supra) is applicable in the present case. I, therefore, set aside Exhibit P-1 in each of the above original petitions and remand the appeals in each of the cases for fresh disposal by the first respondent.

6. While remanding the case, I am constrained to observe that the compensation awarded by the first respondent-appellate authority in case of failure on the part of the management to reinstate the employee as per the impugned order, Exhibit P-1 (a), is arbitrary and excessive. I am constrained to make this observation in spite of the fact that the matter is being remanded, because of an unjustifiably liberal tendency found in the matter of awarding compensation u/s 18 by some of the appellate authorities. The compensation contemplated u/s 18(4) of the Kerala Shops and Commercial Establishments Act is more often than not fixed arbitrarily. Very often, it is found that the entire back-wages are directed to be paid irrespective of the time taken for disposal of the appeal or irrespective of any findings as to whether the employee concerned was otherwise employed during the pendency of the appeal. Again, compensation is granted without adverting to any principle whatsoever. Compensation can be granted by the appellate authority only based on some sound principle. It cannot depend upon the whims and fancies of the Presiding Officer concerned. Neither can it be subjectively based. Some of the relevant factors that can be taken into account in awarding compensation are:

1. The total length of service rendered by the employee whose services were sought to be terminated.

2. The age of the employee concerned.

3. His chances of re-employment in other establishments.

4. Whether the employee was in fact employed or not during the pendeny of the appeal.

5. The reasonable expectation of continuous employment with the employer concerned, in the facts and circumstances of the case.

7. In other words, the compensation will have to bear a direct nexus as to the loss caused to the employee because of the wrongful termination of the employment and consequent inability of the employee concerned to find another alternative gainful employment. The legal right to claim compensation for the loss caused to an employee on wrongful termination of service and consequent inability to find an alternative employment cannot be stretched to such an extent as to unjustifiably damage or stultify the industrial development or commercial activity. The social welfare legislations like the Kerala Shops and Commercial Establishments Act is not

intended to suffocate industrial and commercial development of the country. While the interests of the socially backward classes should be protected adequately, social welfare legislations should not be permitted to be used as a tool to hold employers for ransom on unjustifiable grounds. I hope the appellate authority will take note of these observations while disposing of the appeals de novo, as directed hereinabove.

8. The fact remains that the second respondent in each of the cases has been sent out of employment without notice. There is nothing on evidence as of now to find whether they were otherwise employed during the pendency of the appeal and these petitions. In the circumstances, it is only fair and reasonable that these employees are allowed to withdraw part of the amount already deposited with the first respondent-appellate authority in terms of the interim orders passed in these petitions, but without providing any security. Therefore, I direct that the first respondent shall take on file all the appeals for fresh consideration and the appellant in S. A. No. 24 of 1986 (second respondent in O.P. No. 1104 of 1989-F) be paid a sum of Rs. 1,000, the appellant in S.A. No. 22of 1986 (second respondent in O.P. No. 1105 of 1989-F) also be paid an amount of Rs. 1,000 and the appellant in S.A. No. 23 of 1986 (second respondent in O.P. No. 1123 of 1989-H) be paid an amount of Rs. 2,000 from the amount deposited by the petitioner. These payments will be subject to the final orders in the appeals. Needless to add that both the petitioner as well as the second respondent in each of the cases, that is the appellants in the shop appeals, will be permitted to adduce additional evidence before the first respondent to arrive at a final decision in the matter. In view of the pendency of the matter for such a long time, I hereby direct the first respondent-appellate authority to post the cases at the earliest and dispose of the same as expeditiously as possible, at any rate within six months from the date of receipt of a copy of the judgment. Either the petitioner or the second respondent in each of the cases would be at liberty to produce certified copy of the judgment before the first respondent in order to enable him to comply with the above directions.

9. With the above directions the original petitions are disposed of. Issue photo copy of the Judgment on usual terms