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(1995) 01 KL CK 0052

High Court Of Kerala

Case No: W.A. No. 1300/94

T.K. Ramesan	APPELLANT
Vs	
A.C. Thomas and Another	RESPONDENT

Date of Decision: Jan. 13, 1995

Acts Referred:

- Kerala Shops and Commercial Establishment Act, 1960 - Section 18, 18(1), 18(2), 18(4A), 2(4)

Hon'ble Judges: K. Sreedharan, J; B.N. Patnaik, J

Bench: Division Bench

Advocate: K.R.B. Kaimal, in W.A. 1300/94 and M.V. Joseph, in W.A. 1398/94, for the Appellant; K.R.B. Kaimal, for 2nd Respondent in W.A. 1398/94, M.V. Joseph, for 1st Respondent in W.A. 1300/94 and Lal George, Government Pleader for 2nd Respodent, for the Respondent

Judgement

B.N. Patnaik, J.
Both the appeals, having arisen out of the same judgment in O.P. No. 6720 of 1990, dated 11th July 1994 were heard together and are being disposed of by this common judgment. The Petitioner in the O.P. (hereinafter called "the committee") is the Appellant in W.A. No. 1398 of 1994 and the sccond Respondent in the O.P. (hereinafter called "the aggrieved employee") is the Appellant in W.A. No. 1300 of 1994.

2. The original petition was filed challenging the order of the appellate authority u/s 18(2) of the Kerala Shops and Commercial Establishments Act, 1960 (for short, the Act) who held that the termination of the services of the aggrieved employee by the committee was without any reasonable cause and was made in violation of the provisions of Section 18(1) of the Act. The committee was directed to reinstate the employee in its service as Lift Operator-cum-Watchman with continuity of service and full back wages and in default, to pay the employee Rs. 28,000 as compensation inclusive of all service benefits and back wages.

3. The facts of the case are as follows:

The Petitioner in the O.P. is the Maintenance Committee, Unity Complex, Sree Narayana Park Road, Cannanore. A five storeyed building called "Unity Complex" was constructed by a partnership firm consisting of 18 persons. During the construction of the building a Maintenance Committee consisting of 6 members was constituted to supervise the construction of the building. On completion of the construction of the building, the partnership was dissolved on 6th August 1986. The building consists of flats and the partners occupied each of the flats separately. The Maintenence Committee, however, continued to function to maintain the passages, all the terraced areas above the 5th floor, the rooms therein, toilet rooms, and like convenience, staircase, courtyard, toilet in the ground floor, near the staircase etc., and all the common facilities attached to and available in the building. Some of the partners rented out their flats and others used them for their own purpose. In October 1986, a lift was erected in the building. The aggrieved employee (second Respondent in the O.P.) was appointed by the committee on part-time basis along with another as a Lift Operator-cum-Watchman with effect from 6th October 1986. One year after the appointment of Lift Operators, the Committee decided to retain only one of them. After service of due notice, the services of the aggrieved employee were terminated with effect from 15th October 1987. While serving the termination order, the employee was offered his balance salary for the month of October 1987, half a month"s salary as compensation and one month"s salary in lieu of notice of one month. The aggrieved employee accepted the notice but did not receive the compensation and notice pay. Thereafter, he filed Shop Appeal No. 66 of 1987, dated 5th December 1987 before the appellate authority u/s 18(2) of the Act. After taking evidence and hearing the parties, the appellate authority passed the order as stated above. Against the order of the appellate authority, the committee filed the Original Petition.

4. The learned Single Judge partly allowed the Original Petition and held that the committee is a commercial establishment and the services of the aggrieved employee having been terminated wrongly directed the committee to reinstate the employee in service as Lift Operator-cum-Watchman with continuity of service and full back wages and in default to pay a total compensation of Rs. 1,400 which represents compensation for 15 days wages and salary for the balance of October, 1987 and one month"s notice pay in lieu of notice. The aggrieved employee challenges the finding of the learned Judge so far as the direction for payment of reduced compensation is concerned and the committee challenges the finding by which it has been held that it is a commercial establishment.

5. Learned Counsel for the committee (Appellant in W.A. No. 1398 of 1994) has contended that the learned Judge as well as the first Respondent in the O.P. have acted without jurisdiction inasmuch as the claim of the employee does not come under the purview of Section 18 of the Act, the employer Committee being not a commercial establishment. Learned Counsel for the aggrieved employee (Appellant in W.A. No. 1300/94) has contended that the learned Judge is not justified in reducing the

compensation awarded by the appellate authority inasmuch as the appellate authority rightly applied the provisions of Sub-section (4A) of Section 18 of the Act in assessing it.

6. The questions that arise for consideration are, whether on the facts and in the circumstances of the case, the committee can be treated as a commercial establishment and whether the aggrieved employee is entitled to get compensation on termination of his services.

7. Sub-section (1) of Section 18 of the Act postulates that the employee must be one who has been employed by a commercial establishment. The appellate authority under Sub-section (2) of Section 18 gets jurisdiction to hear the appeal and pass an order of reinstatement and/or award compensation only if a commercial establishment or a shop dispenses with the sevices of its employee without reasonable cause and without giving at least one month"s notice or wages in lieu of such notice. It is nobody"s case that the committee is a shop.

8. Sub-section (8) of Section 2 of the Act states that "establishment" means a shop or a commercial establishment. Sub-section (4) of Section 2 of the Act defines "commercial establishment" as follows:

commercial establishment means a commercial or industrial or trading or banking or insurances establishment, an establishmeat or administrative services in which the persons employed are mainly engaged in office work, hotel, restaurant, boarding a ating house, cafe or any other refreshment house, a theatre or any other place of public amusement or entertainment and includes such other establishment as the Government may, by notification in the Gazette, declare to be a commercial establishment for the purpose of this Act, but does not include a factory to which all or any of the provisions of the Factories Act, 1948 (Central Act 63 of 1948) apply.

Sub-section (6) of Section 2 of the Act lays down that an "employee" means a person wholly or principally employed, in and in connection with, any establishment and includes an apprentice. Sub-section (7) of Section 2 lays down that "employer" means a person owning, or having ultimate control over the affairs of, an establishment and includes the manager, agent or other person acting in the general management or control of an establishment.

9. It has been observed by this Court in Ramanathan v. State of Kerala 1991 (1) K.L.T 89 that an establishment is a commercial establishment if it is engaged in a commercial or industrial or trading or banking or insurance work. The idea conveyed by the use of the word "commercial" is that it should be understood with reference to commercial activity. There is no commercial activity unless there is at least some element of trade or business. In Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others, the Supreme Court observed that the heart of trade or business or analogous activity is organisation with an eye on competitive efficiency, by hiring employees, systematising

processes, producing goods and services needed by the community and obtaining money"s worth of work from employees.

10. The averment in the O.P. that the committee was constituted to maintain the building and the common facilities provided to the occupants has not been controverted. The aggrieved employee in his evidence before the appellate authority stated that the members of the committee are the owners of the Complex. The first floor of the Complex is a hospital. He does not know whether the Committee has got any right on it. He has not seen any record regarding the ownership or business in the flats. FACT Regional Office is in the third floor. He has not enquired whether the committee has got any business activity. The Secretary of the Maintenance Committee, in his evidence before the appellate authority, stated that his sons conduct a hospital in the second floor of the building of which he is the owner. Some of the owners of the flats are doing business and some of them are not doing any business in their flats. The Committee was elected to maintain the common places in the Unity Complex building. All the 18 persons have the right to use the common places.

11. Learned Counsel for the aggrieved employee argues that it being admitted by the Secretary that the commercial activities are carried on by some of the owners of the flats who happen to be the members of the committee, it should be held that the committee is a commercial establishment as well and that the aggrieved employee was employed by a commercial establishment. This argument, in our opinion, has no force.

12. Admittedly, the aggrieved employee has been appointed by the committee and not by any individual flat owner who has a commercial establishment. He has clearly stated in his evidence that he has not enquired as to whether the committee conducts any business in the building. There is also no denial of the fact that the committee has been constituted to look after the maintenance of the building including the facilities provided to the owners of the flats. A few individual members of the committee may be carrying on their commercial activities in some of the flats. But those commercial activities cannot be attributed to the committee which is a distinct body. In the absence of any evidence that the committee as a collective body carries on any business or trade or that it has a share in any commercial activity carried on by the individual flat owners, it cannot be said that the committee is engaged in any commercial activity, merely because a few members thereof independently carry on commercial activities in the building. If any commercial establishment in the building incidentally got the services of an employee of the committee gratis, there can be no inference that he rendered such services as an employee of a commercial establishment.

13. For the aforesaid reasons, we are of the view that the committee is not a commercial establishment and the aggrieved employee being not an employee of a commercial establishment as envisaged in Section 18(1) of the Act, he is not entitled to get any compensation etc. The finding of the learned Single Judge that the committee is a commercial establishment cannot be upheld. The appellate authority, therefore, did not

have the jurisdiction u/s 18(2) of the Act to entertain the appeal filed by the aggrieved employee. Hence the order of the appellate authority and the judgment of the learned Single Judge are set aside.

14. Learned Counsel for the employer-committee (Appellant in W.A. No. 1398 of 1994) has, however, agreed to pay a total compensation of Rs. 1400 to the employee on compassionate grounds. We allow this concession. No order as to costs.

15. With the above observation, we dismiss W.A. No. 1300 of 1994 and allow W.A. No. 1398 of 1994.