

**(2002) 07 KL CK 0093**

**High Court Of Kerala**

**Case No:** O.P. No. 3929 of 1996

Makkarkunju

APPELLANT

Vs

State of Kerala

RESPONDENT

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**Date of Decision:** July 9, 2002

**Acts Referred:**

- Constitution of India, 1950 - Article 19(1)

**Citation:** (2003) 2 LLJ 547

**Hon'ble Judges:** K.A. Abdul Gafoor, J

**Bench:** Single Bench

**Advocate:** P. Ravindran, for the Appellant; P. Ramakrishnan and T.C. Krishna and P.V. Lonachan, Government Pleader, for the Respondent

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### **Judgement**

K.A. Abdul Gafoor, J.

More than six years have elapsed since the filing of this case. Challenge in this Original Petition is against Ext. P1 notification issued by the Government. In spite of that, either the Government or respondents 2 and 3 who are to administer Ext. P1, have not chosen to file a counter affidavit. The petitioner submits that Ext. P1 amendment to the Kerala Motor Transport Workers' Welfare Fund Scheme, 1985 is totally arbitrary and unreasonable insofar as the amount paid by them in respect of the Welfare Fund account to their workers to be forfeited to the fund when the workmen becomes not eligible for the amount so paid by the employer.

2. Clause 46 of the Kerala Motor Transport Workers' Welfare Fund Scheme provides for payment of Welfare Fund to Motor Transport Workers on completion of one year service. This provision was challenged earlier. The challenge was repelled as per the decision of this Court in Unni Mammu Haji v. State of Kerala 1989 (1) KLT 729. Even then, it was held in para 18 of the report as follows:

"In the light of these principles and in the context of the peculiar nature of the employment, we are of the view that a minimum period of one year service to earn

gratuity prescribed under the scheme cannot be said to be unreasonable. We are aware that the employer is required to contribute 5% of the wages to the fund towards gratuity every month once an employee has become a member of the fund. The employees' entitlement can be satisfied only if the employer has made the statutory contribution. There is nothing in the Act or the scheme entitling the Board to appropriate the contributions by way of gratuity in cases where gratuity is not payable to the employee for want of requisite minimum service. In such cases, it will be open to the employer to apply for and get a refund of the contributions made by him towards gratuity not payable to the employee. We do not see any unreasonable restriction on the employer's right under Article 19(1)(g) of the Constitution to carry on trade or business for the reason that he is required to contribute 5% of the wages due to each employee towards gratuity payable to him on termination of service."

It is to tide over this, Ext. P1 amendment is effected introducing Clause 4 to paragraph 46 of the said scheme which reads as follows:

"The contributions made by an employer to the Fund but which is not entitled to the employee for want of requisite minimum period of continuous service shall be forfeited to the Board and shall not be refunded to the employers, but shall be credited to the Reserve Account of the Fund".

3. Constitution of Welfare Fund is for the benefit of the employees. It is not for the enrichment of the Welfare Fund Board. Contributions are made by the employer depending upon the list of employees. Contribution is towards gratuity as well. It may happen that on termination, retirement or death, a workman may not be entitled to gratuity for want of at least one year service. In such circumstances the contribution made by the employer towards gratuity payable to his workmen who could not complete a minimum period of one year cannot be paid to the workmen. In such a situation, it shall necessarily be repaid to the employer who had remitted it. It cannot be termed as something for enriching the authority which is administering the fund; Therefore, on that count, Ext. P1 amendment is arbitrary and unreasonable. It enables the Welfare Fund Board to get illegal and unlawful enrichment at the cost of the employer. Employer is liable to pay only whatever eligible to the workmen. Here, employer was statutorily compelled to effect payment, though the workman was not entitled. So the payment made by the employer shall be returned to him and cannot be forfeited to the Board. Ext. P1 is therefore arbitrary. Accordingly, it is quashed. The amount paid by the petitioners towards gratuity of workmen, but not paid due to disentitlement to any workmen who had ceased to be in service, shall be refunded to the petitioners.

Original Petition is disposed of as above.