

(2002) 07 KL CK 0064
In the High Court Of Kerala
Case No : O.P. No. 15279 of 2002

Ajithkumar

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 11-07-2002

Acts Referred:

Industrial Disputes Act, 1947 — Section 36

Citation : (2002) 95 FLR 307 : (2002) 3 ILR (Ker) 606 : (2003) 1 LLJ 473

Hon'ble Judges : Kurian Joseph, J

Bench : Single Bench

Advocate : B. Mohanlal, for the Appellant; M.K. Aboobacker, Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Kurian Joseph, J.—A party to an industrial dispute before a Court/Tribunal refuses to grant consent to engage a legal practitioner. Has the Court/Tribunal got an inherent power to overrule the objection on merits and appoint a legal practitioner? Does Varghese v. Nichimen Corporation 2001 (2) KLT 75 (Bombay), reflect the correct legal position?

The petitioner challenges Ext. P3 order passed by the Industrial Tribunal. By the said order the Tribunal declined permission to the management to engage a legal practitioner. It may be seen that before the Industrial Tribunal the management had made an earlier attempt for appointment of legal practitioner and on being objected to, the proceedings went on without the assistance of a legal practitioner on either side. The application leading to Ext. P3 is a second attempt on the ground that the President of the union is a legal practitioner and hence the management should be permitted to engage a legal practitioner before the Tribunal. But it is not in dispute that the proceedings before the Tribunal are conducted by the General Secretary of the union who is not a legal practitioner and hence it cannot be said that there is any prejudice to the petitioner as of now. Learned counsel for the petitioner relies on a decision of the High Court of

Bombay reported in *Varghese v. Nichimen Corporation* (2001 (2) KLT 75) and contends that there is no absolute bar for the Tribunal in considering the request for engaging an advocate. The Short Note reads as follows:

"If there was no objection raised on the first date of the proceedings to the appearance of the legal practitioner on behalf of the other side the consent is to be taken as implied consent. The grant of "leave" would be more decisive rather than the "consent" of the party. In view of the above discussion, according to me, the leave granted by the Labour "Court/Tribunal" will have overriding effect as a party cannot be represented by a legal practitioner even when the other side consents without the leave of the Labour Court/Tribunal. Considering the vast development of law and the complications which arise in the litigation the Labour Court/Tribunal has an inherent right in the interest of justice to seek proper assistance in resolving the industrial dispute to the satisfaction of both the parties and in accordance with law and grant "leave" to a party before it to be represented by a legal practitioner. There is no absolute bar for the legal practitioner to appear before the Labour Court/Tribunal as it is u/s 36(3) in the conciliation proceedings. No party can withhold appearance of a legal practitioner by denying "consent" without any justification and arbitrarily for no rhyme or reason. If a party is represented by an office bearer etc. of a Trade Union or an Association, it cannot refuse to grant consent to the other side without any reasonable cause and justification to engage a legal practitioner and the Labour Court/Tribunal can always consider the bonafides of such a party withholding consent and can always grant "leave" to the other parties to be represented by a legal practitioner in the interest of justice notwithstanding the refusal of consent by the other side."

With great respect, I am not persuaded to accept the said view. In order to ascertain the background of the decision, the text of the judgment was obtained. It was a case where the workmen challenged an interim order of the Labour Court, Mumbai granting permission to the management to engage a counsel. The workman was represented by a person who was the General Secretary of the Union and he was an "old experienced very senior trade union leader having vast knowledge and experience to his credit". The management was a Japartese Company. The issue is dealt with at paragraphs 10 and 11 of the judgment which reads as follows:

" 10. There is no absolute bar for the legal practitioner to appear before the Labour Court/ Tribunal as it is u/s 36(3) in the conciliation proceedings. No party can withhold appearance of a legal practitioner by denying "consent" without any justification and arbitrarily for no rhyme or reason. If a party is represented by an office bearer etc. of a Trade Union or an Association, it cannot refuse to grant consent to the other side without any reasonable cause and justification to engage a legal practitioner and the Labour Court/Tribunal can always consider the bonafides of such a party withholding consent and can always grant "leave" to the other parties to be represented by a legal practitioner in the interest of

justice notwithstanding the refusal of consent by the other side. No party to the proceedings has an unbridled and absolute right to refuse to give consent to the other party. No party can adopt unreasonable attitude to exploit the situation arising out of Section 36(4) of the Act to the deliberate disadvantage of the other side. This provision was enacted to help the budding Trade Union movement and it was never intended for them to take wrongful advantage of the same even after the Trade Unions have become capable of defending themselves and their workmen. The provision is always subject to the scrutiny of the Labour Court/Tribunal and it can always decide the question of refusal of consent by the other party and can overrule the refusal of the consent on merits independently while considering to grant or refuse the "leave" contemplated u/s 36(4) of the Act.

11. It will be useful to reproduce the Section 36 for ready reference, which reads as under:

"36. Representation of parties.-(1) A workman who is a party to a dispute shall be entitled to be represented in any proceeding under this Act by-

(a) any member of the executive or other office bearer of a registered trade union of which he is a member;

(b) any member of the executive or other office bearer of a federation of trade unions to which the trade union referred to in Clause (a) is affiliated;

(c) where the worker is not a member of any trade union, by any member of the executive or other office bearer of any trade union connected with, or by any other workman employed in the industry in which the worker is employed and authorised in such manner as may be prescribed.

Provided that, where there is a recognised Union for any undertaking under any law for the time being in force, no workman in such undertaking shall be entitled to be represented as aforesaid in any such proceeding (not being a proceeding in which the legality or propriety of an order of dismissal, discharge, removal, retrenchment, termination of service, or suspension of an employee is under consideration) except by such recognised union.

(2) An employer who is a party to a dispute shall be entitled to be represented in any proceeding under this Act by-

(a) an officer of an association of employers of which he is a member;

(b) an officer of a federation of association of employers to which the association referred to in Clause (a) is affiliated;

(c) whether the employer is not a member of any association of employers, by an officer of any association of employers connected with, or by any other employer engaged in, the industry in which the employer is engaged and authorised in such manner as may be prescribed.

(3) No party to the dispute shall be entitled to be represented by a legal

practitioner in any conciliation proceeding under this Act or in any proceedings before a Court.

(4) In any proceeding before a Labour Court, Tribunal or National Tribunal, a party to a dispute may be represented by a legal practitioner with the consent of the other parties to the proceedings and with the leave of the Labour Court, Tribunal or National Tribunal as the case may be.

It is crystal clear that the party to the dispute in any proceedings under this Act is specifically conferred a right or entitlement to be represented by a member of the Executive or an office bearer of a registered union or a Federation or an officer of Association of Employers or a Federation of the Employers' Associations. This right is totally denied u/s 36(3) in the proceedings before the Conciliation proceedings or in any proceedings before the Court as far as the representation by a Legal Practitioner is concerned. However, Section 36(4) relaxes this total ban on the representation by the Legal Practitioner if the other party gives consent and the Labour Court/ Tribunal grants leave to be represented by a Legal Practitioner. The bar on the Legal Practitioners appearance is based on a general impression that they would contribute to the delay in disposal of the disputes. The impression might be correct to some extent but the legal fraternity alone cannot be held responsible for the delay as there are number of causes which also delay the disposal of the cases. Further very often the parties-in-person create a number of problems from lack of knowledge and proper understanding and a deep sense of revenge against the other side and complete absence of detachment from the dispute and lack of knowledge of law and functioning of the Courts and techniques and niceties in the mailers. For such and similar factors, the parties-in-person are likely to suffer more in their own cause. In my considered opinion it is not always in the interest of the parties to deny them the legal assistance in the Courts/Tribunal of the legal practitioners. Denial of justice totally is worse than the delayed justice."

2. I am afraid, Section 36 does not in any way deny equal justice. Under Sub-section (3) of Section 36 of the Act, no party to a dispute shall be entitled to be represented by a legal practitioner in any conciliation proceedings, under the Industrial Disputes Act or in any proceedings before a Court. However, under Sub-section (4), it is provided that in any proceeding before a Labour Court, Tribunal a party to dispute may be represented by a legal practitioner with the consent of the other parties to the proceeding and with the leave of the Labour Court, Tribunal or National Tribunal as the case may be. The legislative intention is very clear: in case a party is to engage a legal practitioner, it can be done only if both conditions are satisfied. (1) The consent of other party. (2) Leave of the Court/Tribunal. It is not enough that any one of the conditions is satisfied. Both conditions have to be satisfied. In rare situations, the statute provides for such absolute conditions. Section 36(4) of the Act is one such condition. It is the prerogative of one of the parties to the dispute has to withhold the consent injuncting the other party from engaging a counsel. It is on the principle of equal

justice. It is not as if one of the parties, is in a disadvantageous situation like the one referred to in the decision cited above before the Bombay High Court (Japartese Company) being left helpless. Sub-sections (1) and (2) of Section 36 provide for such situation where a party can be represented by office bearers of the trade union/management and association wherein the party is a member or is affiliated and in case it is not any such member, the party can be represented by any other workman/employer engaged in the industry in which the workman or employer is engaged and duly authorised. Therefore, once a party withholds consent in the matter of the other party engaging a counsel, the Labour Court/Tribunal cannot go beyond that and the Court/Tribunal cannot overrule the objection of one side and appoint a legal practitioner. In other words, the Court/Tribunal gets jurisdiction to engage a counsel in a proceeding before it only if one party consents. The inherent jurisdiction of the Court/Tribunal cannot be extended to the extend of overruling the objection and appointing a legal practitioner. This is of course, subject to the inherent power of any Court or Tribunal to appoint a legal practitioner as *amicus curiae* for the purpose of assisting the Court/Tribunal.

3. Infact the Apex Court has elaborately considered the scope of Section 36(4) in *Paradip Port Trust, Paradip Vs. Their Workmen*, wherein it is stated thus:

"A lawyer, *simpliciter*, cannot appear before an Industrial Tribunal without the consent of the opposite party and leave of the Tribunal merely by virtue of a power of attorney executed by a party. A lawyer can appear before the Tribunal in the capacity of an office-bearer of a registered trade union or an officer of associations of employers, and no consent of the other side and leave of the Tribunal will, then, be necessary.

Section 36 is not exhaustive but only supplemental to any other lawful mode of representation of parties. The parties, however, will have to conform to the condition laid down in Section 36(4) in the matter of representation by legal practitioners; Both the consent of the opposite party and the leave of the Tribunal will have to be secured to enable a party to seek representation before the Tribunal through a legal practitioner *qua* legal practitioner. This is the clear significance of Section 36(4) of the Act. If, however, a legal practitioner is appointed as an officer of a company or corporation and is in their pay and under their control and is not a practising advocate the fact that he was earlier a legal practitioner or has a legal degree will not stand in the way of the company or the corporation being represented by him. Similarly if a legal practitioner is an officer of an association of employers or of a federation of such associations, there is nothing in 36(4) 10 prevent him from appearing before the Tribunal under the provisions of Section 36(2) of the Act. Again, an office-bearer of a trade union or a member of its executive, even though he is a legal practitioner, will be entitled to represent the workmen before the Tribunal u/s 36(1) in the former capacity. The legal practitioner in the above two cases will appear in the capacity of an officer of the association in the case of an employer and in the capacity of an

office-bearer of the union in the case of workmen and not in the capacity of a legal practitioner. The fact that a person is a legal practitioner will not affect the position, if the qualifications specified in Section 36(1) and Section 36(2) are fulfilled by him. It must be made clear that there is no scope for enquiry by the Tribunal into the motive for appointment of such legal practitioners as office-bearers of the trade unions or as officers of the employers' associations.

It is true that "and" in particular context and in view of the object and purpose of a particular legislation may be read as "or" to give effect to the intent of the Legislature. However, having regard to the history of the present legislation, recognition by law of the unequal strength of the parties in adjudication proceedings before a Tribunal, intention of the law being to discharge representation by legal practitioners as such, and the need for expeditious disposal of cases, it cannot be held that "and" in Section 36(4) can be read as "or". Consent of the opposite party is not an idle alternative but a ruling factor in Section 36(4). The question of hardship is a matter for the Legislature to deal with and it is not for the courts to invoke the theory of injustice and other consequences to choose a rather strained interpretation when the language of Section 36 is clear and unambiguous.

Further, Section 30 of the Advocates Act cannot be invoked. First, the Industrial Disputes Act is a special piece of legislation with the evowed aim of labour welfare and representation before adjudicatory authorities therein has been specifically provided for with a clear object in view. This special Act will prevail over the Advocates Act which is general piece of legislation with regard to the subject matter of appearance of lawyers before all courts, tribunals and other authorities. The Industrial Disputes Act is concerned with representation by legal practitioners under certain conditions only before the authorities mentioned under the Act. Second, the matter is not to be viewed from the point of view of legal practitioners but from that of the employer and workmen who are the principal contestants in an industrial dispute. It is only when a party engages a legal practitioner as such that the tatter is enabled to enter appearance before Courts or tribunals. Here, under the Act, the restriction is upon a party as such and the occasion to consider the right of the legal practitioner may not arise."

Therefore, I do not find any justification in interfering with Ext. P3 order passed by the Tribunal declining permission to the management to engage a legal practitioner. Varghese's case (2001 (2) KLT 75 (Bom.)) does not reflect the correct legal position in the light of the Supreme Court decision cited above.

The Original Petition is dismissed.