(2015) 02 KL CK 0137

In the High Court Of Kerala

Case No : Writ Petition (C) No. 32544 of 2010

Biju Mon APPELLANT

Vs

State of Kerala and Others RESPONDENT

Date of Decision : 19-02-2015

Acts Referred:

Citation : (2015) 2 KHC 188

Hon'ble Judges : K. Vinod Chandran, J.

Bench : Single Bench

Advocate : S. Sreekumar, Senior Advocate, P. Martin Jose and P. Prijith, for the Appellant; R. Renjith, Government Pleader, Koshy George, K.D. Babu, Joy George, SCs and Unni K.K., Advocates for the Respondent

Final Decision : Allowed

Judgement

K. Vinod Chandran, J.—Petitioner is aggrieved by the determination order passed at Ext. P2, which stands confirmed in an appeal before the Government. Originally the petitioner was issued with notice for dues under the Kerala Toddy Workers Welfare Fund Act, 1969 and the petitioner also is said to have filed an objection to the same. The petitioner was then faced with revenue recovery proceedings, which he challenged in WP (C) No. 4079 of 2008. This Court specifically noticed the contention of the petitioner that he was in the dark as to any enquiry having been made, after the initial enquiry notice produced therein, as Ext. P1. This Court directed that a fresh consideration would be made on the petitioner filing the objections. The fresh consideration made as per Ext. P2, is impugned herein. Admittedly, the petitioner is not the licensee of the toddy shop No. 45 of the Kuttanad Range, in the year 2003-2004, with respect to which proceedings were initiated under the Welfare Fund Act. The 4th respondent who was admittedly the licensee and the employees were issued with notice. A registered worker, the licensee and the petitioner appeared before the Officer. The petitioner submitted that he had only been an employee for 2 1/2 months and he has absolutely no connection with the management of the shop. The licensee however contended that the licensee was conducting the shop along with the petitioner. The registered worker who appeared, also deposed that there was a joint-management by the petitioner and the 4th respondent. On that basis alone, the petitioner was mulcted with half the liability.

2. The Welfare Fund Officer speaks of a detailed enquiry conducted by him. But however none of the facts which were revealed in that enquiry is seen placed on record. After speaking of the "detailed enquiry"; finding the management of the shop having been carried on by the petitioner also, the Officer would state that the petitioner has not produced any evidence to show that he had not been in the management of the shop. It would be difficult to accept that reasoning especially since the petitioner could not have produced negative evidence before the officer as to himself having not conducted the shop. The liability has been mulcted on the petitioner only on the strength of the deposition of the licensee and the registered worker.

3. No reliance can be placed on the licensee''s deposition since it is a self-serving statement which seeks to reduce his liability. The Hon''ble Supreme Court in Joseph Joseph and Others Vs. State of Kerala and Others, held that intermediary persons could not be held to be the employer of workers employed for conduct of business in a toddy shop, in the absence of proof to the contrary. True, the Hon''ble Supreme Court also held that, the mere fact that the transfer of a licence was prohibited; would not restrict the Board from taking proceedings against any person who was in de facto management of a shop. The reasoning was that the definition of employer in the Welfare Fund Act, took in any such third party who was in de facto management of the shop. However there should be evidence to show that there was a de facto management by the third party and employees were employed on his behalf.

4. In the present case, this Court is unable to find any such evidence; but for the self-serving deposition of the licensee and that of a registered worker. The burden, lies heavily on the licensee, to shift the liability to another. The transfer of a license granted under the Kerala Abkari Act, 1077 is not permissible. Ignoring such illegality, the Welfare Fund Act provides for proceeding against any such transferee, who was in de facto management, by virtue of the definition of ''employer'' under the Welfare Fund Act. However that cannot be on the mere statement of the licensee, who has the primary and essential liability to satisfy the dues under the Welfare Fund Act.

5. The licensee hence should produce reliable cogent evidence to prove that the management was, in fact carried on by a third party and the employees were also employed by such third party. Even on such evidence; the licensee would not be absolved of the liability and the same would only be treated as joint and several. The Board could also, on the basis of any evidence collected at an enquiry, impose such joint and several liability on a third party. However that enquiry cannot be confined to taking the deposition of the licensee and the workers. As far as the licensee is concerned, any such statement made of

management by a third party; if stands alone, has to be dismissed as a self-serving statement; without any tangible evidence otherwise. The evidence of an employee or a union leader, would definitely stand on a different footing. But even that cannot be the sole basis of mulcting the liability on a third party; since it could be a collusive attempt or one of enlightened self-interest. If the liability is mulcted on the basis of such deposition alone, then any person with financial capacity could be projected as a person who had been carrying on the management of a toddy shop along with the licensee, purely in the interest of the employees.

Herein but for the statements of the worker and the licensee there is no evidence, let alone any tangible or substantial material, to mulct the liability of the licensee, on the petitioner; as a joint and several liability. In such circumstances, the writ petition is allowed. Ext. P2 and P3 shall stand set aside.

