

(2016) 11 KL CK 0046

In the High Court Of Kerala

Case No : Writ Appeal No.1315 of 2015

Binani Zinc Employees Multipurpose Co-Operative Society Ltd.

APPELLANT

Vs

Lizy Rajan

RESPONDENT

Date of Decision : 15-11-2016

Acts Referred:

Kerala Co-operative Societies Act, 1969 — Section 69

Kerala Shops and Commercial Establishment Act, 1960 — Section 18

Citation : (2017) 1 ILRKerala 187 : (2017) 1 KerLJ 76

Hon'ble Judges : Mr. Antony Dominic and Mrs. Shircy V., JJ.

Bench : Division Bench

Advocate : Sri. K.S. Ajayaghosh and Sri. Paul Abraham Vakkanaal, Government Pleader, for the Respondent; Sri. N.K. Subramanian and Sri. S. Ananthakrishnan, Advocates, for the Petitioner

Final Decision : Disposed Off

Judgement

Antony Dominic, J. - Binani Zinc Employees" Multipurpose Co-operative Society Limited is the appellant. They filed Writ Petition No.29933/08 challenging Ext.P1 order passed by the Appellate Authority under the Kerala Shops and Commercial Establishments Act, 1960. By the said order, the Appellate Authority set aside the order of termination of the first respondent, an employee of the Society and ordered that she shall be reinstated in service with 7th of the back wages for the period she was kept out of service after adjusting the subsistence allowance paid or to pay compensation of Rs.4,50,000/- in lieu of re-employment and back wages. By the judgment under appeal, the learned Single Judge dismissed the writ petition. It is aggrieved by this judgment, this appeal is filed.

2. Briefly stated, the facts of the case are that, after engaging her from 1991 on daily wages, the appellant society appointed the first respondent as a Junior Clerk with effect from 3.11.1994. She was suspended from service from 7.10.98. This was in contemplation of a disciplinary action, in which she was issued memo of charges containing eight charges. An outsider was appointed as the Enquiry

Officer. In Ext.P2, Report submitted by the Enquiry Officer, he held that charge Nos.1 and 2 were partly proved and that charge Nos.4, 5 and 6 were proved. The findings of the Enquiry Officer were accepted by the disciplinary authority and finally, the first respondent was dismissed from service. She preferred an appeal before the Board of Directors under Rule 198 (4) of the Kerala Co-operative Societies Rules. The appeal was rejected by Ext.P4 order.

3. Aggrieved by the above orders, the first respondent filed an appeal under Section 18 of the Kerala Shops and Commercial Establishments Act, 1960 (hereinafter referred to as "the Act" for short). By Ext.P1 order, the Appellate Authority set aside the order of dismissal and ordered reinstatement of the first respondent with 7th of the back wages for the period she was kept out of service after adjusting the subsistence allowance paid. The management was also given the option to pay compensation of Rs.4,50,000/- in lieu of reinstatement with back wages. This order, was challenged in the writ petition.

4. The judgment under appeal shows that before the learned Single Judge, the main issue raised and considered was about the competence of the second respondent to entertain and consider the appeal filed by the first respondent under Section 18 of the Act. However, relying on Exts.P9 and P10 judgments of this court and the judgment in Thodupuzha Taluk General Marketing Co-operative Society v. Michael Sebastiab [2010 (1) KLT 938], this contention was overruled. The findings of the Appellate Authority were also confirmed by the learned Single Judge and it was held that unless it is perverse or not based on legal evidence, the findings are impugned to interference in a proceedings under Articles 226 and 227 of the Constitution of India. It was accordingly that the writ petition was dismissed, which judgment is under challenge before us.

5. We heard the counsel for the appellants, learned counsel appearing for the first respondent and the learned Government Pleader appearing for the second respondent.

6. The first contention raised by the counsel for the appellant was that having regard to the principles laid down by the Larger Bench of this Court in the judgment in Chirayinkeezhu Service Co-operative Bank Ltd. v. Santhosh [2015 (4) KLT 163 (L.B.)], the very appeal filed by the first respondent before the second respondent was not maintainable. The second contention raised is even if the appeal is held to be maintainable, the contentions of the appellant regarding the perversity of the findings of the Appellate Authority were not properly considered by the learned Single Judge. According to him, on the evidence that was available, the Enquiry Officer had found the first respondent guilty of some of the misconducts alleged and that those proved misconducts justified an order of dismissal from service. According to the counsel, the learned Single Judge ought have interfered with the findings of the Appellate Authority and restored the order of dismissal passed by the disciplinary authority, which was confirmed by the 1st Appellate Authority.

7. These contentions were refuted by the learned counsel appearing for the first respondent. It was pointed out that substitution of Section 69 of the Kerala Co-operative Societies Act by Act 1 of 2000, was implemented only with effect from 2.1.2003. According to him, the dismissal of the first respondent was with effect from 6.1.2001 and the Shop Appeal in which Ext.P1 order was passed, was filed on 19.9.2002. It is stated that the appeal having been filed long before the substitution of Section 69 in its present form, the employee had the vested right to continue the appeal in the forum which was competent to entertain the appeal as on the date of institution of the lis. In support of this proposition, the learned counsel placed reliance on the judgment of the Apex Court in *Videocon International Limited v. Securities and Exchange Board of India* [2015 (4) SCC 33]. The learned counsel also contended that this contention of the appellant has to be rejected in the light of Exts.P9 and P10 judgments upholding Ext.P8 order passed by the First Appellate Authority rejecting this very contention raised by the appellant regarding the alleged incompetence of the appeal before the second respondent. Insofar as the second contention is concerned, learned counsel contended that reading of Ext.P1 order passed by the Appellate Authority itself would show that the findings of the Enquiry Officer were totally perverse and that, therefore, the Appellate Authority was entitled to come to its own conclusions in exercise of its appellate power under Section 18 of the Act.

8. We have considered the submissions made. The first issue that arises for consideration is whether the appeal filed by the first respondent before the second respondent invoking its appellate power under Section 18 of the Act was maintainable or not. Section 18 of the Act, provides that any employee of a shop or commercial establishment 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. Sub Section 3 entitles the Appellate Authority to dismiss the appeal or direct reinstatement of the employee with or without back 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. Insofar as this case is concerned, though the appellant did not contend that the society is not a shop or commercial establishment, the contention raised by the appellant was that the remedy of an employee of a Co-operative Society is only under Section 69 of the Kerala Co-operative Societies Act.

9. Section 69 of the Kerala Co-operative Societies Act, provides resolution of disputes by Co-operative Arbitration Court and Registrar. As per this Section, notwithstanding anything contained in any law for the time being in force, if a dispute arises between the society and its employee, such dispute shall be referred to the Co-operative Arbitration Court constituted under Section 70A, in the case of non-monetary disputes. Section 69(2) provides that any dispute arising in connection with employment of officers and servants, including their promotion and inter se seniority shall also be deemed to be a dispute for the

purposes of Section 69(1). The scope of Section 69 of the Kerala Co-operative Societies Act was considered by a Larger Bench of this court in the judgment in Chirayinkeezhu Service Co-operative Bank Ltd. (supra). In this judgment, this court held that while enacting the provision of Section 69(1), the Legislature has used the non obstante clause and the phrase "no court" which was a clear expression of the intention to exclude the jurisdiction of all courts and that service disputes of both officers and employees of co-operative societies were contemplated to be referred and adjudicated only under Section 69 and to the exclusion of the other adjudicatory forum created under other enactments. In other words, by this judgment, law was settled that resolution of service disputes of employees of the co-operative societies, is permissible only under Section 69 which was to the exclusion of all other statutory remedies. It is on this basis, argument is now raised by the appellant's counsel that the order passed by the Appellate Authority under the Act was without jurisdiction.

10. In answer, it was contended by the counsel for the first respondent that appeal being a vested right and a continuation of the proceedings, she is entitled to prosecute the appeal before the forum that was available on the date of commencement of the lis. According to counsel, since law was declared by the Larger Bench in Chirayinkeezhu Service Co-operative Bank Ltd. (supra) only in 2015, the dispute which commenced long before that, was entitled to be continued in the same forum. It was in support of this plea that the counsel placed reliance on the Apex Court judgment in Videocon International Limited (supra). Having considered this contention, we confess our inability to accept it. A reading of the Larger Bench judgment of this court would show that the principle laid down therein is that Section 69 as it was originally enacted contemplated adjudication of all disputes by the forums created thereunder. When the Kerala Co-operative Societies Act was enacted in 1969, it contained Section 69, as the dispute resolution mechanism. Therefore, irrespective of the fact that Section 69 was substituted by Act 1 of 2000 which was brought into force with effect from 2.1.2003 or that the legal position was clarified by this court only in 2015, adjudication under Section 69 was the only remedy available since the enactment of the Kerala Co-operative Societies Act in 1969. Admittedly, dispute was raised by the first respondent long thereafter. Therefore, she cannot take advantage of the principles laid down in the judgment in Videocon International Limited (supra) and argue that the appeal under the Act was maintainable.

11. Though the legal position is as above, insofar as this case is concerned, it is seen that when the appeal was pending before the second respondent, question of jurisdiction and maintainability was raised by the appellant and pursuant to the orders of this court in O.P.12457/03, jurisdiction and maintainability of the appeal under the Act was considered by the second respondent as a preliminary issue. Accordingly, Ext.P8 order was passed holding that the second respondent had jurisdiction in the matter and that the appeal filed under the Act was maintainable. The appellant challenged Ext.P8 order before this court in W.P.

(C)24695/03. By Ext.P9 judgment, this court upheld Ext.P8 order and dismissed the writ petition. The appellant carried the matter in appeal by filing W.A.1734/04. The Division Bench also dismissed the appeal by Ext.P10 judgment. The appellant challenged the matter further before the Apex Court and the Apex Court also confirmed Exts.P9 and P10 by dismissing SLP(C)No.6584/2005 as per its Annexure A1 order, dated 8.4.2005.

12. From the above, therefore, it is obvious that the issue of jurisdiction and maintainability of the appeal was raised by the appellant and in Exts.P9 and P10 inter party judgments, this court has held that the appeal filed under the Act was maintainable. As per annexure A1 order, Exts.P9 and P10 judgments have attained finality and thus binding on the parties thereto. Having regard to the principles subsequently laid down by the Larger Bench of this court in Chirayinkeezhu Service Co-operative Bank Ltd. (supra), even if it is taken that Ext.P10 is judgment impliedly overruled, as far as the parties thereto are concerned, such overruling will not nullify the binding nature of Exts.P9 and P10 judgments and they would still continue to be bound by the findings therein. Basis of this conclusion is the settled legal principle that when the ratio decidendi of an earlier decision undergoes a change, the final order of the earlier decision, as applicable to the parties to the earlier decision, is in no way altered or disturbed. (Sanjay Singh and another v. U.P.Public Service Comm., Allahabad and Another) (AIR 2007 SCW 707). If that be the principle, we will have to necessarily hold that having regard to the finality that Exts.P9 and P10 inter party judgments have attained and the binding nature thereof, it is not open to the appellant to again raise the plea of absence of jurisdiction of second respondent or that the appeal filed by the first respondent under the Act was not maintainable. Therefore, we reject the first contention raised by the appellant that in the light of the judgment in Chirayinkeezhu Service Co-operative Bank Ltd. (supra), the appeal filed before the first respondent was not maintainable and, therefore, Ext.P1 order passed by the Appellate Authority is without jurisdiction.

13. Now, turning to the merits of the matter, there were eight charges levelled against the first respondent. In Ext.P2 report, the Enquiry Officer has held that charges 1 and 2 were partly proved and that charges 4, 5 and 6 were proved. Insofar as the remaining charges are concerned, the first respondent was exonerated. Charge No.4 was that on 19.6.97, while the first respondent was in charge of Clerk-cum-Cashier, she had shown Rs.8,792/- in the books as dividend paid on shares to various members for the year 1995-1996 as explained in the charge memo, without obtaining any proper vouchers signed by the members concerned. It was also alleged that on the same day another amount of Rs.12,041/-, was shown in the books of accounts as dividend paid on shares for 1995-1996 without proper vouchers signed by members and that the signature of the recipients in the vouchers were forged. It was also alleged that on that day though the members had no liability to the society to adjust their dividend and that no application from the members for adjustment was also forthcoming.

Charge No.5 was that during the period from 20.6.97 to 28.6.97, Rs.48,840/- was shown in the books as share amount repaid and that the signatures of the concerned persons on a separate sheet of paper kept with the vouchers were forged. It was alleged that all the concerned members had retired or left from the service of the company as on that date and the so called subscription and withdrawal of shares in their names was a fraud. Charge No.6 was that as per the records, the dues of loan No.2166 for Rs.25,000/- in the name of Mr.Chandy Joseph was cleared only on 17.4.1997 whereas the clearance certificate dated 7.10.95 was issued indicating his liability as "nil". This was alleged to be a clear case of fraudulent misrepresentation and cheating practised by the delinquent.

14. While the Enquiry Officer held the aforesaid misconducts were proved in its entirety, charge Nos.1 and 2 were held as only partially proved. Charge No.1 was that while working as a Junior Clerk on daily wages and thereafter on regular basis, during the period from 1992-1993 to 1996-1997 the delinquent actively associated and aided in the commissioning of the malpractices alleged and committed grave misconducts such as dereliction of duty, disobedience of rules and procedures, abuse of official power, forgery, breach of trust, falsification of books of accounts and misappropriation of funds of the society. The second charge was that while acting on behalf of the Secretary in his absence on 28.2.1995, the delinquent debited Rs.1.5 lakhs in the books of accounts as loans paid to three members at the rate of Rs.50,000/- each in violation of the bye-laws and fabricated the books and records and forged their signatures in the concerned loan applications, bonds etc. and misappropriated the amounts. It was also alleged that the alleged recipients had left the service of the company long before the loans were sanctioned.

15. Ext.P2 enquiry report, which runs into more than 110 pages, shows that before the Enquiry Officer, while the management examined MW1 and 2 the delinquent had examined the former President of the Society as DW1 and herself as DW2. The management had also produced Exts.M1 to M68 and the delinquent had produced Exts.D1 to D28. It was considering the oral and documentary evidence that in so far as the charge No.4 is concerned, the Enquiry Officer has concluded thus:

"From the above discussions, it is clear that the delinquent, as cashier on 19.6.97 made payment of Rs.108126/- as per Ext.M55(a) and (b) which included fictitious payment of Rs.8792/- mentioned in charge No.4(i) without obtaining signatures of the concerned members in the voucher and Rs.12041/- mentioned in charge No.4(ii) without satisfying herself that the concerned persons were actually payable so much amount and misutilised the amount thereof. She has purposefully abetted in misappropriating the amount thereof and in fabricating and falsifying the books and records of the Society. The charge Nos.4(i) and (ii) are proved to this extent."

Similarly, regarding the 5th charge also, after appreciating the oral and documentary evidence, the Enquiry Officer concluded thus:

"From the above discussions, it is clear that the delinquent as cashier on 28.6.97, knowing that the signature of the concerned persons were forged in Ext.M59(a) to (d) and when there was sufficient reason to believe that the signature of members in Ext.M58(a) to (g) were forged as they were residing at far of place from the society having left from the service of the company without satisfying herself as to the genuineness of the vouchers, conniving with the then Secretary, effected payment fictitiously as share amount repaid to them, as mentioned in both the vouchers and misutilised the amount thereof. The charge No.5 is proved to this effect."

On the 6th charge also, after a detailed examination of the evidence on record, the Enquiry Officer held thus:

"From the above discussions, the charge against the delinquent that she practised fraudulent misrepresentation and cheating on the authorities stands established".

16. Similarly, detailed discussion with respect to charges 1 and 2 is seen in Ext.P2 report and it was concluded that these charges were partially proved. However, a reading of Ext.P1 order passed by the Appellate Authority shows that only a cursory reference is made to the evidence relied on by the Enquiry Officer. Insofar as charge No.4 is concerned, the first respondent has observed that the delinquent had no personal gain and hence the charge of misappropriation of amount and in fabrication and falsification of books and records of the society are not sustainable. Likewise, with respect to charge No.5 the conclusion of the Appellate Authority is that the first respondent alone is not guilty of charges stated in the memorandum of charges and it is also stated that the society did not take steps to examine a share holder in order to substantiate the charge on forgery of signature of the share holders. With respect to charge No.6 relating to the issuance of clearance certificate, the first respondent has been absolved for the reason that subsequently, loans were cleared by the persons concerned and, therefore, the society did not incur any loss in this respect. Insofar as the charge No.1 is concerned also, it is concluded that there is no deliberate attempt on the part of the first respondent for calculation of lesser rate of interest. Similarly, with respect to the charge of tampering of records, the conclusion of the Enquiry Officer that there was a strong case against the delinquent had been overruled without assigning any specific reason. Charge No.2 also has been held to be not true on the reasoning that the first respondent was not in charge of the Secretary as on 28.2.95. After entering such findings, the Appellate Authority concluded that the action of the management in dismissing the appellant is without any bonafides and without any substantiating evidence. However, it is found that there was negligence on the part of the delinquent. Finally, the Appellate Authority has concluded the appeal by setting aside the dismissal and ordering reinstatement of the first respondent with 7th back wages or to pay compensation of Rs.4,50,000/- in lieu of reinstatement and back wages.

17. The Appellate Authority under Section 18 of the Act, is vested with the power

to re-appreciate the evidence and come to its own conclusions. It is also entitled to substitute the punishment. Its powers are akin to that of Industrial Tribunals and Labour Courts which exercise power under Section 11A of the Industrial Disputes Act. However, such power cannot be exercised in an arbitrary or whimsical manner and the reasons which persuaded the Appellate Authority to interfere with the disciplinary power exercised by the employer should be reflected in the order passed by it. Insofar as Ext.P1 order is concerned, the reasoning is not only laconic, but is also inadequate.

18. That apart, the reasoning of the Appellate Authority for interfering with the findings of the Enquiry Officer are also totally unacceptable. Law is trite that in a domestic enquiry if there is some legal evidence indicating the guilt of the delinquent that should be accepted. It is also settled that it is not the quantity of evidence that matters but, the quality thereof is what matters. As we have already seen, the allegations of misconducts were substantiated by the management by examining witnesses and providing voluminous documents of the Society. It was without even bothering to properly refer to the evidence thus adduced by the management or the documents which were referred and relied on by the Enquiry Officer, that the Appellate Authority has interfered with the findings of the Enquiry Officer and exonerated the first respondent. That apart conclusions such as since loan was subsequently closed, the management did not suffer any financial loss, the first respondent is not guilty of the charge of issuing clearance certificate when liability was outstanding, to say the least, is perverse. Similar is the conclusion with respect to charge No.5 that since the first respondent alone is not guilty, she is liable to be exonerated of the charge.

19. Having considered the matter in its entirety, we are of the considered opinion that the findings of the second respondent as reflected in Ext.P1 order are totally perverse and cannot be upheld. Therefore, the judgment under appeal, insofar as it confirms Ext.P1, is liable to be set aside and we do so.

20. Be that as it may, even if the findings of the Enquiry Officer are sustained, question still remains whether the proved misconducts justified the imposition of the capital punishment of dismissal from service. While considering this issue, this court has to take into account, the gravity of the misconducts proved and the track record of the employee and the responsibility that she discharged in the Society. Then only a decision can be taken whether the punishment imposed is disproportionate and if so, what is the appropriate punishment. The first respondent had worked in the Society, initially as a daily rated employee from 1.6.92 till 31.10.94. Thereafter, she was appointed as a Junior Assistant on regular basis with effect from 3.11.94. There is no case for the Society that there was any previous instance of misconduct or disciplinary action against the first respondent. Considering the fact that the first respondent was employed in a Bank and handling the hard earned money of the members of the society, we will not be justified in concluding that the proved misconducts are not grave. But at the same time, we cannot ignore the fact that, many of the misconducts that

were alleged against the first respondent were not proved and even charge Nos.1 and 2 were only partially proved. Taking into account all these factors, we feel that though this was not a case for dismissal of the employee from service, at the same time, having regard to the proved misconducts and the inevitable loss of confidence on the employee, we are also not satisfied that this is a fit case for ordering reinstatement in service. This is all the more for the long interval since her ouster from service and the fact that she is close to the age of retirement from service.

21. Considering all these factors, we direct the management to pay Rs.2,00,000/- compensation to the first respondent, in full and final settlement of all her claims. The amount shall be paid within two months from today and in the event of non payment, it would be open to the first respondent to get the amount recovered by taking recourse under the Revenue Recovery Act.

Judgment under appeal is set aside and the writ appeal is disposed of. No costs.