

(1992) 10 KL CK 0016
In the High Court Of Kerala
Case No : O.P. No. 4766 of 1992

Chennamangalam Nair Samajam

APPELLANT

Vs

Sarada

RESPONDENT

Date of Decision : 28-10-1992

Acts Referred:

Industrial Disputes Act, 1947 — Section 33C(2)

Kerala Payment of Subsistence Allowance Act, 1972 — Section 4

Citation : (1993) 2 LLJ 150

Hon'ble Judges : Shamsuddin, J

Bench : Single Bench

Advocate : P.F. Thomas, for the Appellant; M. Ramachandran, Govt. Pleader, for the Respondent

Judgement

Shamsuddin, J.—The petitioner is a Charitable Society registered under the Tranvancore Charitable Societies Act. The Society started some commercial activities and is running chitties. First respondent was employed as Head Clerk under the petitioner. On April 18, 1988, she was suspended pending enquiry into certain irregularities alleged against her. A domestic enquiry was conducted in which she was found guilty of misconducts alleged. Accordingly, she was dismissed from service by order dated October 3, 1989.

2. Aggrieved by the order of dismissal, she filed an appeal under the Kerala Shops and Commercial Establishments Act. The Appellate Authority constituted under the said Act allowed the appeal and directed the 1st respondent to be reinstated within 30 days of the receipt of the gist of the order. It was further ordered that if the first respondent was not reinstated within the stipulated time, she was entitled to Rs. 22,689/- as compensation, notice pay and back-wages together with interest at a rate of 9% per annum.

3. Thereafter, first respondent filed an application u/s 33(C)(2) of the Industrial Disputes Act claiming the difference in salary on the ground that the statutory minimum wages payable to her was Rs. 730/-, but she was paid only a sum of

Rs. 420/-. She restricted her claim from January 1, 1988 on that count. Rs. 930/- was claimed by her as arrears of wages. It is also averred that she was not paid salary for the month of April, 1988 and that she was suspended on April 18, 1988. The amount claimed on that count was Rs. 450/-. A claim towards subsistence allowance payable under the Payment of Subsistence Allowance Act for the period from January 5, 1989 to October 3, 1989 was also made. According to the petitioner, she is entitled to Rs. 7,300/- as subsistence allowance. Another item of claim was bonus. It was averred that the rest of staff was paid bonus for the period 1987-88, equivalent to 45 days' salary and that therefore she was entitled to Rs. 1,095/- as bonus. Ext. P1 is the said application.

4. Petitioner filed an objection Ext. P2. It is contended therein that petitioner is not an industry, shop or a commercial establishment and that therefore Minimum Wages Act is not applicable to the petitioner. It is further contended that the claim for bonus is not entertainable since the Act is not applicable to the petitioner. It is averred that for the realisation of the claim under the subsistence allowance, the machinery provided under the Kerala Payment of Subsistence Allowance Act has not been approached and that therefore that claim is not sustainable before the second respondent.

5. First respondent filed a rejoinder reiterating her claims made on various grounds. It was also averred that the bonus was paid to all the staff, all throughout the period, but it was not disbursed to the first respondent and in the circumstances, that claim also is legally sustainable.

6. The Labour Court found that the Minimum Wages Act is applicable to the petitioner and therefore the petitioner was entitled to the minimum wages to the tune of Rs. 730/-, but she was paid only Rs. 420/- and therefore she was entitled to the balance of arrears of minimum wages of Rs. 930/- for the period from January 1, 1988 to March 13, 1988. It was held that she was entitled to the salary for the period of April, 1988 upto April 18, 1988, the date on which she was placed under suspension and that amount would come to Rs. 440/-. The Labour Court also held that there was no legal bar for recovery of the amounts due under the Payment of Subsistence Allowance Act and that she was entitled to get an amount of Rs. 7,300/- as subsistence allowance. First respondent also took the view that she is entitled to bonus for the period 1987-88 as the rest of the staff was paid bonus for the period 1987-88, equivalent to 45 days' salary. Thus, a total amount of Rs. 9,165/- was awarded and the petitioner was directed to pay the said amount within one month, failing which there was a further direction that the amount would carry interest at the rate of 12%.

7. In this Original Petition, learned counsel for the petitioner raised the following contentions:- (1) Since a machinery is provided under the Payment of Subsistence Allowance Act, no recourse can be had to Section 33(C)(2) of Industrial Disputes Act for the recovery of subsistence allowance; (2) Even assuming that there is no legal bar to make a claim u/s 33(C)(2) for the purpose, the percentage of wages payable as subsistence allowance will be with reference

to the actual wages drawn and not with reference to the wages payable under the Minimum; Wages Act. (3) Claim for bonus is unsustainable since bonus, in the instant case, is claimed on the basis of profit sharing and as such without any settlement or fixation in an industrial dispute by the Industrial Tribunal or Labour Court. such a claim is not sustainable in application u/s 33(C)(2) of Industrial Disputes Act, and (4) in any event, the award of interest is not permissible and in that respect also, Ext. P3 is unsustainable.

8. I shall now deal with the contentions raised by learned counsel for petitioner. It is true a machinery has been provided u/s 4 of the Kerala Payment of Subsistence Allowance Act, 1972 for recovery of subsistence allowance. In order to appreciate the contention, that no application would lie u/s 33(C)(2), it is profitable to quote Section 4 of Payment of Subsistence Allowance Act.

9. "4. Recovery of money due from an employer:- Where any money is due to an employee from an employer under this Act, the employee himself or any other person authorised by him in this behalf, or in the case of the death of the employee, his legal representative may, without prejudice to any other mode of recovery make an application to the Government in such manner as may be prescribed for the recovery of money due to him, and if the Government, after giving the employer an opportunity of being heard in such manner as may be prescribed, is satisfied, that any money is so due, it shall issue a certificate for that amount to the Collector who shall proceed to recover the same in the same manner as an arrear of land revenue."

9. It is clear from Section 4 itself that this remedy is without prejudice to any other mode of recovery. It is argued by learned counsel on the basis of general principle of interpretation that normally when a special statute is enacted for the purpose of enforcing some rights and a machinery is provided thereunder, recourse will be had to that machinery and to none else. However that principle can hardly have an application in the instant case, in as much as Section 4 expressly states that the machinery provided under Section 4 is only without prejudice to any other mode of recovery. I am supported in this view by a decision of this court in Karunakaran Nair v. Dhanalakshmi Bank Ltd. 1988 (2) KLT 136 where Kochu Thommen, J. as he then was, negated an identical contention raised in that case.

10. Learned counsel for the petitioner heavily pressed into service a decision of the Supreme Court in State of Punjab Vs. Labour Court Jullunder and Others, That case related to recovery of payment of gratuity. The Supreme Court held that Parliament intended that the proceedings for payment of "gratuity due under the Payment of Gratuity Act must be taken under that Act and not under any other Act and that being so, it must be held that the applications filed by the employees u/s 33(C)(2) of the Industrial Disputes Act was unsustainable.

11. It may be noticed that the said Act was a complete code in relation to gratuity and it not only provided a machinery for recovery but also provided an

appeal against the order of the controlling authority, who has been invested with powers to decide the liability. There is no provision in the Gratuity Act as the one contained in Section 4 of Payment of Subsistence Allowance Act that the machinery u/s 4 is without prejudice to any other mode of recovery. In the circumstances, I have no hesitation to reject the said contention raised on the analogy of Gratuity Act.

12. However, there is substance in the contention of learned counsel that the basis adopted by the second respondent to determine the quantum of subsistence allowance is not correct. Section 4 is the charging section. It has made provision for determination of subsistence allowance for : different periods, during which the employee is under suspension. The basis for determining the subsistence allowance is linked with the wages, which the employee was drawing immediately before such suspension.

13. The question that arises for consideration is what is meant by the expression "wages". This term "wages" has been defined in Section 2(g) of the Payment of Subsistence Allowance Act as: meaning all remuneration capable of being expressed in terms of money which would if the terms of employment, expressed or implied, were fulfilled, be payable to an employee in respect of his employment or of work done in such employment and also includes the categories enumerated in Clauses (i) & (ii). This definition is identical with the definition contained in Section 2(rr) of Industrial Disputes Act. It is not disputed that the petitioner was drawing Rs. 420/- as wages immediately before suspension. However, the 2nd respondent treated Rs. 730/- as the last drawn wages on the basis that under the Minimum Wages Act, petitioner was entitled to Rs. 730/- as wages. The second respondent took the view, though it is not stated in so many words, that it was minimum wages that the employee is entitled to under the Minimum Wages Act that is to be taken into account as the last drawn wages and not actual wages drawn by the employee. I do not find any justification to hold that the wages defined in Section 2(g) would take in the wages that is payable to the employees under Minimum Wages Act. It is true that the employee will be entitled to claim wages payable under the Minimum Wages Act, if the Act is applicable to the establishment and that he may also be entitled to recourse to remedies available under the Industrial Disputes Act for the purpose of enforcing that right. As a matter of fact, in this case also the first respondent has claimed the balance of arrears of wages and an order has been passed allowing the arrears of wages on the basis of Minimum Wages Act. However, that will not enable the employee to adopt wages under the Minimum Wages Act as the basis for determining wages that is last drawn by the employee. It is only wages which is actually drawn by the employee that has to be taken as the basis. I am therefore inclined to hold that the second respondent was wrong in adopting Rs. 730/- as the wages last drawn. He ought to have taken Rs. 420/- as last drawn wages as it was the wages that was last drawn by the employee. So calculated, the first respondent will be entitled only to Rs. 3,780/- as against Rs. 7,300/- allowed by the Labour Court as subsistence

allowance for the period claimed. The award will be modified to that extent.

14. The next contention raised by learned counsel for petitioner is that since the petitioner made the claim on the basis of profit sharing, the claim for bonus is not maintainable. In this context, learned counsel invited my attention to the statement in the deposition of first respondent before the Labour Court, which is marked as Ext. P4 that she demanded profit sharing bonus. Ext. P1 only states that rest of the staff was paid bonus for the period equivalent to 45 days' salary and as such she is also entitled to it. In Ext. P2, there is no denial of this statement, though there is a contention that the employee is not entitled to bonus as the Payment of Bonus Act is not applicable to the petitioner. In the rejoinder filed by the employee also, the bonus is claimed on the basis that the rest of the staff was paid on the basis of 45 days' salary. In the circumstances, I am unable to accept the contention that the bonus cannot be recovered u/s 33(C) (2). So long as there is no dispute in regard to basis for determining the quantum of bonus there is nothing to be adjudicated before quantification. So construed I am of the view that the second respondent has not gone wrong, in awarding the bonus claimed by the petitioner.

15. A Division Bench of this court had occasion to consider the question whether Section 33(C)(2) can be invoked for the purpose of recovery of bonus in Pappu and Another Vs. Raja Tile and Match Works, There the appellants moved the Labour Court u/s 33(C)(2) claiming that bonus for the year 1978-79 should be paid to them taking into account the amounts they received as wages for the national and festival holidays. The Division Bench observed that there is no dispute regarding liability to pay bonus and it is in respect of a particular year, 1978-79, and there is also no dispute regarding liability to pay bonus and the only dispute raised by the employer was with regard to quantum of bonus which required to be calculated and that therefore Section 33(C)(2) of the Industrial Disputes Act is the remedy available to the employee. It follows that there is no substance in the contention of learned counsel that bonus is not recoverable by invoking Section 33C(2).

16. The last contention raised by learned counsel is regarding the award of interest. Interest has been awarded at the rate of 12% only and that too in the event of failure to pay the amount within the stipulated time of one month. The argument put forward by learned counsel is that the Labour Court was acting only just like an executing court in exercising powers u/s 33C(2) and therefore the Labour Court is not competent to award future interest as is done in the instant case. In this context, learned counsel invited my attention to a decision of the Madras High Court which took the view that where there is an award for reinstatement of the workman with full backwages, the Labour Court u/s 33C(2) while making the computation, has got only role of an executing Court, and it cannot go beyond the terms of the award unless the question is incidental to the working of the reliefs on the basis of the award. It was held that in the absence of any provision for the payment of interest in the award there cannot be any

claim for any such interest and that the claim for interest could not be said to be incidental to computation of the benefits given under the award.

17. On the other hand, another single Judge of the Madras High Court in *Management of Tabesh Process, Sivakasi Vs. Presiding Officer, Labour Court and Others*, took the view that it was not outside the scope of the Labour Court to grant interest on the amount that was determined as compensation and that the power to award interest was available to the Labour Court or Industrial Tribunal and that there was no infirmity in the order of the Labour Court in awarding interest.

18. A learned single Judge of the Allahabad High Court had occasion to consider a similar question in *Union of India (UOI) and Another Vs. S.B. Agnihotri and Another*, The learned Judge took the view that the Labour Court has got equitable jurisdiction to award interest on the amounts due to the workman, but were withheld by the employer. Learned Judge further held that the High Court will not be justified in interfering with the award of interest in exercising powers under Article 226 of the Constitution of India.

19. The amounts due under various counts were quantified by the Labour Court and an award was passed. It is only future interest that is awarded and that too only if the amounts awarded were not paid within one month. This is not a case where the Labour Court was executing an award passed by the Industrial Tribunal or the Labour Court. In this case, recourse was taken to recover the amount due under the provisions of Section 33C(2) and in that context, award of future interest on the amounts due to the employee is equitable and reasonable and is only incidental to the reliefs claimed. In any event, I am not inclined to interfere with the award of interest in exercise of my powers under Article 227 of the Constitution of India.

20. In the result, in modification of the amounts awarded, in Ext. P5, I hold that the first respondent is only entitled to a total amount of Rs. 6,245/-. As the petitioner was not paid the amount within the stipulated time, first respondent will be entitled to the amount of interest at 12% per annum from the date of expiry of one month from the date of award, as ordered by the Labour Court.

Original Petition is disposed of as above.