
(2008) 07 KL CK 0032
In the High Court Of Kerala
Case No : O.P. No. 7588 of 1999

Hajee M.A. Mohamed Kannu Sons

APPELLANT

Vs

S.A. Nazrudeen and Another

RESPONDENT

Date of Decision : 22-07-2008

Acts Referred:

Kerala Shops and Commercial Establishment Act, 1960 — Section 18, 18(2)

Citation : (2008) 3 ILR (Ker) 498 : (2009) 2 LLJ 121

Hon'ble Judges : P.N. Ravindran, J

Bench : Single Bench

Advocate : U.K. Ramakrishnan and E.K. Madhava, for the Appellant; S. Rajasekharan Nair and M.S. Vijayachandra Ababu, for the Respondent

Final Decision : Dismissed

Judgement

P.N. Ravindran, J.—The petitioner is a partnership firm carrying on business in hardware, tools and paint. It is said to be the successor of the firm Hajee M.A. Mohammed Kannu & Brothers.

2. The first respondent in the Original petition was a Shop Assistant in the firm, Hajee M.A. Mohammed Kannu & Brothers. On September 5, 1988 he was placed under suspension and a memo of charges alleging misconduct was issued. It was alleged that he was a late comer, that he used to leave the establishment early without permission, that he was wilfully disobeying lawful instructions given by the employer, that he was intentionally destroying the properties of the establishment and was supplying more items than what was actually required by the customers with the oblique motive of causing loss to the employer. As his explanation to the memo of charges was not satisfactory, a domestic enquiry was conducted. The Enquiry Officer found him guilty of the charges. A copy of the enquiry report was furnished to him and he was called upon to show cause why he should not be dismissed from service. As the explanation offered by the first respondent was not satisfactory, he was dismissed from service on May 4, 1989.

3. The first respondent filed an appeal before the second respondent u/s 18(2) of the Kerala Shops and Commercial Establishments Act, 1960 challenging the order of dismissal. The appeal was filed on June 9, 1989 and it was numbered as S.A. No. 10/1989. It was later renumbered as S.A. No. 27/1992. Hajee M.A. Mohamed Kannu & Brothers, the sole respondent in the appeal appeared and filed its objections. The validity of the domestic enquiry held into the charges was considered as a preliminary issue. By order passed on June 17, 1998, after 9 long years, the Appellate Authority held that the enquiry was not validly and properly conducted. The Appellate Authority further held that the findings of the Enquiry Officer are perverse. The enquiry report was set aside. The appeal thereafter stood posted for hearing to August 10, 1998. On that day, it was adjourned to August 26, 1998. On August 26, 1998, the counsel appearing for the employer filed a memo stating that the management has decided to cancel the order dismissing the employee from service. A copy of the order passed in that regard on August 26, 1998 (Exhibit P-1 herein) was also produced before the Appellate Authority. The counsel appearing for the employee sought time for filing objections and the appeal was adjourned to September 14, 1998. On September 14, 1998, the counsel for the employee filed objections to the memo filed by the employer and the case was adjourned to September 28, 1998 for hearing on the objections. On September 28, 1998, the appeal was adjourned as requested by counsel on both sides to October 14, 1998. On October 14, 1998, the counsel for the employer filed an affidavit along with a petition praying for dismissal of the appeal. The counsel for the employee thereupon sought time for filing a reply and the appeal was accordingly adjourned to October 26, 1998. On October 26, 1998, the counsel for the employer filed a hearing note producing along with it a copy of the decision of this Court in Eraveli Co-op. Consumers' Stores Ltd. Vs. Dy Labour Commissioner and Others, . It was contended that when the employer cancels the order dismissing the employee from service, the Appellate Authority ceases to have jurisdiction to go into the merits of the appeal, but can only dismiss it. The counsel for the first respondent was thereupon directed to submit his reply to the hearing note submitted by the counsel for the employer within seven days. The counsel appearing for the first respondent employee, relying on the decision of this Court in Secretary, Fatima Co-operative Credit Society Limited v. Appellate Authority ILR (1994) Ker 193 contended that the Appellate Authority is empowered to direct reinstatement of the employee or to direct payment of compensation in lieu of reinstatement. By Exhibit P-2 order passed on November 30, 1998, the Appellate Authority overruled the contentions of the employer and directed the employer to pay a lumpsum compensation of Rs. 50,000/- to the employee in lieu of reinstatement in service. The employer was directed to pay the compensation within 30 days failing which it was ordered that penalty and interest at the rate of 18% per annum will be imposed and the amount recovered under the Kerala Revenue Recovery Act, 1968. The petitioner firm has in this Original Petition challenged Exhibit P-2 and prayed for the following reliefs:

i) to issue a writ in the nature of certiorari or any other appropriate writ, order of direction calling for the records relating to Exhibit P-2 order dated November 30, 1998 of the second respondent in S.A. No. 27/1992 and to quash Exhibit P-2 order.

(ii) to declare that the first respondent is not entitled to get any reliefs in S.A. No. 27/1992 and the second respondent has no jurisdiction to proceed with S.A. No. 27/1992.

Though notice of this Original Petition has been served on the first respondent employee, he has not chosen to enter appearance and file a counter affidavit.

4. I heard Sri. P.V. Lohithakshan, the learned Counsel appearing for the petitioner. The learned Counsel contended that as the order dismissing the employee from service has been revoked and a decision has been taken to reinstate him in service, the Appellate Authority ceases to have jurisdiction to pass orders on the appeal. Reliance was placed on the decision of a Division Bench of the Travancore-Cochin High Court in *V. Ramabhadran v. P.K. Somasekharan and Ors.* AIR 1953 TC 325 and of this Court in *President, Eraveli Co-operative Consumers' Stores Ltd. v. Deputy Labour Commissioner (supra)* in support of the said contention. The learned Counsel further contended that even though the Appellate Authority had by order passed on June 17, 1998 set aside the enquiry, it was open to the employer to adduce evidence in support of the charges and that the Appellate Authority was bound to afford the employer an opportunity to adduce evidence in support of the charges. Therefore the Appellate Authority erred in passing the impugned order, it was contended. Reliance was placed on the decision of the Apex Court in *The United Planters Association of Southern India Vs. K.G. Sangameswaran and another*, and of this Court in *Parameswaran Elayidam Vs. Mutual Aid Bankers and Another*, in support of the said contention. The learned Counsel further contended that in any view of the case, the Appellate Authority ought to have afforded the employer an opportunity to adduce evidence in support of the charges, if it was of the view that Exhibit P-1 cannot be accepted and acted upon.

5. The facts in *V. Ramabhadran v. P.K. Somasekharan and Ors.* (supra) are as follows:

The Trivandrum branch of the Oriental Government Security Life Assurance Company Ltd. terminated the services of one of its employees on April 30, 1951. The employee concerned thereupon filed an appeal u/s 41 of the Travancore-Cochin Shops and Establishment Act before the Labour Commissioner, the Appellate Authority constituted under the said Act. The appeal was presented on May 17, 1951. When the issue came to the notice of the head office of the employer company, the authorities in the head office on being satisfied that the order passed by the branch office on April 30, 1951 discharging the employee from service was not properly passed, instructed the branch office to withdraw and cancel the order passed on April 30, 1951, place the employee under

suspension pending enquiry and hold an enquiry into the allegations against him. As directed by the head office, the branch office at Thiruvananthapuram issued a communication dated May 28, 1951 (within one week from the date on which the appeal was presented) intimating the employee that the order passed on April 30, 1951 discharging him from service has been withdrawn and cancelled and that he would be under suspension from that date pending enquiry. The communication dated May 28, 1951 was served on the employee on May 28, 1951 itself. The employer contended inter alia that in view of the communication issued on May 28, 1951, the order challenged in appeal has become non-existent and therefore, the Appellate Authority cannot adjudicate upon the validity of the said order. Overruling the said contention, the Appellate Authority proceeded to consider the appeal on its merits and passed an order on November 30, 1951 holding that the employee was discharged from service without reasonable cause. The employer was directed to reinstate the employee in service. The said order was challenged before the Travancore-Cochin High Court. A Division Bench of the Travancore-Cochin High Court held that as the order of discharge passed on April 30, 1951 had been cancelled and withdrawn, the Appellate Authority had no jurisdiction to pass the impugned order. It was also held that when the order impugned is cancelled, it becomes non-existent and hence, it cannot form the basis of an appeal and that when the appeal has become infructuous and unnecessary, the Appellate Authority had to dismiss the appeal on that ground. In *President, Eraveli Co-operative Consumers' Stores Ltd. v. Deputy Labour Commissioner (supra)*, Balakrishna Eradi, J. (as his Lordship then was) following the decision of the Division Bench of the Travancore-Cochin High Court in *V. Ramabhadran v. P.K. Somasekharan and Ors. (supra)*, held that when the order challenged has become non-existent, the Appellate Authority ceases to have jurisdiction to pass any order on the appeal. In *President, Eraveli Co-operative Consumers' Stores Ltd. v. Deputy Labour Commissioner (supra)*, the employee was dismissed from service on September 24, 1966. He filed an appeal on October 4, 1966 before the Appellate Authority u/s 18 of the Kerala Shops and Commercial Establishments Act, 1960. On October 2, 1966, even before the appeal was filed, the Board of Directors of the employer society decided to cancel the order of dismissal and treat the employee as continuing under suspension pending enquiry. On receipt of notice of the appeal, the employer - society entered appearance and contended that as the order of dismissal was already cancelled by the society, the appeal filed by the employee was not maintainable. The Appellate Authority overruled the said contention, went into the merits of the appeal and directed reinstatement of the employee. The said order was challenged in this Court. It was held that as the original order of termination was cancelled, the Appellate Authority ceased to have jurisdiction to go into the merits of the appeal.

6. In the instant case, the order dismissing the first respondent from service was passed on May 4, 1989. The appeal before the second respondent - Appellate Authority was presented on June 9, 1989. After 9 long years, the Appellate

Authority found that there was no proper enquiry. The findings of the Enquiry Officer were found to be perverse and the enquiry was set aside by order passed on June 17, 1998. The appeal thereafter stood posted for hearing on August 10, 1998 and then on August 26, 1998. On August 26, 1998, the learned Counsel appearing for Hajee M.A. Mohamed Kannu & Brothers, the sole respondent in the appeal filed a memo producing a copy of Exhibit P-1 stating that the management has decided to cancel the order of dismissal. The counsel appearing for the first respondent employee thereupon sought time for filing objections and the appeal was adjourned to September 14, 1998 for that purpose. The employee filed his objections on September 14, 1998 and the appeal was adjourned to September 28, 1998. On September 28, 1998 at the request of the counsel appearing on either side the appeal was adjourned to October 14, 1998. On October 14, 1998, the counsel for the first respondent in the appeal (Hajee M.A. Mohamed Kannu & Brothers) filed an affidavit along with a petition to dismiss the appeal. The counsel for the first respondent employee prayed for time to file a reply to the said petition. On October 26, 1998, the counsel for the respondent in the appeal (Hajee M.A. Mohamed Kannu & Brothers) filed a hearing note along with a copy of the decision of this Court in *President, Eraveli Co-operative Consumers' Stores Ltd. v. Deputy Labour Commissioner (supra)*. By Exhibit P-2 order passed on November 30, 1998, the Appellate Authority overruled the contentions of the employer, allowed the appeal and passed the following order:

In the instant case there is nothing on records to show that the appellant has been validly reinstated into service as alleged by the counsel in the memo filed on August 26, 1998. There is no admission on the part of the counsel for the appellant that the appellant has been reinstated into service. In the circumstances I direct the respondent to make payment of lumpsum compensation for the period of non-employment of above 9 years. Admittedly the appellant has 7 years blemishless service with the respondent. Now he is aged 36 years. Chances of getting reemployment are remote. Had he not been dismissed, he would have got 23 more years of service. Considering all these relevant factors I award a lumpsum compensation amount of Rs. 50,000/- in lieu of reinstatement into service. The respondent is directed to make payment of lumpsum amount of compensation as ordered above within 30 days of receipt of the intimation of order. Failing which penalty and interest @ 18% will be imposed and the amount recovered under Revenue Recovery Act.

7. Exhibit P-2 does not disclose that any document proving the dissolution and re-constitution of the firm Hajee M.A. Mohamed Kannu & Brothers was produced before the Appellate Authority. The partnership deed whereby the firm Hajee M.A. Mohamed Kannu Sons, which issued Exhibit P-1 communication on August 26, 1998 was constituted, was also not produced. The first respondent employee is out of service since May 4, 1989. No material was produced to show that the employer firm which was the sole respondent before the Appellate Authority stood dissolved or that the firm which issued Exhibit PI notice is its successor. No

material was also produced before the Appellate Authority to show that any of the partners of the employer firm continue to be and are partners of the firm which issued Exhibit P-1. The terms on which the first respondent employee would be reinstated, whether he is entitled to back wages, etc. were also not disclosed to the employee or to the Appellate Authority. Even in this Original Petition the particulars referred to above are not set out. In Exhibit P-1, apart from merely stating that a decision has been taken to reinstate the employee in service, the terms of reinstatement in service are not set out. On the materials available, I am persuaded to take the view that the employer was attempting to take advantage of the law laid down by this Court in *President, Eraveli Co-operative Consumers' Stores Ltd. v. Deputy Labour Commissioner (supra)* by issuing Exhibit P-1 notice, 9 long years after the employee was wrongly dismissed, as found by the Appellate Authority in its preliminary order. In the absence of any material to show that the decision evidenced by Exhibit P-1 reflects the decision of the employer and as the terms on which the employee is reinstated have not been pleaded or proved, the Appellate Authority cannot be faulted for not accepting Exhibit P-1.

8. As noticed by me earlier, in *V. Ramabhadran v. P.K. Somasekharan and Ors. (supra)*, the employee was dismissed from service on April 30, 1951. The appeal was filed on May 17, 1951 (within 17 days) and the order cancelling the order impugned in the appeal was passed on May 28, 1951 and communicated to the employee on the very same day. The order of the Appellate Authority was passed on November 30, 1951. In *President, Eraveli Co-operative Consumers' Stores Ltd. v. Deputy Labour Commissioner (supra)* the employee was dismissed from service on September 24, 1966. Even before the appeal was filed, the Board of Directors of the society that met on October 2, 1966, decided to cancel the order of the dismissal and treat the employee as continuing on suspension pending enquiry. While in the former case, the order cancelling the dismissal was passed within two weeks of the appeal being filed, in the latter, the order cancelling the order of dismissal was passed even before the appeal was filed. In both the cases, the employer had at the earliest opportunity, revoked the order of dismissal and decided to place the employee under suspension and continue with the domestic enquiry. In the instant case, the employer contested the appeal for nine long years. Exhibit P-1 is dated August 26, 1998 and it was produced before the Appellate Authority along a memo on August 26, 1998 itself. Further as noticed earlier, it has not been shown that Exhibit P-1 is one issued by the employer firm. The firm which issued Exhibit P-1 did not choose to get itself impleaded in the appeal also. The jural relationship of master and servant between the petitioner and the first respondent has not been established. The employee was also not informed about the terms on which he would be reinstated. Therefore, the Appellate Authority was perfectly right in declining to accept and act upon Exhibit P-1. In my opinion, the order of dismissal being one passed by the firm, *Hajee M.A. Mohamed Kannu & Brothers*, only the said firm or its successor could have revoked the order of dismissal and reinstated the

employee in service. It would be unjust and grossly inequitable to permit someone other than the employer to make an offer of reinstatement after nine long years have passed after the employee was dismissed from service and that too without the terms of reinstatement being disclosed.

9. It was contended that the Appellate Authority ought to have in any view of the matter afforded the employer an opportunity to prove its case. The petitioner herein is Hajee M.A. Mohamed Kannu Sons. The petitioner firm is not a party to the appeal. It did not choose to get itself impleaded in the appeal. The details regarding the constitution of the petitioner firm are not available. Even the date on which it was constituted is not set out. Who are all its partners is not disclosed even in this Original Petition. Whether the petitioner firm came into existence as a result of dissolution of the firm Hajee M.A. Mohamed Kannu & Brothers is not proved by any cogent material. A firm can be constituted or reconstituted only in writing. In short, there is no material to show that the firm, Hajee M.A. Mohamed Kannu & Brothers has ceased to exist and that the firm Hajee M.A. Mohamed Kannu Sons (the petitioner in this Original Petition) is the successor of the said firm. Though these are matters within the exclusive knowledge of the employer, it has chosen to leave everything to guess work. It is settled law that a partnership firm is not a natural or a juristic person. It is only a compendious name for the partners acting together. Unless it is shown that the employer firm has been dissolved and the petitioner firm was constituted as its successor, the petitioner firm does not have the locus standi to challenge Exhibit P-2. Exhibit P-2 is an order passed in S.A. No. 27/1992 filed by the first respondent herein against the firm Hajee M.A. Mohamed Kannu & Brothers. The direction in Exhibit P2 is to the said firm to pay to the employee, a lumpsum compensation of Rs. 50,000/- in lieu of reinstatement. As the petitioner has not proved by cogent material that it is the successor of the firm Hajee M.A. Mohamed Kannu & Brothers and that it has stepped into the shoes of the employer, it is not entitled to challenge Exhibit P-2.

For the reasons stated above, I hold that there is no merit in the Original Petition. The Original Petition fails and accordingly it is dismissed. No costs.