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**(1971) 12 KL CK 0001**  
**In the High Court Of Kerala**

K.K. Bhaskaran and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

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**Date of Decision :** 23-12-1971

**Acts Referred:**

Constitution of India, 1950 — Article 19, 254

**Citation :** (1973) 1 LLJ 204

**Hon'ble Judges :** T.S. Krishnamoorthy Iyer, J;P. Govindan Nair, J

**Bench :** Division Bench

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## Judgement

Govindan Nair, J.—These petitions challenge the validity of the Kerala Toddy Workers' Welfare Fund Act, 1969 (hereinafter referred to as the Act). The contentions urged were that the stipulations in the Act that the employers should make contribution towards a fund to be established under the provisions of the Act and the scheme framed under the Act, are repugnant to the Employees' Provident Funds Act, 1952, a Central enactment, and that the stipulation for contribution towards gratuity which must also be credited to the same fund is an unreasonable restriction on the right of an employer to carry on any occupation, trade or business guaranteed by Article 19(I)(g) of the Constitution. Further, it was urged that the provision in Section 3 of the Act enabling the Government by notification in the Gazette to frame a scheme to be called the Toddy Workers' Welfare Fund Scheme for the establishment of a fund under the Act is bad in that it provides for delegated legislation without giving any guidance in relation to the manner in which the scheme should be framed.

2. The provisions of the scheme that has been framed and published along with the Act in paragraphs 45(b) and 60 thereof were also separately challenged,

3. Paragraph 28 of the scheme, as it originally stood, was in these terms:

28. Membership.—Every employee shall be entitled and required to be a member of the fund from the beginning of the financial year immediately following the date on which the scheme comes into force if he has completed three months

continuous service.

4. This paragraph was amended by notification dated 14th January, 1970 which has been produced as Ex. R-I and it runs thus:

In exercise of the powers conferred by Section 3 of the Toddy Workers' Welfare Fund Act, 1969 (22 of 1969), the Government of Kerala hereby make the following amendments to the Toddy Workers' Welfare Fund Scheme, 1969, published under notification No. 26620/H1/69/LSWD dated the 29th December, 1969, in the Kerala Gazette Extraordinary No. 305 dated the 29th December, 1969, namely:

#### AMENDMENTS

In the said Scheme,?

(1) In sub-paragraph (ia) of paragraph 2, after Clause (a), the following clause shall be inserted, namely :

(aa) "calendar year" means the year commencing on the first day of January.

(2) In paragraph 28, for the words "financial year" the words "calendar year" shall be substituted.

(3) In paragraph 37, for the figures and word "35 and 36" the figures and word "34 and 35" shall be substituted.

5. It was contended that this notification issued on 14th January, 1970 giving retrospective effect to the establishment of the fund from 1st of January, 1970 is bad.

6. We shall consider these contentions seriatim. Before doing so, we must mention that it was agreed by counsel that argued the cases before us?counsel for all the petitioners have not argued the cases before us but it was left to some to shoulder the responsibility?that the pleadings in O.P. No. 2845 of 1970 and in O.P. No. 589 of 1971 along with those contained in the Amendment Application C. M. P. No. 8684 of 1971 in O.P. No. 589 of 1971 and the counter-affidavits filed by the State, the 1st respondent, and the Welfare Fund Inspector, the 2nd respondent in O.P. No. 589 of 1971 may be taken to be representative and exhaustive of the pleadings in this batch of cases which we propose to dispose of by a common judgment as the questions arising and agitated before us in all the petitions were the same.

7. The argument relating to repugnancy was elaborated by contending that the provision in Section 4 of the Act for contribution of 8% by the employer and employee is in substance and in reality a contribution towards provident fund. Relating to provident fund, it was pointed out there is a Central enactment, the Employees' Provident Funds Act, 1952, which had already occupied the field in relation to provident fund and, therefore, the State Legislature is incompetent to pass any law repugnant to the provisions in the Employees' Provident Funds Act,

1952 and that, in any event, such a law in relation to the same matter which is repugnant to the provisions of the Central Act will have no avail. We will assume without deciding that the Employees' Provident Funds Act, 1952, is a complete code in relation to the amenity of provident fund to the workers not only in the industries scheduled to the Employees Provident Funds Act, 1952, but in view of the provision in S. 1(3)(b) of the above Act enabling the Central Government to apply that Act to any other establishment employing twenty or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in that behalf and the further provision in the proviso to S. 1(3)(b) enabling the Central Government after giving not less than 2 months notice of its intention so to do, by notification in the Official Gazette, to apply the provisions of that Act to any establishment employing such number of persons less than twenty as may be specified in the notification, the Act permeates the entire field of legislation in relation to provident fund. As we understand this argument, it has to assume of necessity if the argument is to succeed that the matter of legislation in the Employees' Provident Funds Act, 1952 and the matter in the Act is the same or identical.

8. To this contention, the simple answer that has been given by respondent's counsel is that assuming there is repugnancy, it is saved by virtue of the assent given by the President to the Act on 11th April, 1969 as visualised by Article 254(2) of the Constitution. We think that this argument is well-founded. The assent will save the application of Article 254(1) and, therefore, there is no question of the State law to any extent becoming invalid assuming the provisions thereof or at least in certain respects being repugnant to the provisions of the Employees' Provident Funds Act, 1952. This must dispose of the contentions raised by the petitioners in these petitions relating to repugnancy. We may, however, refer to the argument of counsel for some of the petitioners that the matter covered by the Act is not the same as that in the Employees' Provident Funds Act, 1952, but only an allied matter. If this is the real position, which we doubt that it is, then there can be no question of repugnancy because repugnancy can occur only when there is legislation by the Parliament and by the State Legislature on an identical matter and this is clear from Article 254 of the Constitution. It was not contended before us that the Act had not been passed under item 24 in List 111 of the Seventh Schedule to the Constitution nor was it suggested that the Employees' Provident Funds Act, 1952, had not been passed under that entry. No doubt this entry provides for so many matters, but it was not, suggested that the item does not deal with provident fund. That is one of the subjects specifically mentioned in entry 24 of List III of the Seventh Schedule to the Constitution. We, therefore, think that the two enactments provided for the same matter provident fund, and even so there can be no invalidity so far as the Act is concerned in view of the assent given by the President.

9. The argument based on Article 19(1)(g) of the Constitution is on the basis that the burden cast by the Act amounts to unreasonable restrictions which cannot be saved by Article 19(1)(g) of the Constitution. Reasonable restrictions in the

interest of the general public can be imposed and nothing in Sub-clause (g) of Article 19(1)(g) would curtail this right of Parliament to impose such restrictions. The question then is whether the restrictions imposed by the Act?it was not urged before us that what has been provided by the Act do not impose some sort of restrictions?are unreasonable restrictions. It was further suggested that the restrictions, even if they are unreasonable, are not in the interest of general public and, therefore, not saved by Article 19(6) of the Constitution.

10. The main argument on the ground that the restrictions imposed are unreasonable are based on the criteria which must weigh with any Tribunal in awarding gratuity to an employee and the principles on which gratuity can be granted to an employee. There have been a number of decisions of the Supreme Court on the subject and it is unnecessary to refer to all these cases particularly in view of the recent pronouncement of the Supreme Court in the decision in *Delhi Cloth and General Mills Co. Ltd, v. Their Workmen* (1968) 36 F.J.R. 247, where there is an exhaustive review of the earlier decisions. It lays down that the principles laid down in the numerous decisions on the subject have not all been uniform and that legislation on the subject giving some sort of uniformity may be necessary. The decision, however, reiterated that gratuity is a benefit conferred on an employee in return for long and satisfactory service and that before a gratuity scheme is framed the capacity of the employer to pay must be considered and that the scheme should be to compensate for long, meritorious and unblemished service. It was ruled that a provision in a gratuity scheme that on voluntary retirement an employee should get the benefit of the fund irrespective of the question when he retired, is unreasonable. It was also ruled that payment of gratuity to an employee who had been guilty of such misconduct as has caused loss to the employer, without any deduction being made from the fund to compensate the loss, is an unreasonable provision. On the basis of these principles it was contended before us by counsel that these basic principles have all been ignored in framing the Act. In the first instance it was urged that the nature of the industry is such that it is impossible to conceive of long and continuous service. To understand this contention, it is necessary to state that the employers governed by the Act are those persons who are successful bidders for the privilege of manufacturing or supplying by wholesale or retail liquor or intoxicating drugs within a local area in auctions conducted pursuant to the provisions in S. 15A of the Abkari Act 1 of 1886. It is accepted on all hands that such privileges are now given only for a period of two years at a time. The persons employed are those who work in connection with the tapping, manufacture, transport or sale of toddy. It was, therefore, argued that a particular employer will be in the picture only for a period of two years at a time. He may or may not care to be a contractor after that period and even if he wanted to, he may not get a chance. This being so, there can be no continuity of service with an employer and much less long continuous service. In relation to that type of employment which is for a short period, it is suggested, there can be no gratuity. The effect of this argument would be that in relation to this type of

employment there can never be any gratuity scheme. Whatever that be, the position has to be examined. Counsel on behalf of the respondents relying on the averments in the counter affidavit pointed out that it is not the case, at any rate, from the point of view of those who were employed in the industry. The same workers continue to be attached, by and large, to an establishment year after year for long periods though the employer may change. It was also pointed out that the only way a provision can be made for gratuity in this type of employment is by legislation, for an employer will be in the picture only for two years and it would not be feasible to raise an industrial dispute and have a scheme framed during that short time and that even if they succeeded in that it will bind only a particular contractor and perhaps not his successor. These are factors which cannot be controverted. Still the question would arise whether there can be a gratuity scheme in this type of employment where the employer changed at short duration making it impossible to have the employer-employee relationship between a particular employer and his employees for a considerable length of time. We do not consider that in circumstances such as this, the principle that there should be long and continuous service would be violated because from the point of view of the employees the service is continuous and for long periods. After all, a scheme for gratuity is meant for the benefit of the employer, and for the contentment of the workmen engaged in an industry. Every successive employer will be benefited and as far as the workmen are concerned it will no doubt be conducive to their contentment. The restrictions imposed by the scheme are not so onerous as to be termed unreasonable restrictions. The contribution to be made by the employer is only 5 per cent and this is so provided by the Act (see Section 4(2)). This is not exorbitant, and it was not argued that it was. If a contractor (employer) is there only for a short period, the burden cast on him also is negligible. It cannot be urged that such a scheme is not in the interests of the general public. A sizable number of persons are employed in the State in the various types of activities which we have referred to, working for contractors, and they can themselves form a class of the public. Apart from that, by the lifting of prohibition, this industry has assumed the importance it had before, and serves the needs of a very large section of the public. For the prosperity of this industry, and for the creation of a happy employer-employee relationship, it is necessary that there should be a gratuity scheme. We may refer to the fact that the State has already framed a gratuity Act, Kerala Act 6 of 1970, which is applicable to many types of industries, and, we are informed, there is one in the anvil to be passed by the Parliament. It is too late in the day to contend that employment should be without a provision for gratuity, particularly in cases where there is no provision for pension. On the whole, therefore, we do not find anything in the scheme as envisaged by the Act which can be said to amount to the imposition of unreasonable restrictions on the right to carry on a trade. We, therefore, reject the contention that Article 19(1)(g) of the Constitution has been violated. This leads us to the question whether there has been excessive delegation of power by virtue of Section 3 of the Act which we shall extract:

3. Toddy Workers' Welfare Fund.?(1) The Government may, by notification in the Gazette, frame a scheme to be called the Toddy Workers' Welfare Fund Scheme for the establishment of a fund under this Act for employees and there shall be established, as soon as may be after the framing of scheme, a fund in accordance with the provisions of this Act and the scheme,

(2) The fund shall vest in, and be administered by the Board constituted u/s 6.

(3) Subject to the provisions of this Act the scheme framed under Sub-section (1) may provide for all or any of the matters specified in the schedule.

11. The section is in a sense negative that it provides only for the framing of a scheme and the establishment of a fund. But when we read Section 4, which specifically provides that the contribution to be made by the employer is eight per cent of the wages and Anr. five per cent towards gratuity and that an employee should also contribute eight per cent, it necessarily follows that the scheme must also provide for such contribution by the employer and the employee. The person on whom the obligation is cast and the extent of the obligation are specified in the Act. We think the Act itself contains guidelines on the basis of which the scheme has to be framed. The scheme must no doubt provide not only for the establishment of a fund and the details regarding the contributions to be made, but for the maintenance of the fund, its administration and allied matters and must also provide for the circumstances under which withdrawals can be made from the fund and the time at which payments shall be made out of the fund. Regarding provident fund a provision is normally made permitting even a person resigning to withdraw the full contribution to the fund, both his as well as that of the employer, irrespective of the time at which he resigned. But in the case of gratuity the principle has been established that there should be a minimum period of employment before resignation to qualify for the benefit of the fund. Since the word "gratuity" is used in the Act, we take it that such restrictions that should form part of any scheme for gratuity as established - by a series of decisions of the Supreme Court must be contained in any scheme that may be framed under the Act. If this is so, and we think it is, it cannot be said that there has been conferment of arbitrary power, or that there has been excessive delegation of powers. We negative this contention.

12. Passing on to the specific provisions of the scheme that have been challenged, namely, paragraphs 45(b) and 60, that they are against the well-accepted principles relating to the payment of gratuity, we think, counsel for the petitioners is well-founded in his contention. We shall read paragraphs 45(b) and 60 of the Toddy Workers' Welfare Fund Scheme, 1969 :

45. Gratuity when payable.?Gratuity shall be payable to an employee?

(a) \* \* \* \* (b) at the time of his retirement either voluntarily or compulsorily:

Provided, however, that eligible period for payment of gratuity of a worker shall be the number of years for which he was a member of the fund.

Explanation,?For the purpose of this paragraph the expression "retirement" includes dismissal or discharge or any other termination of service for misconduct or retirement on account of permanent total disablement due to accident or disease.

60. Withdrawal of full amount.-A "member may withdraw the full amount standing to his credit in the fund?

(a) on attaining the age of 58 years;

(b) on account of permanent and total incapacity for work due to bodily or mental infirmity duly certified by a registered medical practitioner designated by the Board:

Provided that it shall be open to the Chief Welfare Fund Inspector to demand from the member fresh certificate from a civil surgeon or any doctor acting in this behalf where the original certificate provided by him gives rise to suspicion regarding its genuineness.

Explanation? A member suffering from tuberculosis or leprosy, even if contracted after leaving the service of an establishment on grounds of illness but before payment has been authorised, shall be deemed to have been permanently and totally incapacitated for work;

(c) immediately before migration from the State for permanent settlement outside ;

(d) on termination of service in the case of mass or individual retrenchment:

Provided that in the case of mass retrenchment, the payment shall be made immediately and in the case of individual retrenchment payment shall be made if the member has not been employed in any other establishment to which the scheme was applicable for a continuous period of not less than six months immediately preceding the date on which the member makes the application for withdrawal:

Provided further that in the case of a member who has been retrenched or whose application for final withdrawal is pending, the member may, at his option, be paid for the period during which the member is out of employment, monthly withdrawals not exceeding one hundred and fifty rupees of a non-refundable nature from the fund. The balance amount, if any, shall?

(a) in case the member secures employment again as a toddy worker continue in his account;

(b) in case where the member does not secure employment, be paid in cash :

Provided the actual payment shall be made only after completing a continuous period of not less than six months immediately preceding the date on which a member makes the application for withdrawal.

(2) In case other than those specified in sub-paragraph (1), the Board or where so authorised by the Board, the Chief Welfare Fund Inspector or an officer under him may, subject to the conditions specified in sub-paragraph (3) permit a member to withdraw the amount standing to his credit in the fund if he has not been employed in any other establishment to which this scheme applied for a continuous period of not less than six months immediately preceding the date on which he makes the application for withdrawal:

Provided that the Chief Welfare Fund Inspector or any other officer authorised in this behalf may, in cases of hardship reduce, subject to such rules as may be made in this regard by the Chief Welfare Fund Inspector with the previous approval of the Board, the said period of six months to such extent as he may consider necessary.

(3) when a member withdraws any amount under sub-paragraph (2)?

(i) 25% of the employer's contribution and interest thereon shall be forfeited to the fund if the period of his membership is not less than 5 years and not more than ten years, or

(ii) 12% of the employer's contribution and interest thereon shall be forfeited to the fund if the period of his membership is more than 10 years but less than 15 years.

(iii) in the case of a member whose period ; of membership of the fund is less than five years-no amount shall be forfeited from the employer's contribution and interest.

(4) Any sum forfeited to the fund under sub-paragraph (3) shall not be returned to the employer but shall be credited to the "Forfeiture Account" of the fund.

13. Paragraph 45 (b) of the scheme provides that gratuity shall be payable to an employee at the time of his retirement either voluntarily or compulsorily and the explanation states that for the purpose of this paragraph the expression "retirement" includes dismissal or discharge or any other termination of service for misconduct or retirement on account of permanent total disablement due to accident or disease. Payment on retirement on account of permanent and total incapacity due to bodily or mental infirmity is provided in paragraph 60(b). What is objected to by counsel on behalf of the petitioners is the provision for payment of gratuity on voluntary retirement before completing a specific period of service, say 10 years or more, and also for payment of gratuity without any provision for setting off losses caused by the misconduct of the employee in cases of termination of service due to misconduct. It is seen from the decision of the Supreme Court in *Delhi Cloth and General Mills Co. Ltd. v. Their Workmen* 1961 I L.L.J. 423 : (1968) 36 F.J.R. 247, and other decisions that a gratuity scheme must insist on a certain number of years of prior service, which, according to the present view of the Supreme Court, is 10 years, in the case of voluntary retirement before payment can be made from the fund. It has also been laid

down that in the interests of proper service a provision for compensation for losses in the case of misconduct causing loss, must be contained in a scheme for gratuity. The provisions in paragraph 45(b) are against these well-established principles. We have already stated that a gratuity scheme framed under the Act must be in accordance with well-established principles, c" the provision in paragraph 45(b), the proviso thereto and the explanation cannot stand. We set aside paragraph 45(b), the proviso and the explanation thereto.

14. Similarly, the provision in paragraph 60(2) must also go for the same reason. All that is required under this paragraph is unemployment for a period of six months which itself can be reduced by the inspector to any shorter period. The restrictions provided in paragraph 60(3) that there will be a cut of 25% of the employer's contribution where retirement is between 5 and 10 years of service and a cut of 12% in the case of service between 10 and 15 years and that there will be no cut at all in the case of retirement before 5 years, we consider as unreasonable.

15. No doubt, we see that paragraph 60 is a provision in relation to payments out of funds which consist not only of contributions towards gratuity but also in regard to provident fund. It is for the framers of the scheme to make such adequate provision to provide for different considerations relating to the time and conditions under which the amounts of contributions towards provident fund may be paid out or withdrawn and for payments out of contributions towards gratuity. To facilitate this, perhaps it will be necessary to bifurcate the fund and keep two funds and make different provisions for payment out of such funds. But, as matters stand now, paragraph 60(2) is not conducive to the establishment of such conditions that are envisaged by the introduction of a gratuity scheme, and we doubt that it will be beneficial to the workmen. We, therefore, set aside paragraph 60(3) of the scheme as well, Since we set aside paragraphs 60(2) and 60(3) we have to and we do set aside paragraph 60(4) also.

16. The only other point remaining to consider is the effect of the notification dated 14th January, 1970, Ex. R-I, already referred to. We shall, before dealing with this question, extract once again Section 3 and also Section 5 of the Act.

3. Toddy Workers' Welfare Fund.? (1) The Government may, by notification in the Gazette, frame a scheme to be called the Toddy Workers' Welfare Fund Scheme for the establishment of a fund under this Act for employees and there shall be established, as soon as may be after the framing of the scheme, a fund in accordance with the provision of this Act and the scheme.

(2) The fund shall vest in, and be administered by the Board constituted u/s 6.

(3) Subject to the provisions of this Act the scheme framed u/s 1 may provide for all or any of the matters specified in the schedule."

5. Modification of Scheme.?(1) Government may, by notification in the Gazette add to, amend or vary the scheme framed under this Act.

(2) Every notification under Sub-section (1) -, shall be laid as soon as may be, after it is issued, before the Legislative Assembly while it is in session for a total period of 14 days which may be comprised in one session or in two successive sessions, and if before the expiry of the session in which it is so laid or the session immediately following, the Legislative Assembly agrees in making any modification in the notification or agrees that the notification should not be issued, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that notification.

17. Along with the Act, a scheme was brought into force by a notification on 29th December, 1969. We have already read paragraph 28 of that scheme. This paragraph was amended apparently pursuant to Section 5 of the Act and the notification dated 14th January, 1970 was issued. This notification has already been extracted. By the notification, the definition of the term "calendar year" has been incorporated, and for the words "financial year" in paragraph 28, the words "calendar year" has been substituted. The other alterations made by this notification are not material. The effect of the two alterations that have been made which we have referred to is to establish a fund from 1st January, 1970. Read with the other provisions in the scheme, this will involve contributions being made for the entire month of January, 1970 within the time stipulated. What is urged is, this in reality and in effect means the establishment of a fund from a date anterior to the date on which the notification has been issued. This is so. The further argument is that Section 3 does not provide for a scheme being framed with retrospective effect. It is also submitted that the power to amend cannot confer a greater power than that given by Section 3. There is force in this contention. But the further submission that the notification must, therefore, in its entirety be void, we find difficult to accept. The general principle seems to be that an Act which purports to be retroactive in operation as well as prospective in operation if it is bad in so far as it is retroactive is still good as far as its prospective part is concerned. We think that that principle must apply in relation to the notification as well. There is no reason, therefore, why this notification should not have effect from the 14th January, 1970 the date on which it was issued. We are fortified in this view by a Full Bench decision of the Travancore-Cochin High Court in (1954) 25 ITR 120 . We, therefore, negate the contention that the notification which contained the amendment to paragraph 28 of the scheme is void ab initio. It will have effect from the 14th January, 1970. In view of this, liability to contribute will arise only from the 14th January, 1970.

18. We dispose of these original petitions as above. We direct the parties to bear their respective costs.