(2015) 04 KL CK 0128

In the High Court Of Kerala

Case No : Writ Petition (C). Nos. 15353 of 2010 (T) and 23310 of 2010

The President, Pathanamthitta Service Co-Operative Bank Ltd. APPELLANT

Vs

Jolly Cherian and Others RESPONDENT

Date of Decision : 10-04-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 21, 34
Industrial Disputes Act, 1947 — Section 33C, 33C(2)
Kerala Shops and Commercial Establishment Act, 1960 — Section 18

Citation : (2015) 04 KL CK 0128

Hon'ble Judges : K. Vinod Chandran, J

Bench : Single Bench

Advocate : Philip J. Vettickattu and B. Premnath (E), for the Appellant; Jai George, Advocates for the Respondent

---

Judgement

K. Vinod Chandran, J—The above writ petitions are an off-shoot of an earlier litigation with respect to the dismissal of one Jolly Cherian [employee] from the services of the Pathanamthitta Service Co-operative Bank [management]. The dismissal was challenged by the employee under the Kerala Shops and Commercial Establishments Act, 1960 [for brevity "the Act"]. The Appellate Authority under the Act, in S.A. No. 43 of 1992, directed reinstatement of the employee as Chief Accountant with 50% backwages and all attendant benefits as also passed an order of compensation of Rs. 2,50,000/- in lieu of reinstatement. The order in appeal was dated 30.03.1999, directing reinstatement within one month. Obviously the employee was not reinstated; nor were the amounts paid as per the directions in the order. The employee initiated execution proceedings, in which an order was passed on 12.10.2001, which was set aside by a Division Bench of this Court; overturning the affirmation made by a learned Single Judge. The order passed in execution dated 31.03.2010 is the subject matter of challenge in the above writ petitions; filed by the management and the employee.

2. The controversy is on a narrow compass as to the computation of the amounts as per the conflicting submissions made by either parties. The Appellate

Authority under the Act, framed three issues so as to adjudicate the computation of amounts due, which are extracted hereunder:

"(1) Whether the Appellant is eligible for backwages and other service benefits from 1/04/1999 to 31/12/2003.

(2) Whether the Appellant is eligible to be promoted as Secretary of the Bank from 01/11/1989.

(3) Whether the Appellant is eligible for all three pay revisions".

3. That the employee is entitled to 50% of the backwages brooks of no dispute. However, whether such backwages have to be computed on the basis of the eligibility to be promoted as Secretary would be the moot question to be considered. The employee has a further claim that the compensation in lieu of reinstatement having not been paid, the employee is entitled to the entire backwages till the date of superannuation; as if the employee had been reinstated within one month of the order dated 30.03.1999, i.e., from 01.05.1999 till 31.12.2003, when the employee attained the age of superannuation.

4. Considering the first issue as to the backwages, deeming the employee to have been reinstated within 01.04.1999, the Appellate Authority declined to consider such claim on the premise that the compensation, being in lieu of reinstatement, takes into account the benefit which would have accrued to the employee on being reinstated. Section 18 of the Act confers power on the Appellate Authority to direct reinstatement of an employee with or without wages for the period the employee was kept out of employment and confers power to direct payment of compensation in lieu of reinstatement. Hence, despite the Appellate Authority finding that the employee is liable to be reinstated, it could always order compensation in lieu of reinstatement. In the present case, the Appellate Authority found it appropriate that the employee be reinstated; but, however, directed that compensation could be paid in lieu of reinstatement.

5. The amount computed as compensation was Rs. 2,50,000/- and the same; as rightly found by the Appellate Authority in the impugned order, takes into account the benefit which would accrue to the employee on reinstatement. Payment of compensation enables the employer to avoid reinstatement. In such circumstance, the employee cannot, in the teeth of an order of compensation in lieu of reinstatement, claim both the compensation and the backwages on the strength of a deemed reinstatement by reason only of failure to pay such compensation. The employer cannot also commit default by neither reinstating the employee nor paying compensation. A via media would have to be found by the Courts of equity in such case of default by the employer and the employee would have to be compensated for not having been paid the compensation at the time when it was rightfully due.

6. When reinstatement is ordered and compensation is also determined in lieu of

reinstatement, the employer ought to pay such compensation within the period in which the reinstatement is directed. In the present case, there is no dispute that the reinstatement was directed within a period of one month and that would expire on 30.04.1999. The employee definitely is entitled to be compensated for not having received such compensation within the period when it was rightfully due to the employee. Hence, while upholding the impugned order of the Appellate Authority to the extent it declined backwages from 01.04.1999 to 31.12.2003, the date of the order to the date of superannuation, this Court is of the opinion that the employee has to be compensated in terms of interest for default in payment of the compensation ordered by the Appellate Authority. The same has to be computed on the basis of the fact situation and the specific assertion of the employer with respect to the offer of payment, which shall be dealt with after the legal issues are dealt with.

7. The second issue, which was answered in favour of the employee was that the employee is liable to be promoted as Secretary and the 50% of backwages due to the employee is to be computed on the basis of the higher pay eligible to the employee, in the post of Secretary. The management would forcefully contend that there could be no computation of backwages on the basis of a deemed promotion to the post of Secretary, since such discretion was within the exclusive domain of the Board of Management of the employer-Society, especially so, for reason of the employee not having the required qualification.

8. With respect to the challenge against the deemed promotion granted by the Appellate Authority, it is to be noticed that such promotion is not a right accrued on the worker. Admittedly the worker did not have the essential qualification to be promoted to the post of Secretary, i.e., Junior Diploma in Commerce [JDC] (wrongly noticed as HDC by the Appellate Authority). True the Kerala Co-operative Societies Act, 1969 confers a discretion on the Board to exempt such qualification with the prior approval of the Registrar. Specifically such discretion has been conferred on the Board to grant exemption and it cannot be assumed that if the worker had been continued in employment, the Board would have exercised such discretion in her favour. The fact that such discretion was exercised even in the case of a person who was promoted from the post of Peon cannot be relied on, to find that the same discretion would have been exercised in the case of the employee herein. The finding of the Appellate Authority in the impugned order is that "here, if the appellant was not dismissed she would have been promoted as Secretary of the Bank on the ground of relaxation". There is no warrant for such assumption by the Appellate Authority. In such circumstances, the order of the Appellate Authority deeming the employee to have been promoted to the post of Secretary on 01.11.1989 would stand vacated. The computation of the backwages due to the employee; 50% of which was directed to be paid with attendant benefits, shall be computed only on the basis of the wages and benefits applicable to a Chief Accountant, from which post the employee was dismissed and to which post there was a direction for reinstatement.

9. With respect to the third issue, dealt with by the Appellate Authority, the employee would be entitled to all the pay revisions till the order of reinstatement was made. As in the case of reinstatement, the pay revision subsequent to such order would not be applicable, since there is an alternative direction for compensation in lieu of reinstatement. The Appellate Authority''s order to that extent is confirmed. The employee would be eligible for the two pay revisions that were introduced during the period prior to the original order of the Appellate Authority under Section 18 of the Act.

10. The Appellate Authority had in fact considered the issue of interest, as against the claim of the employee at 18% from 01.05.1999, the date on which the compensation in lieu of reinstatement fell due. It is the contention of the respondent-Bank that as against the said order, the Bank had filed an appeal before the High Court and then to the Supreme Court. Though both the said appeals went against the Bank, it is the contention that, having availed of legal remedies, it was perfectly valid for the Bank to decline reinstatement or compensation in lieu of reinstatement till the legal remedies are exhausted. It is also contended that immediately after the order of the Hon''ble Supreme Court rejecting the appeal of the management, an amount of Rs. 3,10,730/- was sent to the employee by the management, which was refused to be accepted by the employee. It is also contended that the present proceedings being in the nature of execution proceedings, there would be no question of interest being awarded for the delay in payment of the amounts directed in the original order, since the original order did not make such order.

11. With respect to the contention that no interest could be awarded in execution proceedings, the issue stands covered against the management by judgment in W.P.(C). No. 15945 of 2011 dated 13.03.2015 [M.M. Joseph v. The Labour Court & Others], wherein this Court had found that when the management challenges an order of reinstatement and payment of backwages, then on such challenge being negatived, the employee would have to be compensated for the delay in payment of the amounts directed, by way of interest. The specific contention based on Section 34 of the Code of Civil Procedure was answered against the management in the following words:

"10.... Undoubtedly, it has been stated oftener than ever, that the proceedings under Section 33C [of Industrial Disputes Act, 1947] is akin to that of an execution. However, it is one thing to say that the power is akin to that of an execution Court and quite another, to assert that it exercises the jurisdiction, conferred on the execution Court, under CPC. The powers granted to the execution Court, under the CPC, is not that which is exercised by the Labour Court under Section 33C(2). If that be so, then, definitely one could import the principle that the execution court cannot go behind the award of a Labour Court; which the claimants under Section 33C(2) seeks to execute. Otherwise there is no warrant for such an assumption.

xxx xxx xxx

14. What is significant is the declaration of the Hon''ble Supreme Court that the Labour Court would not be a Civil Court. While conceding the accepted position that the Labour Court exercises jurisdiction akin to execution proceedings; under Section 33C(2), it is to be emphasised that the Labour Court would not be constrained, insofar as the jurisdiction being confined to that, exercised under Order XXI of the CPC. The CPC has been held to be a guide insofar as any adjudication proceeding is concerned. But one cannot limit or restrict the powers of a Special Court; under the provisions of the CPC. The Labour Court hence would not be entitled to fall back on the provisions of Section 34 to grant interest when passing an order of payment of backwages nor could it be said that; when such an interest is not granted; under sub section (2) of Section 34, there is a deemed refusal as provided therein; when the decree itself is silent on that aspect".

12. The management of the Bank having taken up the matter before the higher forums ought to have paid up the amounts as directed by the Appellate Authority under Section 18; on failure of which it would definitely invite the additional liability of interest over and above the amounts computed as backwages, attendant benefits and also compensation in lieu of reinstatement. Even as per the earlier order which was set aside by this Court, amounts were due far in excess of the amounts said to have been paid by Demand Draft on 05.11.2001. The admitted case of the management is that the management sent a Demand Draft on 05.11.2001 for an amount of Rs. 3,10,730/-; which does not even satisfy the 50% of the backwages and the attendant benefits due. Hence, the compensation in lieu of reinstatement determined at Rs. 2,50,000/- would carry interest at the rate of 10% from 01.05.1999. As to the 50% of backwages and all attendant benefits due, the management would be liable to pay interest for the entire amounts so computed, again at the rate of 10% from 01.05.1999 to 05.11.2001. The interest liability from 05.11.2001 would stand reduced as against an amount of Rs. 3,10,730/-. However, with respect to the balance amounts, the management would be liable for interest at 10%, to the employee, till payment.

In the above circumstances, the impugned order, bearing No. G.406/99 dated 31.03.2010 shall stand set aside only to the extent indicated above, i.e., to the extent the Appellate Authority has deemed the employee to have been promoted as Secretary from 01.11.1989. W.P(C). No. 15353 of 2010 filed by the management-Bank shall stand allowed to that extent. W.P.(C) No. 23310 of 2010 filed by the employee shall also stand allowed to the extent of the interest awarded by this Court as indicated above. The employee and the management-Bank shall appear before the Appellate Authority for proper computation of the amounts as directed herein above, which shall be computed within three months from the date of appearance of both parties. The parties shall appear before the Appellate Authority on 10.06.2015. Parties are left to suffer their respective costs.

