

(1990) 06 KL CK 0016
In the High Court Of Kerala
Case No : O.P. No. 1198 of 1986

The Service Co-operative Bank, Kodikulam	APPELLANT
Vs	
A.O. Chacko and Other	RESPONDENT

Date of Decision : 07-06-1990

Acts Referred:

Kerala Shops and Commercial Establishment Act, 1960 — Section 18(3), 18(4)

Citation : (1990) 2 KLJ 13

Hon'ble Judges : K.P. Radhakrishna Menon, J

Bench : Single Bench

Advocate : Thomas v. Jacob, for the Appellant; V. Radhakrishna Menon and K.G. Anil Babu, Govt. Pleader, for the Respondent

Judgement

K.P. Radhakrishna Menon, J.—Ext. P11 order of the 2nd respondent u/s 18(3) of the Kerala Shops and Commercial Establishments Act, for short "The Act" is under challenge. The 1st respondent filed an appeal challenging the order of the petitioner terminating his services. The 2nd respondent after evaluating the evidence adduced by the parties came to the conclusion that the order dispensing with the services of the 1st respondent is not sustainable in law and consequently issued the following directions :-

The appellant is out of employment ever since 1-4-83. His last drawn wages for a month was Rs. 270/-. So his back wages for the period from 1-4-83 till the date of this order (30-1-83) i.e. 32 months is quantified as Rs. 8,640/-. The respondents are directed to pay the same to the appellant within 30 days and also to reinstate the appellant within 30 days.

In case the respondents fail to reinstate the appellant as ordered above, it is further ordered as provided u/s 18 (4) of the Act, that the respondents should pay a further compensation of Rs. 2,000/- (Rupees two thousand only) to the appellant within 30 days and that his entire security deposit of Rs. 5,000/- should also be repaid to him alongwith the compensation

The learned counsel for the petitioner submits that inasmuch as the appeal was filed out of time the same ought to have been dismissed by the second respondent.

2. For two reasons, this argument cannot be accepted. (1) No such plea has been taken by the petitioner in its written statement. (2) The finding that the order terminating the services of the first respondent is not sustainable, is based on evidence.

3. Regarding reason No. 1. The Act enables the employer to raise a specific contention that the appeal is liable to be dismissed as it is one filed out of time. This right provided for by the statute rests in the employer and intended for his benefit and as such the same can be waived. It is all the more so because such waiver is not forbidden by law. A question however would arise, Has the petitioner intentionally relinquished this right? The answer depends upon the facts of each case. Here from the conduct of the petitioner in not raising this contention in the written statement (it is relevant in this context to note that the question of limitation is a mixed question of fact and law) it can be inferred without the fear of contradiction that the respondent has abandoned/relinquished this right resting in him and provided for by the Act. (See the decision of the Supreme Court in *Basheshar Nath Vs. The Commissioner of Income Tax, Delhi and Rajasthan and Another*, The petitioner therefore cannot be allowed to raise this contention for the first time in the original petition.

4. Coming to the second reason: The second respondent after evaluating the materials available on record has found that the first respondent has in fact been dismissed from service and the order dismissing him from service is not sustainable. This is a finding of fact, based on evidence. The contention, the petitioner had raised before appellate authority, namely that the first respondent had only been suspended, must be held to have been rejected. There is therefore little scope to interfere with the above finding.

5. However, the direction to refund the security amount of Rs. 5,000/- is liable to be set aside in view of the fact that the second respondent is incompetent to decide the question as to whether the security amount is liable to be refunded. The said direction therefore is vacated.

6. Ext. P11 order of the second respondent is modified to the extent indicated above, that is, the direction to refund the security amount is deleted. In every other respect it is sustained.

7. The learned counsel for the first respondent submits that the first respondent may be given a chance to agitate his right to get refund of the security amount by initiating proceedings for arbitration u/s 69 of The Co-operative Societies Act. The learned counsel in this connection submitted that the first respondent did not take steps to get refund of the security amount as the order Ext. P11 had directed the petitioner to refund the same. Under these circumstances, his request to pass appropriate orders enabling him to initiate proceedings for

recovery of the security amount requires to be granted. The first respondent, if so advised, can initiate proceedings u/s 69 of the Co-operative societies Act, for recovery of the security amount.

8. As per the directions of this court, the petitioner has deposited a sum of Rs. 15,640/- in this court being the compensation amount the first respondent is entitled to get as per Ext. P11. In the light" of what is stated above, the first respondent is entitled to the said amount less the security deposit. That means he is to get Rs. 10,640/-. The office shall pay this amount to the first respondent. The balance amount will be returned to the petitioner.

The Original Petition is disposed of as above.