

(2016) 07 KL CK 0024
In the High Court Of Kerala
Case No : W.P. (C) .No. 31850 of 2006 (N)

V. Sasi

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 13-07-2016

Acts Referred:

Citation : (2016) 4 ILRKerala 6 : (2016) 3 KerLJ 392 : (2016) 3 KLT 421

Hon'ble Judges : Mr. P.R. Ramachandra Menon and Mr. Anil K. Narendran, JJ.

Bench : Division Bench

Advocate : Sri. N. Raghuraj and Smt. K. Amminikutty, Advocates, for the Appellant; Senior Government Pleader Sri. M. Muhammed Shafi, Sri. Renil Anto, SC, KTWFF Board, Sri. M.G. Karthikeyan, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Ramachandra Menon, J.—Having found that a licensee under the Kerala Abkari Shops Disposal Rules 2002 is "jointly and severally" liable to satisfy the arrears of contribution under the Toddy Workers' Welfare Fund Act, along with the immediate employer who was running the shop, is it open for the licensee to contend that he can be proceeded against only after proceeding against the assets and person of the immediate employer? The decision sought to be relied on by the petitioners/licensees in support of such contention raised by them, that it cannot be so, as reported in 2006 (3) KLT 988 [Welfare Fund Inspector v. Jaya], has been doubted by a learned Judge of this Court passing an order of reference on 23.02.2015, which in turn is under consideration now.

2. The petitioners and three others were the licensees of the toddy shops bearing No. 1 to 142 of the Kuttanad Excise Range during the Abkari year 1988 - '99. As it was quite permissible, having not been prevented either by the Statute or by any order issued by the Department/Government, the petitioners/licensees, for reasons of their own, were getting the shops run through the concerned party respondents, who were the immediate employers, without transferring the licence.

3. By virtue of the relevant provisions in the Kerala Toddy Workers' Welfare Fund Act 1969 ("Welfare Fund Act" in short), contribution was payable by the "employer", in respect of the employees, at the prescribed rate. Admittedly, the employers who had engaged the employees during the tenure of the licence, failed to remit the requisite extent of contribution and it fell in arrears. Proceedings were initiated against the employers (both the licensees and the immediate employers) by the concerned authorities and final determination order was passed under Section 8 of the Welfare Fund Act, fixing the liability "jointly and severally" on the licensees as well as the immediate employers. Apart from the petitioners and the party respondents herein, several other persons were also found liable to satisfy the arrears of contribution. Recovery proceedings were pursued under the Revenue Recovery Act against the petitioners, causing their properties to be attached and sold. This made the petitioners in W.P.(C) No.31850 of 2006 to approach this Court seeking to proceed against the immediate employers as well, who were actually running the toddy shops and for such other reliefs.

4. Subsequently, it was noted by the petitioners that no steps were taken by the Department against 40 persons named in Ext. P1 and hence a direction was sought for to proceed against all the persons referred to in Ext. P1, except the petitioners against whom the proceedings under the Revenue Recovery Act had already been initiated, besides seeking for a declaration that the concerned authorities were legally bound to proceed against the persons who were found to be the employers of the concerned shops during the period 1998-99, by filing W.P.(C) No. 6226 of 2007. In the course of further proceedings, the authorities caused to issue a warrant to one of the licensees under Section 65 of the Revenue Recovery Act, which was sought to be intercepted by filing W.P.(C) No. 4961 of 2011. It is also prayed for, to cause to initiate revenue recovery action against the concerned respondents, who were the "immediate employers" and were liable to effect the contribution under the Welfare Fund Act.

5. Heard the learned counsel for the petitioners, the learned counsel appearing for the party respondents, the learned standing counsel for the Welfare Fund Board and the learned Government Pleader appearing for the State/Department.

6. The learned counsel for the petitioners submits that the factual position that the petitioners were licensees and as to culmination of the proceedings by passing final determination order by the competent authority under the Welfare Fund Act is not under dispute. It is also conceded that there is no challenge against the liability or the quantum fixed in this regard. Grievance is against the alleged inaction on the part of the department/revenue authorities in not taking any steps against the "immediate employer" while confining the action only against the petitioners/licensees. It is also pointed out that, by virtue of the law declared by a Division Bench of this Court in 2006 (3) KLT 988 (cited supra), the petitioners/licensees can be proceeded against, only after exhausting steps for recovery against the actual employers, who were running the shops during the

period in question, under the license procured/issued to the petitioners. The learned counsel further submits that the order of reference passed by the learned Single Judge itself is bad, in so far as the learned single judge is always bound by the verdict passed by a Division Bench, as in 2006 (3) KLT 988 (cited supra). Reference could have been made, if the correctness of 2006 (3) KLT 988 (cited supra) was doubted in any manner, only by a subsequent Division Bench, which course was not open for a single Judge, who ought to have passed the verdict in terms of 2006 (3) KLT 988 (cited supra), permitting to proceed with steps against the petitioners/licensees only after getting the remedy against immediate employers exhausted. The reference order is stated as defective, by placing reliance on the verdict passed by the Apex Court in *Nahar Industrial Enterprises Ltd. v. Hong Kong & Shanghai Banking Corporation* [2009 (3) KLT SN 57 (Case No. 59) SC] and that of a Division Bench in *Abdu Rahiman v. District Collector and another* [ILR 2009 (4) Ker. 513].

7. The learned counsel appearing for the party respondents submits that the liability was fixed "jointly and severally" upon them as well as on the petitioners. It is stated that the party respondents have already been proceeded against and their properties have been sold. It is also pointed out that the liability had actually to be satisfied by the petitioners/licensees and as per the terms of operation between the concerned party respondents and the petitioners/licensees, the party respondents were only to pay, a fixed amount to the licensees every month, as consideration and it was for the licensees to satisfy all statutory liabilities.

8. Sri. Renil Anto, the learned standing counsel appearing for the Toddy Workers' Welfare Fund Board submits that, as per the definition of the term "employee" and "employer" [Section 2(c) and 2 (d) of the Welfare Fund Act] wider coverage is intended and it does not exclude anybody who actually runs the shop, though not in a capacity as the licensee. It is pointed out that, by virtue of Rule 7 (23) of the Kerala Abkari Shops Disposal Rules 2002, there is a bar in "transferring" or "subletting" the licence and that the Welfare Fund Act intends to cover all circumstances including when the Toddy Shop is run by a non-licensed person as well. The Welfare Fund Act, as the very name indicates, is a welfare legislation, where the liability is "joint and several". In response to the submissions made by the learned counsel for the petitioners and the contesting respondents that the liability is almost completely satisfied, the learned standing counsel submits the same is not correct and that the recovery effected by the revenue authorities has not been fully credited to the Boards' account.

9. Mr. Varghese C. Kuriakose the learned counsel appearing for the 6th respondent in W.P.(C) 6226 of 2007 submits that the agent cannot be made personally liable. The property belonging to the 6th respondent was taken over and same was sold appropriating the sale proceeds against the liability. The learned counsel further submits that a concession, if any, given in a judgment is not the law and as such, the liability is always "joint and several".

10. Mr. M. Muhammed Shafi, the learned senior Government Pleader appearing for the State/Department submits that the challenge against the reference order is rather wrong and misconceived and that, as per the law declared by the Supreme Court as well as Full Bench and Division Bench of this Court, the course followed by the learned single judge, on doubting a Division Bench judgment, in turn referring the matter for reconsideration of a Division Bench, is quite permissible. The learned Government Pleader also submits that the liability is "joint and several", even as per the finding rendered by Division Bench reported in 2006 (3) KLT 988 (cited supra and sought to be relied on by the petitioners) and that there is no merit in these writ petitions.

11. With regard to the challenge against the "order of reference", the submission made by the learned counsel for the petitioners is that a single Judge is always bound by a Division Bench and that the single Bench can never doubt the same or refer it for reconsideration. The law has been made clear by a Constitution Bench of the Apex Court in *Pradip Chandra Parija v. Pramod Chandra Patnaik* [(2002) 1 SCC 1], whereby it has been categorically asserted, that a "two Judges Bench" has to refer the matter to a "Bench of three Judges", if the former Bench feels that the standing decision of the "three Judges Bench" is not correct; otherwise, the two Judges Bench has to follow the decision rendered by the three Judges Bench. Only if the "Bench of three Judges" conclude that the earlier judgment rendered by the three Judges Bench is incorrect, can there be a reference to larger Bench. The issue had also come up for consideration of a Full Bench of this Court and as per the decision rendered in *Peter v. Sara* [2006 (4) KLT 219 (F.B.)] it has been held that a single Judge has no power to refer the matter to a Full Bench and that, if the single judge doubts the verdict of a Division Bench, it can only be referred to a Division Bench. The Division Bench has to consider whether the matter could be referred to Full Bench. This was followed and reiterated by a Division Bench of this Court in *Anil Kumar v. State of Kerala* [2012 (4) KLT 793] as well.

12. The decision sought to be relied on by the petitioners, as reported in 2009 (3) KLT SN 57 (C. No. 59) (cited supra) stands on a different footing as discernible from the factual sequence referred to therein. The principle laid down is only that the decision rendered by a Bench of larger strength is binding on any subsequent Bench of lesser or co-equal strength and that, if the bench of co-equal strength doubts the correctness of the decision rendered by the earlier co-equal Bench, the matter has to be placed for consideration of the Bench of next higher strength. That apart, the verdict passed by the Constitution Bench of Supreme Court reported in (2002) 1 SCC 1 (cited supra) was never brought to the notice of the Bench consisting of two judges while passing the verdict in the said case.

13. From the above, it is quite evident that, though a Single Judge is bound by a Division Bench, it is always open for the Single Bench to doubt the correctness of the verdict of the Division Bench. If the Single Judge wants to pass a verdict, it

can only be in tune with the law declared by the Division Bench and if the said verdict is doubted, reference is possible to a Division Bench and it is for the Division Bench to consider whether the matter is to be referred to a Full Bench. This being the position, the order of reference passed by the learned Single Judge is well within the power and jurisdiction of the learned single Judge. It is declared accordingly.

14. The next question to be considered is the extent of liability upon the employers/licensees. Admittedly, the petitioners are the licensees who were to run the shops during the period in question and hence primary liability is upon them, to effect the contribution in respect of the employees. It is true, that there is a bar in transferring the licence or subletting the right. But it also remains a fact that the licensee, though not have effected any transfer or subletting, may not be actually running the shop under some compelling circumstances and that he may be running the shop through such other person as well. The Kerala Toddy Workers' Welfare Fund Act, being a welfare legislation enacted for the welfare of employees, has taken note of such situation as well, and it is accordingly, that a wider definition has been given to the term "employer" as per Section 2(c) of the Act, which reads as follows:

"2(c) "employer" means any person who employs, whether directly or through another person, or whether on behalf of himself or any other person, one or more employees and includes any person who has a licence for the manufacture (distribution, storage or sale) of toddy under the Abkari Act for the time being in force."

Definition of the term "employee" as given under Section 2 (d) of the Act is also relevant, which is reproduced below:

(d) "employee" means any person who is employed for wages in connection with the tapping, manufacture, (transport, storage or sale) of toddy and who gets his wages directly or indirectly from the employer and includes any person employed by or through a contractor or through an agent in or in connection with the tapping, manufacture, (transport, storage or sale) of toddy."

15. From the above provisions, it is evident that the licensee and the actual person who is running the shop, are equally to be regarded as "employer" for the purpose of effecting contribution in respect of the employees concerned. As such, the liability is "joint and several". This exactly is the law declared by a Division bench of this Court in *Ashokan v. Kerala Toddy Workers Welfare Fund Board* [2012 (3) KLT 723] and by a Single Bench in *Kelan v. State of Kerala* [2007 (2) KLT 933] (cited by the learned counsel for the petitioners)

16. The remaining question to be considered is whether any law has been declared by a Division Bench of this Court in 2006 (3) KLT 988 (cited supra) to the effect that the licensee can be proceeded against under the Toddy Workers' Welfare Fund Act only after proceeding against the actual employer who was running the shop during the relevant time. The answer can only be an emphatic

"No". The learned Judges have extracted the definition of the terms "employer" and "employee" as defined under Section 2(c) and Section 2(d) of the Act respectively, in paragraph 7 of the verdict. In Paragraph 8 of the judgment, it has been held that the term "employer" is an inclusive definition. After referring to meaning of the term "employee", the Bench observed that, even though the licensee may not be paying any wages directly to his employees attached to the shop, by virtue of the definition clause contained in Section 2 (c) of the Welfare Fund Act, he is also made liable for effecting contribution under the Act. It was categorically asserted and held in paragraph 10 of the said verdict that both the licensee/principal employer and the immediate employer of the shop are "jointly and severally liable" to satisfy the contribution, by virtue of the wider definition of the term employer under Section 2 (c) of the Act.

17. It has to be borne in mind that the appeal considered by the Division Bench in 2006 (3) KLT 988 (cited supra) was in fact preferred by the Welfare Fund Inspector, against the verdict passed by the learned Single Judge holding that the "licensee" cannot be held liable. Based on the declaration made by the Division Bench in paragraph 10 [that the liability was joint and several], the verdict passed by the learned single judge was set aside. However, an observation was made, that it will be open for the authorities to proceed against the licensee after exhausting the remedy against the 4th respondent/employer; which has to be read and understood as having given in the light of the particular facts and circumstances involved in the said case. In other words, the declaration of law as contained in Paragraph 10 of the verdict is that the liability is "joint and several". As such, the observation in the next sentence that it will be open for the authorities to proceed for recovery of the balance amount from the licensee after exhausting their remedies against the persons found to have employed the persons and directly paying wages to them, is only a concession given to the licensee, which cannot be taken as any declaration of law. The reference made by the learned single Judge is answered, holding that liability to satisfy contribution under the relevant provisions of the Kerala Toddy Workers' Welfare Fund Act is "joint and several" upon the "licensee" as well as on the "immediate employer" concerned.

18. In the above circumstances, the challenge raised by the petitioners against the relevant proceedings is held as unfounded. It is open for the respondent authorities to proceed against the petitioners/licensees as well as the immediate employers, jointly and severally, for realisation of the due amount in accordance with law. The amounts recovered/collected by the authorities of the Revenue Department shall be credited to the account of the Welfare Fund Board, if still to be credited and only the outstanding liability, if any, shall be sought to be recovered from the parties concerned. If there is any inter se dispute between the licensees and the immediate employers (i.e. petitioners and party respondents), based on the agreement or memorandum of understanding, if any, it is left open to be settled between them by way of appropriate proceedings in accordance with law, which need not be the look out of the department/revenue.

19. The Writ Petitions are dismissed accordingly.