

Derly K.J. vs Linto Raphael

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Court : Kerala

Decided On : Dec-09-2022

Judge : Honourable Mr.Justice K.Vinod Chandran,Honourable Mr.Justice C. Jayachandran

Appeal No. : Con.Case(C)/2399/2022

Appellant : Derly K.J.

Respondent : Linto Raphael

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN & THE HONOURABLE MR.JUSTICE C.JAYACHANDRAN FRIDAY, THE 9TH DAY OF DECEMBER 2022 / 18TH AGRAHAYANA, 1944 CON.CASE (C) NO.2399 OF 2022 AGAINST THE JUDGMENT DATED 26.09.2022 IN WP(C) NO.22754/2020 OF HIGH COURT OF KERALA PETITIONER/PETITIONER: DERLY K.J., AGED 50 YEARS, W/O.JOSEPH, KATTUKARAN HOUSE, MARATHAKKARA P.O, OLLUR, THRISSUR:680306. BY ADV JELSON J.EDAMPADAM RESPONDENT/RESPONDENT: LINTO RAPHAEL FATHER'S NAME & AGE NOT KNOWN TO THE PETITIONER SECRETARY, OLLUR

TOWN CO-OPERATIVE SOCIETY LTD.NO.R 1120, COMPANYPADY P.O., OLLUR, THRISSUR DISTRICT: -680 306. BY ADV.T.R.HARIKUMAR THIS REVIEW PETITION HAVING COME UP FOR ADMISSION ON 09.12.2022, ALONG WITH R.P.NO.1040/2022 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN & THE HONOURABLE MR.JUSTICE C.JAYACHANDRAN FRIDAY, THE 9TH DAY OF DECEMBER 2022 / 18TH AGRAHAYANA, 1944 R.P NO.1040 OF 2022 AGAINST THE JUDGMENT DATED 26.09.2022 IN WP(C) NO.22754/2020 OF HIGH COURT OF KERALA REVIEW PETITIONERS/RESPONDENTS 2 & 3: 1 OLLUR TOWN CO-OPERATIVE SOCIETY LTD NO.R 1120, REPRESENTED BY ITS SECRETARY, COMPANYPADY P.O, OLLUR, THRISSUR DISTRICT, PIN - 680306. 2 THE MANAGING COMMITTEE, OLLUR TOWN CO-OPERATIVE SOCIETY LTD NO.R 1120, REPRESENTED BY ITS PRESIDENT, COMPANYPADY P.O, OLLUR, THRISSUR DISTRICT, PIN - 680306. BY ADVS. T.R.HARIKUMAR ARJUN RAGHAVAN RESPONDENTS/PETITIONER & 1ST RESPONDENT: 1 DERLY K.J., AGED 50 YEARS, W/O.JOSEPH, KATTUKARAN HOUSE, MARATHAKKARA P.O, OLLUR, THRISSUR:680306. 2 THE KERALA CO-OPERATIVE TRIBUNAL, THIRUVANANTHAPURAM, REPRESENTED BY ITS SECRETARY, PIN - 695001. BY ADV JELSON J.EDAMPADAM THIS REVIEW PETITION HAVING COME UP FOR ADMISSION ON 09.12.2022, ALONG WITH CON.CASE(C) NO.2399/2022 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN & THE HONOURABLE MR.JUSTICE C.JAYACHANDRAN FRIDAY, THE 9TH DAY OF DECEMBER 2022 / 18TH AGRAHAYANA, 1944 R.P.NO.1120 OF 2022 AGAINST THE JUDGMENT DATED 26.09.2022 IN W.A.NO.445/2020 OF HIGH COURT OF KERALA REVIEW PETITIONER/APPELLANT: OLLUR TOWN CO-OPERATIVE SOCIETY LTD NO.R 1120, REPRESENTED BY ITS SECRETARY, COMPANYPADY P.O, OLLUR, THRISSUR DISTRICT, PIN - 680306. BY ADVS. T.R.HARIKUMAR ARJUN RAGHAVAN RESPONDENTS/RESPONDENTS: 1 THE KERALA CO-OPERATIVE TRIBUNAL, REPRESENTED BY ITS SECRETARY, THIRUVANANTHAPURAM, PIN - 695001. 2 DERLY.K.J, AGED 50 YEARS, W/O.JOSEPH, KATTUKARAN HOUSE, MARATHAKKARA P.O, OLLUR, THRISSUR, PIN - 680306. BY ADV JELSON J.EDAMPADAM THIS REVIEW PETITION HAVING COME UP FOR ADMISSION ON 09.12.2022, ALONG WITH CON.CASE(C) NO.2399/2022 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN & THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN FRIDAY, THE 9TH DAY OF DECEMBER 2022 / 18TH AGRAHAYANA, 1944 R.P.NO.1122 OF 2022 AGAINST THE JUDGMENT DATED 26.09.2022 IN W.A.NO.331/2021 OF HIGH COURT OF KERALA REVIEW PETITIONER/1ST RESPONDENT: OLLUR TOWN CO-OPERATIVE SOCIETY LTD NO.R 1120, REPRESENTED BY ITS SECRETARY, COMPANYPADY P.O, OLLUR, THRISSUR DISTRICT, PIN - 680306. BY ADVS. T.R.HARIKUMAR ARJUN RAGHAVAN RESPONDENTS/APPELLANT & 2ND RESPONDENT: 1 DERLY K.J, AGED 50 YEARS, W/O.JOSEPH, KATTUKARAN HOUSE, MARATHAKARA P.O, OLLUR, THRISSUR, PIN - 680306. 2 THE KERALA CO-OPERATIVE TRIBUNAL, THIRUVANANTHAPURAM,

REPRESENTED BY ITS SECRETARY, PIN - 695001. BY ADV JELSON J.EDAMPADAM THIS REVIEW PETITION HAVING COME UP FOR ADMISSION ON 09.12.2022, ALONG WITH CON.CASE(C) NO.2399/2022 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: K.VINOD CHANDRAN & C.JAYACHANDRAN, JJ.

----- Cont.Case (C) No.2399 of 2022 in WP(C) No.22754 of 2020, Review Petition Nos.1040 of 2022 in WP(C) No.22754 of 2020, 1120 of 2022 in W.A.No.445 of 2020 & 1122 of 2022 in W.A.No.331 of 2021
----- Dated this the 09th December, 2022

ORDER

K.Vinod Chandran, J.

The review petitions arise from a common

judgment in two writ appeals and one writ petition.

The subject matter of the writ petitions was the disciplinary enquiry initiated against the 1st respondent herein, who was the Accountant of the Society; the review petitioner herein. Disciplinary proceedings were initiated on charges of misconducts, including calculation of interest on certain specified accounts, which the delinquent employee asserted would not give rise to a charge of misconduct, especially if the other similar

accounts are verified. The disciplinary e
Disciplinary Authority.

2. On a challenge before the Co-operative

Tribunal, the enquiry report was set aside and there was a direction to the Arbitration Court to verify the correctness of the enquiry proceedings and the enquiry report afresh. The employer filed the writ petition, in which it was directed

that the employer will be allowed to adduce evidence before the Arbitration Court, thus ensuring that the allegation raised of a fair opportunity having not been given to the delinquent could be rectified

atleast before the Arbitration Court. Both the employer and the employee filed writ appeals, which were disposed of by the common judgment, in which we called for a writ petition filed by the employee challenging the invalidity of the memo of charges; which was also disposed of by the common judgment.

3. We found that the memo of charges was issued by the Disciplinary Sub-Committee, while the appointing authority was the Managing Committee. *Kodanchery Service Co-operative Bank Ltd. v. Joshy*

Varghese [2020 (4) KLT 129] found that only an appointing authority can issue a memo of charges. The enquiry, hence, stood vitiated by reason of the subsequent declaration of law by this Court. We

held so and directed the enquiry to be commenced

from the stage at which the enquiry was found to have been vitiated. Liberty was granted to the employer to consider the objections to the show- cause notice filed by the employee and either accept the objections, dropping the proceedings, or issue a fresh memo of charges. We also directed that the period when the delinquent employee stood terminated shall be considered as spent on service and the entire benefits due to her shall be paid within a period of one month. The review is filed only as against the direction to pay the back wages. As of now, the employee is reinstated in service, a fresh memo of charges issued and the delinquent placed under suspension.

4. Sri.Arjun Raghavan, learned Counsel appearing for the employer Society, would place reliance on the decision in *Chairman-cum-M.D., Coal*

India Ltd. v. Ananta Saha [(2011) 5 SCC 142], wherein it is held that the question of back wages should be determined by the Disciplinary Authority in accordance with law, only on the conclusion of the fresh enquiry, especially when it is the settled law that if the enquiry ends in a termination, the same would relate back to

the date of the earlier termination; when de novo proceedings are directed by a judicial forum. It is also argued that if a binding precedent was not noticed, it is a self evident error as has been spoken of in *State of Rajasthan v. Surendra Mohnot* [(2014) 14 SCC 77].

5. Sri.Jelson P.Edumpadam, the learned

Counsel appearing for the respondent employee, however would resist the review petition placing reliance on *Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya* [(2013) 10 SCC 324], wherein it has been declared that when the employer acts in gross violation of the statutory provision or gives short shrift to principles of natural justice or is guilty of having victimized the employee, then the

Court or Tribunal would be fully justified

consequence in the de novo enquiry since it is a deliberate preconceived attempt on the part of the management. It is also pleaded that, as of now, the employee has been kept out of service for almost 8 years. Reliance is also placed on a Division Bench

judgment of this Court in Mathew Joseph

v.Registrar of Co-operative Societies [ILR 2022 (4) Kerala 555].

6. In *Surendra Mohnot* (supra) the Hon'ble Supreme Court held that when self evident errors come to the notice of the Court and they are not

rectified in exercise of review jurisdiction or jurisdiction of recall, which is a facet of plenary jurisdiction under Article 226 of the Constitution of India, a grave miscarriage of justice occurs. Ignoring a binding precedent or not having noticed it; as in the present case, would hence be a ground for review and the failure to exercise such jurisdiction would tantamount to miscarriage of justice. We have looked at the decisions placed before us by both the Counsel, which we find is on distinctive facts.

7. *Ananta Saha* (supra) was a case in which

serious allegations were made against the employee and there was violation of statutory provisions in initiating the enquiry and imposing the punishment; both, by authorities not competent so to do, under

the statutory regulations. Hence there was a direction to carry out de novo enquiry from the stage at which the irregularity was noticed. On the question of back wages, following the decision of the Constitution Bench in Managing Director, ECIL v. B.Karunakar [(1993) 4 SCC 727] it was held so in paragraphs 49 & 50 of Ananta Saha (supra) :

49. The issue of entitlement of back wages has been considered by this Court time and again and consistently

held that even after punishment imposed

upon the employee is quashed by the court or tribunal, the payment of back wages still remains discretionary. Power to grant back wages is to be exercised by the court/tribunal keeping in view the facts in their entirety as no straitjacket formula can be evolved, nor a rule of universal application can be laid for such cases. Even if the delinquent is reinstated, it would not automatically make him entitled to back wages as entitlement to get back wages is independent of reinstatement. The factual scenario and the principles of justice, equity and good conscience have to be kept in view by an appropriate authority/court or tribunal. In such matters, the approach of the court or the tribunal should not be rigid or mechanical but flexible and realistic. (Vide U.P. SRTC v. Mitthu Singh [(2006) 7 SCC 180 : 2006 SCC (L&S) 1590 : AIR 2006 SC 3018] , Akola Taluka Education Society v. Shivaji [(2007) 9 SCC 564 :

(2007) 2 SCC (L&S) 679] and Balasaheb Desai Sahakari S.K. Ltd. v. Kashinath Ganapati Kambale [(2009) 2 SCC 288 :

(2009) 1 SCC (L&S) 372] .)

50. In view of the above, the relief

sought by the delinquent that the appellants be directed to pay the arrears of back wages from the date of first termination order till date, cannot be entertained and is hereby rejected. In case the appellants choose to hold a fresh enquiry, they are bound to reinstate the delinquent and, in case, he is put under suspension, he shall be entitled to subsistence allowance till the conclusion of the enquiry. All other entitlements would be determined by the disciplinary authority as explained hereinabove after the

conclusion of the enquiry. With these

observations, the appeal stands disposed of. No costs.

8. Deepali Gundu Surwase (Supra) was a case in which there was clear victimization found; the enquiry itself having been initiated for reason

of the teacher in a School, controlled by a family, having not contributed a specified amount for settling the tax liability visited on the Trust, which was in management of the School. The Tribunal, before which the termination was challenged, set aside the termination and directed reinstatement with full back wages, which direction to disburse full back wages was interfered with by a learned Single Judge of the High Court. It was

held, affirming the direction issued

implies that the employee will be put in the same position, in which he would have been put, but for the illegal action taken by the employer. However, it was also held that merely for setting aside a termination, the employee does not get a right to the entire back wages; especially looking at S.11A of the Industrial Disputes Act, 1947. By S.11A the Labour Court/Industrial Tribunal is empowered to interfere with a punishment, if it is disproportionate to the misconduct proved; when the Court or Tribunal would also have the discretion not to award full back wages. That would depend on the circumstances in which the charge arose, the gravity of the misconduct, as also the factum of whether the delinquent was employed elsewhere gainfully.

9. Having gone through the judgments placed before us, we are of the opinion that the

facts in the instant case are similar to the facts

in Ananta Saha(supra). As far as Deepali Gundu Surwase(supra), the facts in that case, as also the decisions referred to therein indicate a final determination entered into by the Courts/Tribunal,

which set aside the termination ordered as illegal. However, in Ananta Saha(supra), as is in this case, there was a de novo proceedings ordered, in which circumstance the discretion has been left to the Disciplinary Authority to decide on the back wages, if eventually a lesser punishment than termination is ordered or the delinquent is found not guilty.

10. The learned Counsel for the delinquent

had raised submissions about the attempt of the employer to somehow terminate the service of the respondent-employee. We cannot, at this stage, assume that there is a preconceived attempt to terminate the respondent and that would be a ground available to the employee, eventually, if termination is ordered, which also would have to be

established by cogent evidence. As of now, the direction is only to carry on a de novo enquiry from the stage of issuance of a memo of charges.

11. We also notice that the irregularity occurred insofar as a Sub Committee, who was not the appointing authority, issued the memo of charges, which was found to be bad, by virtue of a later decision of this Court in Kodanchery Service Co-operative Bank Ltd.(supra). As far as the Division Bench judgment of this court in Mathew Joseph (Supra) placed before us, we find that the learned Judges had referred to the judgment on which review is now sought. In view of the decision of the Hon'ble Supreme Court, we are of the opinion

that the direction to disburse the back wages within a period of one month has to be reviewed. We do so and direct the enquiry to be completed within a period of

three months from the date of receipt of a certified copy of the judgment.

12. The review petitions having been allowed to the extent prayed for, the contempt case does not survive. The learned Counsel for the petitioner in the contempt case submits that the

charges now alleged are substantially different from that alleged earlier. We cannot rule on such an allegation in the contempt case. As of now the contempt case stands closed without prejudice to the above contention of the petitioner. Sd/- K.VINOD CHANDRAN, JUDGE Sd/-co C.JAYACHANDRAN, JUDGE sp/09/12/2022 APPENDIX OF CON.CASE(C) NO.2399/2022 PETITIONER'S ANNEXURES:- ANNEXURE-I THE CERTIFIED COPY OF THE COMMON

JUDGMENT IN W.P.(C) NO. 22754 OF 2020,

W.A. 445 OF 2020 AND W.A 331 OF 2021 DATED 26.09.2022. ANNEXURE-II TRUE COPY OF THE LETTER FORWARDING ANNEXURE-I TO RESPONDENT. ANNEXURE-III TRUE COPY OF THE CHARGESHEET DATED 07.11.2022, ALONG WITH ITS FORWARDING LETTER. ANNEXURE-IV TRUE COPY OF THE LETTER DATED 17.11.2022, ISSUED BY THE PRESIDENT OF THE BANK.

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