

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

WEDNESDAY, THE 12TH DAY OF AUGUST 2015/21ST SRAVANA, 1937

WP(C).No. 23166 of 2015 (U)

PETITIONERS:

1. ANILKUMAR.K., SENIOR MANAGER (UNDER ORDER OF SUSPENSION), NEETHI DISTRIBUTION CENTRE, CONSUMERFED, KARICODE, TKMC POST, KOLLAM, RESIDING AT BABU MANDIRAM, BHARANIKKAV, PORUVAZHI P.O., KOLLAM.
2. SURESH KUMAR.C.U., SENIOR MANAGER (UNDER ORDER OF SUSPENSION), NEETHI DISTRIBUTION CENTRE, CONSUMERFED, KALVARI ROAD, POOTHOLE, THRISSUR, RESIDING AT CHANGAYIL HOUSE, CHATHIYARA, THAMARAKKULAM P.O., ALAPPUZHA DISTRICT.

BY ADVS.SRI.M.SASINDRAN
SRI.V.VENUGOPAL

RESPONDENTS:

1. THE MANAGING DIRECTOR, KERALA STATE CO-OPERATIVE CONSUMERSFEDERATION LTD. (CONSUMERED), GANDHI NAGAR, KOCHI - 682 020.
2. KERALA STATE CO-OPERATIVE CONSUMERS FEDERATION LTD., (CONSUMERFED), GANDHI NAGAR, KOCHI 682 020 REP. BY THE MANAGING DIRECTOR
3. THE BOARD OF DIRECTORS OF THE KERALA STATE CO-OPERATIVE CONSUMERSFEDERATION LTD. (CONSUMERFED), GANDHI NAGAR, KOCHI 682 020 REPRESENTED BY ITS PRESIDENT.
4. THE REGISTRAR OF CO-OPERATIVE SOCIETIES, THIRUVANANTHAPURAM - 695 001.

R1 TO R3 BY ADV. SRI.GEORGE POONTHOTTAM
R4 BY SPL. GOVT. PLEADER SRI.D.SOMASUNDARAM

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 12-08-2015 ALONG WITH WPC. 23865/2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX IN WP(C).No. 23166 of 2015 (U)

PETITIONER'S EXHIBITS:

EXT. P1: A TRUE COPY OF THE ORDER DATED 24/7/2015 ISSUED BY THE FIRST RESPONDENT SUSPENDING THE FIRST PETITIONER

EXT. P1(a): TRUE ENGLISH TRANSLATION OF EXHIBIT P1

EXT. P2: A TRUE COPY OF THE ORDER OF SUSPENSION DATED 24/7/2015 ISSUED BY THE FIRST RESPONDENT SUSPENDING THE 2ND PETITIONER

EXT. P2(a): TRUE ENGLISH TRANSLATION OF EXT.P2

EXT. P3: A TRUE COPY OF THE MEMO OF CHARGES ISSUED TO THE FIRST PETITIONER

EXT. P3(a): TRUE ENGLISH TRANSLATION OF EXT.P3

EXT. P4: A TRUE COPY OF THE MEMO OF CHARGES ISSUED TO THE SECOND PETITIONER

EXT. P4(a): TRUE ENGLISH TRANSLATION OF EXT.P4

EXT. P5: A TRUE COPY OF THE CIRCULAR DATED 25/4/2011 ISSUED BY THE MANAGING DIRECTOR

EXT. P5(a): TRUE ENGLISH TRANSLATION OF MALAYALAM PORTION OF EXT.P5.

RESPONDENT'S EXHIBITS:

EXT. R1(a) TRUE COPY OF THE PROMOTION POLICY AND THE FEEDER CATEGORY RULES AS APPROVED BY THE REGISTRAR

EXT. R1(b) TRUE COPY OF THE CIRCULAR NO.9 DATED 8.6.2012 WITH ENGLISH TRANSLATION

EXT. R1(c) TRUE COPY OF THE G.O.(Rt) NO.76/2015/VIG DATED 3.6.2015

EXT. R1(d) TRUE COPY OF THE COMMUNICATION NO.13978/B2/13/VIG DATED 27.6.2015

EXT. R1(e) TRUE COPY OF THE PROCEEDINGS OF THE MANAGING DIRECTOR NO.CF/Ad2/INSP/2014-15/973 DATED 15.7.2015

/TRUE COPY/

P.S. TO JUDGE

Dama Seshadri Naidu, J.

W.P.(C)Nos.23166 & 23865 of 2015

Dated this the 12th day of August, 2015

COMMON JUDGMENT

Facts:

The two petitioners in W.P.(C)No.23166/2015 and the sole petitioner in W.P.(C)No.23865/2015, all of them being the Senior Managers in charge working in the second respondent Society, have filed the present writ petitions assailing the orders of suspension passed by the first respondent in W.P.(C)No.23166/2015 and the third respondent in W.P.(C)No.23865/2015.

2. Since all the petitioners, having been similarly situated, have raised a common grievance against the same set of respondents, this Court has proposed to dispose of both the writ petitions through a common judgment. Accordingly, for ease of reference and convenience, the facts as narrated and the parties as arrayed in W.P.(C)

No.23166/2015 have been referred to for the purpose of elucidating the issue.

3. Briefly stated, the petitioners have been placed under suspension through Exhibits P1 and P2, apart from having been served with Exhibits P3 and P4 charge memos by the first respondent. Essentially assailing the orders of suspension as being ultra vires of the fourth respondent, the petitioners have filed the present writ petition.

Submissions:

Petitioners':

4. Mr.Sasindran, the learned counsel appearing for the petitioners in W.P.(C)No.23166/2015, has submitted that the second respondent is a Consumer Federation, a Co-operative Society, governed by the provisions of the Kerala Co-operative Societies Act, 1969 and the Rules made thereunder. The learned counsel has drawn my attention to Section 80 of the Kerala Co-operative Societies Act ('the

Act' for brevity) dealing with classification of the societies, especially Section 80(3) thereof dealing with the power to make rules. He has further referred to Rule 182 (2) of the Kerala Co-operative Societies Rules ('the Rules' for brevity) to emphasize the fact that it is the Managing Committee that has got the power to appoint all employees in the Federation, and consequently to suspend them, as well.

5. The learned counsel has also drawn my attention to Rules 198(2)(a) and 198(2)(b) of the Rules to hammer home the point that disciplinary powers are to be exercised by a sub-committee to be appointed by the Managing Committee. In that context, the learned counsel has strenuously contended that Rule 188(8) of the Rules is explicit in stating that the power of suspension vests with the appointing authority, which is none other than the Managing Committee. In other words, it is the singular contention of the learned counsel for the petitioners that

the first respondent, being the Managing Director, has not been conferred with any power either under the principal enactment or under any secondary legislation, to suspend a delinquent employee, as a part of the disciplinary proceedings.

6. Based on the averments made in the counter affidavit filed by the respondent Society, the learned counsel would refer to clause 29 of the Bye-laws to contend that once the bye-laws are in conflict with the principal enactment or the rules made thereunder, they would not survive. In support of his submissions, the learned counsel has placed reliance on **P.A. George v. Tatapuram Co-operative Society Ltd.**,¹ and **Venugopalan v. Co-operative Tribunal**².

7. The learned counsel for the petitioner in W.P.(C) No.23865/2015 has adopted the submissions of the learned

1 1975 KLT 367
2 1986 KLT 1213

counsel for the petitioners in W.P.(C)No.23166/2015.

The Plea of the State:

8. The learned Government Pleader, appearing for the fourth respondent in W.P.(C)No.23166/2015 and respondents 1 and 2 in W.P.(C)No.23865/2015, has substantially endorsed the submissions of the learned counsel for the petitioners. He has also drawn my attention to Section 13A of the Act to stress the proposition that once there is a conflict between the substantive legislation and the bye-laws, it is the former that prevails. In support of his submissions, the learned counsel has placed reliance on **Philomina Dominic v. Kerala State Co-operative Housing Federation**³ and **State of Kerala v. Saseendran**.⁴

Respondents 1 & 2:

9. Mr.George Poonthottam, the learned counsel appearing for respondents 1 and 2 in W.P.(C)No.23166/2015

3 2011 (1) KLT SN 27

4 2009 (2) KLT 482 (FB)

and the third respondent in W.P.(C)No.23865/2015, i.e. to the exclusion of the Managing Committee, has strenuously contested the submissions made by the learned Government Pleader as well as the learned counsel for the petitioners. To begin with, the learned counsel has submitted that the petitioners, in fact, have an efficacious alternative remedy by way of recourse to the Arbitration Court in terms of Section 69 of the Act.

10. The learned counsel has metaphorically made a submission that Article 226 of the Constitution is not the panacea for all ills. In elaboration, the learned counsel would contend that it is not the question of whether this Court can or cannot interfere, but it is essentially a question whether this Court should.

11. The learned counsel, having taken me through the records, has taken the trouble of expatiating on the present state of affairs of the respondent Federation.

Suggestively, the learned counsel would submit that when the approved feeder category has ninety-four employees, the respondent Federation has more than four hundred regular employees. According to him, the daily wagers are in the region of about four thousand. As regards the position held by the petitioners, the learned counsel would contend that the respondent Federation does not contain any post of the description 'Senior Manager' in its approved staff pattern.

12. Tracing the roots of the petitioners' employment in the respondent Federation, the learned counsel has submitted that the first petitioner was initially appointed a Mazdoor on contract basis, whereas the second petitioner, a Sales Helper, both in temporary positions. In the course of time, the petitioners got their services regularised as Sales Persons with the approval of the Registrar. According to him, in so far as their present position is concerned, they

were appointed through Exhibit R1(b) as Senior Managers by none other than the erstwhile Managing Director.

13. The petitioners' appointment, strictly going by the statutory scheme, is not regular; it has, however, never been questioned. On the contrary, it was taken advantage of by the petitioners themselves. In other words, the Managing Director, being the appointing authority, contends the learned counsel, has every power to place under suspension the petitioners, who, according to him, face grave allegation of misappropriation of funds.

14. The learned counsel has also contended that the petitioners are estopped from assailing the orders of suspension either on the principal of acquiescence or the principle of estoppel, as the case may be.

15. The learned counsel has drawn my attention to the expansive powers of the Managing Director as in charge of the over-all administration. It is the singular contention of

the learned counsel for the respondents that as part of his discharging the day-to-day administrative functions, the Managing Director has ample powers to be exercised under exigent circumstances for the welfare of the organisation. According to him, these powers are inherent and need not be conferred on him in express statutory terms.

16. It is the specific contention of the learned counsel that the bye-laws, which have the binding effect, through clause 29, enumerate the powers of the Managing Director. According to him, Clause 29 of the Bye-laws confers sufficient powers on the Managing Director to be exercised vis-a-vis his subordinates—the petitioners, indeed, are his subordinates.

17. The learned counsel has also contended that it is not administratively possible for the Managing Committee to meet frequently to take care of the day-to-day administrative needs, and as such, it is the Managing

Director who exercises the plenary administrative powers.

18. The learned counsel has also made a specific reference to Rule 188(6) to emphasise that the expression used therein is 'may'; it is not essential for the Managing Committee to place a delinquent employee under suspension. According to him, a joint reading of Rules 198(2), 198(3) and 198(6) of the Rules leads to the definitive conclusion that the Managing Director is not powerless in placing the petitioners under suspension.

19. Fairly concedes the learned counsel that the Managing Committee has the statutory power of appointing the employees, and thereby the power of taking disciplinary measures, including suspension, against them. He, nevertheless, would contend that while the Managing Committee exercises the statutory powers, the Managing Director exercises the administrative powers, which, according to the learned counsel, include the power of

supervision and also discipline. In that context, the learned counsel would draw my attention to Rule 47 of the Rules to emphasise that the Managing Director enjoys over-all control of the organisation.

20. Placing reliance on **Prasanth Maroli v. Kannur Primary Co-operative Agricultural & Rural Development Bank Ltd.**⁵, the learned counsel has contended that the administrator, even in the absence of express powers, has inherent powers of discipline, which, in their wake, include the power of suspension as well. The learned counsel has also contended that a comprehensive reading of the bye-laws makes it clear that the Managing Committee has not got the powers enumerated under clause 29; on the other hand, the Managing Director has. It is also the contention of the learned counsel that clause 29 of the Bye-laws, which confers the disciplinary powers, has not been challenged by any of the petitioners. The learned counsel, in support of his

submissions, has placed reliance on **Raj Kumar Soni & Another v. State of U.P., & Another**⁶ to emphasise that any interference by this Court at this juncture would only amount to reviving an illegality.

21. Eventually the learned counsel has submitted that the petitioner in W.P.(C)No.23865/2015 has, in fact, been placed under suspension by the Government but not by the Managing Director.

22. Heard the learned counsel for the petitioners, the learned counsel for the respondents, as well as the learned Government Pleader, apart from perusing the record.

Issue:

23. The sole issue that emerges for judicial consideration is whether the first respondent has the jurisdiction to place the petitioners under suspension. There is, of course, a concomitant issue as regards the maintainability of the writ petitions in the light of the

objection taken by the respondents.

The Scope of Adjudication:

24. At the outset, I deem it appropriate to make it clear that the issue will be considered in a narrow compass, strictly confining the discussion and thereby the adjudication only with regard to the issue that has been referred to above. This caveat has to be placed on record because the learned counsel for the first respondent has elaborated on the state of affairs in the respondent Federation; in other words, he has left sufficient hints in the course of his submissions concerning the alleged maladministration in the Federation.

Managerial Mismatch:

25. To elaborate ever so briefly in the manner of an oxymoron, I may observe that the learned counsel for the first respondent has hinted at how the federation has become feather-bedding for employment. According to the

learned counsel, though there are only 94 approved posts in the feeder category, there are, as on date, more than 400 regular employees. The learned counsel has also alleged that there are about 4000 employees on daily wage basis.

26. The learned counsel for the first respondent, the Managing Director, also represents the second respondent, the Federation, but not the third respondent, the Board of Directors of the respondent Federation. It may not be out of place to mention that earlier a learned Senior Counsel represented respondents 1 to 3, but later withdrew his consent to appear for the respondents on the ground that there was a conflict in the instructions he had received from the Managing Director on one hand, and the Managing Committee on the other.

27. In my considered view, the internal disputes between the two organs of the Institution may not be germane for the issue to be decided presently. At any rate,

it has been adverted to in the present disposition only with a view to expressing the Court's concern as regards the state of affairs in the Federation, in which the State has a majority stake. I only hope that the authorities concerned will take remedial steps if there are any administrative shortfalls in the effective management of the Federation, for the internal squabbles should not reflect adversely on the performance of the Federation.

Brass-tacks:

(a) Maintainability:

28. Addressing the issue of maintainability, the learned counsel for respondents 1 and 2 has contended that the petitioners have an efficacious alternative remedy under Section 69 of the Act. The learned counsel for the petitioners has, however, countered the said contention by submitting that Exhibits P1 and P2 primarily suffered from want of authority. In other words, the orders of suspension

have been passed by an authority who does not have the power and thereby the impugned orders are ultra vires of the authority.

29. It is axiomatic to observe that an order which is ultra vires can always be questioned before this Court, notwithstanding the self-imposed limitation of alternative remedy. This Court as well as the Hon'ble Supreme Court has, through a profusion of precedents, held definitively that expansive as the adjudicatory powers of the High Court under Article 226 of the Constitution of India are, the Court is, however, essentially to be guided by the self-imposed restrictions concerning the availability of an efficacious alternative remedy. Indeed, numerous are the precedents that the self-imposed bar of alternative remedy cannot come in the way of judicial review under Article 226 of the Constitution of India, if the issue has to be addressed on any of the following three counts: (1) that the order assailed is

ultra vires of the authority, (2) that there is a violation of the principles of natural justice, or (3) that the writ petition seeks enforcement of the fundamental rights.

30. A learned Division Bench of this Court in **Bharath Sanchar Nigam Ltd., Tvm v. Assistant Commissioner (Assessment), Commercial Taxes, Tvm and Others**⁷, after referring to earlier precedents on the issue, has eventually held as follows:

“32. In fact, through a catena of judgments, it has been held that the rule of an alternative remedy is a self-imposed restriction on a judicial review under Article 226 of the Constitution of India. It is, however, equally well established that (i) where the writ petitions seeks enforcement of any of the fundamental rights; (ii) where there is violation of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged, an alternative remedy does not operate as a bar.”

31. In the present instance, it is the contention of the petitioners that the first respondent has not been clothed with any power either under the principal enactment or under the subordinate legislation to place the petitioners

under suspension. As such, in my considered view, the objection on the part of respondents 1 and 2 as regards the maintainability cannot be sustained and is accordingly rejected.

(b) Sustainability of the Orders of Suspension:

32. As has been contended by the learned counsel for the petitioners and the learned Government Pleader, Section 80 of the Act classifies the societies and Section 80 (3) thereof confers on the Government the power to make Rules. Chapter 15 of the Kerala Co-Operative Societies Rules, 1969 deals with 'establishment'. Rule 182(2) of the Rules mandates that the Committee shall be the authority competent to appoint the employees in a Co-Operative Society. Let us examine Rule 198 of the Rules, which deals with disciplinary action. The sub-rules (2A), (2B) and 2(6) of Rule 198 are the particular legislative instances that fall for consideration in the context of the disciplinary powers to be

exercised by an authority.

33. Sub-rule 2(A) of Rule 198 is to the effect that the Committee of a Society shall constitute a Disciplinary Sub-Committee consisting of not more than three of its members, of whom one shall be designated as Chairman. The President of the Committee of the Society, however, shall not be a member of the Disciplinary Sub-Committee. In terms of sub-rule 2(B), the Disciplinary Sub-Committee so constituted shall inquire into the charges against the employee either by themselves or by engaging an external agency. In fact, sub-rule (3) tabulates the authorities competent to impose various penalties on different categories of employees.

34. The fulcrum of the present adjudication being the power of authority to place a delinquent employee under suspension, sub-rule (6) of Rule 198 is germane. The said Rule reads as follows:

“(6) An authority competent to appoint an employee may suspend him pending enquiry into serious charges against such employee. No employee shall however be kept under suspension for a period exceeding six months at a time. In no case an employee shall be kept under suspension for a continuous period exceeding one year without the prior approval of the Registrar. An employee under suspension shall be entitled to subsistence allowance payable under the Kerala payment of Subsistence Allowance Act, 1972 (27 of 1973).

Provided that an employee not coming under the purview of the Kerala Payment of Subsistence Allowance Act, 1972 (27 of 1973) shall be entitled to subsistence allowance at the rate admissible to State Government Employees as prescribed under the Kerala Service Rules.”

35. A perusal of the above provision makes it clear that an authority competent to appoint an employee may as well suspend him pending an enquiry into serious charges against such employee. Of course, the provision extracted above incorporates certain conditions and safeguards to be adhered to while the said power of suspension is exercised by the competent authority. It is beyond cavil that the Managing Director is not the appointing authority; ipso facto, nor can he be a disciplinary authority having the

power of suspension.

36. The learned counsel for respondents 1 and 2 has, however, strenuously contended that the power of suspension in the chief administrator of the Organisation, i.e., the Managing Director, is implicit. This contention needs to be examined at some length. In fact, the submission is two-fold: that clause 29 of the bye-laws empowers the Managing Director to punish an employee; that the Managing Director, being the Head of the Administration, has the inherent power of placing an employee under suspension.

37. I will address first the former part of the submission of the learned counsel. As has been extracted in the counter affidavit, clause 29 of the bye-laws of the respondent Federation enumerates the powers and duties of the Managing Director. Those powers, indisputably, include the power of exercising control and supervision over the

staff of the Federation; needless to observe that the power of control and supervision is inclusive of punishing the erring employees even by way of removal from office. According to the learned counsel for respondents 1 and 2, clause 29(d) of the Bye-laws amply empowers the Managing Director to suspend an employee since it is only an interim measure before the eventual punishment could be inflicted.

38. It needs no cogitation to hold that an authority that has the power of discipline, including that of removal from service, also has the incidental power of suspending a delinquent employee pending enquiry. It is, however, equally well established that when there is any conflict between a primary legislation and secondary legislation, the primary legislation prevails. In turn, when there is any conflict between the secondary legislation and the administrative instructions, it is the former that prevails. In my considered view, the bye-laws of any organisation

cannot have statutory force; at best, they are measures of internal management which have enforceability so long as they do not come in direct conflict with either the primary legislation or the subordinate legislation. In P.A.George (supra) this Court has held that Bye-laws are not statutory in nature. In Venugopalan (supra) it is held that no bye-law can prevail against the statutory rule. Section 13A of the Act statutorily recognises this proposition.

39. In the present instance, in terms of Rule 198 of the Rules, the power of discipline has been conferred on the Managing Committee, but not on the Managing Director. To that extent, clause 29 of the bye-laws comes in conflict with the said substantive statutory provisions. I am, therefore, inclined to hold and accordingly hold that clause 29 of the bye-laws cannot have precedence over Rule 198 of the Rules.

40. The other limb of the submission on the part of the learned counsel for respondents 1 and 2 is that since the Managing Director is the head of administration in the respondent Federation, it is imperative that he should exercise the power of suspension vis-a-vis his subordinates since the said power is only incidental for the effective administration. In support of his submissions, the learned counsel has placed reliance on Prasanth Maroli (*supra*).

41. In Prasanth Maroli (*supra*), the facts in brief are that an employee who suffered conviction was placed under suspension by the President of the Society. Before the order of suspension could be ratified by the Managing Committee, it was challenged. In that context, this Court has observed that an authority vested with the general control over the affairs of an establishment has the necessary power to do such things as are necessary for the immediate management of situation in relation to the establishment.

Keeping in view the necessity of getting the approval of the Managing Committee by the President, who has, otherwise, the power of suspending the employee, this Court has further observed that if the ratification by the committee is to be insisted upon as a precondition for placing an employee under suspension, it permits the employee in the meanwhile to continue without any obstruction within the establishment, even when a fact-situation has clearly arisen to place him under suspension.

42. The above observation Prasanth Maroli (*supra*) has been made in the context that it is neither convenient nor practically possible for the Committee of any Society to meet without any prior notice and except in accordance with the terms of the bye-law. This is precisely why the President, being the President of the Committee of the Society, is conferred with the power to do such things as are necessary to manage the establishment.

43. Indeed, this Court has further held that such power of the President as to his control over the administration includes the power to make an order suspending an employee from the Society in anticipation of the ratification by the competent authorities, namely the Committee, of which the President himself is a member. This ratio, which has been essentially rendered in the factual background of the said case, cannot have a universal application. It is not the case of inherent lack of power; on the contrary, it is a case of pre-maturity.

44. Firstly, the President of the Society has been conferred with the power of suspension, but only subject to the ratification by the Committee of which he is a part. The suspension has been brought into force pending ratification by the Committee. It is not a question of lack of inherent power of the authority, as has already been observed.

45. It is still to be observed that once there is a specific enumeration of power, or a particular authority has been conferred with the specific power, the question of some other authority exercising the same power invoking either the inherent or the incidental powers of the administration does not arise. To illustrate, all Civil Courts have inherent powers in terms of Section 151 of CPC. Expansive as the power has been, once there is any specific statutory provision either in the Code or any other extant statute, the Court cannot fall back on the inherent power.

46. In *Philomina Dominic* (supra), this Court, while interpreting Rule 198 of the Rules, has held that when the appointing authority is the Board, the order of suspension cannot be passed by the Managing Director. In *Saseendran* (supra), a learned Full Bench of this Court has held that the order of suspension can be passed (a) by the appointing authority, (b) by any authority to which the appointing

authority is subordinate, and (c) by any other authority empowered by the Government in that behalf. The ratio of the above cases clinches the issue beyond the pale of any controversy.

47. In the present instance, Rule 188(6) of the Rules specifically empowers the Managing Committee to exercise the disciplinary powers, including that of suspension. In that context, I am afraid, the contention of the learned counsel for respondents 1 and 2 cannot be countenanced that the Managing Director in terms of the bye-laws has still been left with any residuary power to be exercised in negation of the specific statutory power conferred on the Managing Committee.

Estoppel and Acquiescence:

48. The learned counsel for respondents 1 and 2 has pressed into service the principle of estoppel by conduct—more specifically the principle of acquiescence. According

to the learned counsel, the petitioners, who were initially working as sales persons, were appointed Senior Managers through Exhibit R1(b), the proceedings issued by the Managing Director. To express differently, it is the Managing Director who has appointed the petitioners as the Senior Managers, albeit in the manner of appointment by promotion. If Rule 198 of the Rules is to be read in conjunction with Exhibit R1(b), contends the learned counsel, the Managing Director is the appointing authority, and so he is the authority who can exercise the disciplinary powers.

49. In the first blush, the submission seems to be rather attractive, but on a closer scrutiny it fails to pass judicial muster. It is not the case of the respondents that the petitioners have been born in the cadre of the Federation through Exhibit R1(b). At best, Exhibit R1(b) is an order in the nature of the promotion. First, the Managing Committee

is the appointing authority; secondly, once an employee has been born in the cadre, he acquires the right to be considered for promotion in the due course.

50. If there is any illegality in the process of promotion, a person is required to be reverted by following the due procedure. Such assumed illegal promotion cannot have the potential of terminating the services of the employee. An authority who has given a promotion, on the other hand, cannot be treated as an authority who has appointed an employee. In the alternative, even assuming that there were to be an appointment by the authority who had not been authorised by law, the said authority could not continue to exercise his non-existent powers even concerning the subsequent stages of the said appointee's career. In other words, a wrong cannot be perpetuated because there is at the inception an element of illegality. Nor can it be countenanced that two wrongs can make one

right. The upshot of the above discussion is that by no stretch of reasoning can it be held that the first respondent is the appointing authority and that he can exercise the power of discipline including that of placing an employee under suspension.

51. Indeed, the learned counsel for respondents 1 and 2 has tried to take aid of the doctrine of acquiescence. In common law parlance, equity is the fountain-head, and acquiescence is one of its streams that flows therefrom. Acquiescence has been defined in Black's Law Dictionary (9th Edn.) as a person's tacit or possible acceptance. It is also said to be an implied consent to an act.

52. In **Estoppel by Conduct and Election by Mr. Justice K.R.Handley**⁸, acquiescence as equitable defence has been elaborated upon to the following effect:

“Acquiescence after the event is an equitable defence when inaction, delay and other facts make it inequitable for the claimant to enforce his rights. This defence and an estoppel

8 Pp.195-96, Ed.2013, Thomson-Sweet & Maxwell

by representation overlap when the claimant by his conduct represents to the defendant that he has abandoned his rights or does not intend to enforce them. In such a case there could be an estoppel if the defendant was thereby induced to change his position. This defence is connected with that of laches and does not depend on an estoppel. As Cotton LJ said in *Allcard v Skinner*:

"Mere delay in enforcing a right is not a defence. It is very different from raising no objection to an act while it is being done, which may be treated as assent to the act, and therefore as being acquiesced in [so] as to be an equitable defence."

In the same case Lindley and Bowen LJ held that the plaintiff's long delay after she ceased to be under the donee's influence barred her action to set aside her gifts.

Lindley LJ said:

"The case by no means rests on mere lapse of time. There is far more than inaction and delay on the part of the plaintiff. There is conduct amounting to confirmation of her gift... in this state of thing I can only come to the conclusion that she deliberately chose not to attempt to avoid her gifts but to acquiesce in them, or, if the expression be preferred, to ratify or confirm them."

Bowen LJ said:

".... if she has so acted, if her delay has been so long as reasonably to induce the recipient to think, and to act upon the belief that the gift is to lie where it has been laid, then, by estoppel, it appears to me that the donor of the gift would be prevented from revoking it. But I do not base my decision here upon the ground of estoppel... the time which has elapsed, though not a bar in itself,.... is nevertheless,

coupled with the other facts of the case, a matter from which but one reasonable inference ought to be drawn by men of the world namely that the lady considered her position at the time and elected and chose not to disturb the gift.

In *Goldsworthy v Brickwell Nourse LJ* said:

".... acquiescence in its proper sense.. involves a standing by to as to induce the other party to believe that the work in assented to. In this sense... acquiescence can bear a close resemblance to promissory estoppel."

53. In **Dawson's Bank Limited v. Nippon Menkwa Kabushiki Kaisha**,⁹ as quoted with approval in **Supdt. of Taxes v. Onkarmal Nathmal Trust**,¹⁰ the Privy Council has explained the distinction between estoppel and waiver by stating that estoppel is not a cause of action, but waiver is contractual and may constitute a cause of action. The reason stated there is that waiver is an agreement to release or not to assert a right. There is no such thing "as estoppel by waiver.

9 AIR 1935 PC 79
10 (1976) 1 SCC 766

54. In **Power Control Appliances v. Sumeet Machines (P) Ltd.**,¹¹ the Hon'ble Supreme Court has held that acquiescence is sitting by, when another is invading the rights and spending money on it. It implies positive acts; not merely silence or inaction such as is involved in laches.

55. Going by the above disposition, if at all there is any tacit acceptance on the part of the petitioners, it is confined only to that promotion but not any further. In addition, as a matter of estoppel by conduct, if it were to be applicable, the petitioners' continuance in the position of Senior Managers does not, in my considered view, amount to any conduct to the prejudice of the Managing Director. As a result, it is impermissible for the respondents to contend that at no point of time can the petitioners be allowed to question the authority of the Managing Director, even when the impugned action is in violation of the statutory terms. As such, I cannot but interdict the action of

11

(1994) 2 SCC 448

the first respondent by holding that Exhibits P1 and P2 orders of suspension are ultra vires of the said authority and that they cannot be sustained. Consequently, they are set aside.

56. As regards the petitioner in W.P.(C)No. 28365/2015, it is the contention of the learned counsel for respondents 1 and 2 that the petitioner was placed under suspension by the Vigilance Department. In the writ petition, however, Exhibit P1(a) proceedings of the first respondent, the Managing Director, have alone been assailed. A reading Exhibit P1(a) makes it clear that a special investigation team was appointed for conducting an enquiry. The investigating officers, having prima facie found that there was substance in the allegation of misappropriation of money on the petitioner's part, have recommended the petitioner to be kept out of service. In my considered view, the investigating officials themselves have

not placed the petitioner under suspension; they have only recommended. It is the Managing Director who suspended the petitioner through Exhibit P1(a) proceedings, albeit acting on the advice of the investigating officers. The advice on the part of the investigating officers could only be taken towards the competent authority who can place the petitioner under suspension. As a result, Exhibit P1(a) in W.P.(C)No.28365/2015 also cannot be sustained. Accordingly, it is set aside.

Invalidation of Orders of Suspension – Does it revive any Illegal Order?

57. In Raj Kumar Soni (supra), the Hon'ble Supreme Court has held that it is not always necessary for the Court to strike down an order merely because the order has been passed against the petitioner in breach of natural justice. The Court can under Article 226 of the Constitution refuse to exercise its discretion of striking down the order if such

striking down will result in restoration of another order passed earlier in violation of principles of natural justice or is otherwise not in accordance with law.

58. The facts of the case are that one person had been leased the Government land by the Sub-Divisional Officer, who, in fact, was not authorised to grant any land. The District Magistrate has cancelled the lease after giving show cause notice and considering the allottee's reply. The order of the District Magistrate was assailed on the ground that the cancellation was not based on the reasons reflected in the show-cause notice. The High Court and subsequently the Supreme Court have held that if there were to be any apparent illegality in the order of the District Magistrate, it need not be set aside once such course of action would revive an otherwise illegal order.

59. In the present instance, I do not see any illegal order getting revived once the orders of suspension, which

are ex facie ultra vires of the Managing Director, are set aside.

Is it the End of the Road?

60. It is, however, made clear that this Court has not held even remotely that the petitioners in both the writ petitions cannot be placed under suspension under any circumstance. It has only declared that the first respondent does not have the power and that it is only the Managing Committee that can exercise the said power in terms of Rule 198(6) of the Rules. Given the gravity of allegations, the third respondent Managing Committee shall consider the issue and take appropriate decision thereof.

61. In the light of the statutory mandate in Rules 198 (2)(a) and (2)(b), the Managing Committee is required to constitute a sub-committee to inquire into the allegations being faced by the petitioners. It is evident that only the said Sub-committee, if constituted, could issue the charge-

memo concerning the allegations. Of course, this process has nothing to do with the investigation said to have been undertaken by the Vigilance Department.

As a necessary corollary, Exhibits P3 and P4 in W.P. (C)No.23166/2015 and Exhibits P2, P4 and P5 in W.P.(C) No.28365/2015 cannot be sustained and are accordingly set aside. As a consequence, the writ petitions are allowed. No order as to costs.

Dama Seshadri Naidu, Judge

tkv/rv

'C.R.'