*HONOURABLE SRI JUSTICE A. RAJASHEKER REDDY

+ WP No.25315 OF 2006

% Dated 03.01.2017

Between:

Rangampeta Primary Agricultural Co-operative Society Limited, Rangampeta, East Godavari Distrtict, represented by its Secretary

....Petitioner

&

$ 1. Budithi Nagabhushanam and others ... Respondents

! Counsel for the petitioner : Sri MV Rajaram

^ Counsel for respondent No.1 : Sri N. Siva Reddy

< GIST : ---

>HEAD NOTE : ---

? Cases referred :

[1] 1981 (1) ALT 465

[2] 1990 (3) ALT 617 (DB)

[3] AIR 1965 SC 111

HON'BLE SRI JUSTICE A. RAJASHEKER REDDY

WRIT PETITION No.25315 of 2006

ORDER::

The petitioner-Rangampeta Primary Agricultural Co-operative Society Limited, Rangampeta, East Godavari District, represented by its Secretary filed this writ petition questioning the order dated 24-07-2006 passed by the 2nd respondent-Authority under Section 48 (1) of the AP Shops & Establishments Act, 1988 (for short, 'the Shops and Establishment Act') and Assistant Commissioner of Labour, Rajahmundry, as being illegal, arbitrary, without jurisdiction and violative of Articles 14 and 21 of the Constitution and also the provisions of the Shops and Establishment Act and consequently set aside the same and pass appropriate orders, to meet the ends of justice.

2. Brief facts of the case are:-1st respondent was appointed as Secretary of the Vadisaleru Primary Agriculture Co-operative Society Limited, which later merged into petitioner-Society, by the District Level Authority in the year 1978. On the allegations that 1st respondent, during

the years 2000-2001, committed certain irregularities, which were pointed out by the auditor during the audit, in maintaining the fertilizer stocks and that the 1st respondent misappropriated the funds of the society, he was kept under suspension by the General Manager, District Co-operative Central Bank Limited, Kakinada, vide orders dated 06-04-2001. Aggrieved thereby, the 1st respondent filed writ petition being WP No.11049 of 2001 and this Court vide order dated 25-06-2001 granted interim suspension mainly on the grounds that the authority which passed the order of suspension, suspending the 1st respondent has no jurisdiction to take such an action. Operative portion of the interim order dated 25-06-2001 passed by this Court is in the following terms:-

> *"There shall be interim suspension of the operation of the impugned proceedings, dated 06-04-2001. It is , however, made clear that as the petitioner (1st respondent herein) conceded that the managing committee of the 4th respondent (petitioner-society herein) is competent to consider placing the petitioner under suspension, it would be open to the 4th respondent to consider if the circumstances exist, placing of the petitioner under suspension, and if any orders of suspension are passed by the 4th respondent pending further consideration of this writ petition,*

the petitioner would be disentitled to question the competence of any such order passed by the managing committee of the 4th respondent. This condition is incorporated as the impugned order of suspension avers that the petitioner has been suspended on allegation of misappropriation. Notice."

3. To vacate the said interim order, the petitioner-society filed vacate stay petition being WVMP No.2190 of 2001, wherein the interim order dated 25-06-2001 was modified, by order dated 30-08-2001, which is thus:-

"Order dated 25-06-2001 passed in WP No.11049 of 2001 is modified to the extent that the 4th respondent (petitioner-society herein) is at liberty to take disciplinary action against the petitioner (1st respondent herein) pending receipt of report under Section 51 of the AP Co-operative Societies Act."

4. Questioning the said order dated 30-08-2001, writ appeal being WA No.343 of 2002 was filed by the petitioner-society. Since the writ appeal was filed against the interlocutory order passed in the writ petition, both WP No.11049 of 2001 and WA No.343 of 2002 were heard together and same were disposed of by order dated 18-11-2002 holding thus:

"The short question that arises for consideration in the writ petition is as to whether after the abolition of the common cadre for all categories of employees, other than those specified in Section 116-A of the AP Co-operative Societies Act, the services of the writ petitioner were permanently allotted to the 4^{th} respondent-society (petitioner-society herein) or not ? If the services of the petitioner (1^{st} respondent herein) stand permanently allotted to the 4^{th} respondent-society, the 4^{th} respondent alone is empowered to take disciplinary action against the petitioner including suspension, removal etc. If the allotment made is not permanent, then, the Registrar of Co-operative Societies is entitled to take disciplinary action against the petitioner."

5. After referring to Rule 72 of the AP Co-operative Societies Rules which speaks of the method and the manner in which the allotment of Secretaries, consequent to the abolition of the common cadre has to be made and under Rule 72 (3) (a) of the said Rules, a Secretary on allotment to a Society shall be deemed to be the employee of that Society and shall be entitled to receive pay and allowance as may be fixed from the funds of the Society, and it was nobody's case that the allotment of the 1^{st} respondent herein to the petitioner-society was made contrary to Rule 72 of the AP Co-operative Societies Rules, it was held that the 1^{st} respondent

was permanent employee of the petitioner-society and the petitioner-society alone is competent to take disciplinary action against the 1st respondent and not the General Manager, District Co-operative Central Bank Limited, Kakinada, and accordingly set aside the impugned order dated 6-4-2001.

6. Thereafter, the petitioner-society allowed the 1st respondent to join duties from 11-03-2002, but reduced his salary to Rs.3,461/- per month from 08-04-2003. On the ground that the 1st respondent misappropriate the funds of the petitioner-society, it appears a general body of the petitioner-society was convened on 28-06-2002 wherein a resolution was passed to terminate the services of the 1st respondent and on the basis of the said resolution of the general body, the petitioner-society issued a letter of termination dated 24-08-2002 and terminated the services of the 1st respondent. The 1st respondent aggrieved by the termination of his services, filed an application under Section 48 (1) of the Act before the 2nd respondent raising several grounds *viz.,* no charge sheet was issued to him

with respect to the charges with which he was charged prior to convening the general body of the petitioner-society on 28-06-2002, no domestic enquiry was conducted muchless surcharge notice was issued to him. That enquiry ordered order Section 51 of the Andhra Pradesh Co-operative Societies Act, 1964, (for short, "the APCS Act") was not concluded by the time of termination of the 1st respondent from service. No approval was obtained from the Registrar of Co-operative Societies for reducing the salary of the 1st respondent. No documents filed to show that approval was obtained from the District Level Committee for terminating the services of the 1st respondent. That the petitioner-society has not followed the procedure either under the provisions of the APCS Act or the provisions of the Shops and Establishments Act, muchless the Special bye-laws of the petitioner-society in terminating his services, except passing a resolution in the general body meeting.

7. Based on the pleadings of the parties, the 2nd respondent-Authority under Shops and Establishments Act framed two issues viz., i) whether the

management has power to reduce the salary of employees ? and ii) whether the termination is legal, if not what relief the employee is entitled for ?

8. So far as the first issue, the 1st respondent was given liberty to approach the proper forum for redressal of his grievance. On the second issue, the 2nd respondent after referring to sequence of facts noted above, found that the petitioner-society has not followed the procedure prescribed in terminating the services of the 1st respondent either under the provisions of the APCS Act or under the provisions of the Shops and Establishments Act, or even the Special bye-laws of the petitioner-society and accordingly held the termination order as illegal and directed the petitioner-society to reinstate him into service without back wages, but with continuity of service. Aggrieved by the same, this writ petition by the petitioner-society.

9. Learned counsel for the petitioner-society contended that the 2nd respondent-Authority has no jurisdiction in view of Section 129 of the

APCS Act. That provisions of the Shops and Establishment Act does not apply to the case of the 1st respondent in view of the exemption contained under Section 73 of the Shops and Establishment Act, which exempted employees in managerial position and having control over the affairs of the establishment and whose monthly wages exceed Rs.1,600/-. That enquiry under Section 51 of the APCS Act was conducted into the affairs of the petitioner-society and found that the 1st respondent was not diligent in maintaining the fertilizer stocks and misappropriated the funds of the society along with ex-Chairman and another and responsible for committing fraud and misappropriated amounts to the tune of Rs.3,33,352/-. That surcharge proceedings have been issued requiring the 1st respondent and others to offer security sufficient to satisfy the said amount, but the 1st respondent did not offer any security and therefore continuing him any further in service is detrimental to the interest of the petitioner-society, as such, the 1st respondent was terminated from service by a resolution of the General Body of the petitioner-society.

10. On the hand, learned counsel for the 1st respondent made submissions in support of the impugned order passed by the 2nd respondent-Authority under the Shops and Establishments Act and contended that Section 77 of the Shops and Establishments Act is specific as to the application of the provisions of the Shops and Establishments Act to the Co-operative Societies and the petitioner-society being a co-operative society, the provisions of the Shops and Establishment Act apply and the 2nd respondent has jurisdiction to deal with the dispute raised by the 1st respondent. It is also contended that inasmuch as the services of the 1st respondent were terminated in utter violation of principles of natural justice giving a go-bye to the procedure prescribed either under the APCS Act or the Shops and Establishment Act and the Rules made thereunder, respectively, the 2nd respondent rightly set aside the order of termination and directed re-instatement of the 1st respondent, and therefore, there are no merits in the writ petition and it is liable to be dismissed.

11. Section 129 of the APCS Act, relying on which, learned counsel for the petitioner contends that 2nd respondent-Authority has no jurisdiction to decide the *lis* raised by the 1st respondent, reads thus:-

"129. Certain Acts not to apply:---The provisions of the Companies Act, 1956, the Andhra Pradesh (Andhra Area) Shops and Establishments Act, 1948 and the Andhra Pradesh (Telangana Area) Shops and Establishment Act, 1951, shall not apply to societies."

12. Section 73 of the Shops and Establishment Act reads thus:-

"73. Exemption:--(1) Nothing in this Act shall apply to----

(a) employees in any establishment in a position of management and having control over the affairs of the establishment, whose average monthly wages exceed sixteen hundred rupees;

(b)...........

(c)...........

(d)..........."

13. Section 77 of the Shops and Establishments Act reads thus:-

"Application of this Act to Co-operative Societies:---Notwithstanding anything in the Andhra Pradesh Co-operative Societies Act, 1964, the provisions of this Act shall apply to the Co-operative Societies."

14. The issue whether the provisions of the APCS Act and the Rules made thereunder would apply to the service conditions of the 1st

respondent, being a Secretary of the society, or the provisions of the Shops and Establishments Act would apply, is no longer *res-integra.* Identical issue fell for consideration before this Court and this Court in *KODANDAM vs. SPECIAL OFFICER, THE WANAPARTHY CO-OP MARKETING SOCIETY LIMITED,* reported in (1981 (1) ALT 465) held that in view of the non-obstante clause in Section 77 of the Shops and Establishments Act, the provisions of the Shops and Establishments Act will have an over-riding effect and would apply to the co-operative societies. Section 2 (10) of the Shops and Establishments Act defines the term *"establishment",* which is thus:-

"establishment" means a shop, restaurant, eating house, residential hotel, lodging house, theatre or any place of public amusement or entertainment and includes a commercial establishment and such other establishment as the Government may, by notification, declare to be an establishment for the purpose of this Act". (emphasis supplied)

15. Section 2 (5) of the Shops and Establishments Act defines the term *"commercial establishment",* which is thus:-

"2 (5) 'commercial establishment' means an establishment which carries on any trade, business, profession or any work in connection with or incidental or ancillary to any such trade, business or profession, or which is a clerical department of a factory or an industrial undertaking or which is a commercial or trading or banking or insurance establishment and <u>includes an establishment under the management and control of a co-operative society,</u> an establishment of a factory or an industrial undertaking, which falls outside the scope of the Factories Act, 1948 (Central Act 63 of 1948), and such other establishment as the Government may, by notifications, declare to be a commercial establishment for the purpose of this Act but does not include a shop" (emphasis supplied).

16. From a reading of the above provisions, it is understood that except a shop, *'establishment'* includes *'commercial establishment'* and commercial establishment' includes a co-operative society.

17. Section 2 (8) of the Shops and Establishments Act defines the term *'employee'* which is thus:-

"employee' means a person wholly or principally employed in, and in connection with, any establishment and includes an apprentice and any clerical or other staff of a factory or an industrial establishment who fall outside the scope of the factories Act, 1948 (Central Act 63 of 1948); but does not include the husband, wife, son, daughter, father, mother, brother or sister of an employer or his partner, who is living with and depending upon such employer or partner and is not in receipt of any wages."

18. Section 2 (9) of the Shops and Establishments Act defines the term *'employer'* which is thus:-

"employer' means a person having charge of or owing or having ultimate control over the affairs of an establishment and includes the Manager, Agent or other person acting in the management or control of an establishment. "

19. Now the question that is to be considered is whether the 1st respondent being a Secretary comes within the meaning of 'employee' as detailed in Section 2 (8) of the Shops and Establishments Act or his position could be considered on par with the powers that could be exercised by the managing committee of the petitioner-society to apply the exemption contemplated under Section 73 of the Shops and Establishments Act. The 1st respondent cannot be understood as an employer as he is governed by the authoritative decisions taken by the managing committing of the petitioner-society. In similar fact situations, as enunciated by the Division Bench of this Court in SS ZAFFAR vs. LABOUR COURT, HYDERABAD (1990 (3) ALT 617 (DB), there are

three components of Section 73 which will have to be considered in the matter. Firstly, in order to come within the category of an *'exempted employee'* in any establishment, the employee must be in a position of management and; secondly, he should have control over the affairs of the establishment and; thirdly, his monthly wages should not exceed Rs.1,600/-. In this case, the 1st respondent was paid Secretary of the petitioner-society and admittedly drawing a monthly salary of Rs.3,461/-, even if the reduced salary of the 1st respondent is taken into account. The Supreme Court in PREM SAGAR vs. STANDARD VACCUM OIL COMPANY (AIR 1965 SC 111) laid down certain tests though illustrative and not exhaustive. It was observed by the Supreme Court that it is difficult to lay down exhaustively all the tests which can be reasonably applied in deciding the question as to whether a person is in a position of management and certain functions discharged by the said person can be scrutinized to come to a conclusion that such person is in fact in a position of management. As understood, a paid Secretary, as in the instant case, would at the most perform the functions of a manager of the petitioner-society. He is not vested with the powers to take independent decisions and he has to await the orders of the managing committee of the petitioner-society to take any policy decisions, in other words he is not a decision making authority. If we look at the job description of the 1st respondent and on a scrutiny of the nature of duties, though he is a paid Secretary, his job is to maintain the fertilizer stocks and manage the administration of the petitioner-society, but does not have ultimate control over managing the affairs of the society as that of a managing committee of the society.

20. Coming to the monthly wages drawn by the 1st respondent is concerned, it has come on record that the 1st respondent is drawing a salary of Rs.3,461/-, even if the reduced salary is taken into account. Though the wages by way of salary drawn by the 1st respondent is Rs.3,461/-, that by itself should not disentitle the 1st respondent from invoking the provisions of the Shops and Establishment Act when

surrounding conditions come within the sweep of the requirements. Therefore, salary drawn over and above what is stated in Section 73 (1) (a) of the Shops and Establishments Act itself cannot be the sole ground to oust the jurisdiction of the 2nd respondent-Authority when all other conditions are complied with.

21. Coming to the correctness or otherwise of the impugned order passed by the 2nd respondent is concerned, it has come on record that no charge sheet was issued to the 1st respondent with respect to the charges with which he was charged to put forth his explanation and no domestic enquiry was conducted, and by the time of termination of the 1st respondent, enquiry ordered order Section 51 of the APCS Act was not concluded. Except passing a resolution in the general body of the petitioner-society to terminate his services, no procedure known to law is followed. Special Bye-laws of the petitioner-society mandates to consult District Level Committee in case of termination of services of the Secretary, which is not done in this case. No documents filed to show that

approval was obtained from the District Level Committee for terminating the services of the 1^{st} respondent.

22. In the circumstances, the impugned order does not suffer from any infirmity warranting interference by this Court. The writ petition fails and it is accordingly dismissed. No order as to costs.

A.RAJASHEKER REDDY,J

Dated: 03-01-2017

Note: LR copy to be marked.
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THE HON'BLE SRI JUSTICE A. RAJASHEKER REDDY

WRIT PETITION No. 25315 of 2006

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DATE: .01.2017

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