IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.08.2018

CORAM:

THE HONOURABLE MR.JUSTICE R.SURESHKUMAR

WP.No.25323 of 2003
WPMP.No.10076 of 2004

1.Bellarmin
2.Anthonimuthu
3.Damodharan Pillai
4.Packiadhas
5.Baby
6.Gilbert John ...Petitioners

-Vs-

1.The District Judge (Cooperative Tribunal)
Kanyakumari District at Nagercoil

2.The Deputy Registrar of Cooperative Societies/
Arbitrator, Thuckalay, Kanyakumari District

3.Thalakulam Eraniel Farmers Service Cooperative
Society, Neyyoor, represented by its Secretary ..Respondents

(R3 impleaded as per order dated 31.07.18 in
CMP No.22757/18 in WP.25323/03)

Prayer:- This Writ Petition is filed to issue a Writ of Certiorari, to call for the records relating to the impugned proceedings of the 1st Respondent in CMA(CS)No.3 of 1999, dated 02.07.2003 and to quash the same.

For Petitioners : Mr.V.Selvaraj

For Respondents : Mr.L.P.Shanmugasundaram
for R2 -AGP
Ms.T.Girija-R3

ORDER

The prayer sought for herein is for issuance of a Writ of Certiorari, calling for the records relating to the impugned proceedings of the 1st Respondent made in CMA(CS)No.3 of 1999, dated 2.7.2003 and to quash the same.

2. The short facts, which are required to be noticed for disposal of this Writ Petition, are as follows:-

a. The Petitioners were the Directors of the 3rd Respondent Society, during the relevant point of time, i.e. in the year 1997-1998. During that period, the Society was given licence to run two liquor shops at Neyoor and Eraniel. Since the said licence was given, in February 1997, it had become necessary for the 3rd Respondent Society to immediately entrust the sales work of the said liquor shops, either to the existing employees and if not, to the newly appointed employees.

b. In this regard, though some of the employees were already working in the 3rd Respondent Society, they were engaged at the fair price shops. Therefore, the salesmen, already in engagement at the fair price shops run by the 3rd Respondent Society, could not be deployed to look after the full time sales of the liquor shops, going to be run by the 3rd Respondent Society on emergency basis. The President and the Board of Directors had decided to appoint four salesmen to run the said two liquor shops and accordingly, four persons were appointed on 10.2.1997 on a consolidated salary of a sum of Rs.900/- p.m. With the said salary, the said four persons, who had been appointed as temporary salesmen, had been working from 10.02.1997 till 31.05.1998 i.e. till the end of the licence period and thereafter, their services had been dispensed with.

c. Subsequently, it appeared that an inspection/ investigation had taken place under Section 82 of the Tamil Nadu Cooperative Societies Act, (in short Act) and pursuant to the same, surcharge proceedings under Section 87 of the Act were initiated against the Petitioners and others. In the said surcharge proceedings, show cause notices were issued to the Petitioners, directing them to show cause as to why action should not be taken against them to recover a sum of Rs.52,152/- with interest from them jointly for the loss incurred by the Society, by way of salary paid to the four salesmen for the period between 10.02.1997 to 31.5.1998, as those appointments had been made by the Board of the Society unauthorisedly.

d. Pursuant to such show cause notices, the Petitioners had given their replies, wherein they claimed to have stated that, since the Society was given the licence to run the liquor shops at the two places and the licence period started immediately in the month of the February 1997, minimum manning of those liquor shops were necessitated. Though some salesmen were already working in the 3rd Respondent Society, all of them had been engaged in the fair price shops. Moreover, when the offer of placing them in the liquor shops for salesman job made to them, none of the employees, who were working at the fair price shops, expressed their willingness to be posted in the liquor shops for salesman job.

e. Further, according to the Petitioners, if the salesmen are not posted in each of the liquor shops, as the licence period already commenced, then it is very difficult to run the liquor shops and therefore, on an emergency basis, four salesmen were appointed by the Board as per the proceedings of the President of the Board, which was subsequently ratified by the Boards' resolution No.2, dated 15.2.1997, wherein both the President and all the eight Directors had signed.

d. Further explanation given by the Petitioners for the surcharge proceedings was that, each of the salesmen, who had been appointed, was paid only a sum of Rs.900/- p.m. as a consolidated salary. With that salary, they had been working till the expiry of the licence period, which ended on 31.05.1998 and thereafter, their services had been abruptly dispensed with.

f. It was the further explanation given by the Petitioners that because of the running the said two liquor shops, the Society earned Rs.12 lakhs and more and gained, for the said period from and out of the sales of liquors alone and therefore, it cannot be considered that the Society had incurred the loss for the appointments made in respect of the four salesmen and thereby, the said amount of Rs.52,152/- paid towards salary to those four salesmen cannot be treated as a loss to the Society and therefore, the proceedings initiated under Section 87 of the Act cannot be sustained and therefore, they requested to drop the said proceedings.

g. However, the 2nd Respondent, who passed the order under Section 87 of the Act, dated 12.12.1998, rejected the defence taken by the Petitioners and the explanation given by them on the ground that under Section 74 of the Act and Rule 149 of the Rules made under the Act, such an appointment should have been made either by the District Committee or by the Bureau of Recruitment, constituted under Section 74 of the Act or such an appointment should have been made, only after getting the names sponsored from the employment exchanges, by giving vide publicity. Since without adopting any such method, as contemplated under the said provisions of the Act and Rules made thereunder, these appointments had been made, such appointments can be considered only as unauthorised appointments and thereby the salary paid to them can very well be treated as loss occurred to the Society and therefore, to make good the loss, Section 87 surcharge proceedings can very well be initiated against them.

h. The 2nd Respondent had also given further reasons in his order, stating that, since already some employees permanently were working in the 3rd Respondent Society, including the salesmen, the services of the existing employees could have very well be pressed into service as salesmen for the liquor shops, but, instead, the Board headed by the President had chosen to make fresh appointments, that too in violation of the provisions of the Act and Rules and hence, the plea of the Petitioners in this regard cannot be accepted. The 2nd Respondent had further stated that, since there was no proof to show that the Society had gained a sum of Rs.12 lakhs in running the said liquor shops during the period 1997-1998 and in the absence of any such proof to show that the Society gained that much, the said plea raised, in this regard, by the Petitioners also cannot be accepted.

i. Ultimately, the 2nd Respondent, in the impugned order, had come to the conclusion that a sum of Rs.52,152/- along with interest @ 22% p.a. i.e. Rs.6841/- should be paid only by the Petitioners and therefore, recovery can be made pursuant to Section 87 surcharge proceedings.

j. As against the said order passed by the 2nd Respondent, under Section 87 of the Act, dated 12.12.1998, the Petitioners had preferred CMA(CS)No.3 of 1999 before the 1st Respondent. The 1st Respondent having accepted the findings given by the 2nd Respondent, had confirmed the same, excepting the interest portion allowed by the 2nd Respondent in the surcharge proceedings and thereby the 1st Respondent slightly modified the order passed by the 2nd Respondent, by directing the Petitioners to pay a sum of Rs.52,152/- alone to the 2nd Respondent Society, by the impugned order, dated 02.07.2003. Aggrieved over the orders passed by the 2nd and 1st Respondents respectively dated 12.12.1998 and 02.07.2003, the Petitioners have filed this Writ Petition with the aforesaid prayers.

3. I have heard Mr.V.Selvaraj, the learned counsel for the Petitioners, who would submit that, the legal ground given by the 2nd Respondent for allowing the Section 87 surcharge proceedings against the Petitioners and in favour of the Society was that the appointments of the Petitioners to the liquor shops run by the Society were in violation of Section 74 of the Act and Rule 149 of the Rules made thereunder. In this regard, the learned counsel would straight away referred to Section 74 of the Act, which reads thus:-

> "74. Recruitment Bureaus:- (1) The Government may, by notification, constitute Recruitment Bureaus at the State and District levels for the recruitment of such categories of paid officers and servants for employment by such class or classes or category or categories of registered Societies as may be prescribed. Nothing contained in this section shall apply to any of the posts in respect of which common cadre of service has been constituted under Section 75.

(2) The manner of constitution of the Recruitment Bureaus and the procedure to be followed by such Bureaus shall be such as may be prescribed.”

4. The learned counsel for the Petitioners would further submit that Section 74 of the Act only empowers the Government to constitute Recruitment Bureaus at the State and District levels for making recruitment for certain class or classes or category or categories of employees in the registered Societies.

5. In the case in hand, the learned counsel for the Petitioners submits that, the appointments made to four salesmen on temporary basis to look after only the sales of the liquor shops during the licence period cannot be considered as a class or classes or category or categories of services as mentioned in Section 74 of the Act and therefore, the reasoning given by the authorities that the said appointments were made in violation of Section 74 of the Act is absolutely unsustainable and therefore, on that reason, the surcharge proceedings ought not to have been passed against the Petitioners.

6. The learned counsel for the Petitioners would further submit that, even in respect of Rule 149, it simply gives power to have a special bylaw, covering the service conditions of its employees under the special bylaw and the special bylaw shall, inter alia, prescribes cadre strength, classification of various categories of posts, method of recruitment for each such post, scale of pay, conditions of probation, duties and responsibilities, leave of various kinds, etc. In this context, the learned counsel would argue that, if the Society is having a special bylaw under Rule 149, functions or areas mentioned under the Rule 149 with regard to the cadre strength, method of recruitment, scale of pay, etc. can very well be decided through the special bylaw to be adopted in this regard under Section 149. He would further argue that, in the case in hand, these appointments made to temporary salesmen for liquor shops were neither treated as a cadre strength nor as a permanent basis and therefore, such a recruitment cannot be fit in within the meaning of either under Section 74 of the Act or under Rule 149 of the Rules made thereunder.

7. Therefore, the learned counsel for the Petitioners would submit that the reasoning given by the concerned authorities to pass such a surcharge proceedings against the Petitioners that the appointments were made in violation of Section 74 and Rule 149 of the Rules cannot have any legs to stand and therefore, the said finding can very well be interfered with by this Court.

8. The learned counsel for the Petitioners would also

argue that, by running these liquor shops, the 3rd Respondent Society had gained a sum of Rs.12 lakhs and more during the said licence period and out of the gain only, a part of the sum had been divested towards the salary, that too a very meagre salary of a consolidated sum of Rs.900/- per month per salesman and therefore, the said amount spent by the Society towards running the liquor shops cannot be treated as loss to the Society and therefore, Section 87 surcharge proceedings cannot be invoked against the Petitioners on the alleged reason of loss sustained by the Society.

9. Per contra, the learned Additional Government Pleader for the Respondents would submit that, before invoking Section 87 surcharge proceedings, as contemplated under Section 87, either there must have been an enquiry under Section 80 or an inspection under Section 81 or an investigation under Section 82 or an inspection of books under Section 83 of the Act. If the outcome of all these proceedings discloses that there had been some misappropriation of the Society's money or fraudulent retention of any money by anyone or any loss caused to the Society because of the breach of trust or violation of the provisions of the Act and Rules, then the Registrar is empowered to take action under Section 87 of the Act.

10. In this context, the learned Additional Government Pleader for the Respondents would further submit that, before invoking Section 87 surcharge proceedings, there had been an inspection under Section 81, of the records, which disclosed that, these appointments made for salesmen post had been made in utter violation of the Rule 149 of the Rules made under the Act and no prior permission was obtained by the Board before making such appointments.

11. It is further submitted by the learned Additional Government Pleader that, moreover, when there had been number of employees already in employment at the 3rd Respondent Society, their services could have very well be utilised by the Society for manning the liquor shops run by them. Instead of exploring all these possibilities, straight away they made appointments that too in violation of Rule 149 of the Rules based on the applications given to the President and Directors of the Society and these appointees had been paid salary from February 1997 to May 1998 and in this regard, a sum of Rs.52,152/- were paid. Since the said amount paid from the Society's fund, it was an unauthorised payment in violation of the Act and Rules and Bylaws and this had been disclosed by way of inspection conducted in this regard. Therefore, certainly, the Authorities have every right to proceed against the Petitioners by invoking Section 87 of the Act.

12. The learned Additional Government Pleader would further submit that, even though it was claimed by the Petitioners that the Society gained a sum of Rs.12 lakhs and more by running the liquor shops during the said period, there had been no proof to show that the Society had gained that much, from and out of running the liquor shops. If that being so, the said defence taken by the Petitioners that because of the wrong appointments made and the salary paid to them, the Society had not lost anything cannot be accepted and therefore, the reasoning given by the Authority, who is the 2nd Respondent, in the surcharge proceedings and the reasoning given by the Appellate Authority, which is the Tribunal, the 1st Respondent herein, in this regard, are fully justifiable and sustainable and therefore, the orders impugned did not require any interference by this Court.

13. I have considered the submissions made by the learned counsel for the Petitioners as well as the learned Additional Government Pleader for the Respondents and also I have perused the entire materials placed before this Court.

14. It is no doubt that, the Petitioners were in the realm of the affairs of the 3rd Respondent Society during the relevant point of time. It is the allegation made against the Petitioners that the appointments of four salesmen, or course, temporarily, between 10.02.1997 and 31.05.1998, were made, unauthorisedly, i.e. without getting prior approval from the Registrar concerned or adopting the methods as contemplated under Rule 149.

15. In this regard, it is the defence of the Petitioners that the Society was given licence to run the liquor shops at two places and once the licensee was given to the licensee, the licence period commenced. Therefore, immediate steps should have been taken to instal the liquor shops and the sales should be commenced.

16. Only in those circumstances, even though the Board had tried to utilise the services of the salesmen, who were already working in the fair price shops, none of the existing staff had come forward to work in the liquor shops to be established by the Society. Moreover, once the salesmen already put up in the fair price shops are taken from the fair price shops and placed at the liquor shops, then the sales at the fair price shops would get affected as essential commodities are being sold at the fair price shops by the Society. More importance should be given always to fair price shops.

17. Only in those circumstances, the said appointments were made, that too on temporary basis, on a consolidated salary

of a sum of Rs.900/- p.m. for each of such employees/salesmen. It is also a fact that those appointees were working only during the licence period in the liquor shops and only when the licence expired or was cancelled or revoked, the services temporarily made for the salesmen also came to an end and thereafter, their services had been completely dispensed with.

18. It is also the claim of the Petitioners that, by running the liquor shops, the Society gained a sum of Rs.12 lakhs and more. In this regard, it is the case of the Society that there was no record to show that such a gain was made by the Society. This Court is unable to accept the said contention made on behalf of Society for the simple reason that, if at all the liquor shops were run by the Society, particulars regarding the purchase of liquors and sale of liquors should have been recorded. In this regard, relevant records of the Society would disclose the correct fact and figures.

19. Even though it was claimed by the Respondents that before invoking Section 87 surcharge proceedings, inspection of records was made and it was found that there was a loss to the Society, in fact, no such proof had been filed by the Society to show that on what basis the Society had come to the conclusion that because of the running of the liquor shops, such a loss of Rs.52,152/- and more was incurred by way of the salary paid to the salesmen. Unless the entire records have been produced before the surcharge proceedings and a copy of the same had been given to the Petitioners to take a defence, the said claim made by the Respondents that there is no proof for the gain of Rs.12 lakhs and more on the side of the Society, cannot be accepted and therefore, the said reasoning given by both the authorities through the impugned orders, in rejecting the defence taken by the Petitioners, in the opinion of this court, cannot be accepted.

20. Moreover, in legal side, it is the strong case of the Respondents that such appointments had been made in violation of Section 74 of the Act and Rule 149 of the Rules. Section 74 of the Act had already been extracted as above.

21. As has been rightly pointed out by the learned counsel for the Petitioners, Section 74 of the Act speaks about constitution of Recruitment Bureaus at State and District levels for recruitment and appointment of class or classes or category or categories of services in the registered Societies. In the case in hand, the so called appointment of salesmen on temporary basis cannot be treated as a class of services or cadre of services. Therefore, Section 74 of the Act cannot be invoked in the case of such appointments.

22. In so far as the reasoning given by the

authorities that the said appointments were made in violation of Rule 149 of the Rules is concerned, here also, the learned counsel for the Petitioners rightly submitted that the Rule 149 speaks about adopting the special bylaw for service conditions, such as cadre strength, classification of various categories, method of recruitment, scale of pay, condition of probation and duties and responsibilities, etc.

23. In the case in hand, the appointment of temporary salesmen for liquor shops only during the licence period cannot be considered as a cadre strength employment or employment classified in this regard, either by bylaws or by the Recruitment Bureaus to appoint in this regard under Section 74 of the Act. Therefore, for making such a temporary appointment for liquor shops, it cannot be said that such appointment should have been made only under Section 74 of the Act as well as Rule 149 made thereunder.

24. Moreover, the said salesmen in the liquor shops were appointed only for a seasonal time for the licence period alone. Once the licence period comes to an end, as this is what had exactly happened in the case in hand also, as none of the appointees had been permitted to work continuously in the shops thereby causing loss to the Society, by way of taking salary beyond the approved cadre strength as per the bylaws adopted in this regard, it cannot also be stated that the said appointment had been made in violation of the Act and Rules and consequently, the reasoning given by the authorities in the impugned orders, in the opinion of this Court, also cannot be accepted.

25. In view of the aforesaid discussions and reasoning, this Court is of the considered view that both the authorities, namely, the 2nd Respondent and the 1st Respondent erroneously held that the Petitioners had caused loss by making temporary appointment of salesmen for liquor shops. The authorities have not taken into account the gain made by the Society in running the said liquor shops and there is no contra record to show that the Society incurred any loss by running the liquor shops. That being the position, it cannot be said that the Society had incurred loss by virtue of these appointments, which are in question and therefore, this Court is of the considered view that Section 87 surcharge proceedings ought not to have been initiated against the Petitioners and therefore, in this regard, the plea raised by the Petitioners as projected by the learned counsel for the Petitioners can very well be accepted.

26. For all the aforesaid reasons, the impugned orders are liable to be set aside, by allowing the Writ Petition as prayed for.

27. In the result, this Writ Petition is allowed, as prayed for. Consequently, the connected MP is closed. However, there shall be no order as to costs.

Srcm

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To

1.The District Judge (Cooperative Tribunal)
Kanyakumari District at Nagercoil

2.The Deputy Registrar of Cooperative Societies/
Arbitrator, Thuckalay, Kanyakumari District

+1cc to M/s.J.Girija, Advocate, SR.No.58461
+1cc to Mr.V.Selvaraj, Advocate, SR.No.59036
+1cc to the Govt.Pleader, Vide Sr.No.58847

WP.No.25323 of 2003
WPMP.No.10076 of 2004

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