



BEFORE THE MADURAI BENCH OF THE MADRAS HIGH COURT

Reserved on	Pronounced on
18.02.2021	01.03.2021

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THE HONOURABLE MR.JUSTICE M.DHANDAPANI

W.P. (MD).Nos.6164, 6166 to 6168 of 2011

The Management
A.1449, Madura Coats Employees'
Co-operative Stores Ltd.
2/3, Arappalayam Cross Street
Madurai 625 016.

.. Petitioner in all the petitions

- Vs -

1. The Appellate Authority under the
Tamil Nadu Shops & Establishments Act
(Deputy Commissioner of Labour)
Sundaram Theatre Road, K.K. Nagar
Madurai 625 020.

2. N.Hemalatha	.. R-2 in WP(MD) 6164/2011
3. N.Selvarajan	.. R-2 in WP(MD) 6166/2011
4. P.Alagarsamy	.. R-2 in WP(MD) 6167/2011
5. M.Stalin	.. R-2 in WP(MD) 6168/2011

W.P.(MD)No.6164 of 2011 filed under Article 226 of the Constitution of India praying this Court to issue a writ of certiorari to call for the records of the 1st respondent relating to T.N.S.E.No.12/2009 and quash the order dated 15.11.2010 as unsustainable under law.

W.P.(MD)No.6166 of 2011 filed under Article 226 of the Constitution of India praying this Court to issue a writ of certiorari to call for the records of the 1st respondent relating to T.N.S.E.No.14/2009 and quash the order dated 15.11.2010 as unsustainable under law.

W.P.(MD)No.6167 of 2011 filed under Article 226 of the Constitution of India praying this Court to issue a writ of certiorari to call for the records of the 1st respondent relating to T.N.S.E.No.15/2009 and quash the order dated 15.11.2010 as unsustainable under law.

W.P.(MD).No.6168 of 2011 filed under Article 226 of the Constitution of India praying this Court to issue a writ of certiorari to call for the records of the 1st respondent relating to T.N.S.E.No.16/2009 and quash the order dated 15.11.2010 as unsustainable under law.



For Petitioner: Mr.Prithiviraj, for M/s. D.Sadiq Raja

For Respondents: Mr.A.Karthik, GA for R-1

Mr.S.Arunachalam for R-2 in all petitions

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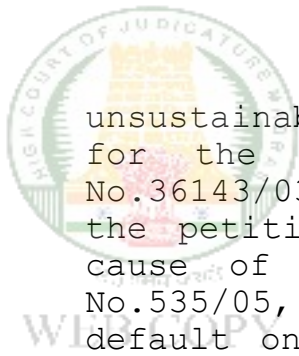
COMMON ORDER

The present petitions have been filed against the order of reinstatement of the respective 2nd respondent herein, ordered by the 1st respondent herein, and praying for quashment of the same as wholly unsustainable.

2. The brief facts as could be culled out from the petitions are that the respective 2nd respondent herein were in the services of the petitioner herein since April, 1999 and performing their duties in the cadre of temporary sales Assistant in the petitioner society. However, terming their appointment to be not in consonance with the Bylaws of the petitioner/society, the show cause notice was issued to them by the petitioner on 9.12.03 and, thereafter, their services were terminated vide order dated 31.7.08. Challenging the said order of termination as not in accordance with the various provisions of the Tamil Nadu Shops & Establishments Act as also Section 25-F of the Industrial Disputes Act, the respective 2nd respondent herein claimed the status of permanent employee as per the provisions of the Conferment of Permanent Status Act, as the said 2nd respondent had worked for more than 480 days within a continuous period of 2 years. The Appellate Authority under the Tamil Nadu Shops and Establishments Act, after hearing the parties, set aside the orders of dismissal dated 31.7.08 passed against the 2nd respondents herein. Aggrieved by the said orders, the present petitions have been preferred by the petitioner/society.

3. Learned counsel appearing for the petitioner submits that the Shops and Establishments Act doesn't employ the term 'workmen' or 'employee' and if at all the 2nd respondents claim to be employees/workmen under the petitioner, the course open to the 2nd respondents is to file petition under the Industrial Disputes Act. It is the further submission of the learned counsel for the petitioner that the petitioner/society is not an 'establishment' as defined u/s 2 (6) of the Shops and Establishments Act and, therefore, the petitions before the 1st respondent is wholly impermissible, as the 1st respondent has no jurisdiction to entertain the petitions filed by the 2nd respondents.

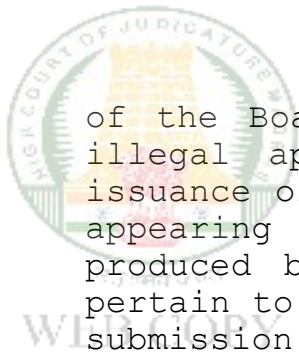
4. It is the further submission of the petitioner that the materials placed by the petitioner clearly reveals that the 2nd respondents are contractual labourers and that the payments were not made to them, but to the contractor, viz., Loyal Security Agency and that being the case, the stand of the 2nd respondents that there is violation of principles of natural justice in their termination is



unsustainable. It is the further submission of the learned counsel for the petitioner that the earlier writ petition in W.P. No.36143/03, in which stay was granted on 11.12.03, was withdrawn by the petitioner therein, viz., the Association, which took up the cause of the 2nd respondents, on 3.2.06 and, thereafter, O.S. No.535/05, filed by the 2nd respondents herein was also dismissed for default on 5.3.08 and the 2nd respondents, having not pursued the legal course to have their grievance ventilated, but only filed petitions to earn time and further the suit/petition having been dismissed for default/withdrawn and no liberty having been granted, the 2nd respondents are are estopped from agitating the same grievance once over.

5. It is the further submission of the learned counsel for the petitioner that the show cause notice was issued on 9.12.03, which resulted in the filing of W.P. No.36143/03 and obtaining interim order on 11.12.03, though not by the 2nd respondents, but by an Association purporting to be representing the 2nd respondents. In spite of filing of the petition and obtaining interim orders, no steps were taken to prosecute the writ petition and on 3.2.06, the writ petition in W.P. No.36143/03 was withdrawn and pending the writ petition, O.S. No.535/05 was filed by the 2nd respondents herein, in which also interim order was obtained. It is the submission of the learned counsel for the petitioner that though the show cause notice was issued in the year 2003, the 2nd respondents have approached the Court, on their own volition, only in the year 2005 by filing the suit. Further, on the obtaining of the interim order in the suit, the writ petition was withdrawn and, thereafter, allowing a period of three years to pass since the filing of the suit, the suit was also allowed to be dismissed for default, by which, the 2nd respondents had gained time to show that they have been in employment all along, by virtue of the interim orders passed in the judicial proceedings, which was a means adopted by the 2nd respondents to frustrate the show cause notice and to build up a case that they have been in continuous employment for a period of more than 480 days within a continuous period of two years. The delaying tactics adopted by the 2nd respondents is not only to gain time, but also to use the judicial process to their advantage clearly shows the devious mind with which they wanted to hang on to the said employment, as they knew fully well that the employment held by them is not through legal means and in accordance with law, as their employer is only Loyal Security Agency, the contractor of the petitioner and not the petitioner.

6. It is the further submission of the learned counsel for the petitioner that though the 2nd respondents were employed through the contractor, viz., Loyal Security Agency from the year 1999, however, the Board adopted a procedure, not in consonance with the Bylaws of the society and in the year 2001, engaged the 2nd respondents as temporary employees from 25.6.01 in posts, which were never in

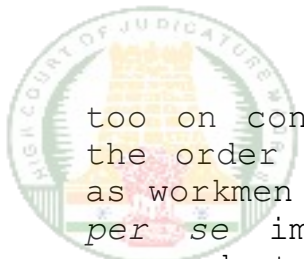


of the Board by the Government by employing Special Officer, the illegal appointments had come to light, which resulted in the issuance of the show cause notice. In this regard, learned counsel appearing for the petitioner highlighted the PF Account slip produced by the 2nd respondents before the 1st respondents, which pertain to the year 2001-2002. Pointing out to the above, it is the submission of the learned counsel that the 2nd respondents were not in employment of the petitioner since 1999 and only through the illegal appointments, the 2nd respondents were engaged as temporary employees, in posts, which were never in existence and, the engagement being in contravention of the Bylaws, their engagement is void and, therefore, they cannot seek enforcement of Section 25F of the Industrial Disputes Act.

7. It is the further submission of the learned counsel for the petitioner this Court, in ***Justine - Vs - Registrar of Co-operative Societies (2003 (1) LLN 315)***, has categorically observed that no staff member, appointed subsequent to G.O. Ms. No.86, CO-operation, Food and Consumer Protection Department, dated 12.3.01, otherwise than through employment exchange shall be continued in service and their services shall be terminated and that any appointment made beyond the cadre strength from 9.7.1980 to 11.3.01 and also beyond the period from 12.3.01. That being the case, the 2nd respondents, having not been appointed through employment exchange, but due to the whims and fancies of the Board, their appointments are liable to be terminated in view of the decision in *Justine's case (supra)*. The petitioner, after issuing show cause notice, in the absence of any explanation from the 2nd respondents, had terminated their service, which cannot be said to be against the legal framework.

8. It is the further submission of the learned counsel for the petitioner that as back as on 23.6.01, the contractor was informed that the service of the contract labourers were no longer required. However, the Board, for reasons best known to it, had continued their services. However, no material has been placed to show that the 2nd respondents were appointed on temporary basis. However, their employment on daily wage basis was modified to one of monthly basis with effect from 24.6.01 vide order dated 6.8.01. However, as claimed by the 2nd respondents, no material whatsoever has been placed to show that they were appointed on temporary basis, and mere grant of emoluments on monthly basis with a day-off would not vest on them any right to be treated on par with the legally employed staff and, therefore, Section 25-F of the Industrial Disputes Act would not stand attracted to the case of the 2nd respondents.

9. In fine, it is the submission of the learned counsel appearing for the petitioner that the engagement of the 2nd respondents on daily wage basis, that



too on contract basis, having been established by the petitioner, the order passed by the 1st respondent treating the 2nd respondents as workmen within the meaning of the Shops and Establishments Act is *per se* impermissible and unsustainable, more so, when the 1st respondent has no jurisdiction to entertain the petition, as the petitioner society does not fall within the ambit of the Tamil Nadu Shops and Establishments Act and accordingly prays for allowing the present petitions. Learned counsel for the petitioner placed reliance on the decision in ***Special Officer, Palayamkottai Urban Co-op Bank Ltd. - Vs - Presiding Officer, Labour Court, Tirunelveli & Anr. (2009 (4) MLJ 186)***.

10. Per contra, learned counsel appearing for the 2nd respondent in the respective petitions, vociferously countered the submissions of the learned counsel for the petitioner and submitted that the petitioners having been appointed as Temporary Sales Assistants by the Board of Directors, who were the governing body, and being the competent authority, their appointment cannot be said to be of contractual nature, once their appointment is shown to be temporary. It is the further submission of the learned counsel that once their appointments are made by the competent authority, even be it illegal and not in consonance with the decision in *Justine's case (supra)*, without following the procedure as contemplated u/s 25-F of the Industrial Disputes Act, their employment cannot be terminated.

11. It is the further submission of the learned counsel that the reason shown for terminating the service of the 2nd respondents was the loss incurred by the petitioner, but without complying with the provisions as contained u/s 25-F of the Industrial Disputes Act, by giving the requisite compensation, not only terminating the 2nd respondents, but employing persons in the place of the 2nd respondent clearly shows that the petitioner, under the guise of terming the employment of the 2nd respondents as illegal, terminates their service and employs other persons in their place, which is wholly unsustainable.

12. It is the further submission of the learned counsel that non-sponsorship of the 2nd respondents through the employment exchange, which is a defect as per the Bylaws of the society, cannot be a ground to terminate the services of the 2nd respondents without following the procedures mandated u/s 25-F of the Act and more so, when the petitioner has re-employed persons in their place, the respective 2nd respondent is entitled to protection u/s 25-H of the Industrial Disputes Act to be appointed in the said place.

13. The 1st respondent, after carefully analysing all the materials, both oral and documentary and in the light of the non-confirmity with the provisions as provided u/s 41 (1) of the Shops & Establishments Act, held the termination of the 2nd respondent



vitiated and, accordingly, set aside the order of dismissal, which does not warrant any interference at the hands of this Court.

14. In support of his contentions, learned counsel for the 2nd respondent relied on the following decisions :-

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- i) Maharashtra State Road Transport Corporation & Anr. - Vs - Casteribe Rajya Parivahan Karmchari Sanghatana (2010 (3) LLN 552);
 - ii) The Special Officer - Vs - The Presiding Officer & Anr. (W.A. No.2848 of 2002 - dated 5.3.07 - Madras High Court);
 - iii) V.Kandasamy - Vs - The Management & anr. (W.A. No.912 of 2001 - Dated 14.08.08 - Madras High Court);
 - iv) Devinder Singh - Vs - Municipal Council, Sanaur (2011 (6) SCC 584);
 - v) Krishna District Co-op. Marketing Society Ltd. - Vs - N.V.Purnachandra Rao & Ors. (Manu/SC/0440/1987);
 - vi) The Management of Palani Agricultural Products Co-op. Marketing Society Ltd. - Vs - The Deputy Commissioner of Labour (W.P. No.3114 of 2002 - dated 5.6.2012); and
 - vii) The Management of Madurai District Central Co-op. Bank Ltd. - Vs - The Presiding Officer & Anr. (W.P. No.2307 to 2315 of 2000 - Dated 9.2.09)

15. This Court bestowed its undivided attention to the submissions advanced by the learned counsel appearing on either side and also perused the materials available on record and also the decisions to which this Court's attention was drawn.

16. Before imploring the factual matrix as put forth by the parties, it is to be pointed out that all the decisions relied on by the respondents unequivocally point out that insofar as termination/dismissal of an employee/workman is concerned, the mandatory requirement of satisfying Section 25 (F) is necessary. This Court is in respectful agreement with the proposition of law expounded by the Hon'ble Supreme Court in the above cited decisions and the same having withstood the test of time, there is no necessity for this Court to analyse the proposition of law relating to Section 25 (F) of the Industrial Disputes Act, but to follow the same with closed eyes.

17. The contentions advanced on behalf of the petitioner are two-fold, viz., firstly that the 1st respondent has no jurisdiction to entertain the present petitions as the petitioner is neither a



'commercial establishment' nor an 'establishment' falling within the definition of Sections 2 (3) and 2 (6) of the Shops and Establishment Act; and secondly the petitioner is not a 'workman' as defined under the Industrial Disputes Act and that he is only a contractual labour and, therefore, following the provisions of Section 25 (F) is not required. It is further the case of the petitioner that once the above stand of the petitioner stands vindicated, the case of the petitioner would squarely fall within the four corners of the ratio laid down in *Justine's case (supra)* and, therefore, the 2nd respondents herein, being illegal appointees, in contravention of the Bylaws of the society, their employment is liable to be terminated and, therefore, the termination of the 2nd respondents is just and proper and the interference by the 1st respondent deserves interference.

18. '*Commercial Establishment*' is defined u/s 2 (3) of the Shops and Establishments Act and the same is quoted hereunder :-

3) 'commercial establishment' means an establishment which is not a shop but which carries on the business of advertising, commission, forwarding or commercial agency, or which is a clerical department of a factory or industrial undertaking or which is an insurance company, joint stock company, bank, broker's office or exchange and includes such other establishments as the state government by notification may by notification declare to be a commercial establishment for the purposes of this Act.

19. '*Establishment*' is defined u/s 2 (6) of the Shops and Establishments Act and the same is quoted hereunder :-

"6) 'establishment' means a shop, commercial establishment, restaurant, eating house, theatre or any place of public amusement or entertainment and includes such establishment as the State Government for the purposes of this Act."

20. Whether a co-operative society is a 'commercial establishment' or an 'establishment' as defined u/s 2 (3) and 2 (6) of the Shops and Establishments Act was dealt with by the Hon'ble Supreme Court in the case of **A.Umarani - Vs - Registrar, Co-operative Societies (2004 (7) SCC 112)**, wherein the Hon'ble Supreme Court held as under :-

"24. Let us now consider the extent to which the provisions of the 1981 Act would apply to the fact of the present case.
25. The 1981 Act applies only to industrial establishments. Industrial establishment has inter alia been defined to mean "an establishment as defined in clause (6) of Section 2 of the Tamil Nadu Shops and Establishments Act, 1947 (Tamil Nadu Act 36 of 1947)".



26. Establishment has been defined in Section 2(6) of the Tamil Nadu Shops and Establishments Act, 1947 as under:

"2. (6) 'establishment' means a shop, commercial establishment, restaurant, eating house, residential hotel, theatre or any place of public amusement or entertainment and includes such establishment as the State Government may by notification declare to be an establishment for the purposes of this Act;"

27. Mr Balakrishnan urged that the cooperative societies are commercial establishments.

28. Whether a cooperative society would be a commercial establishment or not would essentially be a question of fact. It cannot be said keeping in view the legislative intent that all cooperative societies would be "commercial establishments" within the meaning of the Tamil Nadu Shops and Establishments Act, 1947. It, therefore, appears that the impugned government order has been issued by the State without proper application of mind. It has furthermore not been stated in the impugned government order that all the cooperative societies are commercial establishments within the meaning of Section 2(6) of the Tamil Nadu Shops and Establishments Act, 1947.

29. The cooperative societies and the land development banks are governed by the statutes under which they have been created as also the rules and bye-laws framed thereunder. The cooperative societies are obligated to follow the cooperative principles as laid down in the Act and the Rules framed thereunder.

30. The State had framed rules in exercise of its power conferred upon it under Section 180 of the 1983 Act in the year 1988. Rule 149 of the 1988 Rules provides for a complete code as regards the mode and manner in which appointments were required to be made and the process of appointments is required to be carried out. In terms of the said rule, requirements to possess educational qualification and other qualifications had been laid down. One of the essential qualifications laid down for holding certain posts is "undergoing cooperative training and previous experience".

31. At this juncture, we may notice some of the provisions contained in Rule 149 of the 1988 Rules.

32. Sub-rule (3) of Rule 149 reads as under:



"149. (3)(a) No appointment by direct recruitment to any post shall be made except by calling for from the societies applications from their employees who possess the qualifications for the post and unless the Government have accorded special sanction for recruitment by advertisement in dailies, by also calling for a list of eligible candidates from the employment exchange.

(b) Where the employment exchange issues a non-availability certificate or the Government have accorded special sanction for recruitment by advertisement in dailies, the society shall invite applications from candidates including those working in other societies by advertisements in one English daily and two Tamil dailies having circulation within the area of operations of the society approved by the Government for the purposes of issue of government advertisements.

(c) Every appointment by direct recruitment shall be made by holding written examination and interview or by holding only interview as decided by the Board and on the basis of the rank given with reference to the marks obtained in the written examination, if any, and the marks awarded in the interview:

Provided that nothing contained in this sub-rule shall apply to any of the posts for the recruitment of which a Recruitment Bureau has been constituted under Section 74 or in respect of which common cadre of service has been constituted under Section 75:

Provided further that nothing contained in this sub-rule shall apply to appointments of dependants of the employees of any society who died or were medically invalidated while in service."

* * * * *

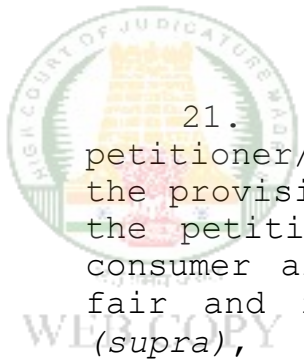
35. No appointment, therefore, can be made in deviation of or departure from the procedures laid down in the said statutory rules.

36. The terms and conditions of services are also laid down in the said rules.

37. The 1983 Act was furthermore amended in the year 1995 providing for cadre strength which is directly relatable to the income of the cooperative societies.

38. Provisions of the Act and the Rules framed thereunder reflect the legislative recruitment policy. The said provisions are, thus, mandatory in nature."

(Emphasis Supplied)

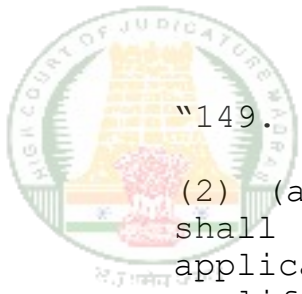


21. It is admitted by the petitioner that the petitioner/society is a co-operative institution constituted under the provisions of the Tamil Nadu Co-operative Societies Act and that the petitioner society is carrying on the activity of supplying consumer articles to its members and the needed poor public at a fair and reasonable price. From the decision in *Umarani's case* (*supra*), cooperative societies and the land development banks are governed by the statutes under which they have been created as also the rules and bye-laws framed thereunder and that the cooperative societies are obligated to follow the cooperative principles as laid down in the Act and the Rules framed thereunder. Therefore, the present petitioner, being a society formed under the Co-operative Societies Act and further engaged in the act of supplying consumer articles to members and needed poor public, whether the petitioner/society could be termed as an establishment falling u/s 2 (6) of the Shops and Establishments Act would be more of a question of fact and, therefore, this Court is not inclined to enter into adjudicating the said aspect in the present writ petition filed under Article 226 of the Constitution, as the issue in the present case does not require any adjudication on the above aspect.

22. Be that as it may. The issue in the present case could be decided based on the materials available on record, as to the status of the 2nd respondents as employee/workmen under the petitioner/society and there is no necessity for this Court to traverse on the issue as to whether a cooperative society is an establishment as defined u/s 2 (6) of the Shops and Establishments Act.

23. It is the case of the petitioner that the 2nd respondents were contractual employees, they being taken on contract from one Loyal Security Services, however, it is the case of the 2nd respondents that they joined the services of the petitioner on various dates, viz., between April, 1999 and August, 1999. It is the case of the 2nd respondents that they were employed by the petitioner and were working as Temporary Sales Assistant in the petitioner/society, which is refuted by the petitioner contending that from 1999 till 25.6.01, the 2nd respondents were contractual employees under employment with the contractor, viz., Loyal Security Agency and on and from 25.6.01, they were temporarily engaged by the Board as Shop Assistants, in a post, which never existed as per the Bylaws of the society and, therefore, their engagement is in contravention of the Bylaws of the society and the ratio laid down in *Justine's case* with regard to recruitment aspect would stand squarely attracted.

24. To buttress their argument, the petitioner places reliance upon Section 149 of the Tamil Nadu Co-operative Societies Rules and for better appreciation, the same is extracted hereunder :-



"149.

(2) (a) No appointment by direct recruitment to any post shall be made except by calling for from the societies applications from their employees who possess the qualifications for the post and unless the Government have accorded special sanction for recruitment by advertisement in dailies, by also calling for a list of eligible candidates from the employment exchange.

(b) Where the employment exchange issues a non-availability certificate or the Government have accorded special sanction for recruitment by advertisement in dailies, the society shall invite applications from candidates including those working in other societies by advertisements in one English daily and two Tamil dailies having circulation within the area of operations of the society approved by the Government for the purposes of issue of government advertisements.

(c) Every appointment by direct recruitment shall be made by holding written examination and interview or by holding only interview as decided by the Board and on the basis of the rank given with reference to the marks obtained in the written examination, if any, and the marks awarded in the interview:

Provided that nothing contained in this sub-rule shall apply to any of the posts for the recruitment of which a Recruitment Bureau has been constituted under Section 74 or in respect of which common cadre of service has been constituted under Section 75:

Provided further that nothing contained in this sub-rule shall apply to appointments of dependants of the employees of any society who died or were medically invalidated while in service."

25. From Rule 149 (2), as extracted above, it is implicitly clear that appointment could be only through the modes, as mandated under the said rule. In this regard, it is worthwhile to refer to the decision of the Division Bench of this Court in *Justine's case* (*supra*), which has been affirmed in *Umarani's case* (*supra*) and for better appreciation, the relevant portion of the order in *Justine's case* is extracted hereunder :-

"In view of what is stated *supra*, we hold:

(i) that G.O. Ms. No.86, Cooperation, Food and Consumer Protection Department, dated 12.3.2001, has got the effect of only authorising the regularisation of the employees



recruited by the cooperative societies for the period from 9.7.1980 to 11.3.2001 exempting the intervention of employment exchange;

(ii) that G.O. Ms. No.86, Cooperation, Food and Consumer Protection Department, dated 12.3.2001, shall not operate for regularisation of any employee recruited by the cooperative societies in violation of sub-Rule (1) of Rule 149 of the Tamil Nadu Cooperative Societies Rules, as amended by G.O. Ms. No.212, Cooperation, Food and Consumer Protection Department, dated 4.7.1995;

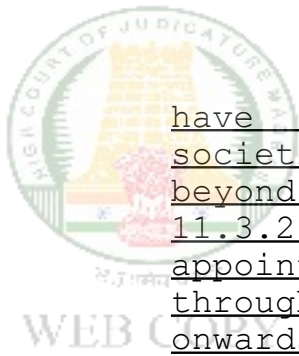
(iii) in societies, where the cadre strength has not been fixed, direct them to adopt the special bye-law in conformity with sub-Rule (1) of Rule 149 of the Tamil Nadu Cooperative Societies Rules, as amended by G.O. Ms. No.212, Cooperation, Food and Consumer Protection Department, dated 4.7.1995;

(iv) direct the Registrar of Cooperative Societies to issue a circular within a week from today calling upon all the cooperative societies in the State of Tamil Nadu to comply with the directions in clause (iii) supra.

(v) direct that within two months of the approval of the special bye-laws under sub-Rule (1) of the Rule 149 of the Rules, the respective Deputy Registrars of Cooperative Societies having jurisdiction over the cooperative societies in their Divisions, shall enquire, by issuing notice to the entire staff recruited from 9.7.1980 to 11.3.2001, and decide as to whether the said recruitment is in conformity with the special bye-laws approved by the Registrar of the Cooperative Societies and terminate the services of such staff members, whose appointments are in contravention of the special bye laws so approved by the Registrar of Cooperative Societies; it is made clear that while considering the validity or otherwise of the appointment of the staff cooperative societies, the requirement of notifying the vacancies to employment exchange shall not be taken cognisance of.

(vi) that no cooperative staff member appointed subsequent to G.O. Ms. No.86, Cooperation, Food and Consumer Protection Department, dated 12.3.2001 otherwise than through employment exchange shall be continued in service and their services shall be terminated forthwith.

(vii) that either the provisions of Tamil Nadu Industrial Establishments (Conferment of Permanent Status to Workmen) Act, 1981 or the Industrial Disputes Act, 1947, or the



have no application to the staff of the cooperative societies appointed without adequate qualifications or beyond the cadre strength for the period from 9.7.1980 to 11.3.2001. This is equally applicable to the staff appointed to the cooperative societies, otherwise than through employment exchange, for the period from 12.3.2001 onwards."

26. It is to be pointed out that though *Justine's case (supra)* was mainly centered on the question of regularisation of the employees of the co-operative societies, who were appointed, not in consonance with the Bylaws of the society, however, the Division Bench of this Court has further directed that *no cooperative staff member appointed subsequent to G.O. Ms. No.86, Cooperation, Food and Consumer Protection Department, dated 12.3.2001 otherwise than through employment exchange shall be continued in service and their services shall be terminated forthwith.* Therefore, it is clear that a categorical direction has been given by the Division Bench with regard to appointments made, which are not in consonance with the Bylaws of the society and a cut-off date has also been fixed in this regard.

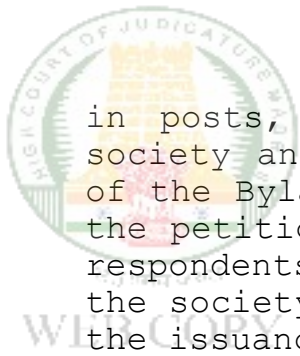
27. In the context of the above decision, it is to be seen that whether the engagement of the 2nd respondents herein are prior to the cut-off period of 11.3.01 or is it after 11.3.2001, which is a crucial question insofar as the 2nd respondents are concerned.

28. While the 2nd respondents contend that their engagement as Temporary Sales Assistants dates back to April/August, 1999, it is countered by the petitioner stating that their engagement during April/August, 1999 is only on contractual basis through the contractor, viz., Loyal Security Services and their so-called engagement in the temporary post is only on and from 25.6.01 by the Board.

29. A perusal of the materials available on record, filed by the petitioner reveals that since October, 1999, the 2nd respondents were shown as persons, who were sponsored by the contractor, viz., Loyal Security Services for working with the petitioner. The days worked by such of the persons are also shown for the said month of October, 1999. Therefore, it is clear from the said document that during October, 1999, the 2nd respondents herein were working under the contractor, viz., Loyal Security Services and were deputed to work with the petitioner/society. Therefore, without any semblance of doubt, it can be safely concluded that the 2nd respondents herein were under contractual employment and working for the petitioner during October, 1999.

30. The petitioner has pleaded that on and from 25.6.01, the 2nd respondents herein were shown as Shop Assistants on temporary basis,

<https://hcservices.ecourts.gov.in/hcservices/>



in posts, which were not cadre posts as per the Bylaws of the society and were temporarily engaged by the Board in contravention of the Bylaws relating to recruitment. It is the further stand of the petitioner that the said illegal temporary engagement of the 2nd respondents herein by the Board, in contravention of the Bylaws of the society had led to the dissolution of the Board and, thereafter, the issuance of show cause notice to the 2nd respondents herein.

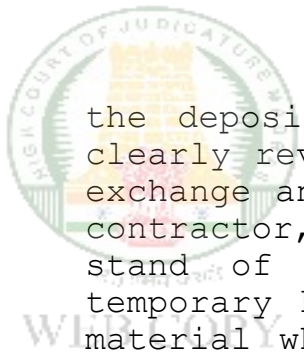
31. In this regard, a perusal of the materials available in the typed set of documents reveal that vide communication dated 23.6.01, the engagement of the 2nd respondents herein were dispensed with by the petitioner/society. However, vide letter dated 6.8.01, the 2nd respondents, who were working in the petitioner/society on contractual basis and earning daily wages, were directed to be paid monthly wages, including leave with effect from 25.6.01. In this regard, the communication emanated from Loyal Security Services dated 20.7.01 reveals that the 2nd respondents herein, who were Security Assistants with the said concern/contractor, were shown to be with the petitioner/society on and from 24.6.01. Therefore, only from 24.6.01, the 2nd respondents herein could be treated to have been engaged on temporary basis by the petitioner/society.

32. Further, a perusal of the order impugned herein, passed by the 1st respondent reveals that there is a categorical admission in cross examination by the 2nd respondents herein, who that they were working under Loyal Security Services before their temporary engagement with the petitioner and that Loyal Security Service is a service contractor for the petitioner.

33. It is further evidenced from the order impugned herein that Exs.A-1 to A-3 have been marked by the 2nd respondents herein of which Ex.A-1 is the copy of the dismissal order dated 31.7.08 and Ex.A-3 is the copy of the P.F. Account Slip for the year 2001-2002. Though it is the stand of the 2nd respondents herein that they have been in temporary employment with the petitioner since 1999, however, the same stands negated by the materials placed as evidence before the 1st respondent. From the above, it is categorically clear that the temporary engagement of the 2nd respondents, even otherwise, would only be from 24.6.01 and prior to the said date, their engagement was only through the contractor, viz., Loyal Security Services on contractual basis. The engagement of the 2nd respondents herein from 24.6.01 is against the direction of the Division Bench of this Court in *Justine's case* and, therefore, the engagement of the 2nd respondents is liable for termination.

34. Be that as it may. It is the case of the 2nd respondents herein that they have been temporarily engaged by the Board, viz., the competent authority, as Shop Assistants, which according to the petitioner is not a cadre post and that the said engagement not being in consonance with the Bylaws, could only be termed to be an illegal appointment and hit by *Justine's case*. As already stated,

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the deposition of the 2nd respondents herein in cross examination clearly reveals that they have not been employed through employment exchange and that their services have been engaged only through the contractor, viz., Loyal Security Services. Further, even if the stand of the 2nd respondents herein that their engagement on temporary basis with the petitioner/society is to be accepted, no material whatsoever has been placed by the 2nd respondents to show their temporary appointment with the petitioner/society, but for the letter of the Special Officer dated 6.8.01 in and by which certain persons, who were on daily wage basis were directed to be brought into monthly wage basis. The said letter cannot in any way be treated as a material for the purpose of inferring that the engagement of the 2nd respondents herein is temporary appointment.

35. Section 2 (7) of the Tamil Nadu Co-operative Societies Act defines "Board", which is as under :-

"2.

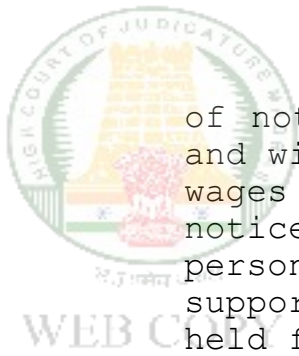
(7) "**board**" means the board of directors or the governing body of a registered society by whatever name called, to which the direction and control of the management of the affairs of the society is entrusted to;

36. From the above provision, it is unambiguously clear that the Board is entrusted with the direction and control of the management of the affairs of the society. It is to be pointed out that the said direction and control of the management of the affairs of the society should be as per the Bylaws of the Society. Further, management of the affairs of the society, would in no way take within its fold arbitrary engagement/appointment of any staff, which appointment, is always subject to the relevant provisions in the Bylaws.

37. Further, as mandated in *Justine's case (supra)*, the rule of recruitment has not been followed and the qualification of the persons so appointed have not been determined in a manner known to law. In the absence of both limbs of the direction as contained in para-19 (vii) of *Justine's case*, the appointment, as claimed by the 2nd respondents herein, is hit by the rule of recruitment and the said appointment could in no way be termed to be an appointment proper, which would have the leverage of calling into play the provisions of the Tamil Nadu Shops & Establishments Act.

38. Pausing here for a moment, Section 41 (1) of the Shops and Establishments Act provides for notice of dismissal when an employee is to be dismissed from service. For better clarity, the same is quoted hereunder :-

"41. Notice of dismissal-(1) No employer shall dispense with the services of a person employed continuously for a period



of not less than six months, except for a reasonable cause and without giving such person at least one months notice or wages in lieu of such notice, provided however, that such notice shall not be necessary where the services of such person are dispensed with on a charge of misconduct supported by satisfactory evidence recorded at an enquiry held for the purpose."

39. In the case on hand, this Court has already held that the engagement of the 2nd respondents herein, termed to be that of temporary appointment, has not been proved in a manner known to law. Even otherwise, the above section is explicitly clear that a person, who has been employed continuously for a period of not less than six months could be dispensed with by the employer only by giving at least one months notice or wages in lieu of such notice. On the ground that the 2nd respondents herein have not been provided with the notice u/s 41 (1) of the Shops and Establishments Act, the order impugned has been passed directing reinstatement.

40. The reasoning as given by the 1st respondent, for issuing such a direction for reinstatement, is as under :-

"12) On a perusal of the appeal petition, counter statement and evidences of both sides, it has been ascertained that the appellant was employed as saleswoman through Royal Security Services and subsequently she was taken over as temporary employee by the respondent from 25.6.2001. It is also confirmed by Ex.A-2 and Ex.A-3. Further, it is not denied by the respondent that the appellant was continuously working till she was dismissed from her service vide order dt. 31.7.2008 and that RW1 has also admitted in his evidence that before issuing dismissal order, the respondent has not issued any charge memo or conducted any enquiry or issued any other notice to the appellant. Though the respondent has filed documents from Ex.R1 to Ex.R5, except the documents Ex.R4 and Ex.R5 the other documents filed in this court are not in a position to correlate relevancy to this case."

(Emphasis Supplied)

41. From the above it is clear that the 1st respondent has given a categorical finding that the 2nd respondents herein have been in temporary employment. However, the documents on which such a finding has been rendered by the 1st respondent is wholly unclear. It transpires that while the 1st respondent has accepted and acted upon Exs.A-2 and A-3 for the purpose of holding the continuous employment of the 2nd respondents herein with the petitioner/society, however, the 1st respondent has brushed aside Exs.R-1 to R-3 opining that the said documents have no relevancy to the issue on hand. However, the 1st respondent has not stated on the basis of which Exs.R-1 to R-3 have no relevancy to the issues on hand. In the considered opinion



of this Court, the above finding recorded by the 1st respondent is fallacious for the following reasons :-

(i) Firstly, the show cause notice was issued on 9.12.03 leading to the filing of W.P. No.36143/03 before this Court wherein this Court had granted order of stay of the show cause notice on 11.12.03. The said document has been marked as Ex.R-1. True it is that the said writ petition was not filed by the 2nd respondents herein, but nevertheless, in view of the said order of stay granted by this Court, the 2nd respondents have continued in the service with the petitioner/society and definitely benefit stood enured to the 2nd respondents herein;

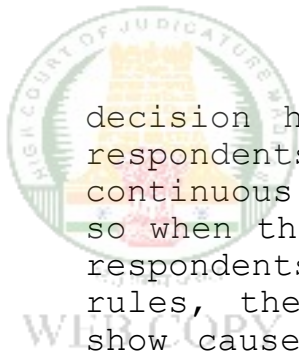
(ii) Secondly, the said writ petition in W.P. No.36143/03 was dismissed as withdrawn by this Court on 3.2.06, which is marked as Ex.R-2;

(iii) Thirdly, Ex.R-3 is the copy of the petition in O.S. No.535/05, which has been filed on 31.3.05 before the District Munsif Court, Madurai, by the 2nd respondents herein. It is to be pointed out here that subsequent to the presentation of the suit on 31.3.05 and obtaining interim order in the suit, the writ petition in W.P. No.36143/03 has been withdrawn; and

(iv) Fourthly, Ex.R-4 is the order in O.S. No.535/05, which has been dismissed for default on 5.3.08.

42. The details as could be culled out from Exs.R-1 to R-4 it is evident that the interim orders granted by this Court and the District Munsif Court acted as the fulcrum for the continuance of the 2nd respondents herein in the service of the petitioner/society. If not for the said interim orders, the petitioner would have acted on the show cause notice dated 9.12.03. According to the materials available on record, the 2nd respondents have been in temporary engagement since 25.6.01 and show cause notice was issued on 9.12.03. However, this Court, in *Justine's case (supra)* has categorically observed that no appointments on and after 12.3.01, which has not been done otherwise than through employment exchange shall be continued and the services of the said persons shall be terminated forthwith. The judgment in *Justine's case* was delivered on 24.10.02 and, thereafter, the show cause notice has been issued and the issuance of show cause notice is very well in consonance with the directions issued by the Hon'ble Division Bench of this Court.

43. In the light of the above, the crucial aspect which needs to be pointed out is the fact that once it has been held by the Division Bench that such of the appointments not made in consonance with the recruitment rules are liable to be terminated and the said



decision has been affirmed by the Hon'ble Supreme Court, the 2nd respondents having not placed any material to show that they were in continuous employment for a period of not less than six months, more so when the petitioner/society has termed the appointment of the 2nd respondents herein to be not in consonance with the recruitment rules, the petitioner/society was wholly justified in issuing the show cause notice in the light of the orders passed in *Justine's* case (*supra*).

44. Brushing aside the above, if a broader construction, as the one given by the 1st respondent for invocation of Section 41 (1) is allowed to remain, it would only lead to swarming of petitions before the Tribunal and in turn before this Court. It has been time and again reiterated that a harmonious construction should be given to a provision of law so that it does justice in letter and spirit and merely because the legislation has a social commitment, the same cannot be used for the purpose of showering a benefit to which the 2nd respondents and allow them to walk away with something to which they would not otherwise be entitled to in accordance with law.

45. Further, one more aspect which requires to be pointed out is the fact that though the 2nd respondents have thought it fit to file the suit before the District Munsif Court, Madurai and obtained interim order, however, it is not the case of either of the party to the *lis* that explanation was submitted by the 2nd respondents to the show cause notice. Without submitting any explanation to the show cause notice, the 2nd respondents not only filed the suit initially, but thereafter, filed the petition before the 1st respondent questioning their dismissal from service. It is trite that if no explanation is offered by the party from whom explanation is called for, an adverse inference could very well be drawn against the said party. In the case on hand, the 2nd respondents having not filed any explanation to the show cause notice inspite of long lapse of time and having not established their continuous employment as provided u/s 41 (1) of the Shops and Establishments Act, the justification adopted by the 1st respondent for directing reinstatement of the 2nd respondent does not stand the test of judicial scrutiny. Further, it is to be pointed out that when the 1st respondent has thought it fit to invoke Section 41 (1) of the Act to give benefit to the 2nd respondents, however, the 1st respondent has lost sight of the fact that the 2nd respondents have not established that they have been in employment continuously for a period of not less than six months. Without there being any material before the 1st respondent as to the continuous employment of the 2nd respondents with the petitioner/society, the direction issued by the 1st respondent for reinstatement of the 2nd respondents is wholly unsustainable.

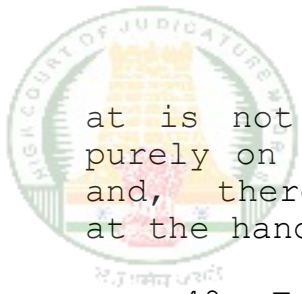
46. It is also to be pointed out that the date of the 2nd respondents being engaged by the petitioner on temporary basis, even according to the 2nd respondents, is not clear. While the affidavit



filed in support of the petition speaks that the 2nd respondents were engaged on temporary basis as early as in the year 1999, however, in the typed set of papers, it is seen that they have been brought on monthly wage basis only w.e.f. 25.6.01. However, curiously, the suit filed by the 2nd respondents show that their engagement on temporary basis is on 12.6.01. This Court is at a loss to understand as to the exact stand taken by the 2nd respondents with regard to their engagement. Further, this Court is unable to comprehend the basis on which the 1st respondent has come to the conclusion that the 2nd respondents have put in continuous service of six months on temporary basis without the benevolence of the interim orders passed by this Court as well as the District Munsif Court.

47. Further, it is also to be pointed out that a show cause notice has already been issued by the petitioner/society way back on 9.12.03 for which no explanation has been offered by the 2nd respondents. Under the umbrella of interim orders, the 2nd respondents have been continuing in service. Such continuance in service could not be taken as continuous service as provided u/s 41 (1) of the Shops and Establishments Act. The continuous service of 7 years arrived at by the 1st respondent cannot be treated to be continuous service for the purpose of invocation of Section 41 (1) of the Shops and Establishments Act when this Court, as early as during the stage of admission of the case has granted stay only with the clear intention of testing the legality of the order passed by the 1st respondent. The legality of the order, in a wider sense, covers all the aspects dealt with by the 1st respondent and as held by this Court above, the 1st respondent has traversed beyond the scope of the petition to hold that the 2nd respondents herein have made out a case for reinstatement, when in fact, there was no tangible material before the 1st respondent to arrive at the said conclusion.

48. Though very many decisions have been pressed into service on behalf of the 2nd respondents, however, it is to be pointed out that the facts in those cases are in no way identical to the case on hand. Those cases were on different set of facts and the issue in those cases pertained to enforcement of Section 25-F of the Industrial Disputes Act. It is to be pointed out that only on this Court arriving at a subjective satisfaction as to legality of appointment of the 2nd respondents herein, the pressing into service of Section 25-F of the Industrial Disputes Act would arise. In the case on hand, this Court has clearly held that the 2nd respondents herein have not made out a case, based on any tangible and acceptable material, before the 1st respondent and in spite of the said lacunae, which has not been looked into in proper perspective by the 1st respondent, the 1st respondent has ordered reinstatement of the 2nd respondents herein, which cannot be sustained in the eye of law. Accordingly, this Court is of the considered opinion that the reasons given by the 1st respondent for ordering reinstatement of the 2nd respondents are wholly unacceptable and the decision arrived



at is not based on the materials available on record and it is purely on the basis of improper appreciation of the legal position and, therefore, the said decision definitely warrants interference at the hands of this Court.

49. For the reasons aforesaid, the writ petitions are allowed and the orders impugned in the respective writ petitions are set aside. In the circumstances of the case, there shall be no order as to costs.

Sd/-

Assistant Registrar

// True Copy //

/ /2021

Sub Assistant Registrar

To
The Appellate Authority under the
Tamil Nadu Shops & Establishments Act
(Deputy Commissioner of Labour)
Sundaram Theatre Road, K.K. Nagar
Madurai 625 020.

+1 CC to M/s.D.SADIQ RAJA, Advocate (SR-8154[F] dated 02/03/2021)

+1 CC to M/s.SPL GP (SR-8217[F] dated 02/03/2021)

ORDER IN
W.P. Nos.6164 of 2011, etc. Batch
Pronounced on 01.03.2021

GLN
MS/24.05.2021/20P.4C