
(1999) 03 MAD CK 0032

In the Madras High Court

Case No : Writ Petition No. 4213 of 1997 and W.M.P. No. 7001 of 1997 etc.

Secretary, I.H.F.D. Colony Flat Owners Welfare Association APPELLANT

Vs

Presiding Officer, Dy. Commissioner of Labour and Another RESPONDENT

Date of Decision : 23-03-1999

Acts Referred:

Tamil Nadu Shops and Establishments Act, 1947 — Section 2(12), 2(16), 41, 41(2)

Citation : (2000) 1 LLJ 78 : (2000) 2 LW 694 : (1999) 2 MLJ 223

Hon'ble Judges : P. Sathasivam, J

Bench : Single Bench

Advocate : M.B. Raghavan and M.B. Gopalan, for the Appellant; K.V. Shanmughanathan, for the Respondent

Final Decision : Allowed

Judgement

P. Sathasivam, J.—By consent of all the parties concerned the main writ petition itself is taken up for final disposal.

2. Aggrieved by the order of the first respondent dated August 8, 1996 in T.N.S.A. No. 1 of 1995 the petitioner Welfare Association has filed the

above writ petition to quash the said order.

3. The case of the petitioner is briefly stated hereunder:

The petitioner is a Welfare Association of Flat Owners of I.H.F.D. Colony with objects to look after the welfare and common interests of the flat

owners/residents. The second respondent herein was a watchman employed by the Association. Since he had left the services of his own and in his

place another watchman was appointed by the Association. Second respondent was never in continuous service of the petitioner at any time and

his employment was only on interrupted periods and by no stretch of imagination can confer the status of permanent employee. It is a Welfare

Association and it will not come within the definition of commercial establishment, nor shop nor employer nor any other relevant definition to attract the provision of Section 41 of the Tamil Nadu Shops and Establishments Act, 1947 (hereinafter referred to as "the Act"). Second respondent was

not a person employed as defined in Section 12 of the Act since no business was carried on by the petitioner nor the second respondent was

wholly or principally employed in connection with any business and the petitioner is neither a shop nor a commercial establishment nor an

establishment. While so, the second respondent filed application u/s 41(2) of the Act praying to set aside the dismissal of services in T.N.S.A.

Case No. 1 of 1995 before the Deputy Commissioner of Labour, Coimbatore-first respondent herein. Petitioner herein resisted the claim of the

second respondent on an erroneous appreciation of law and facts passed a perverse order dated August 2, 1996 setting aside the dispensation of

service without any material on record. The said order is illegal and without jurisdiction. Having no other remedy petitioner has approached this

Court by way of the present writ petition.

4. Second respondent has filed a counter affidavit disputing the various averments made by the petitioner. It is stated that he joined the services of

the petitioner-Association on February 1, 1993. He rendered a continuous service for nearly two years. He was drawing Rs. 900 per month

towards his salary. While so, the second respondent denied him employment with effect from March 16, 1995 without assigning any reason.

Therefore, he was constrained to prefer an appeal before the first respondent herein. First respondent has examined the case in detail and passed a

reasonable order. The contention that the non-applicability of Shops Act to the second respondent Association was also considered in detail and

ultimately rejected the same. Likewise, the contention that he had abandoned the service was also rejected. There is no merit in the writ petition,

accordingly he prayed for dismissal of the same.

5. In the light of the above pleadings, I have heard Mr. M.B. Raghavan, learned counsel for the petitioner as well as Mr. K.V. Shanmughanathan

for second respondent.

6. It is seen that the petitioner is a Welfare Association of Flat owners of I.H.F.D. Colony. According to them their objectives are to look after the

welfare and common interest of the flat owners/residents to provide and maintain social, recreational and educational activities, to promote civic and cultural interests amongst the members to construct, maintain, develop, improve, secure and manage all the common properties and similar other activities but not for any profit or political motive. It is the case of the petitioner that, even though the second respondent herein was employed as watchman by the petitioner-Association, he had left the services on his own and in his place another Watchman was appointed by them. On the other hand, it is the case of the second respondent that the petitioner is a society registered under the Societies Registration Act and it renders various services to its members. The Association collects service charges apart from water charges. He was appointed on February 1, 1993 and without any reason or notice he was denied employment with effect from March 16, 1995. Since in spite of his efforts he was not reinstated, he filed an appeal T.N.S.A. No. 1 of 1995 before the first respondent. After referring Section 2(6), (12) and (16) of the Act, the first respondent came to the conclusion that the petitioner-Association is a "shop" as defined u/s 2(16) of the Act. After holding so, in the absence of any enquiry dispensation of the services of the second respondent cannot be treated as just and legal, set aside the oral orders of dispensation of service of the second respondent herein with effect from March 16, 1995. Accordingly, it is to be seen whether the petitioner Association is a "shop" within the meaning of Section 2(16) of the Act in order to appreciate the rival contentions. I shall refer the provisions which are applicable to our issue.

Section 2(12) "Person employed means: (i) in the case of a shop, a person wholly or principally employed therein in connection with the business of the shop,

(ii) in the case of the factory or an industrial undertaking, a member of the clerical staff employed in such a factory or undertaking,

(iii) in the case of a commercial establishment other than a clerical department of a factory or an industrial undertaking, a person wholly or

principally employed in connection with the business of the establishment, and includes a peon;

(iv) xxxxxxxxx

(v) xxxxxxxxx

(vi) in the case of an establishment not falling under paragraphs (i) to (v) above, a person wholly or principally employed in connection with the

business of the establishment, and includes a peon;

(vii) in the case of all establishments, a person wholly or principally employed in cleaning any part of the premises;

but does not include the husband, wife, son, daughter, father, mother, brother or sister of an employer who lives with and is dependent on such

employer;

2(16): Shop means; any premises where any trade or business is carried on or where services are rendered to customers and includes offices,

storerooms, godowns and ware-houses, whether in the same premises or otherwise, used in connection with such business but does not include a

restaurant, eating-house or commercial establishment.

7. It is clear, in order to attract Section 2(16) there must be activities of trade or business or services are rendered to customers. I have already

extracted the object of the petitioner-Association. It is clear from the particulars furnished that petitioner-Association is a welfare Association and it

is not a commercial establishment nor a "shop". It is also clear that there is no relationship of customer with any person or persons and service if

any was rendered only to members and not others. Each member is a part of the Association and there is no customer relationship between the

Association "and is members. As rightly contended that, regulation of entry of persons and vehicles are incidental to various functions of

Association. Likewise, the particulars furnished clearly show that there was no profit motive nor it renders any service to any one other than its

members. In such circumstances, the members of the Association cannot be equated with customer.

8. Now, I shall consider the decisions relied on by both side. The very same provision viz., Section 2(16) of the Act was construed by the Division

Bench of this Court in a decision reported in Pappi Chetty Raghaviah Chetty v. Commissioner of Labour 82 L.W. 812. In the said decision their

Lordships after referring to "shop" as defined by Section 2(16), have expressed:

.... The expression "trade or business" throws light upon such other and the two words cannot be read in complement. Business, though it need

not be in the sense of trade, should, in our opinion, be an activity in the commercial sense. That such a sense is an inherent element of a shop is evident from the entire definition of a shop. Shop must be a place where business is carried on, or where services are rendered to customers. In the place of the charity office, neither business is carried on, nor any customers resort to it. There is also no question of any office used for commercial purposes or store-room or godowns or warehouse, in the sense contemplated by the definition. We have read the definition of other concepts in Chapter I and we are led to think that collection of rent for proposal of the appellant trust cannot be regarded as a commercial activity so as to make the trust office a shop. As we indicated earlier, shops are dealt with in Chapter II and the first of the provisions of those chapter speaks of the opening and closing hours of shops and contemplates customers restoring to it especially the proviso to Section 7(1). Section 8 is even clearer when it speaks of selling outside the shops being prohibited after the closing hour. We are inclined to think that shop in this chapter is used in the popular sense of a shop where commercial activity is found. It is true that to constitute a commercial activity there need be no profit motive. But it does not follow from it that any activity of collecting money irrespective of the purpose and circumstances of and in which it is done, can be regarded as a commercial activity. We realise that the word business is of a wide import. Anything can be a business. But it is not in that wide sense that the word has been used in definition of a shop. In our view, the trust institution is not a shop and is not governed by the Madras Shops and Establishments Act, 1947.

The said decision, particularly the conclusion is directly applicable to our case.

9. In L.M. Chitale and Another Vs. The Commissioner of Labour, after referring similar question and also considering Section 2(16) of the Act the learned Judge has concluded.

The other part of the definition of a "shop", that is, a "shop" means "any premises where services are rendered to customers" is to my mind equally inapplicable to the case of a chartered architect. It is not denied by the other side that a chartered architect does carry on a learned profession and that it is his special qualifications that are placed at the disposal of his clients. The manifold duties of a chartered architect and the restrictions that

have been placed upon the discharge of his professional functions have been referred to by the learned counsel. The Code of professional conduct prescribed by the Royal Institute of British Architects indicates that he is as much constrained in the performance of his functions as a lawyer or a solicitor is. Learned counsel for the petitioners has also referred to corpus juris where an architect is denied as one skilled in practical architecture, one whose profession is to devise the plans and ornamentation of buildings or structures or direct their construction. The requirement of learning, skill and integrity for the carrying on of that profession are also indicated. That an architect is called upon to prepare plans on behalf of his client for the construction of a building, to prepare estimates and the like and even to supervise the constructions in the interests of his client are not denied. How in these circumstances, it can be said that the office of a consulting architect can be regarded as premises where services are rendered to customers it is difficult to see. In the context in which this part of the definition finds place, associated with trade or business on the one side and with offices, store rooms, godowns and warehouses on the other, ordinary principles of construction would appear to require that this part of the definition should be construed as services rendered to customers in the carrying on of trade or business. The matter is not covered by any authority, but I am certainly of the view that the office of an architect cannot be termed a premises where services are rendered to customers.

10. Similar definition viz., ""shop"", ""commercial establishment"" and ""establishment"" have been considered by Single Judge of the Karnataka High

Court in *The National Institute of Engineering (Society) v. Labour Inspector*, 1975 LIC 1134. The learned Judge after referring Madras decision

Rajam Krishnan v. Director of Employment and Training, Madras, (1973) II LLJ 604 (Mad) has concluded.

A reading of the definitions of the expressions ""shop"" and ""commercial establishment"" would show that unless the premises is used for trade or

business purposes or there is an element of commerce it cannot be considered either as a shop or a commercial establishment. The members of the

public cannot resort to the hostel to buy foodstuffs. It cannot be called a public place of amusement or entertainment. It is intended only for the

benefit of the students of the Engineering College. There is no allegation made by the respondent in this case that the petitioner has been running the

hostel with a view of make profit. In the circumstances, it is difficult to hold that the hostel is either a shop or a commercial establishment as defined

by Clauses (a) and (e) of Section 2 of the Act. It cannot therefore be an establishment as defined under Clause (i) of Section 2 of the Act. The

above view receives support from the decision of the High Court of Madras in Rajam Krishnan v. Director of Employment & Training, Madras

(supra). The impugned notices are therefore, quashed. The petition is accordingly allowed.

11. All the above referred decisions clearly show that, the expressions ""shop"", ""establishment"" and ""commercial establishment"" unless the premises

is used for trade or business purpose and there is an element of commerce, it cannot be considered either as a ""shop"" or as a ""commercial

establishment"". The particulars furnished abundantly show that the said Association is only for the benefit of its members. In other words, outsiders

have no connection with the petitioner- Association. It is intended only for the benefits of the members of the Association. It is not the case of the

second respondent that the petitioner-Association has been running the same with a view to make profit.

12. No doubt, learned counsel appearing for the second respondent by relying on the decision of the Apex Court reported in Chief Commissioner,

Delhi and Others Vs. Federation of Indian Chambers of Commerce and Industry, New Delhi and Others, , vehemently contended that, the

activities of the petitioner-Association attract services rendered to customers, accordingly it is a ""shop"" within the meaning of Section 2(16). In the

light of the submission made by the learned counsel, I have gone through the entire judgment of their Lordships. The said decision relates to Delhi

Shops and Establishments Act, 1964. Though similar provisions are there, after considering the activities of Federation of Indian Chambers of

Commerce rendering material service to the members and non-member businessmen, their Lordships, have concluded that:

The Federation comes within the definition of term ""shop"". It is clear that the said Federation is not only rendering material services to its

members, but also to non-member businessman.

Further it was held in that case that:

the activity of the ""Federation"" is in the nature of business or trade"".

Their Lordships have also clarified:

The very definition of "commercial establishment" indicates that the activity of a registered society, charitable or other trust would not fall outside

the definition, if the activity carried on by it amounted to a trade or business or any work in connection therewith or incidental thereto.

In the light of the specific clarification in the absence of activity relating to business, trade or professions (sic) or any work in connection therewith

or incidental thereto, the activities of the petitioner-Association cannot be construed to attract Section 2(16) of the Act. Hence, the said decision of

the Apex Court is distinguishable and not applicable to the facts of our case.

13. It is clear from the language used in Section 2(16) as well as other provisions "shop" must be a place where business is carried on or where

services are rendered to customers. In the place of petitioner-Association neither business is carried on nor the claim of customers are attended.

As observed by the Division Bench in Pappi Chetty Chetty v. Commissioner of Labour (supra) considering the entire provisions, of the Act, "shop

referred to in the Act is used in the popular sense of a "shop" where commercial activity is found. There is no dispute that to constitute a

commercial activity, there need be no profit motive. In my view, the petitioner-Association is not a "shop" and is not governed by the Tamil Nadu

Shops and Establishments Act, 1947. Contrary view expressed by the first respondent in the impugned order dated August 8, 1996 is quashed.

Accordingly, the writ petition is allowed. No costs.

14. In view of the disposal of the main writ petition, connected W.M.Ps. are closed as unnecessary.