
(1990) 06 MAD CK 0010
In the Madras High Court

Tamil Nadu Adi Dravidar Housing and Development
Corporation Ltd.

APPELLANT

Vs

The Appellate Authority/Deputy Commissioner of Labour and
Another

RESPONDENT

Date of Decision : 29-06-1990

Acts Referred:

Constitution of India, 1950 — Article 226

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

Citation : (1990) 2 MLJ 354

Hon'ble Judges : K.M. Natarajan, J

Bench : Division Bench

Judgement

K.M. Natarajan, J.—This Writ Petition is filed under Article 226 of the Constitution of India for the issuance of a Writ of certiorari calling

for the records relating to the proceedings of the appellate authority of the Tamil Nadu Shops and Establishments Act. 1947/Deputy Commissioner

of Labour, Coimbatore, the first respondent herein made in TNSE No.2/89, dated 30-6-1989 and to quash the same.

2. In the affidavit filed in support of this petition by the Managing Director of Tamil Nadu Adi Dravidar Housing and Development Corporation

Limited, it is averred as follows:

The second respondent viz., D. Ganesan was an employee of the petitioner's Corporation. He was working as an Assistant in the Tamil Nadu Adi

Dravidar Housing and Development Corporation Limited, Erode. Sub-Division of Coimbatore from 24-11-1980 to 14-2-1983. He stayed away

from duty with effect from 14-2-1983 onwards. During his tenure of service in Erode Sub-Division, he has misappropriated Corporation money,

delayed remittances and made short remittances. Hence five charges were framed against him under Rule 58(b) of Tamil Nadu Adi Dravidar

Housing and Development Corporation Limited Service Rules on 15-2-1988 for misappropriation of Government remittances and production of

false chalans, forging the signature of the Treasury Office, cheating the Corporation by encashing the demand drafts, stealing of cheque leaves from

the chest of the District Development Officer, Tamil Nadu Adi Dravidar Housing and Development Corporation Limited, missing of the RC. Book

of Jeep TMZ 8750 of Erode Tamil Nadu Adi Dravidar Housing and Development Corporation, Sub Division and refusal to surrender the

materials used for misappropriation. He submitted an explanation to the charges framed against him, but he did not want any enquiry of witnesses.

As desired by him, personal hearing has been conducted on three days on 28.3.1988, 31-5-1988 and 27-6-1988. It is submitted that he has

accepted the charges and that he has not requested any copies of documents either in his explanation or at the time of enquiry. As the irregularities

committed by him, are of serious nature, he has been removed from service in the proceedings, dated 27-7-1988. The appeal petition preferred by

him before the Board of Tamil Nadu Adi Dravidar Housing and Development Corporation Limited was also dismissed. He filed an application

before the first respondent, who is an appellate authority under the Tamil Nadu Shops and Establishments Act, 1947. The first respondent treated

the same as an appeal u/s 41(2) of the Tamil Nadu Shops and Establishments Act, 1947, hereinafter referred to as the Act in TNSE No.2/89 and

allowed the appeal by his order dated 30-6-1989. The said order is now challenged in this writ petition on the ground that the impugned order is

without jurisdiction.

3. It is stated that the Tamil Nadu Adi Dravidar Housing and Development Corporation Limited is an establishment under the control of the

Government of Tamil Nadu and as such it is exempted u/s 4(1)(c) of the Act The said Corporation is a company incorporated under the

Companies Act, 1956 and there is every control of Government of Tamil Nadu over capital funds, allotment of shares, borrowing, issue of

debentures, appointment and removal of Directors, Fixing remuneration or compensatory allowances for the Directors, appointment of Managing

Directors, approval of proposals and also the overall power to issue directive or instructions to the petitioner's Corporation and as such it is clear

from the above facts that the petitioner's Corporation is subject to the authority or control of the Government of Tamil Nadu. The first respondent

had assumed jurisdiction erroneously as the Act is not applicable to the petitioner's Corporation. Hence, the impugned order passed by the first

respondent is wholly without jurisdiction and liable to be quashed.

4. In the counter affidavit filed by the second respondent, it is stated that he was issued with a charge memo dated 15-2-1988 by the petitioner's

Corporation, alleging certain misconduct and that he has submitted his explanation to the charge memo on 2-3-1988. Thereafter, after conducting

a farce of an enquiry, his services were terminated abruptly. There was no enquiry worth mentioning. His services were terminated on and from

27-7-1988. Against the said order of termination, he preferred an appeal u/s 41(2) of the Act before the Deputy Commissioner of Labour,

Coimbatore, who is the appellate authority nominated. The Deputy Commissioner of Labour, Coimbatore allowed the appeal and set aside the

order of termination. It is further stated that the petitioner's Corporation did not raise the objection with regard to the jurisdiction to entertain his

appeal before the Deputy Commissioner of Labour and it participated in the whole of the proceedings without any demur. The only point taken in

this writ petition is that the petitioner's Corporation is an establishment under the control of the Government of Tamil Nadu and hence it is

exempted u/s 4(1)(c) of the Act. It is further submitted that the question as to the jurisdiction of the appellate authority not having been raised

specifically before the Appellate Authority, the petitioner's Corporation is precluded or estopped from raising the jurisdictional issue before this

Court for the first time in this writ petition. Further the petitioners having participated in the proceedings before the appellate Authority and having

accepted the jurisdiction of the Appellate Authority, it is too late for the petitioners to raise the objection at this stage. Hence, he prayed for the

dismissal of this petition, by contending that the impugned order of the appellate Authority is well made and that the same is not liable to be

interfered with under Article 226 of the Constitution of India.

5. Learned Counsel for the writ petitioners mainly submitted that the fact that

the petitioner's Corporation is under the control of the State

Government and it is exempted u/s 4(1)(c) of the Act is not disputed. The Deputy Commissioner of Labour, Coimbatore, who is the Appellate

Authority u/s 41(2) of the Act has no jurisdiction to entertain the appeal preferred by the second respondent, who is employed in the petitioner's

Corporation and since the question of jurisdiction goes to the very root of the matter, it is open to the petitioners to raise their objection even at this

stage in this writ petition and on that ground alone, the impugned order is liable to be quashed. In this connection, he drew my attention to the

following two decisions, reported in:

1. Gurumurthy v. Additional. Commissioner. For Workmen's Compensation (1987) II M.L.J. 335 and

2. Jesudasan v. Selvaraj (1989) 2 L.W.86.

Learned Counsel for the petitioner submitted that in the decision reported in Gurumurthy v. Addl. Commr. For Workmen's Compensation (1987)

II M.L.J. 335 Nainar Sundaram, J. though accepted the principle held in paragraph 6 of the Judgment, as follows:

Learned Counsel for the second respondent was at pains to draw my attention to very many citations for the propositions that total lack of

jurisdiction cannot be cured by consent or acquiescence and acquiescence in the exercise of jurisdiction by a Tribunal or Court, when it lacks such

jurisdiction cannot bar the party from raising the contention subsequently. There is no need to refer to these citations because we can take it that

the above proposition is well settled and nobody can dispute the said proposition. But this is not the question in issue here. The question is whether

this Court while exercising its highly prerogative writ jurisdiction can omit to take note of the conduct of a party, before it.

Ultimately, the learned judge came to the conclusion that the second respondent cannot be permitted to raise this plea at this belated stage after the

lapse of ten years after so much water has flown over the matter. Learned Counsel for the writ petitioners submitted that the learned judge has

accepted the principle that total lack of jurisdiction cannot be cured by consent or acquiescence in the exercise of jurisdiction by a Tribunal or

Court, when it lacks such jurisdiction cannot bar the party from raising the contention subsequently. But in the facts and circumstances of that case,

since it was raised after a lapse of ten years and much water has flown over the matter, it was not allowed to be raised. In the subsequent decision

of the Bench reported in *Jesudasan v. Selvaraj* (1989) 2 L.W. 86 wherein Nainar Sundaram, J. was also a party, it was held as follows:

A ground purely one of law on the admitted facts of the case can be allowed to be-raised for the first time before this Court in appropriate cases,

while exercising its highly prerogative writ jurisdiction, should not allow a party to raise a new ground, not raised earlier before the forums below.

The objection, in our view, is one going to the very root of the matter and vitiates the section of the private School. We cannot shut our eyes to the

legal lacuna and reject the case of the headmaster inspite of it. This Court should not disengage itself from consideration of a legal point emerging

on admitted facts and decline to exercise its jurisdiction, if the facts of the case do warrant the same.

The observation of the Division Bench of this Court is that when the question of jurisdiction goes to the very root of the matter, then, on the

question of law, this Court can certainly allow the party to raise the same in the writ petition and then quash the order passed by the Deputy

Commissioner of Labour, who has no jurisdiction.

6. On the other hand, learned Counsel appearing for the respondents relied on the decision rendered by Nainar Sundaram, J in *Gurumurthy v.*

Addl. Commr. for Workmen's Compensation (1987) II M.L.J. 335 and submitted that in the present case since the petitioners failed to raise the

question of jurisdiction before the appellate authority, it is not open to them to raise it before this Court and that documents have not been

produced to show that the State Government is having control over the petitioner's Corporation and that it is exempted u/s 4(1)(c) of the Act.

7. For appreciating the contentions put forward by both parties, it is worthwhile to quote the relevant provisions of the Tamil Nadu Shops and

Establishments Act, 1947. u/s 4(1)(c) of the Act, it is provided as follows:

Establishments under the Central and (State) Governments, local authorities, the Reserve Bank of India, (a railway administration-operating any

railway as defined in Clause (20) of Article 366 of the Constitution) and cantonment authorities.

To find out whether the establishment involved in this writ petition viz., Tamil

Nadu Adi Dravidar Housing and Development Corporation Limited

comes under the definition of Section 4(1)(c) of the Act, it is seen from the affidavit filed by one Dr. R. Prabhakara Rao, the Managing Director of

the Tamil Nadu Adi Dravidar Housing and Development Corporation Limited that the said Corporation is an establishment under the control of the

Government of Tamil Nadu. Further it is seen that the Company is incorporated under the Companies Act, 1956. There is every control of the

Government of Tamil Nadu over capital funds, allotment of shares, borrowing, issue of debentures, appointment and removal of Directors, fixing

remuneration or compensatory allowance for the Directors, appointment of Managing Directors, approval of proposals and also the overall power

to issue directive or instructions to the petitioner's Corporation. It is also finally stated that the Corporation is subject to the authority and control of

the Government of Tamil Nadu.

8. In the counter affidavit filed by the second respondent, those averments are not disputed. But it is only stated that the petitioner-Corporation did

not raise the objection with regard to jurisdiction to entertain the appeal filed by the Deputy Commissioner of Labour, Coimbatore and that it

participated in whole of the proceedings without any demur to that effect On the other hand, the only point taken in the writ petition is that the

petitioner-Corporation is under the control of the Government of Tamil Nadu and it is exempted from the provisions u/s 4(1)(c) of the Act. In the

counter affidavit it is further stated that since the question as to the jurisdiction of the Appellate Authority has not been raised before the Appellate

Authority, the petitioner-Corporation is precluded from raising the jurisdictional issue before this Court for the first time. On the face of the affidavit

filed by the Managing Director of the petitioner-Corporation which has not been challenged that the non-production of the records could not be a

ground to refer the contention of the petitioner-Corporation that it is an establishment under the control of the Government of Tamil Nadu, as there

is nothing to rebut the sworn statement of the Managing Director, who is an I.A.S. Officer.

9. The attention of this Court was also drawn by learned Counsel for petitioner to the decisions reported in Damodaran, P.C. v. The Regional

Manager, Food Corporation of India 1986 W L.R.322 and in Raman, C.V. v. The

Management of Bank of India 1985 WL.R. 360. In

Damodaran, P.C. v. The Regional Manager, Food Corporation of India 1986 WL.R.322, the Food Corporation of India challenged the

jurisdiction of the Appellate Authority in entertaining the appeal u/s 41 of the Act on the ground that having regard to the provisions in Section 4(1)

(c) of the Act, the provision for appeal in Section 41 of the Act could not be invoked, in view of the fact that the Food Corporation of India is an

establishment of the Central Government. The Division Bench of this Court, after eliciting the provisions of Section 4(1)(c) of the Act, observed as

follows:

So far as the Food Corporation of India is concerned, if it is shown that it is an establishment under the Central Government, then it is clear that

having regard to the provisions in Section 4(1)(c) of the Act, the provisions for appeal in Section 41 of the Act would not be invoked by the

appellant herein because the provisions of the Act themselves are inapplicable to the establishment of the Food Corporation of India. The

constitution and the nature of the establishment of the Food Corporation of India, has been considered by the Supreme Court in Workmen of The

Food Corporation of India Vs. Food Corporation of India, and it was held that the Food Corporation of India is an instrumentality of the State

within the expression "other authority" in Article 12. In paragraph 16 of the judgment, the Supreme Court has referred to the following

circumstances to come to the conclusion that the Food Corporation of India is an instrumentality of the State:

1. Section 5 provides for the initial capital and for acquiring power to increase the capital in such manner as the Central - Government or the State

Government as the case may be, may determine, initial capital being provided by Central Government.

2. The management of the Corporation is to vest in a Board of Directors and the Board of Directors in discharging its functions shall act amongst

others according to the instructions on questions of policy as may be given by the Central Government.

3. The annual net profits of the Food Corporation of India has to be paid to the Central Government.

4. Every Food Corporation has to submit to the Central Government an annual

report of its working and affairs and the same has to be laid before the House of Parliament.

The above circumstances will clearly indicate that the Food Corporation of India is completely under the control of the Central Government. Any

instruction on questions of policy issued by the Central Government are statutorily required to be implemented by the Board of Directors, and even

the annual net profit of the Food Corporation of India has to be paid to the Central Government. If the affairs of the Corporation are thus wholly

controlled by the Central Government, it is clear that the establishment of the Food Corporation of India will be under the Central Government. It

is necessary to point out that Clause (c) of Section 4(1) of the Act uses the phraseology "establishment under the Central and State Government".

The phraseology is not "establishment of the Central Government and the State Government". By the use of the word "under" the scope of Clause

(e) or Section 4(1) of the Act is made much wider, and if it is shown that the Central Government or the State Government exercises control over

an establishment, then such an establishment will be said to be under the Central Government or the State Government, as the case may be.

The scope of Section 4(1)(c) of the Act was recently considered by a Division Bench of this Court in C.V. Jaman and Ors. v. Bank of India

Southern Region. 1985 W L.R. 360. The Division Bench held that the control of the Government of India over the nationalised Banks is enormous

and hence such banks are exempted from the Tamil Nadu Shops and Establishments Act, 1947. In that decision, it was argued before the Division

Bench that Section 4(1)(c) of the Act contemplates an establishment which is a department of the Government. This argument was rejected with

the observation that "if really that was the intention of the law makers, nothing would have been easier than to state a department of Government,

u/s 4(1)(c) of the Shops Act." Dealing with the meaning of the word "under" the Division Bench took the view that the meaning of the word

"under" was subject to the "authority or control of and the Bench further held that if the nationalised Bank is subject to the authority or control of

the Government of India which is the meaning of the word "under" the principle of deep and pervasive control may be applied in considering

Section 4(1)(c) of the Shops Act.

Having regard to the nature and establishment of the Food Corporation of India as indicated above, we are inclined to take the view that the establishment of the Food Corporation of India is under the Central Government and will therefore, be exempted from the provisions of the Act in view of the provision of Section 4(1)(c) of the Act. Consequently, the appeal provision in Section 41(2) of the Act could not have been invoked by the appellant herein and the appellate authority has no jurisdiction to deal with the validity of the termination order passed against the appellant herein.

In the decision reported in *Raman, C.V. v. The Management of Bank of India* 1985 Writ L.R.360 it was held that the State Bank of India is

subject to the authority and control of the Government of India and it is exempted under the application of the Tamil Nadu Shops and

Establishments Act, 1947. Applying the said ratio to the facts of this case also and in view of the uncontroverted averments made, I have no

hesitation in holding that the petitioner-Corporation is an establishment under the control of the Government of Tamil Nadu and as such it is

exempted u/s 4(1)(c) of the Act; In the decision reported in *Gurumurthy v. Additional Commissioner for Workmen's Compensation* (1987) II

M.L.J. 335 as extracted in the narration part of this judgment, learned judge has accepted the proposition that the lack of jurisdiction cannot be

cured by consent or acquiescence and acquiescence in the exercise of jurisdiction by a Court, when it lacks such jurisdiction cannot bar the party

from raising the contention subsequently and that the said proposition is well settled and nobody can dispute the same. But on the facts of the said

case, learned judge held that the second respondent cannot be permitted to raise this plea at the belated stage after the lapse of ten years after so

much water has flown over the matter. But in the instant case, it is to be noted that as against the order of termination, the second respondent

preferred an appeal before the Board, but he was unsuccessful and against the order of the Board, he filed a revision before the Government and

there also he was unsuccessful; Thereafter, he preferred an appeal u/s 41 of the Act before the appellate authority and the appellate authority

allowed the said appeal on the ground of violation of principles of natural justice without going into the merits of the case. Challenging the very

same order, this writ petition is filed on the ground of want of jurisdiction by the appellate authority and even though the ratio laid down is

applicable to the facts of this case, the conclusion arrived at on the facts of the case cannot be involved in favour of the second respondent in this

writ petition. Learned Advocate for petitioner also drew my attention to the decision of a Division Bench of this Court in *Jesudan, R. v. K. Selvaraj*

(1989) 2 L.W. 86 wherein Nainar Sundaram, J. who was a party to the Bench has held that a ground purely one of law on the admitted facts of

the case can be allowed to be raised for the first time before this Court in appropriate cases, though the normal rule is that this Court, while

exercising its highly prerogative writ jurisdiction, should not allow a party to raise a ground, not raised earlier before the forums below. Learned

Judge further has observed that the objection is one going to the very root of the matter and vitiates the action of the private School. Learned

Judge has also observed that they cannot shut their eyes to the legal lacuna and reject the case of the Headmaster inspite of it and that this Court

should not disengage itself from consideration of the legal point emerging on admitted facts and decline to exercise its jurisdiction, if the facts of the

case do warrant the same.

10. In view of the above finding on the question of jurisdiction and since the objection is one which goes to the very root of the matter and the

appeal itself is incompetent u/s 41 of the Act, the appellate authority has no jurisdiction to entertain the same. Certainly, the impugned order passed

by the Deputy Commissioner of Labour, who is the appellate authority u/s 41 of the Act is one, which is passed without jurisdiction.

11. The mere fact that the petitioner-Corporation had failed to raise the question of jurisdiction before the Appellate Authority in the circumstances

of the case, cannot bar the petitioner-Corporation from raising the same in this writ petition, for the reasons stated in the earlier paragraphs.

12. In the result, this writ petition is allowed and the impugned order passed by the first respondent is hereby quashed. However, in the facts and

circumstances of the case, there will be no order as to costs. However, on the representation made by the learned Counsel it is open to the second

respondent to agitate the order of dismissal before the Industrial Tribunal if so advised.