

(2000) 12 MAD CK 0067

In the Madras High Court

Case No : W.A. No's. 109 and 110 of 1989 and W.P. No. 14659 of 1989

The Workmen of Nilgiris Co-operative Marketing Society
Limited and another

APPELLANT

Vs

State of Tamil Nadu and 5 others

RESPONDENT

Date of Decision : 12-12-2000

Acts Referred:

Constitution of India, 1950 — Article 226

Contract Labour (Regulation and Abolition) Act, 1970 — Section 10, 103, 12, 7

Industrial Disputes Act, 1947 — Section 10, 2, 25

Citation : (2001) 1 LLJ 1095

Hon'ble Judges : V.S. Sirpurkar, J;M. Chockalingam, J

Bench : Division Bench

Advocate : Mr. N.G.R. Prasadfor M/s. Row and Reddy and R. Vaigai, for the Appellant; Mr. M. Rathinam, Government Advocate, Mr. A.L. Somayaji, for Mr. K.V. Venugopal, for the Respondent

Final Decision : Dismissed

Judgement

M. Chockalingam, J.—This judgment shall govern writ appeal Nos. 109 and 110 of 1989 and writ petition No.14659 of 1989.

2. The above two writ appeals have arisen from a common order rendered by the learned single Judge dated 12.1.1989 in W.P.No.9333 and

9334 of 1985 filed by the appellant herein. The writ petition W.P.No.14659 of 1989 has arisen from the Award of the Labour Court made in

I.D.No. 53 of 1984 dated 5.9.1989.

3. The facts and circumstances which led to the filing of the writ appeals and the writ petition can be stated as follows:

The Nilgiris Co-operative Marketing Society has its Head Office at Udthagamandalam and Branch office at Mettupalayam and other Offices in the

Nilgiris District. The said Society was constituted for the benefit of about 20000 vegetable growers and merchants who were the members. The potatoes and other vegetables of the said members were used to be brought to the Society's yard by the growers or their representatives in lorries hired by them. The workmen who were originally 407 in number consisting of both men and woman were doing the work of loading, unloading, grading and sorting. The arrival of potatoes and other vegetables would be high and low according to the season. When the lorries arrived in the yard of the Society, the workers who were available at that time out of the said 407 persons, were used for the purpose of loading, unloading, etc. through 19 group leaders called Contractors. Weighing and stocking facilities were available in the godown. After the grading process is over, the Society arranged for the auction of the produce. Following the auction sale, the said persons were used for loading the potatoes and vegetables in the lorries through the group leaders, The said workers were paid on piece rate basis through the said contractors. The amounts so paid were recovered from the members by adjustment.

4. Not satisfied with the conditions of service, the 407 workers who were members of the Union putforth a charter of demands on the Society on 19.4.82 for permanent status, security of employment, ESI benefits, fixation of working hours and overtime wages, etc. Since the Society did not pay heed to the demands of the Union, the workers finally decided to go on strike with effect from 24.9.1982 by giving a strike notice. During the conciliation before the Labour officer, Udhagamandalam, the Society agreed to pay festival advance, but did not do so, which resulted the workers to go on strike. The Society published in local newspapers Malai Murasu and Daily Thanthi giving notice of closure. No retrenchment compensation was given to the workers as per the provisions of the Industrial Disputes Act, During the conciliation proceedings, the Union approached the Hon''ble Supreme Court to implement various labour legislations. Then a direction was given by the Apex Court to the Conciliation Officer to expedite the conciliation proceedings. But the conciliation proceedings failed. Then the matter was referred by the Government of Tamil Nadu in its order in G.O.Ms. No. 1085 dated 19.5.84 of the Labour Department for adjudication of the following issues:

(i) whether the non-employment of the workmen referred in the reference is justified?

(ii) To what relief ?.

5. Following the same, a claim statement was filed by the Union, wherein they prayed the Tribunal to hold that the non employment of 73 porters

and 335 graders of the Society was not justified and direct the Society to give there employment with back wages and other benefits. A detailed

counter statement was filed by the Society stating that the alleged porters and graders were not workmen of the society and hence no valid

industrial dispute can be raised against the Society, 3 witnesses were examined on the side of the Union while one witness was examined on the

side of the Society. Exs.W1 to W19 and Exs, M1 to M26 were marked by the parties respectively. The Industrial Tribunal after considering the

materials and the rival submissions, passed an Award rejecting the reference. Challenging the said Award of the Industrial Tribunal, the Union has

filed W.P.No. 14659 of 1989.

6. During the pendency of the said I. D.No 53 of 1984, the Nilgiris Co-operative Marketing Society Thozhilalar Sangam, Ooty (Union) filed two

writ petitions in W.P.Nos.9333 and 9334 of 1985. In W.P.No.9333 of 1985, the appellant sought for a relief of writ of mandamus directing the

first respondent, State of Tamil Nadu and the second respondent. State Labour Advisory Committee to forbear the employment of contract labour

in loading, unloading, grading, packing and other allied operations in the third respondent. Nilgiris Co-operative Marketing Society Ltd., under S.

10 of the Contract Labour (Regulation and Abolition) Act, 1970, while the appellant prayed in W.P. No.9334 of 1985 for an issue of writ of

mandamus directing the Marketing Society not to engage contract labour for the aforesaid work on the ground that the same would be contrary to

Ss. 25-D and T of Industrial Disputes Act and Ss 7 and 12 of the Contract Labour (Regulation and Abolition) Act 1970.

7. Contending that the Society was making an attempt to terminate the services of the members of the Union and introduce contract labour system

by inviting tenders from contractors to supply labour, the Union sought for as interim injunction in W.M.P. Nos.13983 and 13984 of 1985 In the

respective writ petitions, which was contested by the society stating that since

the question whether the 407 members of the Union were direct employees of the Society or whether they were employees under the contractors was pending issue in I.D.No.53 of 1984, an order of injunction should not be granted.

8. On 3.9.1985, His Lordship Nainar Sundaram,.J., as he then was, passed an interim order in W.M.P.No. 13983 of 1985 only as follows :

I direct the third respondent not to entrust any work, to the contractors for the time being until further orders.

9. On 5.9.1985, Justice Sathiadev, as he then was, passed an order in WMPS Nos.13983 and 13984 of 1985 as follows:

As an interim arrangement till final orders are passed next week, the procedure which was being followed and as incorporated in paragraph 5(n)

of the counter affidavit filed before the industrial Tribunal, Madras in I.D. No. 53 of 1984 to be followed by the third respondent Society.

10. In paragraph 5 (n) of the counter affidavit filed in I.D.No.53 of 1994, it is stated as follows:

""For doing the various items of work in the marketing yards, the services of certain third parties are made available to the members. They are

always-available in the yards and the member or the merchant engages anyone of them who is available and whose workers are free of

engagement, payment for the work is to be made by the members or merchants to the contractor. But because the members do not ordinarily have

money to pay for this item of work the Society makes the payment in the shape of advance at the instance of the members and on behalf of the

members and recovers the amount from the members. The various items of work are supervised only by the members or the merchants and not by

the Society or any of its employees. In his own interest, a member stays in the yard until his produce is auctioned and weighment is made and

recorded.

11. On 1.11.1985, Justice T. Sathiadev, as he then was, after hearing the rival submissions, passed an order in both the above W.M.Ps. dismissing

them for interim relief. During the pendency of those applications, the Society produced a Certificate of Registration issued by the Assistant

Commissioner of Labour, Coimbatore in 1982 under S. 7 of the Contract Labour (Regulation and Abolition) Act, 1970. The Court vacated the

interim orders, It was observed as follows:

These references pertain to the claim made by the Society that it had been engaging contract labour through contractors whose names are found in

the registration certificate. This stand is acceptable only because of the certificate. This is only a prima facie conclusion arrived at and this would

not prevent a correct determination being made in any other forum whatsoever on the merits of the matter.

12. An appeal was filed from the final orders made in WMP No. 13983 of 1985, in W.A. No.992 of 1985, which was also dismissed on

5.11.1985. The Union preferred Civil Appeal No.5381 of 1985 in the Apex Court, wherein the Apex Court though granted Special Leave,

ordered on 4.12.1985 that pending disposal of the writ petition in the High Court, there will be an interim arrangement of the lines mentioned in

paragraph 5(n) of the counter affidavit filed before the Industrial Tribunal in I.D.No.53 of 1984 and which was adopted as an Interim arrangement

by the High court In its interim order dated 5.9.1985.

13. Contending that the order of the Apex Court was not implemented by the Society, a contempt petition was filed in Contempt Petition No.

10530 of 1986 in Civil Appeal No. 5381 of 1985. Though a counter was filed by the Society, an assurance was given by the learned counsel

appearing for the Society. Following the same, the Apex Court passed an order on 26.9.1986 as follows:

On behalf of the Marketing Society, Dr.Y.S, Chitale, learned Counsel assures us that hereafter workmen will not be permitted to be employed by

contractors to work within the yard of the Society. He also assures us that the 407 workers previously employed may come back and work; in the

yard without any objection. It is open to any worker to go and seek employment, but contractors will be excluded. The case now pending before

Industrial Tribunal may be disposed of expeditiously. Civil Misc. Petition is disposed of accordingly.

14. Alleging that despite the orders of the Apex Court as above, the Society did not obey the same, the appellant filed in this Court W.M.P.Nos.

19310 and 19311 of 1986 in the writ petitions, seeding for a direction to the Society to give employment to the 407 workers, and to pay them

directly and a direction to the Society not to employ the outsiders without giving

full employment opportunities to the 407 workers. His Lordship

Mohan, J, as he then was, passed an order in these WMPs on 15.12.1986 as follows:

The third respondent shall give employment directly to all the 407 workers, if, after providing employment to these 407 workers, any more hands

are required, then the management is free to give employment to such of those persons. The Collector of Coimbatore will see to it that the order of

the Supreme Court extracted above is implemented in its true spirit.

15. Aggrieved by the said interim order, the Society filed W.A.No.1372 of 1986 wherein an order was passed on 23.12.1986 by the First Bench

of this Court on the following terms:

Apparently it appears to us that the order made by the learned single Judge runs counter to the order of the Supreme Court dated 4.12.1985.

Therefore, the order of the learned single Judge is stayed, since the order which is in controversy is that of the Supreme Court, this is eminently a fit

case where, the parties are at liberty to get necessary clarification from the Supreme Court, Till the order is clarified by the Supreme Court, if the

parties approach me Supreme Court for this, the appellant will implement the order dated 4.12.1985 by way of an interim arrangement.

16. C.M.P.No.1128 of 1987 was filed by the union before the Apex Court for clarification wherein an order was passed on 22.1.1987 as follows:

""Issue Notice. In the meanwhile the direction given by the learned single Judge, will be given effect.

Thus, the order of the learned single Judge dated 15.12.1986 was restored. While disposing of the C.M.P.No.1128 of 1987, for clarification, the

Apex Court passed an order on 13.4.1987 as follows:

The interim arrangement will continue till disposal of the writ petition in the High Court. Meanwhile the trial of the industrial dispute will be stayed.

No order on the application for impleading party. All the CMPS are disposed of accordingly.

17. The petitioner in W.P.No.9334 of 1985 filed W.M.P. No.11751 of 1987 seeking a direction to the Society to pay the wages in conformity

with the procedures laid down in para 5(N) of the counter statement filed in I.D.No.53 of 1984 by the respondent society and on par with the

potato Chamber of Commerce wages pending W.P.No.9334 of 1985, wherein

Justice Venkataswami, as he then was, passed an order on 29.8.1988 on the following terms;

In the result, the 3rd respondent is directed to give employment directly to all the 407 workers and pay the wages directly to them as per the order of the Supreme Court dated 4.12.1988,. This petition is ordered accordingly.

18. Aggrieved by this interim order, the Society filed an appeal in W.A.No.1261 of 1988. The Division Bench consisting of Their Lordships

Nainar Sundaram and Thanikachalam, JJ., as they then were, while dismissing the writ appeal has issued the following direction.

To give quietus to the controversy in the writ petition, we direct that W.P.No. 9334 of 1985 along with the connected writ petition viz. WP No.

9333 of 1985 be listed for final hearing on 26.10.1988 at the top of the list before the learned single Judge, who hears the date-fixed writ petitions.

19. The learned single Judge (Justice S. Ramalingam, as he then was) took up both the writ petitions, heard the rival submissions, and dismissed

the writ petitions by a common order, as stated above, which is now challenged in these proceedings. While dismissing the writ petitions, the

learned Judge has observed as follows;

The writ petitions are liable to be dismissed. However, having regard to the fact that the petitioner has made an application to the State

Government as early as on 9.8.1985 as seen from paragraph 13 of the affidavit to prohibit the employment of contract labour u/s 10 of the Act for

loading, unloading and other activities of the 3rd respondent society, a reference to the counter affidavit filed by the government is necessary,

paragraphs 12 and 13 of the counter affidavit are extracted:

I submit that the averments in paragraph 13 are not correct. The Union has applied to the State Advisory Contract Labour Board to issue

directions to the management prohibiting the employment of contract labour under Sec. 10 of the Act. I submit that after consultation with State

Advisory Contract Labour Board, the Government will take a decision in this matter.

This counter affidavit has been sworn to on 5th December, 1986. Even though there was no order pending these W.Ps, prohibiting the

Government from passing orders under Sec, 10 of the Act, the Government has not taken any action in spite of the averments contained in

paragraphs 12 and 13 of the counter affidavits. It is for the Government to pass orders under sec. 10 of the Act as expeditiously as possible, one way or other.

20. Mr.N.G.R.Prasad, learned Counsel appearing for the appellant as well as the petitioner would urge that the members of the Union have been

working for long number of years, but they were not given permanent status; that their age is very low; that the number of benefits like provident

fund, ESI Act, maternity benefit, bonus and drinking water and toilet facilities were not given to them that the workers were doing loading and

unloading, . grading, packing and stitching and other connected operations which work was an integral part of the business of the Society; that

when the Society wanted to introduce the contract labour system and when there was only direct labour system, the petitioner/appellant proceeded

to file the Writ Petitions Nos.9333 and 9334/85, seeking a writ of mandamus directing the State, the Labour. Department and Labour Advisory

Committee to prohibit the employment of the contract labour in the Society under S. 10 of the Contract Labour Act and for a mandamus directing

the Society not to engage the contract labour for loading, unloading, grading, etc., as it is contrary to S. 25(D) and 25(T) of the Industrial Disputes

Act and Sections 7 and 12 of the Contract Labour (Regulation and Abolition) Act, 1970 r/w relevant rules; that the Society gave an assurance

before the Apex Court on 26.9.1986 in Contempt Petition 10530 of 1986 to employ the petitioner therein directly and to exclude any contractors;

that the Society should not be allowed to employ contract labour any more and should have prohibited it from introducing any contract labour

system; that the learned single Judge should have directed the concerned authorities to pass orders according to S. 10 of the Contract Labour

(Regulation and Abolition) Act, 1970; that the order dated 15.12.1986 of the Hon"ble Justice Mohan, as he then was, was confirmed by the

Supreme Court by which the direct employment was unquestionably established; that the Society should not be allowed to continue the contract

labour system; that the order dated 29.8.88 of the Hon"ble Justice Venkataswami, as he then was, was confirmed on 11.10.88 by the Division

Bench by which labour was directed to be employed and paid wages directly by the Society and hence the learned single Judge should have issued the writ of mandamus as prayed for.

21. The learned counsel would further add that if all the above orders were to be read only as interim orders, it would only enable the management

to exploit the workers by engaging contract labour; that once the direct labour system was established, the employer should not be allowed to

revert the same into one contract labour system; that even on the date of the writ petitions, the Society was directly employing the workers

represented by the union; that the society has well established the direct employment of the workers in view of the case filed by the Society in

O.S.No. 2293 of 1993, the agreement entered into between them and the conciliation officer on 20.10.82, the memo dated 27.10.82, issued by

the Society to the Godown Keepers to supervise and control the loading and grading workers and the averments in the counter statement of the

society in I.D.No.53 of 1984; that the certificate of registration was a mere devise to defeat the rights of the workers; that on perusal of the

affidavit filed by all the alleged contractors that they were really not contractors, but were only workers, which was borne out by the documents

filed by the society itself, the learned single Judge has observed that the Society cannot be precluded from contending that it was not a principal

employer on the ground that there cannot be any estoppel against the statute and the question can be decided only in the proceedings before the

Tribunal, which was erroneous; that the learned single Judge should have held that the Society could not say that the merchants and growers were

the employers; that the bye-laws of the Society, the Office order dated 22.9.63 and circumstances of the case would indicate clearly that the

workers were employed by the Society and not by the merchants and growers.

22. The further contention of the appellant/petitioner's side is that a reading of the interim order made in Contempt petition No.10530 of 1986 in

Civil Appeal No. 5381 of 1985 would clearly indicate that only on the assurance of the learned Counsel Dr.Y.S. Chitale appearing for the Society

that thereafter the workmen will not be permitted to be employed by the contractor to work within the yard of the Society and that the 407

workers previously employed may go back and work in the yard without any

objection and it was open to any worker to go and seek employment but contractors would be excluded, an interim order was passed. Hence the Industrial Tribunal should have passed an Award in view of the argument that they were directly employed by the Society and that they were not employed by the contractors and that in view of the assurance and the interim orders of the Supreme Court, it has to be held that the workers of the Union were directly employed by the Society and their status has got to be regularised as workers of the Society entitled to all the benefits available to them in law.

23. The above contention is seriously opposed to by the learned Senior counsel for the Society Mr. A.L. Somayaji stating, that the said order by the Supreme Court was only an interim order which could have the force till the disposal of the industrial dispute before the tribunal and that the Industrial Tribunal has held that there was no employer and employee relationship between the Society and the workers.

24. Arguing for the third respondent/Society, the learned senior counsel would contend that the porters and graders whose names were given in the list were not work-men as defined under the Industrial Disputes Act and hence no valid Industrial dispute can be raised against the Society that they appear to be under the employment of certain contractors whose services are made available to the members of the Society for doing the abovementioned work in the marketing yards; that there was no contract of employment between the Society and these workers; that they were neither employed by the respondent/Society nor paid by the Society; that the said society is a Co-operative Society not organised with any profit motive but only with a view to help the small agriculturists and to protect their interest from the exploitation of the traders.

25. Vehemently attacking the Award of the Industrial Tribunal, the learned counsel for the appellant/petitioner would submit that the Tribunal though found that the arguments put forth by the petitioner's side based on W-7, W-8 W-12 and W-14 had force has wrongly held that there was no employer-employee relationship between the Society and the members; that there was overwhelming documentary evidence pointing to the employer-employee relationship between the Society and the workers; that in the face of such evidence, any other conclusion was totally

unwarranted; that both the control and organisation test enunciated by the judicial pronouncements were more than fully satisfied in the instant case;

that though the Tribunal has correctly followed the decisions of the Apex Court putforth by the petitioner's side, it should have necessarily come to

the conclusion that on the undisputed facts, there was employer-employee relationship; that the Society has issued circulars as found under W-7

and W-8 asking the staff to exercise supervision and control over the graders and porters working in the yard; that the Society was represented as

employer in the conciliation proceedings under the Industrial Disputes Act, 1947, as shown under Ex.W-12, and agreed to pay the festival

advance; that the Society has given a conduct certificate to one Sultan Mohideen, whom the Society claimed was only a contractor or third party;

that the 19 persons whose names find a place in Ex.W.10 as licencees or contractors never applied for any contract with the Society, and their

names find a place in the list of 407 workers mentioned in the order of reference; that the so-called group leaders received wages daily from the

Society and disbursed it to the workers; that the Society earned nearly Rs.40 lacs profit by way of commission by organising the work of grading

and auctioning potatoes and vegetables; that the Tribunal erred in holding that the workers were not the workers of the society because the Society

was selling the products not as owners but as commission agent; that the Tribunal failed to see that even a commission agent could have workers to

do the job; that the Tribunal should have held that the 407 workers were direct labour, as there was no certificate of Registration under the

Contract Labour Act, before 24.8.1982; that the seasonal nature of work as not a relevant factor to decide the relationship of employer-employee

between the Society and the workers and hence the award is liable to be quashed. The learned counsel also referred to the payment of deepavali

advance, supply of dothi, shirt cloth and saree, prior to deepavali by the Society; that the Society issued tokens and badges to the workers; that

there were occasions, in which memos were issued to the workers by the Society on the complaints made by the members; that so many of them

were working there for more than 3 or 4 decades.

26. The learned senior counsel, for the third respondent/Society would state that it is true that memos were issued at the instance of the members,

but no punishments were inflicted at any point of time, and since the society had no authority to do so, the Society cannot take any action against them; that the Society had no control over the workers; that they were at liberty to go and work in various places on the same day; that at no point of time any wage was paid to them; and thus the giving of dothi and saree at the time of deepavali was only a gift made in their favour; that during the period of emergency 150 tokens were given to them on the request of the workers that they wanted the same to show to, the police force during night hours; and that after, the emergency was revoked those tokens were not renewed; and all the above would not indicate anything that there existed any employer-employee relationship; and that the Society is neither running a business nor conducting any manufacturing process where these members of the Union were employed.

27..The learned Counsel for the appellant brought to the notice of the Court the inconsistent stand by putting forth a plea before the High Court

that the workmen were employed by the contractors. But the Society took a plea that the growers and merchants were the employers of those

workers, before the Industrial Tribunal while there did not speak anything about the contractors in the original suit before the District Munsif's

Court, Coimbatore, and would submit that this will also indicate that these workers were directly employed by the Society. This contention of the

appellant's side cannot be accepted for the simple reason that it was for the appellant/petitioner to prove that there existed the relationship of

employer-employee and thus they were workers under the Society. Even assuming that there were inconsistency in the plea of the respondent, it

cannot be a proof of the appellant's case.

28. A careful scrutiny of all the available materials would reveal the following which are in our opinion necessary to settle the controversy between

the union and the society.

29. The Nilgiris Co-operative Marketing Society Ltd., came into existence in the year 1935 in order to protect the small agriculturists and farmers

who were the members therein from the exploitation of the traders. Now the said Society, has a membership of 22000 small farmers and

agriculturists, who produce potato and other vegetables which are highly perishable. The produce viz. potatoes and other vegetables are brought to

the marketing yard of the Society at Mettupalayam by the member farmers or their representatives in lorries. Immediately on the arrival of the produce so brought, they are unloaded, sorted out or graded, weighed and auctioned in the presence of the member farmers or their representatives. After the auction is over, the potato and other vegetable packets were loaded in the lorries. The member farmers, who are the owners of the produce have got a right to confirm by giving consent or decline to sell the produce as per the auction, and they are having right to sell their produce in the succeeding auction. The member of the Society is under no obligation to bring his produce to the Society for sale. He can sell his produce in any other manner he thinks fit. The above work of unloading, unpacking, sorting or grading, weighing, packing and loading is done by the workers, who were available then in the yards.

30. It is pertinent to note that the workers are engaged by the merchant farmers that too through the contractors. The payment for the work done by them is made on piece rate basis only by the contractors and not directly by the society. The contractor after passing a voucher, receives the amount from the Society and distributes the same to the workers in proportion to their work or as understood between him and the workers. Since the member farmers do not have sufficient funds for the above work, the Society makes payment to the contractor at the first instance and make adjustment of the said sum so paid out of the sale proceeds, the Society does not directly either engage the workers or make any payment for the work done by them. If some of the members wish to do the above work, viz. unloading, sorting, grading, etc., the workers cannot stop them from so doing. No attendance register or wage register has ever been maintained for the workers, though the Society has been all along maintaining attendance and wage registers for its regular staff employed therein. The Society at no point of time has fixed the working hours for those workers, and they had no fixed working hours also. The workers are at liberty to go and work anywhere at any time and on any day. as they desire. The Society cannot compel them to do the work on any day or on a particular day. These workers were never appointed by the management of the society. During the heavy season, the contractors engage more number of workers whom they bring outside those 407 workers. Likewise during

lean seasons, the workers can go anywhere and work. The member farmers who arrive at the Society's yard with potato and other vegetables have a right either to engage or not to engage the workers available in the marketing yard of the Society. Thus the Society conduct the auction of the potatoes and other vegetables brought by the member farmers in the marketing yard and hand over the auction sale proceeds to the respective member farmers, after adjusting the advance payment made to the workers through the contractors. The members of the Union who were engaged for unloading, grading, sorting, weighing, packing and loading are neither employed nor paid directly by the Society. The object of the formation of the Society and the work which is actually carried on by the society is only to protect the interest of the small agriculturists from being exploited by the traders.

31. In so far as W.P.No. 9333 of 1985 is concerned, the petitioner/ appellant has prayed for a writ of mandamus directing the first and second

respondents to forbear the employment of contract labour in the Society under S. 10 of the Contract Labour (Regulation and Abolition) Act,

1970. The said statute has vested a power for the Government to be exercised in certain circumstances. It is only for that statutory authority to

decide whether on the facts and circumstances of a given case, such a power has to be exercised. It is doubtful whether the writ jurisdiction of the

High Court can be invoked to issue a mandamus to the Government to exercise that power, since there was no statutory obligation to perform the

duty. But it is a power that is vested to be exercised by the Government in certain circumstances. However, the learned single Judge while

disposing of the said writ petition has observed as follows:

It is for the Government to pass orders under s. 10 of the Act as expeditiously as possible one way or the other.

Though the said writ petition was disposed of on 12.1.89, the Government has not taken any steps whatsoever till this time.

32. In so far as W.P.No.9334 of 1985 is concerned, the petitioner/appellant have prayed for writ of mandamus against the Society not to engage

contract labour. The Government after appraising the facts and circumstances of the case, has to decide whether or not to exercise the power

vested on it, to issue a direction prohibiting the engagement of the contract

labour, and thus a writ of mandamus cannot be issued directly to the first respondent. However, the learned single Judge has pointed out that the question which was to be decided was whether the Society had employed those persons directly or whether they were employed only through contractors and such a question was not free from doubt, and that was a question to be adjudicated and decided on the facts and the materials placed before the Industrial Tribunal in I.D.No.53 of 1984, and thus it was for the appropriate authority to decide the question whether there was direct relationship of employer-employee between the Society and those 407 persons.

33. Though the matter was referred to the industrial Tribunal and taken on file in I. D. No.53 of 1984, final directions were given by the High

Court on 12.1.89 while disposing of both the writ petitions filed by the workmen as follows:

The question that has to be decided is whether the Society has employed these persons directly or whether they were employed only through

contractors and such a question is not free from doubt. This is not a matter to be decided on affidavit alone. This is a matter to be adjudicated

upon and decided on the facts and materials placed before the Industrial Tribunal in I.D.No.53 of 1984. This contention of the respondents has

considerable force. The mere fact that the Society has taken out a registration under the provisions of the Act would not make them the principal

employer if they are not otherwise so. Of course, this will be a relevant fact to be taken note of by the appropriate authority in deciding the question

whether there was direct relationship of employer and employee between the Society and these 407 persons."

34. While disposing of the industrial dispute, the Tribunal in the light of the directions of the High Court, took up the question for decision whether

the petitioner-union has substantiated their case that there is employer and employee relationship between the members of the petitioner- Union

and the respondent-Society.

35. Subsequent to the disposal of those writ petitions in W.P. No.9333 and 9334 of 1989 on 12.1.89, the pending dispute between the parties in

I.D.No.53 of 1984 was taken up for trial, and disposed of as stated above, holding that there did not exist any employer-employee relationship

between the Society and the workers. Thus the decision on the questions involved in the two writ appeals at this stage would not assume any importance. What remains is the disposal of the writ petition W.P.No. 14659 of 1989 by deciding the only question whether the petitioner/appellant were direct employees of the Society or not.

36. In both those writ petitions and Industrial dispute, the case of the appellant was that the 407 members of the Union were directly employed by the Society and they were directly paid by the society for the services rendered by them to the Society and thus there was a relationship of employer and employee between the Society and those members/workers. On the contrary, the Society would urge that they were neither employed nor paid by the Society and thus there was no relationship of employer and employee between the Society and the members of the Union,

37. At the outset, it has to be necessarily stated that the petitioners in the claim statement before the Industrial Tribunal have specifically pleaded that they were engaged by the Society directly and were paid on piece rate basis, as per the specified charges collected from the growers and traders, and nowhere they have stated that they were employed through contractors. Though they were given opportunity to produce sufficient oral and documentary evidence, they have not proved that they were directly employed or paid by the Society. But the available evidence would clearly indicate that there were 19 contractors, who used to engage the workers for unloading, sorting, grading, packing and loading, and pay them wages after receiving a lumpsum from the Society.

38. The contention of the learned counsel for the appellant that it is for the Society to show that there did not exist the employer-- employee relationship between the society and the workers cannot be countenanced. Refuting the said contention, the learned senior counsel appearing for the third respondent-Society would submit that it is for the petitioner to prove the same. We are afraid whether we could accept such a plea because it would be allowing the appellant to shift the onus to the opposite party without discharging the same.

39. In support of the above contention, the learned Senior Counsel for the Society relied on the following decisions. In the decision reported in The

Factory Manager, Cimmco Wagon Factory Vs. Virendra Kumar Sharma and Another, the Supreme Court has held thus;

""Definitely, the Division Bench was not right in raising presumption u/s 103 of the Act in order to say that the respondent was a workman in

relation to an industrial dispute for the purposes of any proceedings under the industrial Disputes Act, 1947. The presumption available under this

section in the first place is rebuttable and secondly, it is available only for the purpose of the said Act. It is also not the case of the respondent that

this presumption was made available in relation to an adjudication of a dispute referred to u/s 10 of the industrial Disputes Act, 1947. Even

otherwise on the material placed on record when it was factually established that the respondent was not a workman, raising a presumption u/s

103 of the Act in his favour was not correct.

40. In the case N.C. John v. Secretary Thodupuzha Taluk Shop and Commercial Establishment Workers Union and others 1973 LIC. 390, the

Kerala High Court has held as follows:

The burden of proof being on the workmen to establish the employer-employee relationship an adverse inference cannot be drawn against the

employer that if he were to produce books of accounts they would have proved employer-employee relationship.

41. It has also been held in the decision reported in Swapan Das Gupta and others v. The First Labour Court of West Bengal and others, 1976

LIC 202 that;

""Where a person asserts that he was a workman of the company and it is denied by the company, it is for him to prove the fact. It is not for the

Company to prove that he was not an employee of the company but of some other person."

42. Whether the contract labour was true, sham, valid and genuine cannot be the subject matter of an Industrial Dispute. This question was raised

and answered by the Supreme Court in the case Gujarat Electricity Board, Thermal Power Station, Ukai Vs. Hind Mazdoor Sabha and Others, .

The said question can be gone into only under those circumstances enumerated in that decision. It has been held in that decision as follows:

As has been pointed out earlier, the order of reference of the dispute to the Tribunal was made by the State Government on the basis of a joint

application for reference u/s 10(2) of the ID Act. The application was duly signed by the present appellant-Board, all the seven contractors

involved in the dispute and by the then Surat Labour Union which had both direct as well as contract labourers, as its members. The respondent.-

union is the successor of the said Surat Labour Union. These facts show two things, viz,, that contrary to the submission made by the learned

counsel, the direct employees of the Board had espoused the cause of the contract labourers, and the appellant Board had also accepted the fact

that the dispute in question was raised and supported also by the said employees. No objection was taken before the Tribunal or the High Court

either to the order of reference or to the adjudication of the dispute by the Tribunal that the dispute was not espoused by the direct employees of

the appellant/Board. This would also show that the fact that the dispute was espoused by the direct employees of the Board was accepted by the

Board and never questioned till this date.

Apart from the fact, therefore, that the Board had signed the joint application for reference and therefore it cannot in an appeal by special leave

under Article 136 of the Constitution for the first time raise the question which is a mixed question of law and fact, we are of the view that even on

facts as they stand it will have to be held that the dispute was in fact espoused by the direct employees of the appellant-Board. We therefore reject

the said contention.

The petitioner/appellant now should not be permitted to widen the scope of reference.

43. It is true that the Hon'ble Apex Court has passed an order only on the assurance of the learned counsel appearing for the Society. But it

should not be forgotten that it was only on interim order passed during the pendency of both the writ petitions filed by the petitioner-union and also

during the pendency of (he industrial dispute ID No.53 of 1984 on the file of the Industrial Tribunal, Madras. As rightly contended by the learned

Senior counsel for the Society, the said interim order was valid and forceful till the final disposal of the industrial dispute and writ petitions.

Needless to say that any interim order passed during the pendency of the main proceedings would have effect and force till the disposal of the main

case and the interim order would be subject to the final order. It is pertinent to

note that the Apex Court While disposing of the abovesaid proceedings has observed as follows;

The case now pending before the Industrial Tribunal may be disposed of expeditiously. Civil Miscellaneous Petition is disposed of accordingly.

This observation of the Supreme Court would clearly indicate that the assurance given by the Society was taken only as an interim measure and

that the said interim order would speak only of the interim arrangement that was to be in force till the disposal of the pending disputes before the

Industrial Tribunal. If it was true that the assurance was given by the Society on an understanding or agreement to continue the workers as directly

employed by and under them, there was no need to indicate the pendency and the expeditious disposal of the industrial dispute.

44. The appellants who now putforth the said contention would have well brought the same to the notice of the industrial Tribunal or the learned

single Judge and would have amended the reliefs already made. But they have not done so. This fact would clearly indicate that what was

understood between the parties at the time of giving the assurance and passing of the interim order was only to purchase peace and give quietus till

final disposal of the dispute before the Industrial Tribunal and hence the contention of the appellant's side that the interim orders of the supreme

Court as shown above has to be given effect to cannot be accepted.

45. In support of his contention that to decide the question whether the relationship of employer and employee subsists between the Society and

the petitioner, the test to be applied was not only control and supervision by the employer, but also the organisational test,, the learned Counsel for

the petitioner/appellant relied on the following decisions.

46. The first case relied on by the petitioner and reported in D.C. Dewan Mohideen Sahib and Sons Vs. The Industrial Tribunal, Madras, cannot

be applied to the facts in the present case. It is true that it was a case where the workmen concerned were the workmen of the independent

contractors; that they were paid on piece rate basis; that no attendance register was kept; and that no fixed hours of work was invoked. The

Supreme Court held that the correct approach in such a case was to consider whether having regard to the nature of the work, there was due

control and supervision by the employer. From the perusal of the said decision, it

could be Seen that though the workers were employed by the contractors, the system was that the management fixed the price of the tobacco and the leaves supplied to the contractors, who took them to their places where the work of rolling was done and gave them to the workmen and the next day, the manufactured beedies were taken by the contractors to the employer-company Having regard to the system and nature of the work, the said decision cannot be applied to the facts in the present case. .

47. In the next decision reported in *Silver Jubilee Tailoring House and others v. Chief Inspector of Shops and Establishments and another*, 1973

(2) LLJ 49, the Supreme Court has held thus;

It is exceedingly doubtful today whether the search for a formula in the nature of a single test to tell a contract of service from a contract for

service will serve any useful purpose. The most that profitably can be done is to examine all the factors that have been referred to in the cases on

the topic. Clearly, not all of these factors would be relevant in all these cases, or have the same weight in all cases. It is equally clear that no magic

formula can be propounded which factors should in any case be treated as determining ones. The plain fact is that in a large number of cases, the

Court can only perform a balancing operation weighting up the factors which point in one direction and balancing them again at those pointing in

the, opposite direction.

Relying on the said decision, the learned counsel for the appellant would submit that the control itself is not always the conclusive; that in many

cases, the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties; that in

the instant case, besides all the tests, a complex test is involved, if the following are satisfied:

- (i) Control;
- (ii) Ownership of the tools;
- (iii) Chance of profit; and
- (iv) Risk of loss.

In that reported case, cloth was given to the workers for stitching after it has been cut and the worker was told how he should stitch it and if he did

not stitch in accordance with the instructions, the employer rejects the work and he generally ask the worker to re-stitch the same and thus it was a

case where the workers were employed in an establishment carrying on the business of production of garments. From the said decision it would be

very clear that the control was not exclusive test and in order to decide the relationship of master and servant between the management and the

workers the Court has to look into all the relevant facts and circumstances. But in the instant case, the society is not carrying on any business or

manufacturing process. Hence the said decision cannot be made applicable to the facts in the present case.

48. In the next decision relied on by the appellant and reported in *Shining Tailors Vs. Industrial Tribunal II, U. P., Lucknow and Others*, the

Supreme Court has held that the right of rejection coupled with the right to refuse the work would certainly establish the master-servant relationship

and both the tests are amply satisfied in the facts of the case. In the instant case, the society has neither exercised the right of rejection nor the

workers ever exercised any right to refuse the work, and thus it is not a case where the said test laid down by the supreme Court can be applied.

49. Equally in the decision reported in *Hussainbhai, Calicut Vs. The Alath Factory Thezhilali Union, Kozhikode and Others*, the Supreme Court

has held thus;

True test may be indicated once again. Where a worker or group of workers labours to produce goods or services and these goods or services

are for the business of another, that other is in fact, the employer. He has economic control over the workers subsistence, skill and continued

employment.

Evidently, neither the Society is producing any goods nor the petitioners are rendering their services for the business of the Society. Hence the said

decision cannot lend any support to the petitioner's case to hold that there existed employer and employee relationship between the Society and

the petitioner/appellant.

50. Similarly the decision reported in *Indian Petrochemicals Corporation Ltd. and another v. Shramik Sena & others*, 1999 (5) J.T. 340 of the

Bombay High Court has no application to the present case for the simple reason that the workmen in that case were workers in a statutory canteen

which was in existence since the inception of the factory and that too managed by a contractor.

51. In the next decision reported in *Parimal Chandra Raha and others v. Life Insurance Corporation of India and others*, the Supreme Court has held thus;

"" (ii) Where, although it is not statutorily obligatory to provide a canteen it is otherwise an obligation on the employer to provide a canteen, the

canteen becomes a part of the establishment and the workers working in the canteen, the employees of the management. The obligation to provide

a canteen has to be distinguished from the obligation to provide facilities to run canteen. The canteen run pursuant to the latter obligation, does not

become a part of the establishment.

From the very reading of the decision, it would be clear that the obligation to provide a canteen is different from the obligation to provide facilities

to run a canteen. The Supreme Court has clearly pointed out that the canteen run pursuant to the latter obligation did not become the part of the

establishment. Here, in the instant case, the Society is being run with the objective of protecting the interest of its members from exploitation,

wherein it is providing the facilities.

52. In the case *Indian Overseas Bank Vs. I.O.B. Staff Canteen Workers' Union and Another*, a co-operative canteen was promoted and

administered with the consent of the management by serving members of the Bank. Staff and it was run within the Bank's premises with the funds,

subsidy and infra-structural facilities provided exclusively by the Bank. This decision cannot be applied to the present facts of the case.

53. In the decision reported in *Dhulia Taluka Sahakari Kharadi Vikri and Prakriya Society and another Vs. Savitraban and others*, it has been

held by the Bombay High Court thus;

Batch of coolies is hired by the Society. It is only such batch which can stack and remove the goods from the godown. The society pays them

their hire charges or wages directly. Although these charges are later recovered from the members, the members have no control over their hiring

and are not responsible to them, for their payment. No coolie other than the coolie hired by the society can enter the godown hired by the society

from warehousing Corporation for either stacking, or removing the goods. The

mere fact that ultimately the charges paid to the coolies are recovered from the members is not sufficient to establish the relationship of an employer and employee, between the members and the coolies. They are hired by and responsible for proper discharge of their work to the society. Society alone is the employer of the coolies and member is not responsible for making the payment of compensation to the coolies. A reading of the above facts would clearly indicate that it was a case where the coolies were hired and paid by the Society directly and those amounts paid as wages were recovered from the members. It was held that society alone was the employer of the coolies. But in the instant case, there is no evidence to indicate that the workers were directly either employed or paid by the society. On the contrary, there is ample evidence to indicate that the workers were employed only through the contractors and wages were also paid only through them. Thus there is nothing to establish the relationship of employer and employee between the Society and the workers.

54. In the case *The Workmen and Others Vs. Hindustan Lever Ltd.*, the substantial question which came up for decision before the Supreme Court was whether there emerged a concluded agreement between the parties and binding on the parties till it was terminated according to law.

We are not addressed to answer any such question as found in that case.

55. In the case reported in *The Management of Indian Bank Vs. The Presiding Officer, Industrial Tribunal (Central), Madras and M.*

Seethalakshmi Ammal, the Division Bench of this court held that the tiny deposit agents of the Indian Bank were workman falling under the definition as found in S. 2(s) of the Industrial Disputes Act, 1947. It is pertinent to note that the management bank as a part of the deposit mobilisation initiated the tiny deposit scheme and under the rules framed by the bank with regard to that scheme, opening of account was to be done only in the presence of an authorised official of the Bank though the collecting agent was permitted to receive deposits from door to door, and thus the tiny deposit agent was undoubtedly engaged in the business of the bank viz. the deposit mobilisation, cut in the instant case, the workers were neither engaged under any scheme of the Society nor engaged in any business of the same.

56. A reading of the decision reported in Secretary Haryana State Electricity Board v. Suresh and others, 1999 (I) LLJ 1006 would reveal that it

is a case where the Supreme Court discussed the legislative intent of the Contract Labour (Regulation and Abolition) Act, 1971. We may hasten to

say that the subject matter to be decided in the writ petition cannot be widened to the question as to the legality or otherwise of the alleged

contract labour in the instant case.

57. The case relied on by the petitioner's side and reported in Chief Conservator of Forests and another, Vs. Jagannath Maruti Kondhare, etc.

etc., can have no application to the present case, since it was a case concerning the casual workman employed in schemes with permanent basic

undertaken by the Forest Department of the State Government, working for 100 to 300 days in each year and being continued for long time.

58. Thus as discussed above, all the decisions relied on by the petitioner/appellant's side do not lend any support/to the appellant's case.

59. The learned senior counsel for the Society relied on the following decisions. In the case Shankar Balaji Waje Vs. State of Maharashtra, , the

supreme Court has held thus;

The concept of employment involves three ingredients (1) employer (2) employee and (3) the contract of employment. The employer is one who

employs, i.e. one who engages the services of other persons. The employee is one who works for another for hire. The employment is the contract

of service between the employer and the employee where-under the employee agrees to serve the employer subject to his control and supervision.

Employment brings in the contract of service between the employer and the employee.

60. It was held in the case Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra, as follows:

..... unless a person is thus employed there can be no question of his being a workman within the definition of the terms as contained in the Act.

The prima facie test for the determination of relationship between master and servant is the existence of the right in the master to supervise and

control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his

work. The nature or extent of control which is requisite to establish the

relationship of employer and employee must necessarily vary from business

to business aid is by its very nature incapable of precise definition. The correct method of approach, therefore would be to consider whether

having regard to the nature of the work there was due control and supervision by the employer.

61. In the decision cited by the respondent's side and reported in Management of Puri Urban Cooperative Bank Vs. Madhusudan Sahu and

Another, , the supreme Court has held thus;

A person engaged by a bank as an appraiser of ornaments, who was required to make himself available when called to weigh and test ornaments

offered to be pledged to the bank to secure loans, is not a " "workman" within the meaning of S. 2(s) of the I.D. Act. The appraiser could be

directed by the bank to appraise quality, purity and value of the ornaments offered for pledging but not the manner in which he shall do it. He was

responsible and accountable for the loss that the bank might suffer due to wrong valuation done by him. However, there was a fair element of

freedom though coupled with responsibility, in the manner in which he could do his work. He was not "employed" as such, so as to establish a

master and servant relationship.

62. In the case State Bank of India and Others Vs. State Bank of India Canteen Employees' Union (Bengal Circle) and Others, , canteens were

run by Local implementation committees at branches of State Bank of India as per the welfare scheme of the Bank. In that case, it was held that

the employees were not employees of the bank, as there was no statutory or contractual obligation or obligation under Sastry award on the bank

to run such canteens. Applying the principles laid down in that decision, it can be held that the petitioner workers were not the employees of the

society, as there was no statutory or contractual obligation on the society to give them employment.

63. The contention of the learned counsel for the appellant/petitioner that the Labour Court while passing the Award under challenge, has not taken

into consideration the evidence, both oral and documentary adduced before them, cannot be countenanced. After careful consideration of the rival

submissions made and the scrutiny of the award under challenge, we are of the opinion that the contentions of the appellant/petitioner do not merit

approval of this Court. The Tribunal has carefully taken stock of all the facts and circumstances properly weighed the oral and documentary

evidence, putforth by both sides and has come to a correct conclusion, after applying the position of law, that the petitioners have not established

the master and servant relationship.

64. A reading of the Award would clearly reveal that the Tribunal has exercised pains to discuss both the oral and documentary evidence adduced

by both sides. As stated in the affidavit filed in support of the present writ petition, the learned Counsel for the petitioner, Mr. N.G.R. Prasad

putforth his arguments mainly on the evidence recorded by the Tribunal. We may hasten to point out that it is not a case where it can be slated that

the evidence was neither considered nor appraised of by the Tribunal. In a recently decided decision reported in Indian Overseas Bank Vs. I.O.B.

Staff Canteen Workers" Union and Another, the Supreme Court has commented heavily on the High Court appreciating the evidence under

Article 226 of the Constitution of India in such matters. Respectfully following the said decision of the Apex Court, we are bound to say that this

Court sitting in the writ jurisdiction cannot and should not make reappraisal of the evidence putforth before the Tribunal. What are all required to

be stated is that the Tribunal only after careful appreciation of the evidence has come to the conclusion that there was no employer-employee

relationship between the Society and the workers, and thus the Award of the Industrial Tribunal is factually correct, legally sound and is not

suffering from any infirmity. There were 407 workers at the time of the. Industrial Dispute in the year 1984. It is an admitted position that about

250 workers are available. But no materials are available, on record regarding the names and age of the workers who are now available. We do

not know how many of the workers, who are available, are in a position to work today.

65. In so far as W.A.No.109 of 1989 is concerned, what are all required to be stated is that the appellants are not entitled to get the relief as

prayed for in the W.P.No.9333 of 1985. However though a direction was issued by the learned single Judge, to the Government to pass orders

under S. 10 of the Act as expeditiously as possible one way or the other, while disposing of the writ petition, the Government has not taken any

steps whatsoever. The learned Government Advocate submitted that steps were not taken since stay was in force. We are of the firm opinion that

it is a fit case where a direction has to be issued to the Government to pass orders Under S. 10 of the Act in any way or the other within a period of

two months herefrom.

66. As far as W.A.No.110 of 1989 is concerned, we do not see any merit in the appeal.

67. Since the petitioner/appellant has not proved the relationship between the society and the workers as one of employer and employee, the

petitioner is not entitled to get the relief as prayed for in W.P.No. 14659 of 1989.

68. In the result, both the writ appeals and the writ petition would fail and they are dismissed with the above direction. No costs. Consequently,

connected CMPs and WMPs, if any, are also dismissed.

V.S. Sirpurkar, J.

The present application is for speaking to the minutes. The same has been filed by the appellant. The basis of this application is the issuance given

by the respondent management that merely because of the dismissal of the above petition, the management will not refuse to give the work to the

members of the appellant union. This application, though not exactly opposed, a counter has been filed on behalf of the respondent management

wherein it is specifically stated in paragraph 4 that even today the workmen are engaged by the second respondent management and there is no

denial of employment by the members. The counter is in the nature of non committing document. It is again tried to be reiterated that the members

of the appellant union are not its workers. That position has already been clarified by us in the judgment. However, since an assurance was given

that merely as the result of the dismissal of their petition before this court, the management will not react adversely against the persons like the

members of the appellant union and would not refuse work on that ground. We record this assurance. Therefore, the following paragraph shall be

added to the judgment:

67-A. During the arguments, the learned senior counsel for the respondent management assured us that as the result of this litigation no adverse

action shall be taken specifically by the management because it was not the task of the society particularly because the members were not their

employees. We record the assurance to this effect that as the result of the dismissal of the petition no specific action of denial of work would be

taken against the members of the appellant union and they would be entitled to work as before in the society.

This petition is ordered accordingly.