

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.04.2015

CORAM

THE HON'BLE MR.JUSTICE D.HARIPARANTHAMAN

W.P.No.12084 of 2015

and M.P.No.1 of 2015

S.G.Manivel

.. Petitioner

Vs

1. The Registrar of Co-operative Societies,
EVR Periyar Road,
Kilpauk, Chennai - 600 010.
2. The Joint Registrar of Co-operative Societies,
Namakkal Region,
2nd Floor, Collectorate,
Namakkal & District.
3. The Deputy Registrar of Co-operative Societies,
Namakkal Circle, R.M.S. Complex,
Trichy Main Road, Namakkal.
4. Co-operative Sub Registrar/
Administrator,
S.336, Nachipatti Primary Agricultural
Co-operative Credit Society Limited,
Nachipatty, Namakkal District.

.. Respondents

PRAYER: This Writ Petition has been filed under Article 226 of Constitution of India, seeking a Writ of Certiorarified Mandamus calling for records on the file of the fourth respondent dated 30.03.2015 and to quash the same and direct the respondents to reinstate the petitioner into service with all consequential service and monetary benefits.

For Petitioner : Mr.R.Chandrasekaran

For Respondents : Mr.D. Venkatachalam G.A.
Assisted by
Mr.R.Bala Ramesh,
Additional Government Pleader

O R D E R

The petitioner sought to question the suspension order issued by the fourth respondent Society.

2. When the matter came up for hearing on 23.04.2015, this Court passed the following order :

"Mr.D.Venkatachalam, learned Government Advocate takes notice for the respondents.

2. The petitioner has sought to question the suspension order dated 30.03.2015 issued by the fourth respondent Co-operative Society.

3. It is well-settled that writ petition as against the Co-operative Society is not maintainable. When it was pointed out, the learned counsel for the petitioner has submitted that the petitioner will be satisfied if a direction is issued to the respondents to pay subsistence allowance.

4. At this juncture, Mr.D.Venkatachalam, learned Government Advocate appearing for the respondents has submitted that the petitioner, being a Secretary, is not entitled to subsistence allowance as per the judgment of a Division Bench of this Court. However, he is not able to produce the copy of the judgment and he seeks time to produce the same.

5. Hence, post this matter on 24.04.2015 at the end of the motion list."

3. Today, the learned Additional Government Pleader produced the order of a Division Bench of this Court in K.Avanasiappan Vs. The Management of Thekkalur Primary Agricultural Co-operative bank, rep. by its President P.Senthilvel and Others, reported in CDJ 2011 MHC 6513 and based on the same, he submitted that the petitioner is not entitled to subsistence allowance.

4. The learned counsel for the petitioner contended that even assuming that as per the judgment, the Act is not applicable to the petitioner, the petitioner is entitled to be paid the subsistence allowance as per Bye-Laws of the Society. Alternatively, he submitted that even if the Bye-Laws are silent on subsistence allowance, the same cannot be deprived, while the employee is asked to face the departmental action and the denial of subsistence allowance amounts to violation of Article 14 and 21 of the Constitution of India.

5. I have considered the submissions made on either side and perused the judgment relied on by the learned Additional Government Pleader.

6. At the outset, I would like to state that the word subsistence itself denotes that the payment is for survival of the employee and his family. Solong as the Society keeps an employee under suspension, the Co-operative Society has an obligation to pay subsistence allowance.

7. It is well-settled that deprival of subsistence allowance is deprival of livelihood and therefore, it is violative of Article 21 of the Constitution.

8. Hence, I am not in agreement with the submission made by the learned Additional Government Pleader that the petitioner is not entitled to subsistence allowance relying on the judgment in K.Avanasiappan Vs. The Management of Thekkalur Primary Agricultural Co-operative bank, rep. by its President P.Senthilvel and Others, reported in CDJ 2011 MHC 6513.

9.1. In the said judgment in K.Avanasiappan's case [CDJ 2011 MHC 6513], the appellant was the Secretary of a Co-operative Bank. He was suspended for certain misconduct and was paid subsistence allowance at the rate of 25% of his wages in terms of the bye-laws.

9.2. He approached the authorities under the Payment of Subsistence Allowance Act for payment of subsistence allowance as per the Act. It was rejected by the authority/Assistant Commissioner of Labour. He questioned the same before the appellate authority/Deputy Commissioner of Labour. The appeal was allowed with a direction to pay the subsistence allowance as per the Act.

9.3. The said order of the appellate authority under the Act was questioned by way of writ petition by the Co-operative Bank. A learned Single Judge allowed the writ petition holding that he was not employee under Section 2(a) of the Act and the remedy is not available to him under the Act.

9.4. The appellant filed writ appeal questioning the order of the learned Single Judge and the writ appeal was dismissed and the order of the learned Single Judge was confirmed and the Division Bench of this Court held that the appellant therein, being the Secretary and not an employee under Section 2(a) of the Payment of Subsistence Allowance Act, 1981, is not entitled to approach the authorities under the Act, namely, Payment of Subsistence Allowance Act, 1981 (hereinafter referred to as 'the Act').

9.5. The judgment in Avaniappan's case was considered in detailed in my judgment dated 07.04.2015 in W.P.No.24625 of 2014 (T.Kirubakaran V. The Deputy Registrar, Co-operative Society, Kanchipuram, Kanchipuram District) and held that the writ petition could be entertained for a direction to pay subsistence allowance in compliance with Article 21 of the Constitution.

10. I am of the considered view that the employees, who are not covered under the Act, could not approach the Authorities under the Act and on the other hand, they could either file an appeal under Section 153 of the Tamil Nadu Co-operative Societies Act, 1983 or they could approach directly this Court under Article 226 of the Constitution of India on the ground that right to life and livelihood is deprived illegally in violation of Article 21 of the Constitution of India.

11. It is also well settled that irrespective of the existence of alternative remedy available to any person, the writ petition is maintainable, if there is violation of fundamental rights. Hence, if Article 21 is violated, then the employee could very well maintain his claim for the subsistence allowance under Article 226 of the Constitution of India.

12. In fact, in an identical situation in the decision in A.ASOKAN V. THE II 558 KUDHIRAICHANDAL PRIMARY AGRICULTURAL CO-OP. BANK LTD., REP. BY ITS SPECIAL OFFICER reported in (2007) 3 MLJ 164, this Court has held that the principle of incorporation shall be applied and that the subsistence allowance could not be denied. That case is relating to a common cadre employee who is governed by G.O.Ms.No.55, Co-operation, Food and Consumer Protection Department dated 24.03.2000. The common cadre employee is not an employee under Section 2(a) of the Tamil Nadu Payment of Subsistence Allowance Act. Similar plea was taken before this Court and the same was negatived by considering the G.O.Ms. No.55 that provides for Subsistence Allowance. It is relevant to extract the regulation under G.O.Ms.55 Co-operation, Food and Consumer Protection Department dated 24.03.2000 that came up for under consideration in that case. Regulation No.29 Sub-Clause (d) reads as follows:

"(i) A cadre employee under suspension shall be entitled to a subsistence allowance as per the payment of Subsistence Allowance Act 1981."

13. Paragraphs Nos.11 to 14 of the above said judgment are extracted hereunder:

"11. But when the Regulation states that as per the provisions of the PSA Act, a cadre employee is entitled for subsistence allowance, can it be extended by saying that even persons, who are not covered by provisions of the PSA Act will be entitled to payment of subsistence allowance as per the Act? Is it a case of a subsequent legislation borrowing or incorporating certain provisions of earlier legislation? These two two questions still looms large.

12. When an earlier Act or certain of its provisions are incorporated become part and parcel of the later Act as if they had been bodily transposed into it. The incorporation of an earlier Act into a later Act is a legislative device adopted for the sake of convenience in order to avoid verbatim reproduction of the provisions of the earlier Act into the later. But this must be distinguished from a referential legislation which merely contains a reference or the citation of the provisions of an earlier statute. In a case where a statute is incorporated, by reference, into a second statute, the repeal of the first statute by a third does not affect the second. The later Act along with the incorporated provisions of the earlier Act constitute an independent legislation which is not modified or repealed by a modification or repeal of the earlier Act. However, wherein later Act there is a mere reference to an earlier Act, the modification, repeal or amendment of the statute that is referred, will also have an effect on the statute in which it is referred. It is equally well settled that the question whether a former statute is merely referred to or cited in a later statute, or whether it is wholly or partially incorporated therein, is a question of construction.

13. In U.P. Avas Evam Vikas Parishad v. Jainul Islam : [1998] 1 SCR 254, the Supreme Court has observed as follows:

"A Subsequent legislation often marks a reference to the earlier legislation so as to make the provisions of the earlier legislation applicable to matters covered by the later legislation. Such a legislation may either be (i) a referential legislation which merely contains a reference to or the citation of the provisions of the earlier statute; or (ii) a legislation by incorporation whereunder the provisions of the earlier legislation to which reference is made are incorporated into the later legislation by reference. If it is a referential legislation the provisions of the earlier legislation to which reference is made in the subsequent legislation would be applicable as it stands on the date of application of such earlier legislation to

matters referred to in the subsequent legislation. In other words, any amendment made in the earlier legislation after the date of enactment of the subsequent legislation would also be applicable. But if it is a legislation by incorporation the rule of construction is that repeal of the earlier statute which is incorporated does not affect operation of the subsequent statute in which it has been incorporated. So also any amendment in the statute which has been so incorporated that is made after the date of incorporation of such statute does not affect the subsequent statute in which it is incorporated and the provisions of the statute which have been incorporated would remain the same as they were at the time of incorporation and the subsequent amendments are not be read in the subsequent legislation."

14. It is seen that G.O.Ms. No.55, Cooperation, Food and Consumer Protection Department dated 24.03.2000 only creates a common cadre service for all the Secretaries of the Primary Agricultural Co-operative Banks. Automatically, such a cadre is not provided under the PSA Act because such a person does not come within the definition of the word 'employee' within the meaning of Section 2(a) of the said Act. Therefore, when the Government frames a statutory regulation in terms of Section 75 of the Tamil Nadu Co-operative Societies Act, it must be aware of the provisions of the PSA Act. Therefore, the reference to the PSA Act under Regulation 29(d) is with a conscious understanding that though the said Act does not apply to the cadre of Secretaries, still the Government wanted to adopt the rates provided under the said Act. Therefore, it is a case of an incorporation of an earlier regulation.

14. Furthermore, the judgment of a Division Bench of this Court in W.A.No.1857 of 2006 dated 21.06.2006 relied on by the learned counsel for the petitioner also makes it very clear that the respondent Society shall not deny the subsistence allowance. Para 1 of the order of the Division Bench of this Court is extracted hereunder:

"... .. The very concept of payment of subsistence allowance to an employee, who is

placed under suspension, is to enable the employee and the members of his family to keep their heart and soul together during the period of suspension. That very concept gets defeated by the act of appellant in not having paid any amount for the period of suspension."

15. Further, I am of the considered view that the action of the fourth respondent in not paying the subsistence allowance is highly arbitrary and amounts to deprivation of livelihood illegally and hence, the same is violative of Article 14 and 21 of the Constitution of India. I am not on the quantum of subsistence Allowance that could be paid. The employee facing suspension cannot be said that no subsistence allowance could be paid to him and such an action is illegal and unconstitutional.

16. The judgment relied on by the learned Additional Government Pleader cannot be applied to the facts of the present case. As stated above, in that case, the appellant was a Secretary of the Co-operative Society and he approached the authority under the Act and his claim was rejected. The Appellate Authority allowed his claim. The order of the Appellate Authority under the Act was challenged before this Court and the learned Single Judge held that the appellant is not an employee under Section 2(a) of the Act and thus allowed the writ petition and the said order is questioned in the Writ Appeal. In the writ appeal, the order of the learned Single Judge was upheld.

17. Accordingly, a direction is issued to the fourth respondent to pay arrears of subsistence allowance from the date of suspension till 31.05.2015 within a period of four weeks from the date of receipt of a copy of this order and shall continue to pay subsistence allowance every month from June 2015 onwards on or before 10th of the succeeding months till the disciplinary proceeding is over and final orders is passed thereon.

18. As far as suspension is concerned, the petitioner is at liberty to approach the revisional authority under the Co-operative Societies Act, if so advised.

19. This writ petition is disposed of in the above terms. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Asst.Registrar

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Sub Asst. Registrar

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To

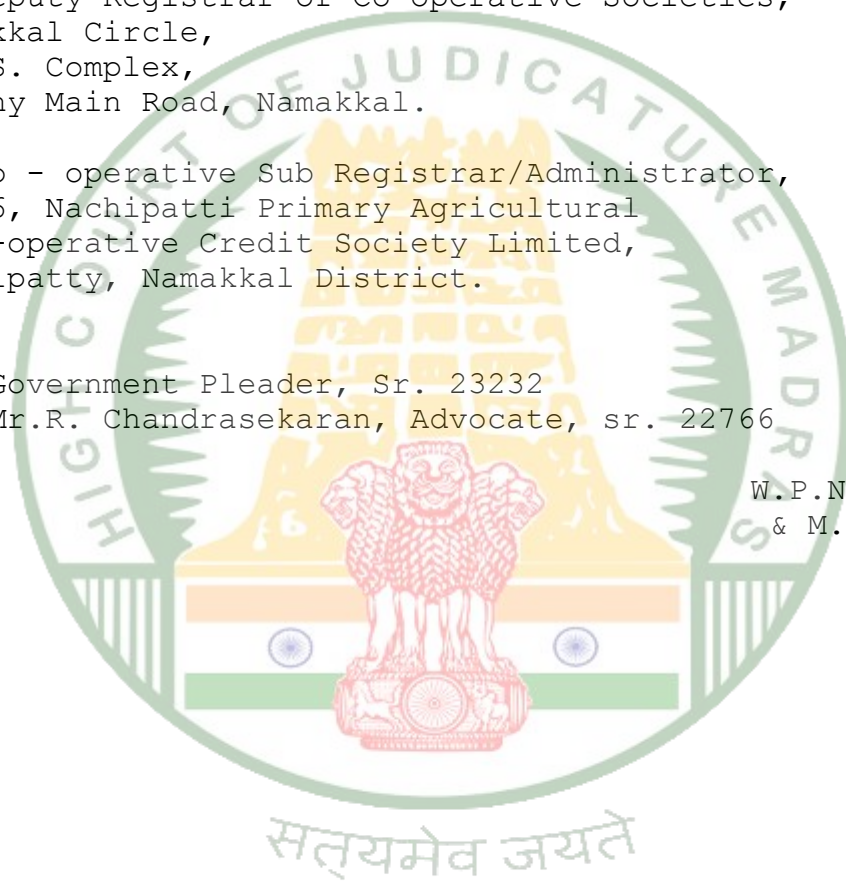
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Nachipatti, Namakkal District.

1 cc to Government Pleader, Sr. 23232

1 cc to Mr.R. Chandrasekaran, Advocate, sr. 22766

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