IN THE HIGH COURT OF JUDICATURE, MADRAS

DATED 07.04.2015

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THE HON'BLE MR.JUSTICE D.HARIPARANTHAMAN

W.P.No.24625 of 2014
&
M.P.No.1 of 2014

T.Kirubakaran .. Petitioner

Vs

1) The Deputy Registrar,
Co-operative Society,
Kanchipuram,
Kanchipuram District.

2. The Pullalur Primary Agricultural
Co-operative Credit Society,
Pullalur Post,
Kanchipuram Taluk & District,
Rep. by its President. .. Respondents

PRAYER: This Writ Petition has been filed under Article 226 of Constitution of India, seeking a Writ of Certiorarified Mandamus calling for the records of the second respondent dated 05.05.2014 and quash the same and direct the respondents to continue to pay subsistence allowance to the petitioner until the order of suspension is revoked.

For Petitioner : Mr.G.Jeremiah
For Respondents : Mr.L.P.Shamuga Sundaram
Special Government Pleader for R1
Mr.R.Bala Ramesh for R2

O R D E R

Heard Mr.G.Jeremiah, learned counsel for the petitioner and Mr.Mr.L.P.Shamuga Sundaram, learned Special Government Pleader for R1 and Mr.R.Bala Ramesh for R2. By consent, the writ petition is taken up for final disposal at the admission stage itself.

2. The petitioner is employed as Secretary in the second respondent Society. He was placed under suspension by an order dated 28.01.2014. The grievance of the petitioner is that he was not paid subsistence allowance so far. Hence, the petitioner made several

requests for subsistence allowance to the second respondent and the same was rejected by the second respondent Society. Further, he made a representation dated 05.05.2014 to grant subsistence allowance during the period of suspension.

3.The second respondent passed the impugned order, refusing to pay the subsistence allowance on the ground that the petitioner is not covered by the Tamil Nadu Payment of Subsistence Allowance Act, 1981 and hence, no Subsistence Allowance could be paid to the petitioner. Therefore, the petitioner is constrained to file this writ petition to quash the above said order dated 05.05.2014 of the second respondent and for a direction to the respondents to pay subsistence allowance to the petitioner until disciplinary proceedings is over.

4.A counter affidavit is filed by the first respondent. Para-7 of the counter affidavit is extracted hereunder:

> "7. I respectfully submit that the Petitioner cannot be termed to be an 'employee' under section 2(a) of the Tamil Nadu Payment of Subsistence Act, 1981. He is not entitled to the payment of subsistence allowance under the said Act. As per the decision of this Hon'ble Court reported in CDJ 2011 MHC 6513 in the case of K.Avanasiappan Vs. The Management of Thekkalur Primary Agricultural Co-operative Bank, the petitioner is not entitled to any relief. Furthermore, the delay in concluding the disciplinary proceedings is only because of the petitioner."

5. The petitioner is placed under suspension from 8.01.2014 and he is not paid subsistence allowance. The reason for denying the subsistence allowance as stated in the order dated 05.05.2014 is as follows:

> ' தமிழ்நாடு கூட்டுறவு சங்க சட்டம் 1983 பிரிவு 2(19)ன்படி சங்க செயலர் அதிகாரி ஆவார். தமிழ்நாடு பிழைப்பூதியம் சட்டம் 1981ன்படி ரூ.3500/= க்கு மேல் அடிப்படைச்சம்பளம் பெறும் மேற்பார்வையாளர் நிலையில் உள்ள பணியாளருக்கு பிழைப்பூதியம் வழங்க தமிழ்நாடு பிழைப்பூதிய சட்டம் 1981ன்படி வழிவகை இல்லை என்பதை தெரிவித்துக் கொள்கிறேன்.'

6.The only reason given by the second respondent is that since the petitioner is not covered by the Tamil Nadu Payment of Subsistence Allowance Act, 1981, as he received more than Rs.3500/- as his basic pay, he is not entitled to Subsistence Allowance.

7.It is the case of the petitioner that as per Special By-Law 31(2) of the second respondent-Co-operative Society, he is entitled to get the Subsistence Allowance. The Special By-Law 31 deals with Suspension. It is his contention that even assuming that the Tamil Nadu Payment of Subsistence Allowance Act, 1981, is not applicable to him, as per the Special By-Law 31(2) of the Society, he is entitled to be paid the rates of subsistence allowance as prescribed under the Tamil Nadu Payment of Subsistence Allowance Act, 1981. Alternatively, he has submitted that the Subsistence Allowance cannot be deprived, while he 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.

8.The second respondent has relied upon the Division Bench Judgment of this Court in K.AVANASIAPPAN V. THE MANAGEMENT OF THEKKALUR PRIMARY AGRICULTURAL CO-OPERATIVE BANK, reported in CDJ 2011 MHC 6513, to sustain the impugned order.

9.I have considered the submissions made on either side. It is relevant to extract the Special By Law 31 of the second respondent-Society:

> 31.SUSPENSION:
> (1) An employee of the society may be placed under suspension from service where:-
> (i) an inquiry into grave charges against him is contemplated or pending: or
> (ii) a complaint against him of any criminal offence is under investigation or trial and if such suspension is necessary in the public interest or in the interest of the society:
> Provided that an employee who is detained in custody whether on a criminal charge or otherwise for a period longer than forty eight hours shall be deemed to have been suspended under this clause.
> (2) The authority competent to suspend an emplyee may grant to the employee suspended, subsistence allowance in accordance with the provisions of the Tamil Nadu Payment of Subsistence Allowance Act 1981.
> (3) The period of suspension already undergone may also be awarded as a penalty to an employee to the extent considered necessary by the authority imposing the penalty.
> (4) The employee under suspension shall not be allowed to retire on attaining the age of super-annuation. His suspension shall be deemed to have been extended till the disposal of the disciplinary proceedings against him. During the extended period, the service rights accrued to the employee shall freeze on the date of super-annuation and the employee shall not be entitled for subsistence allowance.

10.The relevant provision is Special By-Law 31 (2). The said clause only incorporates the rates of subsistence allowance as provided under Tamil Nadu Payment of Subsistence Allowance Act, 1981.

The clause 31 of the Special By-Law, while vests power on the employer to place an employee under suspension, has provided for payment of Subsistence Allowance. The rates are prescribed as provided under the Tamil Nadu Payment of Subsistence Allowance Act. In my view, Clause 31(2) of the Special Bye-law of the Society provides subsistence allowance to the petitioner. The mention therein of the Tamil Nadu Payment of Subsistence Allowance Act is only with regard to the rates of subsistence of allowance. It is not in dispute that the petitioner is the employee of the Society. I proceed on the basis that he is not an employee who comes under Tamil Nadu Payment of Subsistence Allowance Act, 1981.

11.As far as the employees who are not covered by the Tamil Nadu Payment of Subsistence Allowance Act, the said employees could not approach the Authorities under the said 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. It is 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 this case, the petitioner has made a request for payment of subsistence allowance to the second respondent. But the second respondent rejected the same on the ground that the petitioner is not an employee under the Tamil Nadu Payment of Subsistence Allowance Act. But in this case, I have held that the bye-law 31(2) provides for payment of Subsistence Allowance to the petitioner and only rate has to be worked out as per the Tamil Nadu Payment of Subsistence Allowance Act. Such incorporation is very common. Hence, in my considered view, he is entitled to subsistence allowance under bye-law 31(2) of the Society. The Society is bound to pay the same.

13.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 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."

Paras 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.
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> 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 statue 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 refereed, 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.
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> 13. In U.P. Avas Evam Vikas Parishad v. Jainul Islam : [1998] 1SCR254 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 statue 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 crates 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 doe snot 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. In my view, G.O.No.55 that was considered in the aforesaid judgment and the bye-law 31(2) of the second respondent Society are identical. Thus, the said judgment is squarely applicable to this case.

15.Furthermore, 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 make it very clear that the second 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."

16.Further, I am of the considered view that the action of the second respondent denying 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.

17.The judgment relied on by the learned counsel for the second respondent cannot be applied to the facts of the present case. In that case, the appellant was a Secretary of the Co-operative Society and he approached the authorities under Tamil Nadu Payment of Subsistence Allowance Act and his claim was dismissed on the ground that he is not an employee under the Payment of Subsistence Allowance Act. However, the Appellate Authority reversed the same and held that the Secretary is also an employee under the said Act. The order of the Appellate Authority under Tamil Nadu Payment of Subsistence Allowance 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 Tamil Nadu Payment of Subsistence Allowance 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.

18.For the aforesaid reasons, the Writ Petition is allowed and the order of the second respondent is set aside and a direction is issued to the second respondent to pay subsistence allowance as per Special Bye-Law 31(2) of the second respondent Co-operative Society. The second respondent shall pay the arrears of subsistence allowance upto 30.04.2015 within a period of four weeks from the date of receipt of a copy of this order and shall continue to pay every month from May 2015 onwards on or before 10th of the succeeding months till the disciplinary proceeding is over. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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b/o
To
1. The Deputy Registrar,
Co-operative Society,
Kanchipuram,
Kanchipuram District.

2. The President Pullalur Primary Agricultural
Co-operative Credit Society,
Pullalur Post,
Kanchipuram Taluk & District,

+ 2 ccs to the Government pleader Sr.19764
+ 1 cc to Mr.G.Jeremiah, Advocate Sr.19328

W.P.No.24625 of 2014
&
M.P.No.1 of 2014

JSV(CO)
Eu 12.05.2015