BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 30.11.2015

CORAM:

THE HONOURABLE Mr.JUSTICE D.HARIPARANTHAMAN

W.P.(MD)No.21305 of 2015

and

M.P.(MD)Nos.1 and 2 of 2015

E.Nagarajan ... Petitioner

Vs.

1.The Registrar,
O/o the Registrar Cooperative House Building Society,
IV Street, Gandhi Nagar,
Adayar,
Chennai - 20.

2.The Deputy Registrar,
House Building Society (in charge),
Madurai Region,
Madurai.

3.The President,
A-1990 Bodinayakanur Cooperative House Building Society,
Bodinayakanur,
Theni District. ... Respondents

PRAYER: Petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, calling for the records relating to the impugned order passed by the 2nd respondent in his proceedings Na.Ka.No.1306/2014 SaPa, dated 10.12.2014 served to the petitioner on 02.02.2015 and quash the same as illegal and consequently, direct the respondents to disburse the retirement benefits of the petitioner including gratuity and Provident Fund within the period that may be stipulated by this Court.

For Petitioner : Mr.H.Mohamed Imran for
Ajmal Associates
For Respondents : Mr.T.R.Janarthanam, AGP for RR1 and 2
Mr.V.Pandi for R3

ORDER

The petitioner was employed in the third respondent Society. He retired from service on 30.04.2009 on reaching the age of superannuation. On the eve of his retirement, he was placed under suspension by order dated 30.04.2009. The said order was questioned before this Court by filing a Writ petition in W.P.(MD) No.4883 of 2009. This Court after hearing both sides, by order dated 14.02.2014 allowed the Writ petition and quashed the suspension order, holding that the third respondent Society has no disciplinary control over the petitioner after his retirement. According to the petitioner, ultimately an order dated 10.12.2014 is passed under Section 87 of the Tamil Nadu Cooperative Societies Act (herein after called "the Act"). In this Writ petition the petitioner has questioned the aforesaid order dated 10.12.2014 passed under Section 87 of the Act and also has sought for a direction to disburse his retirement benefits.

2.When the matter is taken up for hearing, the learned counsel for the petitioner has submitted that he would confine his case only to the later portion of the prayer in the Writ petition and the petitioner could be given liberty to file an appeal before the Appellate Authority questioning the order dated 10.12.2014.

3.Heard both sides.

4.The learned counsel for the petitioner has submitted that the retirement benefit of the petitioner shall be paid to him on his retirement. According to him, denial of the retirement benefit would amount to violative of Articles 14 and 21 of the Constitution of India. The learned counsel has submitted that if at all, the petitioner is liable to pay any amount to the 3rd respondent Society, pursuant to any proceedings, including the proceedings under Section 87 of the Act, the third respondent could recover the same from the petitioner in the manner known to law, but, the third respondent could not withhold the terminal benefits. At the old age, the petitioner could not survive without the terminal benefit, which he has earned for the service rendered by him.

5.The learned counsel for the petitioner has relied on decisions reported in ***2015(6) MLJ 684 (A.Sengodan Vs. Registrar of Cooperative Societies, Chennai and others)*** and ***A.Kannan Vs. The Joint Registrar of Cooperative Societies, Villupuram District (W.P.No.10007 of 2015).***

6.On the other hand, the learned counsel for the 3rd respondent has submitted that since the petitioner has caused huge loss to the third respondent Society, he is not entitled to receive the terminal benefits.

7.I have considered the rival submission made on either side.

8.According to the learned counsel for the petitioner, the petitioner retired from service on reaching the age of superannuation. Hence, I am of the view that the retirement benefits, which are earned by the petitioner for the service rendered in the 3rd respondent Society, could not be withheld, particularly, in the absence of any statutory provisions in this regard. As rightly pointed out by the learned counsel for the petitioner that the payment of terminal benefits is not bounty and the same are paid for the service rendered by the petitioner. Particularly, the terminal benefits are governed by the statutory provisions.

9.For an employee employed in the Cooperative Society, gratuity is paid either under the Payment of Gratuity Act, 1972 or under Section 79 of the Tamil Nadu Cooperative Societies Act. Likewise, the employee in the Cooperative Society is entitled for provident fund as per Section 78 of the Tamil Nadu Cooperative Societies Act or as per the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. The earned leave encashment benefit cannot also be denied to the petitioner. In respect of availing leave, the petitioner accumulated the leave and the same has to be paid at the time of his retirement subject to certain maximum limit. Hence, the earned leave encashment benefit amount is the property of the petitioner and the same cannot be deprived by the respondent.

10.Therefore, the learned counsel for the petitioner has submitted that denial of terminal benefits by the third respondent is arbitrary and violative of Articles 14 and 21 of the Constitution of India. Further more, as rightly pointed out by the learned counsel for the petitioner that the matter is squarely covered by the decision in ***2015(6) MLJ 684*** (cited supra). It is useful to extract relevant paragraph as under -

> *"3.Heard the leard the learned counsel for the petitioner and the learned Government Advocate appearing for the respondents 1 and 2 and perused the material documents available on record. Since the impugned order in the Writ Petition is passed by the second respondent-Deputy Registrar of Co-operative Societies, it is not necessary to issue notice to the third respondent-Society.*
>
> *4.If the petitioner is governed by the provisions of the Payment of Gratuity Act, the gratuity payable to him on retirement, cannot be with-held by the employer on any account other than the reasons given under the provisions of the said Payment of Gratuity Act. The respondents 1 and 2 cannot with-hold the gratuity on the ground that the surcharge proceedings are pending against the petitioner.*

5.On the other hand, if the provisions of the Payment of Gratuity Act are not applicable to the case of the petitioner, the issue will be governed by Section 79 of the Tamil Nadu Co-operative Societies Act, which is extracted hereunder:

"Section 79: Gratuity Fund--(1) A registered society not being an establishment to which the Payment of Gratuity Act, 1972 (Central Act 39 of 1972) applies, may provide in its by-laws for payment of gratuity to the employees at such rates and on such conditions as may be specified in the by-laws and such society may• establish a Gratuity Fund or make other arrangements for the purpose.

(2) A Gratuity Fund, if any, established by a registered society under sub-section (a)shall be invested in the financing bank, but shall not b)be used in the business of the society; b)form part of the assets of the society; c)be liable to attachment or be subject to any other process of any Court or other authority."

6. A reading of the above extracted Section 79 makes it clear that the provisions of the Payment of Gratuity Act, are being incorporated therein, the gratuity earned by an employee for rendering service, cannot be with-held at the time of retirement.

7. It is also relevant to notice the fact that the third respondent-Society is a non-pensionable establishment and only retirement benefits like Gratuity are being paid to its employees.

8. Equally, it is also worthwhile to be noted that the Provident Fund cannot be with-held. While a certain amount is being deducted towards the PF contribution from the salary of employees like the petitioner herein, matching contribution is made by the employer and disbursed al the time of retirement of an employee.

9. If the establishment like the third respondent Society is governed by the Employees' Provident Funds and Miscellaneous Provisions Act, then the petitioner shall be paid the contribution made by him at the time of retirement, and the petitioner is entitled to pension as provided under the scheme provided under the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act.

10. If an employee is not governed by the Employees' Provident Funds and Miscellaneous Provisions Act, the same are not applicable to the employees like the petitioner working under the third respondent-Society, and in that case, Section 78 of the Tamil Nadu Co-operative Societies Act is applicable, which reads as follows:

"Section 78: Provident Fund: (I) A registered society not being an establishment to which the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (Central Act XIX of 1952) applies, may establish a Provident Fund for the benefit of its employees to which shall be credited all contributions made by the employees and the society in accordance with the by-laws. (2) A Provident Fund established by a reg istered society under sub-section (1) shall u be invested in the financing bank, but shall not a)be used in the business of the society; b)form part of the assets of the society; c)be liable to attachment or be subject to any other process of any Court or other authority."

11.In my view, unless there is a statutory provision for with-holding the Provident Fund (relating to contributions of employer and employees)/Gratuity, or other retiral benefits, the same cannot be with-held. The employer cannot with-hold the above retiral benefits of the employees under any circumstances, in the absence of power conferred on them or provided under the relevant statute.

12.Hence, the impugned order is quashed. A direction is issued to the third respondent-Society to settle the retiral benefits including Provident Fund, Gratuity, Leave Encashment and other benefits connected thereto, as expeditiously as possible, and not later than eight weeks. The Writ petition is allowed. No costs. The Miscellaneous petitions are closed."

11.In yet another decision in ***A.Kannan Vs. The Joint Registrar of Cooperative Societies, Villupuram District (W.P.No.10007 of 2015)*** the relevant paragraphs of the is as under -

"9.In my view, non payment of gratuity to a workman who is not in pensionable service is violative of Article 21 Of the constitution. It is well settled that for enforcement of fundamental rights a writ petition under Article 226 is maintainable. Reference could be had to the case reported in Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and Other, (1998) 8 SCC 1. Hence the plea raised by the 2nd respondent that workman shall approach the authority under Payment of Gratuity Act under the Tamilriadu Shops and Establishment Act is rejected.

10.The other plea is that I passed an order dated 07.04.2015 in W.P.No.9976/2015 directing the petitioner therein to approach the appropriate authority under Section 153 of the Tamil Nadu Co operative Societies Act, when there was a claim made by the workman for interest on the belated payment of terminal benefits. In my view, the said judgment cannot be of any use to the 2nd respondent. Even *surcharge proceeding or any criminal proceeding is pending against the employee of the co-operative society, the same cannot be a ground to deprive gratuity in view of Section 14 of payment of Gratuity Act. Unless the workman is dismissed and there is an order of forfeiture of gratuity passed under Payment of Gratuity Act, the payment of gratuity cannot be taken away by the employer. Even here, if the petitioner was paid the gratuity amount and the petitioner seeks for interest, I could have directed him to approach the concerned authority relating to payment of interest. In this case after retirement, no amount is paid to workmen. Workmen is entitled only to gratuity, provident fund and earn leave encashment. None of the amounts are paid to the workmen. Now, the 2nd respondent cannot take a technical plea of non maintainability of writ petition on the ground of availability of alternative remedy. Hence, writ petition is allowed, a direction is issued to the 2nd respondent to pay gratuity and leave encashment within a period of eight weeks from the date of receipt of a copy of this order. No costs. Consequently, connected miscellaneous petition is closed."*

12.For the aforesaid reasons and the judgments (cited supra), the Writ petition is disposed of with the following directions:

(i)The petitioner is at liberty to question of the order dated 10.12.2014 passed under Section 87 of the Act by filing an appeal before the concerned Appellate Authority.

(ii)The third respondent Society is directed to settle all the terminal benefits payable to the petitioner viz.,gratuity, provident fund, earned leave encashment benefits and other terminal benefits, if any payable, within a period of 8 weeks from the date of receipt of a copy of this order. If the amount is not paid within the time stipulated by this Court, the 3rd respondent Society shall pay the interest at the rate of 9% per annum for the terminal benefits.

No costs. Consequently, connected M.Ps. are closed.

Sd/-
Assistant Registrar(CS-II)

/True Copy/

Sub Assistant Registrar

To

1.The Registrar,
O/o the Registrar Cooperative House Building Society,
IV Street, Gandhi Nagar, Adayar, Chennai – 20.

2.The Deputy Registrar,
House Building Society (in charge),
Madurai Region, Madurai.

3.The President,
A-1990 Bodinayakanur Cooperative House Building Society,
Bodinayakanur, Theni District.

Copy To:
The Section Officer, V.R & E.R Section,
Madurai Bench of Madras High Court, Madurai

+1cc to Mr.Ajmal Associates, Advocate Sr.No.68399
+1cc to Spl.GOvernemnt Pleader Sr.No. 68526
nbj
AA/SKS-RR/22.12.2015/7p-7c

W.P.(MD)No.21305 of 2015
30.11.2015