

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.06.2017

CORAM:

THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR

W.P.No.16079 of 2017

&

W.M.P.No.17371 of 2017

K.Subramanian

... Petitioner

Versus

1.The Government of Tamil Nadu,
Rep. by Secretary to Government of Tamil Nadu,
Co-operative, Food & Consumer Protection Department,
Fort St. George, Chennai - 600 009.

2.The Registrar of Co-operative Societies,
Kilpauk, Chennai - 600 010.

3.The Deputy Registrar of Co-operative Societies
(Debt & Credit),
Chennai - 600 108.

... Respondents

Prayers: The Writ Petition is filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorari calling for the records relating to the order dated 03.04.2017 made in Na.Ka.No.3456/2016/sapa-1 passed by the 3rd respondent herein and quash the same.

For Petitioner : M/s.S.Senthilnathan

For Respondents : Mr.V.Selvaraj,
Additional Government Pleader

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O R D E R

The petitioner has filed this writ petition to call for records relating to the order dated 03.04.2017 made in Na.Ka.No.3456/2016/sapa-1 passed by the 3rd respondent herein and quash the same.

2. According to the petitioner, he is working as Assistant in the Tamil Nadu Agricultural Employees Co-operative Thrift and Credit Society, Chepauk, Chennai - 600 005. The new Board of Society had passed a resolution in its General Body meeting held on 11.10.2013, fixing new scale of pay to the petitioner. The 3rd respondent / Deputy Registrar,

Co-operative Societies while putting on hold the new scale of pay, ordered enquiry under Section 81 of the Tamil Nadu Co-operative Societies Act and the enquiry Officer held that the pay fixation was done in accordance with the Rules under the said Act. The 3rd respondent, on being not satisfied with the report of the enquiry officer, ordered for re-enquiry. Second enquiry was conducted and the enquiry officer reversed the findings of the first enquiry officer and held that the pay fixation was not correct. Based on the second enquiry report, without issuing a show cause notice, the 3rd respondent has passed the impugned order dated 03.04.2017 under Section 87 of the said Act to recover a sum of Rs.2,87,649/- paid already to him under the new scale of pay. Hence, the petitioner has filed this Writ Petition for the above relief.

3. Per contra, the learned Additional Government Pleader would submit that at the outset, the Writ Petition is not maintainable. The petitioner has challenged the Order passed by the third respondent Society. If the petitioner is aggrieved by the impugned order passed by the third respondent, an appeal lies before the appellate authority under Section 152 of the Tamil Nadu Cooperative Societies Act. Moreover, the petitioner, without exhausting the appeal remedy, has filed this Writ Petition before this Court and hence, the same is liable to be dismissed.

4. I have considered the submissions made by the learned counsel for the petitioner and the learned Additional Government Pleader appearing for the respondents. In the decision rendered by this Court in the case of K.Marappan Vs. The Deputy Registrar of Co-operative Societies, Namakkal Circle, Namakkal-636 001 and another reported in 2006 (4) CTC 689, this court has held as follows.

7. In Pradeep Kumar Biswas v. Indian Institute of Chemical Technology, 2002 (2) CTC 474 : 2002 (5) SCC 111, the majority judgment considered a catena of decisions on the point and it has been observed in paragraph-25 of the judgment (SCC p.129) that --

"the tests propounded by Mathew, J. in Sukhdev Singh were elaborated in Ramana and were reformulated two years later by a Constitution Bench in Ajay Hasia. What may have been technically characterised as obiter dicta in Sukhdev Singh and Ramana (since in both cases the 'authority' in fact involved was a statutory corporation), formed the ratio decidendi of Ajay Hasia".

Thereafter, the Court has extracted paragraph-11, at pp 737-38 of the case of Ajay Hasia, as follows:

"The concept of instrumentality or agency of the Government is not limited to a corporation created by a statute, but is equally applicable to a company or society and in a given case it would have to be

decided, on a consideration of the relevant factors, whether the company or society is an instrumentality or agency of the Government so as to come within the meaning of the expression 'authority' in Article 12."

It is then observed that Ramana's case noted with approval in Ajay Hasia, and quoted the tests laid down in the case of Ajay Hasia at p.737 in para 9, which reads as follows: (SCC pp.130-31, Para-27)

"(1) One thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government (SCC p.507, Para 14);

(2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character (SCC p.508, Para 15);

(3) It may also be a relevant factor...., whether the corporation enjoys monopoly status which is State-conferred or State protected (SCC p.508, para 15)

(4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality (SCC p.508, Para 15);

(5) If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government. सत्यमेव जयते

(6) 'Specifically', if a Department of Government is transferred to a corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of Government (SCC p.510, Para 18)".

The Court observed in paragraph-31 as follows: (SCC pp. 131-32)

"31. The tests to determine whether a body falls within the definition of 'State' in Article 12 laid down in Ramana with the Constitution Bench imprimatur in Ajay Hasia form the keystone of the subsequent jurisprudential superstructure judicially crafter on the subject which is apparent from a chronological consideration on the authorities cited".

After considering a number of decisions, it has been observed in Para 40 of Pradeep Kumar Biswas as follows: (SCC p.134)

"40. The picture that ultimately emerges is that the tests formulated in *Ajay Hasia* are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning of Article 12. The question in each case would be - whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State."

.....

21. From the above discussion, the following propositions emerge:

(i) If a particular co-operative society can be characterised as a 'State' within the meaning of Article 12 of the Constitution (applying the tests evolved by the Supreme Court in that behalf), it would also be 'an authority' within the meaning and for the purpose of Article 226 of the Constitution. In such a situation, an order passed by a society in violation of the bye-laws can be corrected by way of Writ Petition;

(ii) Applying the tests in *Ajay Hasia* it is held that a respondent society carrying on banking business cannot be termed as an instrumentality of the State within the meaning of Article 12 of the Constitution;

(iii) Even if a society cannot be characterised as a 'State' within the meaning of Article 12 of the Constitution, even so a Writ would lie against it to enforce a statutory public duty cast upon the society. In such a case, it is unnecessary to go into the question whether the society is being treated as a 'person' or 'an authority' within the meaning of Article 226 of the Constitution and what is material is the nature of the statutory duty placed upon it and the Court will enforce such statutory public duty. Although it is not easy to define what a public function or public duty is, it can reasonably be said that such functions are similar to or closely related to those performable by the State in its sovereign capacity.

(iv) A society, which is not a 'State' would not normally be amenable to the writ jurisdiction under Article 226 of the Constitution, but in certain circumstances, a writ may issue to such private bodies or persons as there may be a statutory provisions which need to be complied with by all concerned including societies. If they violate such statutory provisions a writ would be issued for compliance of those provisions.

(v) Where a Special Officer is appointed in respect of a co-operative society which cannot be characterised as a 'State' a writ would lie when the case falls under Clauses (iii) and (iv) above.

(vi) The bye-laws made by a co-operative society registered under the Tamil Nadu Co-operative Societies Act, 1983 do not have the force of law. Hence, where a society cannot be characterised as a 'State', the service conditions of its employees governed by its bye-laws cannot be enforced through a Writ Petition.

(vii) In the absence of special circumstances, the Court will not ordinarily exercise power under Article 226 of the Constitution of India when the Act provides for an alternative remedy.

(viii) The decision in M.Thanikkachalam v. Madhuranthagam Agricultural Co-operative Society, 2000 (4) CTC 556, is no longer good law, in view of the decision of the Seven-Judge Bench of the Supreme Court in Pradeep Kumar Biswas case and the other decisions referred to here before".

5. In the light of the aforesaid Full Bench decision of this Court and also considering the fact that the petitioner, without exhausting the alternative remedy available under Section 152 of the Tamil Nadu Cooperative Societies Act, 1983, has approached this Court, and hence the Writ Petition is liable to be dismissed as not maintainable. Accordingly, the Writ Petition is dismissed. However, liberty is granted to the petitioner to approach the Appellate Tribunal within a period of two weeks from the date of receipt of a copy of this order. The learned Additional Government Pleader gives an undertaking that, till such time, the respondents will not precipitate the matter. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS III)

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pvs

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To

1.The Secretary to Government of Tamil Nadu,
Government of Tamil Nadu,
Co-operative, Food & Consumer Protection Department,
Fort St. George, Chennai - 600 009.

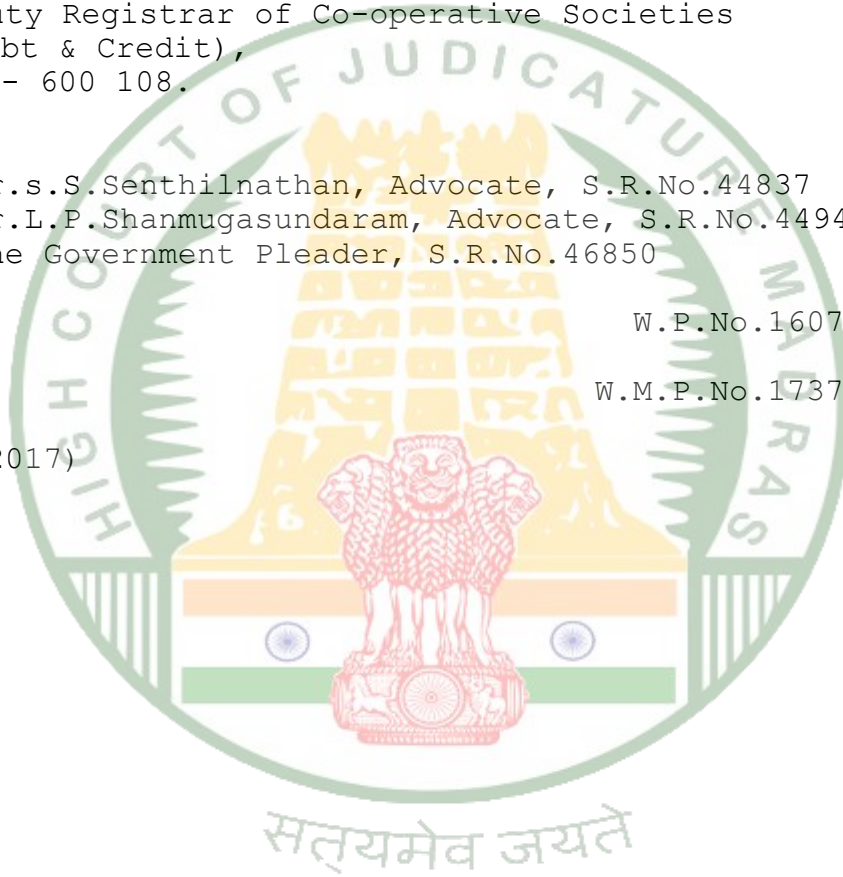
2.The Registrar of Co-operative Societies,
Kilpauk, Chennai - 600 010.

3.The Deputy Registrar of Co-operative Societies
(Debt & Credit),
Chennai - 600 108.

+lcc to Mr.s.S.Senthilnathan, Advocate, S.R.No.44837
+lcc to Mr.L.P.Shanmugasundaram, Advocate, S.R.No.44946
+lcc to the Government Pleader, S.R.No.46850

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SCD(CO)
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