

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 14 /12/2018

Pronounced on : 11 .01.2019

C O R A M

THE HON'BLE MR.JUSTICE SUBRAMONIUM PRASAD

Writ Petition No.10369 of 2013

G.Anandan

...

Petitioner

Vs

1. The Join Registrar
Vellore Region Co-operative Societies
Vellore.

2. The Special Officer
Tirupathur Taluk Co-op Marketing Society Ltd
7 A Chairman Arumughanar Road
Tirupatur
Vellore District 635 601.

Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying for issuance of a Writ of certiorarified mandamus to call for he records relating to the proceedings issued by the second respondent order dated 18/5/2010 and the order of the first respondent in Revision Petition No.10/2010, A 2 in Na.Ka.5428/2010, A 2 dated 28/2/2011 and to quash the same and consequently, direct the respondents to reinstate the petitioner into service with all consequential service and attendant benefits.

For petitioner Mr.G.Sankaran

For respondents Mr.L.P.Shanmuga Sundaram
for R.1.

Mr.P.S.Sivashanmuga Sundaram
for R.2.

O R D E R

The instant writ petition is filed for a writ of certiorarified mandamus, to quash the proceeding, dated 18/5/2010, issued by the second respondent and the order of the first respondent, in Revision Petition No.10/2010, A 2 in Na.Ka.5428/2010, A 2, dated 28/2/2011, and consequently, direct the respondents, to reinstate the petitioner into service, with all consequential service and attendant benefits.

2. The facts in brief are that the petitioner while working as a Salesman (Incharge), in Achamangalam fair price shop, had not remitted a sum of Rs.1,58,355/-, being the value of products sold from the Society. A memo was issued, on 21/5/2003. Thereafter, the petitioner, was put under suspension, on 1/10/2004. Since subsistence allowance was not paid, he made a representation, on 21/1/2005, i.e., after three and a half months, requesting for payment of subsistence allowance.

3. Vide, order, dated 29/3/2005, charges were framed against him, and he was directed to remit the entire amount to the Society, within a period of seven days, from the date of framing charges, i.e., 29/3/2005, on the ground that he had admitted his liability. On 20/5/2005, the petitioner once again wrote a letter for subsistence allowance. An enquiry was conducted. The petitioner did not participate. The Enquiry Officer found that the petitioner had misappropriated the Society's fund and held that charges were proved. The disciplinary authority accepted the findings of the Enquiry Officer and terminated the petitioner.

4. Being aggrieved, the petitioner had filed a revision petition, claiming that the second respondent has not paid the subsistence allowance and the enquiry proceedings was initiated.

5. The respondent filed a counter stating that the petitioner had not submitted any application, till 17/5/2010, requesting to pay subsistence allowance along with a certificate, mentioning that he was not doing any job during the period of suspension. It was further stated that in the explanation, dated 29/4/2010, the petitioner had stated that he is ready to pay Rs.30,000/-, by compensating subsistence allowance and the remaining amount will be paid every month, in instalments, after he was reinstated in service. The revisional authority, dismissed the revision petition, without interfering in the punishment.

6. The order of the revisional authority is under challenged in the present writ petition. Society has filed a counter affidavit stating that the petitioner is not entitled to subsistence allowance, because he had admitted that he was ready to remit Rs.30,000/-. The and the subsistence allowance entitled to him be adjusted to the shortage and the balance amount if any be remitted in instalments.

7. Heard the learned counsel for the parties.

8. The short issue that arises for consideration is whether the non-payment of subsistence allowance will vitiate the entire enquiry or not?.

9. The Hon'ble Supreme Court in GHANSHYAM DAS SHRIVASTAVA Vs. STATE OF MADHYA PRADESH {1973 (1) SCC 656}, has observed as under:-

"5. With respect, we find it difficult to share the view taken by the High Court. Paragraph 5 of the writ petition expressly alleges that on December 5, 1964, the appellant sent a letter to the enquiry officer informing that unless he was paid subsistence allowance he would not be able to face the enquiry proceedings. The letter was filed along with the petition. It is annexure H. The letter stated that "Until and unless I am paid subsistence allowance I categorically refuse to face any proceeding as I have no capacity to do so because of acute shortage of funds." This is obviously specific pleading on the point that for non-payment of subsistence allowance he was short of funds and could not attend the enquiry. It is true that his affidavit does not give any particulars about his sources of income and the estimate of expenses to be incurred in the enquiry. But it would prima facie suggest that he had no other sources of income, except his pay. If he had no other sources of income, he could not invent them for the purpose of mentioning them in the affidavit. More significantly, the Government affidavit does not allege that he had any other source of income except pay. The fact that he had been drawing a monthly pay of Rs. 300 till October, 1964 would not necessarily show that he had sufficient money to enable him to go to Jagdalpur to attend the enquiry in February, 1965. He was suspended on October 30, 1964 and thereafter he did not get subsistence allowance until March 20, 1965. Having regard to the prevailing high prices, it is not possible to draw any adverse inference against him from the mere circumstance that he had been receiving a monthly pay of Rs. 300 till October, 1964. The fact that he filed a writ petition immediately on the passing of the order of dismissal and thereafter came in appeal to this Court, would not establish that he had enough resources to enable him to attend the enquiry. It seems to us that on the whole

the High Court has gone by conjectures and surmises. There is nothing on the record to show that he has any other source of income except pay. As he did not receive subsistence allowance till March 20, 1965, he could not, in our opinion, attend the enquiry. The first payment of subsistence allowance was made to him on March 20, 1965 after a part of the evidence had already been recorded on February 9, 10 and 11, 1965. The enquiry proceedings during those days are vitiated accordingly. The report of the enquiry officer based on that evidence is infected with the same defect. Accordingly, the order of the Government dismissing him from service cannot stand. It was passed in violation of the provisions of Art. 311(2) of the Constitution for the appellant did not receive a reasonable opportunity of defending himself in the enquiry proceedings."

10. Similarly, in STATE OF BIHAR AND OTHERS Vs. ARBIND {2013 (16) SCC - 615}, the Hon'ble Supreme Court observed as under:-

"10. At this juncture, it is appropriate to recapitulate the principles laid down by this Court pertaining to payment of subsistence allowance and the effect of such non-payment. It is settled in law that an order of suspension never puts an end to the service of an employee. He is only not entitled to the salary but is eligible to get the subsistence allowance. It has been held in Khem Chand v. Union of India [AIR 1963 SC 687] that the effect of an order of suspension is that though the employee continues to be a member of the service, he is not permitted to work and is paid only subsistence allowance which is less than his salary. The said principle has been reiterated in State of M.P. v. State of Maharashtra [(1977) 2 SCC 288 : 1977 SCC (L&S) 232] .

11. It is apt to note that the subsistence allowance is governed by the service rules. It is given to a suspended employee for his sustenance. It is in a way making a provision for maintenance and survival. In O.P. Gupta v. Union of India [(1987) 4 SCC 328 : 1987 SCC (L&S) 400 : (1987) 5 ATC 14] it has been stated that the very expression "subsistence allowance" has an undeniable penal significance. It

basically means—a means of supporting life, especially a minimum livelihood. Thereafter, the learned Judges proceeded to observe thus: (SCC p. 341, para 15)

"15. ... It is a clear principle of natural justice that the delinquent officer when placed under suspension is entitled to represent that the departmental proceedings should be concluded with reasonable diligence and within a reasonable period of time. If such a principle were not to be recognised, it would imply that the executive is being vested with a totally arbitrary and unfettered power of placing its officers under disability and distress for an indefinite duration."

12. In *Fakirbhai Fulabhai Solanki v. Presiding Officer* [(1986) 3 SCC 131 : 1986 SCC (L&S) 411], while dealing with denial of subsistence allowance during proceedings before an Industrial Tribunal, the Court expressed that: (SCC p. 136, para 5)

"5. ... if no amount is paid during the pendency of such an application it has to be held that the workman concerned has been denied a reasonable opportunity to defend himself in the proceedings before the Tribunal [and] such denial leads to violation of principles of natural justice and consequently vitiates the proceedings before the Tribunal under sub-section (3) of Section 33 of the Act and any decision given in those proceedings against the workman concerned."

13. In *Capt. M. Paul Anthony v. Bharat Gold Mines Ltd.* [(1999) 3 SCC 679 : 1999 SCC (L&S) 810] the Hon'ble Supreme Court expressed the view that when on account of penury occasioned by non-payment of subsistence allowance an employee is not able to undertake a journey to attend the disciplinary proceedings, the findings recorded by the inquiry officer on such

proceedings which are held ex parte stand vitiated.

14. In Jagdamba Prasad Shukla v. State of U.P. [(2000) 7 SCC 90 : 2000 SCC (L&S) 825] it has been held that the payment of subsistence allowance, in accordance with the rules, to an employee under suspension is not a bounty. It is a right and if a suspended employee is unable to appear for want of funds on account of non-payment of subsistence allowance, it is a clear case of breach of principles of natural justice on account of the denial of reasonable opportunity to defend himself in the departmental enquiry and that vitiates the departmental enquiry and the consequent order of removal from service. It is seemly to state here that in the said case the employee had intimated the authorities about the financial crunch.

15. In this context, we may fruitfully refer to a two-Judge Bench decision in Anwarun Nisha Khatoon v. State of Bihar [Anwarun Nisha Khatoon v. State of Bihar, (2002) 6 SCC 703 : 2002 SCC (L&S) 961]. In the said case the employee claimed for subsistence allowance for the entire period of suspension of her husband, who was not terminated, and during the pendency of the enquiry had breathed his last. The wife preferred a writ petition before the High Court of Patna which was dismissed on the ground that the husband of the appellant therein was only present for one day at the headquarters and hence, not entitled to the benefit. It was argued that under Rule 96(2) of the Bihar Service Code a government servant is required to furnish a certificate that he is not engaged in any other employment, business, profession or vocation and as such a certificate was never submitted, the subsistence allowance was not paid. Reliance was placed upon the authority of the High Court in Genesh Ram v. State of Bihar [(1995) 2 PLJR 690] wherein the High Court had opined that it was not necessary for an employee to attend the work after suspension. It was also stated therein that the suspended employee could not be compelled to mark attendance. Further it was ruled that the authority was entitled to ensure itself about the presence of suspended employee at the headquarters before making payment of

subsistence allowance and in the event of a dispute it would be for the employee to establish his presence at the headquarters. This Court, commenting on the said decision, ruled thus:

"9. In our view, this authority, far from assisting the respondents, is against them. This authority shows that there is no requirement to mark attendance. To us also no rule could be shown which required a suspended employee to mark attendance. The respondents can at the most ask for a certificate that the appellant's husband was not engaged in any other employment, business, profession or vocation. The appellant's husband having died, he could not have furnished such a certificate. At no stage have the respondents asked the appellant to give such a certificate. Thus the grant of subsistence allowance cannot be denied on the ground that such a certificate is not given."

After so holding, the Court directed that after the employee filed an affidavit that her husband was not engaged in any other employment, business, profession or vocation, the subsistence allowance would be released in her favour."

11. Material on record shows that the petitioner has made repeated representations. Representations, dated 21/1/2005 and 20/5/2005, would show that the petitioner was suspended from service, on 1/10/2004. On 21/1/2005, he sent a letter, claiming subsistence allowance. The said letter reads as under:-

"Sir,

I was under suspension with effect from 1/10/2004. So far, I have not been paid subsistence allowance. Further, my family is under severe poverty. I am facing severe difficulty in running my family. Hence, I request you to pay pending subsistence allowance. Since I was under suspension from 1/10/2004, I am unable to run my family. Further, for the past four months, I have not been paid subsistence allowance. Hence, I request you to pay me subsistence allowance. I would like to bring to your kind attention

that prior to that, I have not been paid salary for 12 months."

12. Similarly, after the charge memo was received, another letter was sent, on 20/5/2005, claiming for subsistence allowance. Payment of subsistence allowance, in the State of Tamil Nadu, is covered under the Tamil Nadu Payment of Subsistence Allowance Act, 1981. Section 3 of the said Act, reads as under:-

"3. (1) An employee who is placed under suspension shall, during the period of such suspension, be entitled to subsistence receive payment from the employer as subsistence allowance, an amount equal to fifty percentum of the wages which the employee was drawing immediately before suspension, for the first ninety days reckoned from the date of such suspension :

Provided that where the period of suspension exceeds ninety days, but does not exceed one hundred and eighty days, the employee shall be entitled to receive, after the said period of ninety days, a subsistence allowance equal to seventy-five percentum of the wages which the employee was drawing immediately before his suspension :

Provided further that where the period of suspension exceeds one hundred and eighty days, the employee the subsistence shall be entitled to receive wages in full which the employee was drawing immediately before his suspension:

Provided also that where the enquiry or criminal proceeding is prolonged beyond the period of ninety days for reasons directly attributable to the employee, the subsistence allowance shall, for the period exceeding ninety days, be reduced to fifty percentum of the wages, which the employee was drawing immediately before his suspension.

(2) An employee shall not be entitled to receive any subsistence allowance if he accepts any other employment during the period of his suspension in any establishment other than the establishment where he had been working immediately before his suspension."

give the certificate that he is not employed elsewhere and that Section 3 (2) of the Tamil Nadu Payment of Subsistence Allowance Act, 1981, postulates that employees working elsewhere is not entitled for subsistence allowance. The petitioner has written a letter, on 21/1/2005 and 20/5/2005 within one year of his date of suspension. The receipt of the letter is not denied. What is stated that he should have enclosed a non-employment certificate. The respondent Management could as well have asked from the petitioner if he was working elsewhere. It is also not their case that he is employed elsewhere. The stand of the employer cannot be accepted. They could have very well asked the petitioner to produce the non-employment certificate. The reason given by the management for not paying subsistence allowance cannot be accepted.

14. In the result, Writ petition is allowed. The enquiry which has been held without paying subsistence allowance to the petitioner therefore, gets vitiated. The petitioner is directed to be reinstated in service, but in the facts and circumstances of the case, without any backwages. The respondent employer, if so advised, may initiate fresh proceedings, in accordance with law. No costs.


Sd/-
Assistant Registrar (CS)
//True Copy//
Sub Assistant Registrar

mvs.
To

1. The Join Registrar
Vellore Region Co-operative Societies
Vellore.
2. The Special Officer
Tirupathur Taluk Co-op Marketing Society Ltd
7 A Chairman Arumughanar Road
Tirupatur
Vellore District 635 601.

+1cc to Mr.G.Sankaran , Advocate SR.No. 3378
+1cc to Mr.P.S.Sivashanmuga Sundaram Advocate SR.No.
3404
+1 CC TO GOVERNMENT PLEADER SR.NO. 3993

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A.SK(12/02/2019)