

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:29.08.2019

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

W.P.No.39082 of 2003
and W.P.M.P.No.47356 of 2003

M/s.V.R.Muthu and Brothers
443, Main bazar
Virudhunagar
Represented by its Partner
Mr.R.Muthu

.. Petitioner

Vs.

1.The Deputy Commissioner of Labour
(Appellate Authority under the
Payment of Subsistence Allowance Act)
Sundaram Theater road
K.K.Nagar
Madurai-625 020.

2.The Assistant Commissioner of Labour
(Authority under the Payment of
Subsistence Allowance Act)
K.K.Nagar
Madurai-625 020.

3.C.Kulanthaichamy

... Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India, praying for issuance of a writ of Certiorari calling for the records of the 1st respondent dated 29.09.2003 made in P.S.A.No.1/2003 confirming the order passed by the 2nd respondent made in P.S.A.I.A.Nos.24/2002 and 45/2002 dated 17.12.2002 and quash the same.

For Petitioner : Mr.S.Silambanan
Senior Counsel for Mr.N.Umapathy

For R1 and R2 : Mr.R.S.Selvam
Government Advocate

For R3 : Mr.P.V.Balasuramaniam for
M/s.BFS Legal

O R D E R

Writ Petition is filed challenging the order of the 1st respondent dated 29.09.2003 made in P.S.A.A.No.1/2003 confirming the order of the 2nd respondent made in P.S.A.I.A.Nos.24/2002 and 45/2002 dated 17.12.2002.

2.Heard the learned Senior Counsel appearing for the petitioner as well as the learned Government Advocate appearing for the respondents 1 & 2 and the learned counsel appearing for the 3rd respondent and perused the materials available on record.

3.The petitioner suspended the 3rd respondent for alleged misappropriation of a sum of Rs.10,00,000/-. The 3rd respondent filed an application under Section 4 of the Tamil Nadu Payment of Subsistence Allowance Act, 1981 (hereinafter called as 'the Act'), before the 2nd respondent claiming subsistence allowance for a sum of Rs.79,002/- for the period from 01.01.2001 to 21.12.2001. The 3rd respondent filed I.A.No.24 of 2002 to condone the delay of 68 days in filing the main application under Section 4 of the Act. The petitioner filed counter affidavit in the said application and also filed I.A.No.45 of 2002 in I.A.No.24 of 2002 in an unnumbered application filed under Section 4 of the Act and contended that application filed by the 3rd respondent under the Tamil Nadu Payment of Subsistence Allowance Act, 1981, is not maintainable as 3rd respondent is not an employee as defined under the Act. The 2nd respondent by the order dated 17.12.2002 held that I.A.No.24 of 2002 filed by the 3rd respondent to condone the delay in filing the application under Section 4 of the Act and I.A.No.45 of 2002 filed by the petitioner to decide the maintainability of application can be heard and decided along with the main application. Against the said order dated 17.12.2002, the petitioner filed appeal before the 1st respondent in P.S.A.A.No.1/2003. The 1st respondent by order dated 29.09.2003 dismissed the appeal on the ground that the 2nd respondent has not passed any order in main application and appeal filed by the petitioner challenging the order passed in I.As. is not maintainable as per Rule 5A of the Tamil Nadu Payment of Subsistence Allowance Rules, 1981. Against the said orders of the respondents 1 and 2, the petitioner has come out with the present writ petition.

4.The learned Senior Counsel appearing for the petitioner contended that the respondents 1 and 2 erred in ordering I.A.Nos.24 and 45 of 2002 to be heard along with main application. Unless the application to condone the delay is ordered, the main application cannot be numbered. Similarly, when the petitioner has raised preliminary issue with regard to maintainability, the same has to be decided before the main

application to be heard and decided. Since the matter is pending from the year 2002 and based on the admitted facts, the unnumbered application filed by the 3rd respondent can be decided on merits and prayed for dismissal of the application filed under Section 4 of the Act filed by the 3rd respondent.

5.The 3rd respondent was employed as transport manager and was earning a sum of Rs.8,360/- per month. The 3rd respondent himself has admitted in the application filed under Section 4 of the Act that he was working as a transport manager and was earning a sum of Rs.8,360/- per month. The learned Senior Counsel contended that admission of the 3rd respondent clearly reveals that he is not an employee as defined in the Tamil Nadu Payment of Subsistence Allowance Act and prayed for allowing the writ petition.

6.The learned counsel appearing for the 3rd respondent contended that the 3rd respondent even though was designated as transport manager, he was doing only supervisory work. He was discharging his duties as per the instructions of the partners of the petitioner. He was not doing any managerial work and hence he is an employee as defined in the Tamil Nadu Payment of Subsistence Allowance Act and application filed by him is maintainable. The respondents 1 and 2 have ordered to hear and decide interim application filed for condonation of delay by the 3rd respondent and application filed by the petitioner for maintainability along with main application is with a view to avoid delay and prevent the petitioner from dragging on the matter and not to pay subsistence allowance to the 3rd respondent. The order passed by the respondents 1 and 2 are valid and legal and prayed for dismissal of the writ petition.

7.From the materials available on record, it is seen that the 3rd respondent has filed application for payment of subsistence allowance from the petitioner from 01.01.2001 to 21.12.2001. The 3rd respondent has not filed the said application within the time limit prescribed for filing the same. Therefore, the 3rd respondent filed I.A.No.24 of 2002 to condone the delay of 68 days in filing the application for payment of subsistence allowance. On receipt of notice in the said application, the petitioner has filed counter affidavit in I.A.No.24 of 2002 and filed I.A.No.45 of 2002 in I.A.No.24 of 2002 to decide the issue of maintainability of the application filed by the 3rd respondent for payment of subsistence allowance. The 2nd respondent, without deciding the application filed by the petitioner, has ordered that both the interim applications would be heard along with main application. The said order is erroneous. Unless the 2nd respondent accepts the reasons given by the 3rd respondent for condoning the delay in filing the main application for payment of subsistence allowance and direct the main application to be

numbered, the same can not be heard on merits. Similarly, the petitioner has raised objection and contended that the 3rd respondent is not an employee as defined under Section 2(a) of the Act and the respondents 1 and 2 ought to have decided that the interim application filed to decide the maintainability of the application before hearing the main application. Therefore, the order of the 2nd respondent deciding to hear both the interim applications along with main application for payment of subsistence allowance is erroneous. Similarly, the 1st respondent erroneously dismissed the appeal referring to Rule 5A of the Tamil Nadu Payment of Subsistence Allowance Rules, 1981. The 1st respondent has not decided whether the main application can be heard on merits without deciding the application to condone the delay. In view of the same, the impugned orders of the respondents 1 and 2 are liable to be set aside and they are hereby set aside.

8. The 3rd respondent claimed subsistence allowance for the period from 01.01.2001 to 21.12.2001. In view of the passage of 18 years, it will be in the interest of justice to decide the application filed by the 3rd respondent on merits instead of remanding the matter to the 2nd respondent to decide I.A.No.45 of 2002 and I.A.No.24 of 2002. There are sufficient materials on record to decide the issue on merits.

9. It is the contention of the learned Senior Counsel appearing for the petitioner that the 3rd respondent was transport manager in the service of the petitioner and he was paid Rs.8,360/- per month. He was discharging managerial duty. He was incharge of buying transport vans as well as engaging drivers. On the other hand, it is the contention of the learned counsel appearing for the 3rd respondent that even though the 3rd respondent was designated as transport manager, he was not given any managerial duties, but his duties are only supervisory in nature and he was discharging the duties as per the instructions of the partners of the petitioner. In view of the above rival contentions, it has to be seen whether the 3rd respondent is an employee as defined in Tamil Nadu Payment of Subsistence Allowance Act, 1981. Section 2(a) of the Act defines 'employee', which reads as follows:

"2(a) "employee" means any person employed in, or in connection with the work or activities of, any establishment to do any skilled, semi-skilled or unskilled, manual, supervisory, technical, clerical or any other kind of work or activities for hire or reward, whether the terms of employment be expressed or implied, but does not include any such person--

(i) who is employed mainly in a managerial or administrative capacity; or

(ii) who, being employed in a supervisory capacity (draws wages exceeding three thousand and five hundred rupees per mensem) or exercises, either by the nature of the duties attached to the office or by reason of the powers vested to him, functions mainly of a managerial nature;"

10.As per the said definition, a person employed in supervisory capacity is an employee provided that he does not draw wages exceeding Rs.3,500/- per month. From the statement annexed to the application filed under Section 4 of the Act by the 3rd respondent, it is seen that in column-7, he has stated that he was working as transport manager and in column-9, he was drawing a sum of Rs.8,360/- per month as salary. Even if the contention of the learned counsel appearing for the 3rd respondent is accepted that 3rd respondent was not discharging supervisory duties, he is not an employee as defined in the Act, as he was drawing more than Rs.3,500/- per month. Admittedly, the 3rd respondent is drawing Rs.8,360/- per month. In view of the above admitted position, the 3rd respondent is not an employee as defined by the Act and application filed by the 3rd respondent under Section 4 of the Act for payment of subsistence allowance is not maintainable. In view of the above, un-numbered application pending on the file of 2nd respondent is dismissed as not maintainable.

11.In the result, the writ petition is allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

s/d-
Assistant Registrar(CO)

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Sub-Assistant Registrar

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To

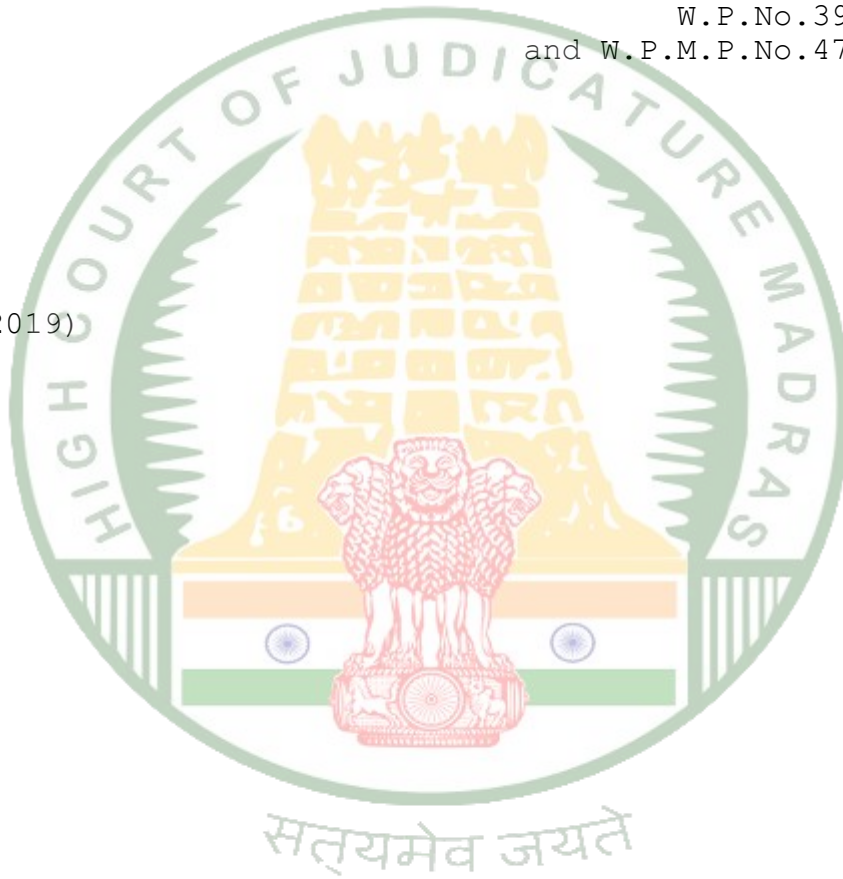
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+1 CC to M/s. Silambanan Associates sr 74278.
+1 CC to M/s. B.F.S. Legal, sr 74734.
+1 Cc to The Govt. Pleader sr 75557.

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NRL (CO)
SP(25/10/2019)



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