BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 23.10.2019

CORAM

THE HONOURABLE MR.JUSTICE **S.S.SUNDAR**

W.P.(MD)No.10875 of 2010

1.P.Athimoorthy
2.M.Ganesan
3.K.Paulchamy
4.P.Sethuramalingam :Petitioners

vs.

1.The Registrar,
The Registrar of Co-Operative Societies,
Kilpauk, Chennai – 10.

2.The Joint Registrar of Co-Operative Societies,
Madurai Region, Lady Doak College Road,
Chinnachokkikulam, Madurai -2.

3.The Deputy Registrar of Co-Operative Societies,
Madurai Circle,
41, Krishnarayar Theppakulam Street,
RDCC Bank Complex, Madurai -1.

4.The Special Officer,
Madurai Co-Operative Printing Works Limited,
15, Thiruparankundram Road, Andalpuram,
Madurai -3.

5.The Principal Secretary
Labour and Employment,
Secretariat, St.Fort George, Chennai. :Respondents

PRAYER: Writ Petition filed under Article 226 of Constitution of India, praying to issue Writ of Mandamus, to direct the respondents to pay all the retiremental dues to the petitioners together with interest at the rate of 10% p.a., as ordered by the Assistant Commissioner of Labour in No.Pa.Ko.No.48 of 2008, dated 14.04.2010 within the period stipulated by this Court.

For Petitioners :Mr.V.R.Venkatesan

For R1 to R3 and R5 :Mr.D.Muruganandam
Additional Government Pleader

For R4 Mr.S.Seenivasagam

ORDER

This Writ Petition is filed for issuing a Writ of Mandamus, to direct the respondents to pay the retirement benefits dues to the petitioners together with interest at the rate of 10% per annum as per the order of Assistant Commissioner of Labour, in his proceedings, dated 14.04.2010.

2.The petitioners herein joined in service under the fourth respondent Cooperative Society between 1960 and 1970 and they were retired from service on attaining the age of superannuation between 2004 and 2005. Since the fourth respondent failed to settle the entire retirement benefits to the petitioners, the petitioners have earlier filed a Writ Petition in W.P.(MD)No.1102 of 2006. When the fourth respondent without settling the dues of petitioners, proposed to sell a land belongs to the fourth respondent Society, the petitioners approached the Assistant Commissioner of Labour under the Payment of Gratuity Act, 1972, for disbursement of amount dues to the petitioners upon retirement.

3.Independent award was passed by the Assistant Commissioner (Labour) directing the fourth respondent to settle the retirement benefits to the petitioners with interest at the rate of 10% per annum within three months from the date of Award. Thereafter, by order, dated 13.04.2010, the fourth respondent has initiated surcharge proceedings against the petitioners under Section 87(1) of the Tamil Nadu Co-operative Societies Act 1976, several years after the retirement of petitioners and without considering the fact that the petitioners were permitted to retire from service and that there was no disciplinary proceedings or charge memo pending at the time of their retirement. It is stated that out of 31 employees, more than 9 employees died due to poverty for non-payment of retirement benefits.

4.Though the fourth respondent initiated action by ordering enquiry under Section 81 of Tamil Nadu Co-operative Societies Act 1976, in 2009, and the enquiry report was submitted on 24.04.2009 itself, the notice under Section 87(1) of Tamil Nadu Cooperative Societies Act 1976, was sent to the petitioners only in April'2010. It is to be seen that under Section 87(1) of the Tamil Nadu Co-operative Societies Act 1976, surcharge proceedings cannot be initiated, after expiry of seven years from the date of delinquency or any other commission or omission. Therefore, it is stated that only to delay the payment of retirement benefits, the surcharge proceedings in this case has been initiated in respect of certain lapses, which were observed about five decades back.

5.Despite the Assistant Commissioner (Labour) has passed the award, it is stated that the respondents have not disbursed the retirement benefits. It is also stated that the Award of Assistant Commissioner (Labour) directing the fourth respondent to disburse the amount payable under the Payment of Gratuity Act, is not challenged and it has become final in respect of petitioners. Since the respondents have not disbursed the retirement benefits, despite several representations thereafter the petitioners have come forward with present Writ Petition.

6.The learned Counsel for the petitioner submitted that respondents have settled the amount towards retirement benefits to some of the employees, who retired after the petitioners' retirement from 2004-05. It is also stated that the respondents are adopting dilatory tactics ignoring the financial conditions, to which the petitioners are put to. It is further stated that, it is only to protect the employees from such untold sufferings, Section 9 of Payment of Gratuity Act 1972, has been incorporated in the Statute. Section 9 of Payment of Gratuity Act 1972, reads as follows:

> *"Section 9: Penalties*
> *(1) Whoever, for the purpose of avoiding any payment to be made by himself under this Act or of enabling any other person to avoid such payment, knowingly makes or causes to be made any false statement or false representation shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees or with both.*
> *(2) An employer who contravenes, or makes default in complying with any of the provisions of this Act or any rule or order made thereunder shall be punishable with imprisonment for a term which shall not be less than three months but which may extend to one year, or with fine which shall not be less than ten thousand rupees but which may extend to twenty thousand rupees, or with both :*
> *Provided that where the offence relates to non-payment of any gratuity payable under this Act, the employer shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years unless the court trying the offence, for reasons to be recorded by it in writing, is of opinion that a lesser term of imprisonment or the imposition of a fine would meet the ends of justice."*

7.The learned Counsel for the fourth respondent submitted that the Writ Petition is not maintainable, as this Court cannot act as Executing Court for implementing the Award of Assistant Commissioner under the Payment of Gratuity Act 1972 The learned Counsel also relied upon the provisions of Payment of Gratuity Act. Under Section 8 of Payment of Gratuity Act, if the amount towards gratuity is not payable by the employer within the prescribed time, the Controlling Authority, on the application made by the aggrieved person, can issue a certificate for the amount to the Collector, who can recover the amount together with compound interest thereon from the date of arrears and pay the same to the person entitled thereto. Referring to the provisions of Payment of Gratuity Act, the learned Counsel for the fourth respondent submitted that the only remedy available to the petitioner is to approach the controlling authority to get a certificate and to recover the amount by initiating proceedings under the Revenue Recovery Act, through Collector.

8.Section 9 of the Payment of Gratuity Act contemplates imposing of a punishment for a term upto 6 months or with fine upto Rs.10,000/- for knowingly makes or causes to be made any false statement or false representation for avoiding any payment to be made by himself under the Act. The employer, who contravenes or makes default in complying with any of the provisions of Act, shall be punishable with imprisonment for a term, which is not less than three months, but upto one year along with fine. Relying upon the provisions, the learned Counsel for the fourth respondent submitted that sufficient protection is given to the employees under the Payment of Gratuity Act to recover the amount. Hence, the learned Counsel for the fourth respondent submitted that the Writ Petition need not be entertained for enforcing an Award of Assistant Commissioner of Labour, which directed the respondents to disburse the retirement benefits under the Payment of Gratuity Act.

9.It is the a case wherein the respondents have contravened and committed default in complying with the order passed under the Payment of Gratuity Act. Some of the officials of fourth respondents are also responsible by filing false statement of affidavit before the Assistant Commissioner of Labour and also before this Court, to delay the payment of of gratuity under the Act. Therefore, the petitioners shall made a representation before the State, who shall authorise a person to address the complaint, as contemplated under Section 11 of the Act.

10.The learned Additional Government Pleader submitted that the Payment of Gratuity Act is not applicable to the Co-operative Societies. His submission was based on Section 79 of Tamil Nadu Co-operative Societies Act, 1976 which reads as follows:

> "79.*Gratuity Fund - (1)A registered society not being an establishment to which the Payment of Grauity 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 (1) shall 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.The Payment of Gratuity Act is a Central Enactment and it is enacted with an object to provide a scheme for payment of gratuity to employees, who are engaged in factories, mines, shops and other establishments. The applicability of the Act can not be excluded by any other provisions under the Tamil Nadu Co-operative Societies Act, 1983. The Tamil Nadu Cooperative Societies Act, though received assent of the President, it is not brought to the notice of this Court that the assent was obtained with specific reference to Payment of Gratuity Act. No other provisions under the Tamil Nadu Cooperative Societies Act is brought to the notice of this Court, as regards, the applicability of Payment of Gratuity Act, 1972. This objection was not raised by the Co-Operative Society before Labour Court and the Labour Court award has become final. In such circumstances, the submission of the learned Additional Government Pleader with regard the applicability of Payment of Gratuity Act to the Cooperative Society cannot be accepted.

12.Assuming for a moment that Section 79 of the Tamil Nadu Cooperative Societies Act was made with an intention to exclude the applicability of Payment of Gratuity Act, the same is unconstitutional. It appears that the Cooperative Society in this case is not controlling any gratuity fund, as it was contemplated under Section 79 of the Act. As a matter of fact, the fourth respondent has cited the financial conditions, as a reason for non payment of gratuity payable to the writ petitioners.

13.For the purpose of directing the State Government, the Principal Secretary to Labour and Employment, Secretariat, St.Fort George, Chennai, *suo motu* impleaded as fifth respondent.

14.In such circumstances, this Writ Petition is disposed of with the following directions:

1)The petitioners are directed to file independent applications along with a copy of this order before the Controlling Authority for issuing a certificate for the amount determined by the Assistant Commissioner of Labour and the Controlling Authority, to whom such application is filed, is directed to issue a certificate within a period of two months from the date of receipt of application. The Collector, thereafter, on receipt of the certificate, shall take all steps to recover the amount from the fourth respondent and to settle the same to the petitioners within a period of six months from the date of receipt of such certificate.

2)The Controlling Authority is directed to issue show cause notice to the fourth respondent before issuing certificate and give a reasonable opportunity of hearing. The fourth respondent shall appear and cite their objection, if any, before the Controlling Authority within a period of two weeks from the date of receipt of such notice from the Controlling Authority. The State of Tamil Nadu shall authorise the Controlling Authority to make a complaint against the employer/4th respondent within a period of four weeks from the date of receipt of a copy of this order.

15.With regard to other retirement benefits, like, death cum retirement benefits and other dues payable to the petitioners, it is contended that the respondents have not made any payment. The payment dues to the petitioners other than gratuity shall be paid to the petitioners by the respondents within a period of four weeks from the date of receipt of a copy of this order.

16.It is stated that the second petitioner is no more. Though the legal heirs of the second petitioner is not impleaded, there is no abatement. It is open to the legal representatives of the second petitioner to prosecute further to get retirement benefits of the second petitioner.

Sd/-

Assistant Registrar (CO)

// True Copy //

Sub Assistant Registrar(CS)

cmr

To

1.The Registrar,
The Registrar of Co-Operative Societies,
Kilpauk, Chennai – 10.

2.The Joint Registrar of Co-Operative Societies,
Madurai Region, Lady Doak College Road,
Chinnachokkikulam, Madurai -2.

3.The Deputy Registrar of Co-Operative Societies,
Madurai Circle,
41, Krishnarayar Theppakulam Street,
RDCC Bank Complex, Madurai -1.

4.The Principal Secretary,
Labour and Employment,
Secretariat, St.Fort George, Chennai.

+1 CC to M/s.SPL GP (SR-94261[F] dated 24/10/2019)

W.P.(MD)No.10875 of 2010
23.10.2019

JMN(15.11.2019) 6P : 6C