



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 30.10.2019

CORAM:

THE HONOURABLE MR.JUSTICE S.S. SUNDAR

W.P.(MD).Nos.4004 and 4005 of 2010

and M.P.(MD).Nos.1 and 1 of 2010

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W.P.(MD).No.4004 of 2010

The Azhagiyapandiyapuram Primary Agricultural
Co-operative Bank Ltd.,
Azhagiyapandiyapuram P.O.,
Kanyakumari District,
represented by its Special Officer.

.. Petitioner

Vs.

1.C.Perumalpillai,

2.The Assistant Commissioner of Labour,
(Authority under Tamil Nadu Payment of
Subsistence Allowance Act),
Trivandrum Road, Palayamkottai,
Tirunelveli District.

.. Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, for the issuance of Writ of Certiorari, to call for records relating to the impugned order of the second respondent in his file in PSA.No.17/2004 dated 19.02.2010 and quash the order of the second respondent.

For Petitioner : Mr.G.Manivannan

For Respondents: Mr.B.Subramania Pillai for R1

Mr.D.Muruganandam for R2

Additional Government Pleader

W.P.(MD).No.4005 of 2010

The Arumanalloor Primary Agricultural
Co-operative Bank Ltd., No.Y-141,
Arumanalloor P.O.,
Kanyakumari District,
represented by its Special Officer.

.. Petitioner

Vs.

1.A.Balakrishnan

2.The Assistant Commissioner of Labour,
(Authority under Tamil Nadu Payment of
Subsistence Allowance Act),
Trivandrum Road, Palayamkottai,
Tirunelveli District.

.. Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, for the issuance of Writ of Certiorari, to call for records relating to the impugned order of the second respondent in his file in PSA.No.19/2004, dated 17.02.2010 and quash the order of the



For Petitioner : Mr.G.Manivannan
For Respondents: Mr.B.Subramania Pillai for R1
Mr.D.Muruganandam for R2
Additional Government Pleader

COMMON ORDER

These petitions have been filed for the issuance of writ of certiorari to quash impugned orders of the second respondent in PSA.Nos.17 of 2004, dated 19.02.2010 and 19 of 2004, dated 17.02.2010.

2.The short question that arises for consideration in these writ petitions is whether the petition filed by the Secretary to the Co-operative Society before the second respondent for subsistence allowance is maintainable.

3.It is not in dispute that the first respondent in both Writ Petition was working as Secretary of the respective Writ petitioners. With regard to certain financial irregularities an enquiry under Section 81 of the Tamil Nadu Co-operative Societies Act, was ordered and the first respondent in the respective writ petitions were later dismissed from service. The first respondent in both petitions were placed under suspension with effect from 01.07.2003. Later, the first respondent in both petitions, who were the Secretary of the respective societies filed the application for payment of subsistence allowance before the second respondent. Though it is contended by the petitioners that the first respondent in the respective petition is not an employee as per the Tamil Nadu Payment of Subsistence Allowance Act, the second respondent held that the first respondent is an employee under the Tamil Nadu Payment of Subsistence Allowance Act and ordered payment of subsistence allowance to the first respondent in both petitions. Against the above order of second respondent the above writ petitions are filed.

4.It is stated that the first respondent was working as the Secretary of the Co-operative Society and therefore, he is an officer as per the definition of Section 2(19) of Tamil Nadu Co-operative Societies Act. Learned counsel appearing for the petitioner relied upon several precedents of this Court, wherein it has been held that Secretary of the Co-operative Society / Co-operative Bank is not an employee as per Section 2 (e) of Tamil Nadu Payment of Subsistence Allowance Act. It is therefore, submitted that the order passed by the second respondent is without jurisdiction and that therefore the writ petitions without seeking the alternative remedy is maintainable.

5.In the case of ***The Management, Elavadi Primary Agricultural Cooperative Bank, rep. by its Special Officer Vs. The Assistant Commissioner of Labour (Authority under Payment of Subsistence Allowance Act) II Assistant Labour Court, Chennai and***

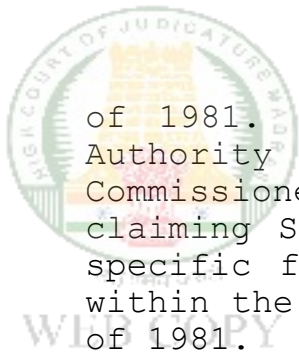


another reported in **2017 (2) LLN 256 (Mad.)**, it has been held that a person employed as a Secretary in a Co-operative Bank cannot be construed as an employee within the meaning of Section 2 (a) of Tamil Nadu Payment of Co-operative Societies Act and that the Assistant Commissioner of Labour does not have the jurisdiction to pass the order directing payment of Subsistence Allowance to the applicant. In the judgment of learned single judge several other judgments of this Court are also cited.

6.The learned counsel appearing for the petitioner relied upon a unreported judgment of Division Bench of this Court in W.A. (MD).No.1411 of 2008, dated 20.12.2011. In a similar case the question arise before the Division Bench was whether Secretary of Co-operative Bank is an employee under Section 2(a) of Tamil Nadu Payment of Subsistence Allowance Act, 1981. It was held that the Secretary of the Co-operative Bank cannot be termed to be an employee under Section 2(a) of the Tamil Nadu Payment of Subsistence Allowance Act, 1981. This judgment was also followed by the learned single Judge in the previous case referred supra (2017 (2) LLN 256).

7.The learned counsel appearing for the respondent however relied upon a judgment of Honourable Division Bench of this Court in **M.Kanagasabapathy Vs. The Special Officer, S-390, Pothanoor Primary Agricultural Co-operative Bank Ltd., Pothanoor and others**, reported in **2007(5) CTC 392**. The Honourable Division Bench held that when a position arise to the status of a person whether he is an employee defined under Section 2(a) of Act 43 of 1981. It has to be independently examined and considered irrespective of the fact that such person fall within the definition of "Officer" under Section 2 (19) of Tamil Nadu Co-operative Societies Act.

8.The Division Bench of course dealt with a similar case, wherein a Secretary of the society claim the benefit under Tamil Nadu Payment of Subsistence Allowance Act, 1981. Though the Labour Court allowed the claim of Secretary of the Co-operative Bank, the writ petition filed by the Co-operative Bank was allowed by holding that a Secretary is an Officer as defined under Section 2(19) of Tamil Nadu CO-operative Societies Act and that therefore, he cannot be construed as an employee under the Tamil Nadu Payment of Subsistence Allowance Act. The judgment of the learned Single Judge of this Court was set aside on the ground that Act 30 of 1983 is a General enactment whereas Act 43 of 1981 (Payment of Subsistence Allowances Act) is a special enactment. The Division Bench further held that Act 43 of 1981 being a Special enactment specifically dealt with the allowances during the period of suspension pending enquiry will prevail over the Tamil Nadu Co-operative Societies Act. The conclusion of the Bench was that the question whether the petitioner therein is entitled to subsistence allowance should be decided by considering the position whether he would fall within the definition of an 'employee' as defined under Section 2(a) of Act 43



of 1981. For the said purpose, the matter was remitted to the Authority under the Payment of Subsistence Allowance Act/Assistant Commissioner of Labour, to take up the application of the petitioner claiming Subsistence Allowance and proceed the same after giving a specific finding as to whether the Secretary of the Society falls within the definition of 'employee' under Section 2(a) of the Act 43 of 1981.

9.The question that falls for consideration in this case is whether the first respondent satisfied the definition of 'an employee'. As held by the Division Bench, the Secretary though is an Officer of Co-operative Society, it is not sufficient to infer that he will not fall within the definition of 'employee' under Section 2(a) of Tamil Nadu Payment of Subsistence Allowance Act. Under Section 2(a) of the Tamil Nadu Payment of Subsistence Allowance Act, the term 'employee' is defined as follows:

"2.Definitions. - In this Act, unless the context otherwise requires, -

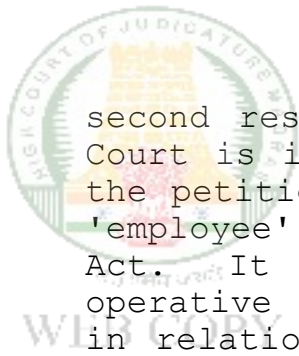
(a) "employee" means any person employed in, or in connection with the work or activities of, any establishment to do any skilled, semi-skilled or unskilled, manual, supervisory, technical, clerical or any other kind of work or activities for hire or reward, whether the terms of employment be expressed 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.The Assistant Commissioner of Labour, in this case, though allowed the application filed by the first respondent, has not elaborated how the first respondent would satisfy the definition of 'an employee' under Section 2(a) of the Act. The conclusion of the second respondent is based on the judgment of the Division Bench of this Court in ***M.Kanagasabapathy Vs. The Special Officer, S-390, Pothanoor Primary Agricultural Co-operative Bank Ltd., Pothanoor and others***, reported in ***2007(5) CTC 392***, wherein the Division Bench has not considered the factual issue as to whether the Secretary of every Co-operative Society would satisfy the definition 'employee' under Tamil Nadu Payment of Subsistence Allowance Act.

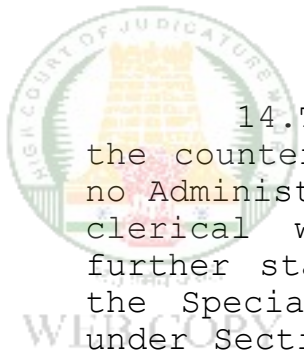
11.The only judgment relied upon by the second respondent is regarding a Supervisor of Co-operative Bank. Even from the portion of judgment extracted by the second respondent in his order, there is no analysis of the issue. Therefore, the order passed by the



second respondent appears to be on presumption. Thereafter, this Court is inclined to examine the question whether the Secretary of the petitioner Co-operative Bank will fall within the definition of 'employee' under the Tamil Nadu Payment of Subsistence Allowance Act. It is admitted before the Court that the Secretary of Co-operative Society is the Administrative Head, taking all decisions in relation to all the business transaction of the society. The duties attached to the office of Secretary are managerial in nature and hence at no stretch of the imagination the Secretary of the society can be treated as an employee under the Tamil Nadu Payment of Subsistence Allowance Act, 1981.

12.The learned counsel appearing for the first respondent would submit that he was working for more than two decades in the same position as Secretary and no increment was paid to him. When this Court enquired about the nature of work that is assigned to the Secretary, the learned counsel was unable to dispute the submission of the learned counsel appearing for the petitioner that the first respondent as Secretary of the Society is doing all the works which are managerial in nature and that day to day management of all business activities of the society is only under the Secretary. Though the learned counsel for the petitioner submit that bye-laws of the society prescribing the nature of work entrusted to the Secretary would support his contention, the learned counsel appearing for the first respondent would state that the bye-laws of the society can not be taken as decisive. The learned counsel for the first respondent would further submitted that no material was produced in this case about the nature of work so as to come to the conclusion that the Secretary would not fall within the definition of 'employee'. The learned counsel for the first respondent also admitted that no document or evidence was marked by the first respondent to prove that the nature of job he was doing is not managerial in nature, but would satisfy the definition of 'employee'. When an issue was raised, both parties are expected to produce records. It is admitted that the first respondent in the respective writ petitions is an authority exercising administrative control over the society. It cannot be disputed that the first respondent in both cases is engaged mainly in a managerial or administrative capacity.

13.The learned counsel appearing for the first respondent then submitted that the first respondent was paid subsistence allowance earlier and that therefore the petitioner is estopped from disputing the right of first respondent to claim subsistence allowance. Law is well settled that there there can be no estoppel against statute. When the first respondent made a claim under statute, his entitlement has to be judged only on the basis of the provisions of the statute. Merely because subsistence allowance was paid for a period earlier, there is no estoppel and the petitioner cannot be compelled to pay against the statutory provisions.



14.The learned counsel for the first respondent referring to the counter affidavit, submitted that Secretary of the Society has no Administrative control and that though he does some managerial or clerical works, he was not authorised to represent the Bank. It is further stated that all the administrative powers are vested with the Special Officer of the petitioner society who was appointed under Section 89(1) of Tamil Nadu Co-operative Societies Act, 1983. Merely, because, the Special Officer is appointed and entrusted with certain functions which are to be performed by the elected body of the Bank, the first respondent cannot claim that he is not an Officer of the Bank. It is true that mere designation alone cannot reveal the nature of duties. However, having regard to the functions of the Secretary which are either managerial or clerical and he was authorised to perform certain managerial functions, this Court is unable to sustain the arguments of counsel appearing for the first respondent.

15.Considering the case on merits, this Court is unable to sustain the order of Assistant Commissioner of Labour allowing the application filed by the first respondent claiming subsistence allowance for different periods in the order impugned in the writ petitions. Hence, the order of second respondent, dated 19.02.2010 in PSA.17 and 19 of 2004 dated 17.02.2010 are set aside and the writ petitions are allowed. However, liberty is given to the first respondent in both writ petitions to approach the appropriate authorities in the manner as provided in bye-laws, if he is entitled to Subsistence Allowance for the period during which he was placed under suspension. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CO)

// True Copy //

Sub Assistant Registrar(CS)

TM

To

1.The Assistant Commissioner of Labour,
(Authority under Tamil Nadu Payment of
Subsistence Allowance Act),
Trivandrum Road, Palayamkottai,
Tirunelveli District.

+1CC TO Mr.B.Subramania Pillai, Advocate, Sr.No.95523
+one cc to Spl.Govt.Pleader, sr.No.95134

SMA/06/01/2020/6P/4C

W.P. (MD) .Nos.4004 and 4005 of 2010

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