

(2016) 11 MAD CK 0086

In the Madras High Court

Case No : W.P. No. 29347 of 2005 and W.P.M.P. No. 32165 of 2005

Management of K. 2078

APPELLANT

Vs

A.S. Iyyasamy

RESPONDENT

Date of Decision : 17-11-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Limitation Act, 1963 — Section 29(2), Section 5

Tamil Nadu Payment of Subsistence Allowance Rules, 1981 — Rule 5 (7), Rule 5A

Citation : (2017) 1 LLJ 264 : (2017) 1 WritLR 219

Hon'ble Judges : Mr. R. Suresh Kumar, J.

Bench : Single Bench

Advocate : Mr. S. Ravi, Advocate, for the Respondent; Mr. G. Sankaran, Advocate, for the Petitioner

Final Decision : Dismissed

Judgement

The prayer in the writ petition is for a writ of certiorarified mandamus, calling for the records on the file of the 2nd respondent in Endt. No. Dis.7689/2005 dated 10.8.2005 and quash the same and direct the 2nd respondent to accept and decide the Interlocutory application filed by the petitioner bank seeking condone delay in filing appeal against the orders passed in PSA 4/2002 dated 3.10.2002 by the 2nd respondent.

2. The case of the petitioner is that the first respondent was the employee of the petitioner Co-operative Bank and for the mistake committed by him, an enquiry was conducted, pending which he was placed under suspension on 09.1.1997 and ultimately, the first respondent was removed from service from 18.9.1999 by the proceedings of the petitioner dated 20.9.1999.

3. The first respondent had filed a petition under the Tamil Nadu Payment of Subsistence Allowance Act, before the second respondent, who is the authority under the Act claiming subsistence allowance from the date of suspension i.e., from 09.1.1997 till the date of removal of service i.e., 18.9.1999. The said

petition filed by the first respondent before the second respondent was ordered by the second respondent on 03.10.2002, ex parte, directing the petitioner Bank to pay a sum of Rs.73,325/- to the first respondent.

4. Though the order was passed as early as on 03.10.2002 and the same was served on the petitioner, the petitioner could not file any review or appeal against the said order or a petition to set aside the said order before the second respondent for the reason that it was not brought to the notice of the Secretary concerned of the petitioner Bank and ultimately, only on receipt of notice from the learned counsel for the first respondent dated 06.5.2005 after coming to know about the award passed by the authority, it had filed a petition for setting aside the order dated 03.10.2002 before the second respondent authority.

5. The second respondent however, by return memo dated 10.8.2005 returned the case papers i.e., the petition filed by the petitioner herein before the second respondent for setting aside the order dated 03.10.2002 on the ground that such a review petition should have been filed within 30 days time as contemplated in the rule within which since the petition was not filed, the same was returned. As against the said order dated 10.08.2005 passed by the second respondent, the present writ petition has been filed with the aforesaid prayer.

6. Heard both sides.

7. The learned counsel appearing for the petitioner would contend that the order dated 03.10.2002 passed by the second respondent was not immediately brought to the notice of the Secretary concerned of the petitioner Bank and only after coming to know the said fact, after receipt of notice from the counsel for the first respondent for payment of the amount as ordered by the second respondent in the said order, in May 2005, the petitioner immediately, rushed to the second respondent and filed a petition on 06.06.2005. This position had been explained in the affidavit filed in support of the said petition filed under Rule 5 (7) of the Tamil Nadu Payment of Subsistence Allowance Rules, 1981 (in short Rules) and in spite of the reasons having been given in the supporting affidavit filed by the petitioner, the second respondent had erroneously rejected the same by returning the papers by order dated 10.08.2005 stating the aforesaid reasons that the petition should have been filed within 30 days from the date of order as the same was beyond that time, there is no power to accept the petition under the Rules and therefore, accordingly, it was rejected.

8. The learned counsel appearing for the petitioner heavily relied upon the Judgment of this Court in the case of A. Aruljothi v. Deputy Commissioner of Labour, Salem and another reported in 2002 (3) L.L.N.544 and submitted that in the said case also the appeal filed under Rule 5 A of the said Rules was rejected on the ground that an appeal should have been filed within a period of 60 days and beyond the period of 60 days, an appeal filed under Section 5 A could not have been entertained and on that ground in that case, the appeal papers were returned by the authority under the Act and challenging the same, the writ

petition was filed and in the said writ petition, the aforesaid decision as reported was passed by this Court.

9. In view of the said categorical decision where this Court has already held that Section 5 of the Limitation Act very well would be made applicable for the petitions/appeals filed under Tamil Nadu Payment of Subsistence Allowance, Rules 1981, the present order which is impugned herein passed by the second respondent would not stand and therefore, the same has to be quashed and the writ petition has to be allowed.

10. In response to the said submissions made on behalf of the petitioner, the learned counsel appearing for the first respondent would contend that no doubt, there is no provision in the said Rule to condone the delay in filing either petition or appeal as against the order passed by the authority. In the said case, an appeal was filed under Section 5 A of the Rule which should have been filed within 60 days. As the same was filed beyond the 60 days, the party had filed a petition to condone the delay seeking to invoke Section 5 of the Limitation Act which was refused or rejected by the authority and as against which only, the said writ petition was filed and ultimately, this Court held that in entertaining the condone delay petition filed under Section 5 of the Limitation Act, even though, there is no express provision is available in the Rules, there is no express bar in entertaining such petition under Section 5 of the Limitation Act, in view of Section 29(2) of the said Act and only in that context the Judgment was rendered.

11. The learned counsel appearing for the first respondent would further contend that in the case in hand, there is no such petition filed by the petitioner herein before the second respondent under Section 5 of the Limitation Act seeking to condone the delay of very longer period i.e., more than two years and in absence of such petition having been filed before the second respondent, there was no occasion even for the second respondent to consider the same and therefore, the law laid down in the said Judgment referred to above as cited by the learned counsel for the petitioner would not be applicable for the present case and therefore, in that view of the matter, the order passed by the first respondent is fully sustainable and therefore, the writ petition deserves to be dismissed. Accordingly, the learned counsel for the first respondent wants the writ petition to be dismissed.

12. This Court has considered the rival submissions of the respective learned counsel as well as the materials placed before this Court.

13. It is an admitted fact that the petitioner suffered with an order at the hands of the second respondent by order dated 03.10.2002. Even though the said order was passed and communicated to the petitioner and the said fact also is accepted by the petitioner at paragraph 4 of the affidavit filed in support of the writ petition, there was no attempt made by the petitioner to approach the second respondent by filing a petition either to set aside the order or to file an

appeal thereon. Though some reasons were given in the affidavit filed in support of the petition before the second respondent, there is no proof to show that those reasons are genuine. Be that as it may.

14. As far as the legal submissions made by the respective counsel are concerned, the original order by the second respondent was passed on 03.10.2002 and the same was immediately, communicated to the petitioner. However, the petitioner had filed a petition to set aside the order only on 06.06.2005 before the second respondent. Therefore, there is a delay of more than 27 years occurred in filing the said petition. The fact remains that while filing the said petition, under Rule 5(7) of the Rules, no petition was filed by the petitioner before the second respondent either under Section 5 of the Limitation Act or any other provision of the Rules, seeking to condone the delay of filing the petition under Rule 5(7) of the Rules as the same should have been filed within 30 days as contemplated under the said Rule itself. If at all, any petition to condone the delay of more than 27 years is filed under Section 5 of the Limitation Act, there would have been a chance to consider the same by the second respondent and since no petition invoking Section 5 of the Limitation Act was even filed by the petitioner, the second respondent had no occasion to go into that issue as to whether Section 5 of the Limitation Act can be invoked in view of the decision of this Court reported in 2002 (3) L.L.N.544 (cited supra). When that being the position, the second respondent had no option except to go in accordance with the Rules rejected the petition filed by the petitioner under Rule 5 (7) of the Rules and by thus, the impugned order passed on 10.8.2005 is fully justifiable and need not to be interfered with.

15. Insofar as the said Judgment of 2002 (3) L.L.N.544 (cited supra) is concerned, at paragraph 8 of the Judgment, the learned Judge has held that insofar as the special law do not expressly exclude the application of the Limitation Act, the application for delay of condonation can be entertained by the appropriate authority under the special law. If this ratio is applied to the present case, it can be easily concluded that if there is any petition to condone the delay under the Limitation Act filed, then there is no hesitation in holding that such petition should have been decided on its own merit and not by the reason that there is no power for the authority under the Rule to condone the delay. However, the facts are slightly different in this case as the petitioner has not even thought of filing a petition under Section 5 of the Limitation Act, in spite of the categorical ruling of this Court on this aspect as has been referred to above. In the absence of even a petition under Section 5 of the Limitation Act, prudently, we cannot expect that the second respondent authority should have considered the claim of the petitioner for the cause of delay in filing the petition to set aside the order and assuming the same, the second respondent should have passed an order in favour of the petitioner. Such a stretch of extending the benefit of invoking Section 5 of the Limitation Act suo motu without even a petition would have a disastrous consequences, and if the same is accepted by this Court, it would open a flood gate as litigant would claim that even without

even a petition under Section 5 of the Act that Section can be invoked suo motu by the authorities or Courts concerned and delay should be condoned.

16. In such view of the matter, this Court is of the considered view that even though the principles enunciated in the said Judgment reported in 2002 (3) L.L.N.544 (cited supra) paves way for invoking Section 5 of the Limitation Act in respect of petition/review or appeal under the Rule, in the absence of even a petition under Section 5 of the Limitation Act by the petitioner, it may not be possible for this Court to consider the plea raised by the petitioner and the submissions made on his behalf.

17. Therefore, this Court finds no infirmities in the order passed by the second respondent which is impugned herein and hence, the writ petition is dismissed. Consequently, the first respondent shall be at liberty to claim the amount payable to him by the petitioner pursuant to the order passed by the second respondent dated 03.10.2002 and such payment shall be made by the petitioner within a period of two months from the date of receipt of a copy of this order.

18. Writ petition is dismissed accordingly. No costs. Consequently, connected miscellaneous petition is closed. 17.11.2016.