(2011) 11 MAD CK 0299

In the Madras High Court

Case No : Writ Petition (MD) No. 10818 of 2008 and M.P. (MD) . No. 1 of 2008

The Management, SP. SPL. 90 Viswanatham Primary Agricultural Co-operative Bank Ltd.	APPELLANT
Vs	
S. Radhakrishnan and The Authority under the Payment of Subsistence Allowance Act/ The Assistant Commissioner of Labour, Madurai	RESPONDENT

Date of Decision : 11-11-2011

Acts Referred:

Evidence Act, 1872 — Section 114
Post Office Act, 1898 — Section 27
Tamil Nadu Payment of Subsistence Allowance Act, 1981 — Section 2(1), 3, 4
Tamil Nadu Payment of Subsistence Allowance Rules, 1981 — Rule 5A

Citation : (2011) 11 MAD CK 0299

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : J. Parekhkumar, for the Appellant; Mahesh Raja for R2 and Government Advocate Mr. D.Srinivasa Raghavan for R1, for the Respondent

Final Decision : Allowed

Judgement

Honourable Mr. Justice K. Chandru

1. The petitioner is the management of Primary Agricultural Co-operative Bank Limited, Viswanatham, Virudhunagar District at Sivakasi. In this writ petition, they have challenged an order passed by the second respondent, the authority constituted under the Tamil Nadu Payment of Subsistence Allowance Act, 1981 (Act No.43 of 1981).

2. By the impugned order, the second respondent computed a sum of Rs.72,148/- as subsistence allowance due and payable from 11.02.2003 to 10.01.2005 for a period of 22 months at the rate of 100%. As against the said order, the writ petition came to be filed and admitted on 27.11.2008. Pending the writ petition, this Court granted only notice on the stay application.

3. The contention of the petitioner was that the first respondent was dismissed by them vide order dated 01.04.2003, which was also produced before the authority as Ex.R1. It was sent by tapal, but was not received by the first respondent and it came back "unserved". It was also marked as Ex.R2. The proof of sending the order was also marked by producing the postal receipt as Ex.R3. The return postal cover was marked as Ex.R4 series. The salary register for the month of June 2001 was produced as Ex.R6. Notwithstanding the fact that the first respondent was dismissed by order dated 01.04.2003, the authority computed the subsistence allowance even for the period beyond his date of dismissal and computed for 22 months that too at the rate of 100%.

4. The order passed by the second respondent refers to the proof affidavit filed by the petitioner''s Society, in which the documents have been filed and noted that when cross-examination of the management witnesses, he had admitted under Ex.R2, there was no indication that it was sent by registered post. Even the certificate of posting alone was filed as Ex.R3. The document that was sent in cover for which Ex.R3 was filed was also not filed. There was nothing on record to show that the order has been served. Since the tapal has come back as door locked, the management should have taken steps to affix the order in the door and should have given public advertisement. Since such procedures have not been followed and the worker continues to remain in the same quarters, the authority held that the workman was continuously under suspension. Notwithstanding his dismissal, the authority held that the workman was entitled for subsistence allowance till 01.11.2005 and computed the amount at the maximum rate of 100%.

5. The contention raised by the management was that since the workman was dismissed after conducting an enquiry that too for a proved misconduct, the dismissal order ought to have been taken note by the authority and the dismissal order was served to the workman by ordinary certificate of posting on 11.03.2004 itself. Hence, there is no cause of action to claim subsistence allowance even for the period for which the workman was not in employment and was dismissed.

6. On notice from this Court, the counsel for the first respondent Mr.D.Srinivasa Raghavan raised two contentions. The first contention was that under Rule 5-A of the Tamil Nadu Payment of Subsistence Allowance Rules, 1981, the management should have filed an appeal to the appellate authority and the same has not been filed. Hence the writ petition is not maintainable.

7. The second contention was that the dismissal order was not served. Unless it is served, it will not come into effect. Therefore, the authority was right in presuming that the first respondent was continued to be under suspension.

8. Insofar as the first contention is concerned, the appeal that his said to be provided under Rule 5-A will not preclude this Court from entertaining a writ petition and the writ petition was admitted by this Court as early as in November,

2008 and therefore, at this stage, the writ petition cannot be dismissed solely on the ground that the appeal remedy is provided before the appellate authority.

9. Secondly, the contention raised by both sides are serious enough warranting a finding to be rendered by this Court on the question of service of notice and also the effect of a dismissal order, on the claim for subsistence allowance, if not served on the employee. Before going into the contentions raised, it must be noted that it enables an employee to receive subsistence allowance in terms of Section 3 of the Tamil Nadu Payment of Subsistence Allowance, Act, 1981. The Act under the said provision provides for rate of suspension allowance. In some cases even reduction of allowance if the circumstances so warrants is provided.

10. The term suspension has also been defined u/s (2)(g)(1) of the Act which reads as follows:

''Suspension'' means an interim decision of an employer as a result of which an employee is debarred temporarily from attending to his office and performing his functions in the establishment on the ground that:

(1) and enquiry into grave charge against him is contemplated or is pending or no final order after the completion of the enquiry has been passed;

Therefore, a person is said to be under suspension, when an enquriy into the grave charges against him is pending or if no final order has been passed after the completion of the enquiry.

11. In the present case, not only the enquiry has been completed and final order has been passed, it was also produced before the authority and marked as Ex.R1 and that was not taken note of on certain technical plea by the authority. In the present case, the management has taken all steps to send the order both by registered posts as well as certificate of posting. While the registered post has come back un-delivered on the ground that the door was locked, whereas the tapal sent along with the certificate of posting did not come back. It leads to a strong presumption that the first respondent was in receipt of such an order.

12. In this context, it is necessary to refer to a decision of the Supreme Court in P.T.Thomas V. Thomas Job reported in (2005) 6 SCC 478 with reference to service of orders on the other side and it was held in paragraphs 14 and 15 as follows;

14... Though the notice was correctly addressed and despite the intimation by the post office, the notice was not accepted by the respondent and was returned unserved. In such circumstances, the presumption of law is that the notice has been served on the respondent.

15. The High Court, in our view, has also misinterpreted Section 27 of the Post Office Act, 1898. The requirement of the section has been complied with in this case. The reasoning of the High Court on this issue is not correct and not in accordance with factual position. In the notice issued, the postman has made the

endorsement. This presumption is correct in law. He had given notice and intimation. Nevertheless, the respondent did not receive the notice and it was returned unserved. Therefore, in our view, there is no obligation cast on the appellant to examine the postman as assumed by the High Court. The presumption u/s 114 of the Evidence Act, 1872 operates apart from that under the Post Office Act, 1898.

13. Even otherwise, the Supreme Court in National Textile Corporation (M.P.) Ltd. Vs. M.R. Jhadav, has categorically stated that the actual communication of an order of suspension is not necessary and it is enough if the order goes out of control of the appointing authority. The following passage found in paragraphs 23 and 24 may be usefully extracted below:

23. In MCD v. Qimat Rai Gupta9 this Court opined SCC p. 319, para 27

27. An order passed by a competent authority dismissing a government servant from services requires communication thereof as has been held in State of Punjab v. Amar Singh Harika but an order placing a government servant on suspension does not require communication of that order. (See StateofPunjab v. KhemiRam.)

24. Therefore, there cannot be any doubt whatsoever that communication of the acceptance of offer was necessary. An internal noting does not constitute a communication. Even in a case of order of suspension, only when the case goes out of the control of the appropriate authority, actual communication may not be necessary.

14. Therefore, in the light of these facts, it cannot be said that there was no order of dismissal exist against the first respondent.

15. A reading of Section 4 of the Tamil Nadu Act, 43 of 1981 would clearly show that it is only when the suspension is in operation, the authority can have power to determine the rates of suspension. But, if the suspension has come to an end as contemplated u/s 2(g)(1), then the authority lacks powers to deal with the question of liability or otherwise of the order which has finally ends the enquiry.

16. At the same time, in the present case, the order of termination was made with effect to 10.07.2002. Merely because an order is passed terminating the service of the employee from the date on which his suspension was made, that will not disable the employee from claiming subsistence allowance till a final order is passed. Therefore, the workman is always entitled to subsistence allowance, notwithstanding the fact that the order of suspension was made retrospectively with effect from 10.07.2002, though it was passed only on 01.04.2003.

17. In the present case, the controversy was not on the retrospective nature of the order, but whether the workman notwithstanding Ex.R1 is entitled to claim subsistence allowance even beyond the date of his termination without challenging the order of termination in the manner known to law in the forum

meant for such purposes.

18. Therefore, this Court is of the opinion that the claim made by the workman for the period from 01.04.2003 to 10.01.2005 is clearly not permissible and he can only get subsistence allowance from 11.02.2003 to 01.04.2003, the date on which Ex.R1 came into existence.

19. In the light of the above, the writ petition stands partly allowed and the order passed by the authority in P.S.A.No.21 of 2007 dated 07.03.2008 is set aside only to the extend that it was provided for subsistence allowance from 01.04.2003 to 10.01.2005. In respect of the unpaid subsistence allowance, the petitioner is directed to pay the said amount to the first respondent without driving him for recoursing any further forum. Consequently, the connected miscellaneous petition is closed. No costs.