

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:31.03.2010

CORAM:

THE HON'BLE MRS.JUSTICE PRABHA SRIDEVAN  
AND  
THE HON'BLE MR.JUSTICE P.P.S.JANARTHANA RAJA

W.A.NOS.189 TO 191 OF 2010

and

M.P.NOS.1,1,2 and 2 of 2010

Dr.K.Ponsingh

...Appellant in all the W.As.

Vs.

1. Central Registrar of Cooperative Societies,  
Department of Agriculture and Cooperative,  
Krishi Bhavan,  
Dr.Rajendra Prasad Road,  
New Delhi 110 001.
2. The Indian Medical Practitioners  
Cooperative Pharmacy and Stores Ltd., (X 185)  
rep. by the Secretary  
34-37, Kalki Krishnamoorthy Salai,  
Thiruvannamipur, Chennai 600 041. ...Respondents 1 & 2  
in all the W.As.
3. The President,  
The Indian Medical practitioners  
Cooperative Pharmacy and Stores Ltd.,  
X 185, 34-37, Kalki Krishnamoorthy Salai,  
Thiruvannamipur, Chennai 600 041. ...Third respondent in  
W.A.No.189 of 2010

Writ Appeals filed against the common order dated 17.11.2009 passed in W.P.Nos.6521 of 2009, 21659 of 2008 and 26794 of 2008 respectively.

WP.6521/09: Petition filed under Article 226 of Constitution of India, calling for the records relating to the order/proceedings dated 20.03.2009 in file No. E/2008-2009 passed by the second respondent and quash the same and to pass such further or other order.

WP.21659/2008: Petition filed under Article 226 of Constitution of India, calling for the records relating to the order/proceedings dated 30.07.2008 in file No.E/2008-2009 passed by the second

respondent and quash the same and also directing payment of subsistence allowance to the petitioner in accordance with clause 3 (XIII) sub-clause (3) of the Standing Orders of the second respondent co-operative society and to pass such further or other orders.

WP.26794/08: Petition filed under Article 226 of Constitution of India, calling for the records relating to the order/proceedings dated 29.9.2008, in file No.E/2008-2009 passed by the 2nd respondent and quash the same and to pass such further or other order.

For Appellants : Mr.Balan Haridas

For Respondents 2 & 3 : Mr.M.S.Palanisamy  
for Mr.R.Sivakunmar

#### J U D G M E N T

(Judgment of the Court was delivered by PRABHA SRIDEVAN,J)

The Assistant Secretary, the appellant herein, who was working as in-charge of Indian Medical Practitioners Cooperative Pharmacy and Stores Limited (for short IMPCOPS), was placed under suspension. A domestic enquiry was initiated. According to the appellant, the subsistence allowance was not paid to him. Therefore, he filed three writ petitions viz., (1)W.P.No.21659 of 2008 for payment of subsistence allowance (WA.190/2010), (2) W.P.No.6521 of 2009 for quashing the order passed by the second respondent to hold domestic enquiry (W.A.189/2010) and (3) W.P.No.26794 of 2008 for a direction to quash the suspension order (WA.191/2010).

2. Learned single Judge dismissed all the writ petitions. While doing so, a direction was given for payment of subsistence allowance to the petitioner in terms of the bye-laws of the respondent-society. Now, these three writ appeals have been filed.

3. The appellant was picked up by the police for an enquiry at around 6.00 a.m. on 29-11-2007 from his office quarters, pursuant to a complaint given by his wife and he was remanded to judicial custody for the offences punishable under Sections 498A, 406, 506(ii)IPC and under Sections 4 and 6 of the Dowry Prohibition Act in Crime No.13 of 2007 on the same day. The said incident had brought down the morale and the image of the Institution. According to Clause 3(xii) Sub Clause (3) of the Standing Orders of the Institution, an employee who has been committed to prison on a criminal charge should be considered as under suspension from the date of his arrest and would be entitled to subsistence allowance until the termination of the proceedings against him. The subsistence allowance was directed to be paid during the period of

suspension with effect from 29.11.2007. On 30.07.2008 by proceedings F.No.E/2008-09, the Secretary of the respondent-Society informed that 100% of the subsistence allowance was paid to the appellant, as per Section 3(1) of the Tamil Nadu Payment of Subsistence Allowance Act, 1981. Thereafter, the petitioner was informed that subsistence allowance as per the aforesaid Act is not admissible to him. Therefore, the excess amount paid was to be recovered from him. Against this, he filed W.P.No.21659 of 2009. By Proceedings F.No.E/2008-09 dated 29.09.2009 show cause notice issued and reply of the appellant were referred and the appellant was informed that since the charges levelled against him are serious in nature, he will be placed under suspension and he will not leave the Headquarters of the Society. At this juncture, he filed W.P.No.26974 of 2008. Interim stay was granted on 04.09.2008 in W.P.No.21659 of 2008 with regard to the recovery of subsistence allowance, giving liberty to the appellant to move the appropriate authority under section 84 of the Multi State Cooperative Societies Act, 2002. On 20.03.2009, by proceedings in F.No.E/2008-09, the appellant was informed about the appointment of Enquiry officer. So, he filed W.P.No.6521 of 2009. On 27.03.2009, by proceedings in E/2008-2009, the appellant was informed about the nomination of Presentation Officer on behalf of the Management. On 07.04.2009, the appellant requested the respondent to pay him the subsistence allowance. In W.P.No.6521 of 2009, an interim order was passed restraining the respondents from proceeding with the enquiry without payment of subsistence allowance, observing that "it is needless to point out that if the subsistence allowance is paid, enquiry can proceed". Thereafter, all the writ petitions were taken up for final disposal on 17.11.2009. The learned Single Judge found that the petitioner is entitled to subsistence allowance only in terms of bye-laws which are applicable to him and not by invoking the provision of the Tamil Nadu Subsistence Allowance Act, since he is admittedly not a 'workman' within the meaning of Section 2(s) of the Industrial Disputes Act. Learned counsel for the respondent IMCOPS submitted that the Society is paying subsistence allowance to the petitioner in terms of the Bye-laws.

4. Learned counsel for the appellant submitted that without payment of subsistence allowance, the enquiry cannot proceed. The Bye-laws clearly referred to suspension for a specific period. Referring to Rule 12(d) of the bye-laws, learned counsel for the appellant would submit that when the bye-law provides that no employee shall in any case be kept under suspension for a period exceeding three months at a time, the retention of the appellant under suspension beyond three months would amount to infraction of his rights guaranteed under Article 21 of the Constitution of India. He would be entitled to full pay after three months. Learned counsel for the appellant further submitted that the word 'suspension' used in 12(c) of the Special Bye-laws would mean that suspension imposed as a punishment and not



suspension pending enquiry and therefore the appellant has no appellate remedy. These writ petitions have been filed for a direction to pay subsistence allowance and to quash all the illegal orders, as not sustainable and the learned Single Judge was not correct in dismissing all the writ petitions relying on Marappan's case.

5. He referred to various decisions which dealt with the meaning of the word "suspension", "the liability of the Master to pay wages during the period of suspension and the extent of the power to suspend.

They are:

- (1) AIR 1959 SC 1342. The Management Hotel Imperial Vs. Hotel Workers' Union
- (2) (AIR 1961 SC 276 (T. Cajee Vs. U. Jormanik Siem )
- (3) AIR 1964 SC 787 (R.P. Kapur Vs. Union of India and another)
- (4) AIR 1968 SC 800 (Balvantrai Ratilal Patel Vs. State of Maharashtra)
- (5) AIR 1970 (1) SCC 362 (V.P. Gidroniya Vs. The State of Madhya Pradesh and another)

6. Learned counsel appearing for the respondents-Society submitted that on the ground of maintainability alone, the writ petitions ought to have been dismissed and further relief cannot be granted. He also submitted that the main issue regarding payment of subsistence allowance was also the subject matter of a decision of the Full bench of our Court and therefore, these writ appeals must be dismissed.

7. In response, learned counsel for the appellant submitted that while the learned Single Judge had dismissed the writ petitions following the decision of the Larger Bench. But once the learned Single Judge had given directions in spite of the observation that the writ petitions were not maintainable, it is not open to the respondents to raise the question of maintainability, when they had not filed the appeal.

8. V.P. Gidroniya Vs. The State of Madhya Pradesh and another reported in AIR 1970 (1) SCC 362, elaborately deals with what is the meaning of suspension of service and what is the legal position as regards a Master's right to place his servant's suspension. The said decision also explained that there are three kinds of suspension known to law as follows:

"6. Three kinds of suspension are known to law. A public servant may be suspended as a mode of punishment or he may be suspended during the pendency of an enquiry against him if the order appointing him or statutory provisions governing his service provide for such suspension. Lastly

he may merely be forbidden from discharging his duties during the pendency of an enquiry against him which act is also called suspension. The right to suspend as a measure of punishment as well as the right to suspend the contract of service during the pendency of an enquiry are both regulated by the contract of employment or the provisions regulating the conditions of service. But the last category of suspension referred to earlier is the right of the master to forbid his servant from doing the work which he had to do under the terms of the contract of service or the provisions governing his conditions of service at the same time keeping in force the master's obligations under the contract. In other words, the master may ask his servant to refrain from rendering his service but he must fulfil his part of the contract.

7. The legal position as regards a master's right to place his servants under suspension is now well settled by the decision of this court. In *The Management of Hotel Imperial, New Delhi and Others Vs. Hotel Workers' Union*, the question whether a master could suspend his servant during the pendency of an enquiry came up for consideration by this Court. Therein this Court observed that it was well settled that under the ordinary law of master and servant the power to suspend the servant without pay could not be implied as a term in an ordinary contract of service between the master and the servant but must arise either from an express term in the contract itself or a statutory provision governing such contract. It was further observed therein that ordinarily in the absence of such a power either in express terms in the contract or under the rules framed under some statute would mean that the master would have no power to suspend a workman and even if he does so in the sense that he forbids the employee to work he will have to pay the wages during the so-called period of suspension. Where, however, there is power to suspend either in the contract of employment or in the statute or the rules framed thereunder, the suspension has the effect of temporarily suspending the relationship of master and the servant with the consequence that the servant is not bound to render service and the master is not bound to pay."

9. In AIR 1961 SC 276, the Supreme Court held in Paragraph 14 as follows:

"14.....These wages or payment for the work done or emolument of the office held could not be withheld in whole or in part unless there is power to make an order of interim suspension either in the contract of employment or in the statute or the rules framed thereunder. The effect of that decision is that in the absence of such power the master can pass an order of interim suspension but he will have to pay the servant according to the terms of contract between them....."

10. In AIR 1968 SC 800, the Supreme Court held in Head note (A) as follows:

The authority entitled to appoint the public servant is entitled to suspend him pending a departmental enquiry into his conduct or pending a criminal proceeding, which may eventually result in a departmental enquiry against him. But what amount should be paid to the public servant during such suspension will depend upon the provisions of the statute or statutory rule in that connection. If there is such a provision, the payment during suspension will be in accordance therewith. But, if there is no such provision, the public servant will be entitled to his full emoluments during the period of suspension. On general principles therefore the Government like any other employer, would have a right to suspend a public servant in one of two ways. It may suspend any public servant pending departmental enquiry or pending criminal proceedings; this may be called interim suspension. The Government may also proceed to hold a departmental enquiry and after his being found guilty order suspension as a punishment if the rules so permit. This will be suspension as a penalty. The question as to what amount should be paid to the public servant during the period of interim suspension or suspension as a punishment will depend upon the provision of the statute or statutory rules made in that connection."

11. In AIR 1964 SC 787 , in Head Note (c), the Supreme Court held as follows:



"(c) But what amount should be paid to the public servant during interim suspension will depend upon the provisions of the statute or rule in that connection. If there is such a provision the payment during suspension will be in accordance therewith. But, if there is no such provision, the public servant will be entitled to his full emoluments during the period of suspension. This suspension must be distinguished from suspension as a punishment which is a different matter altogether depending upon the rules in that behalf".

12. In AIR 1959 SC 1342 , the Supreme Court held in Head Note as follows:

"The power of the employer to suspend an employee under the ordinary law of master and servant in the sense of a right to forbid a servant to work, is not an implied term in an ordinary contract between master and servant, and such a power can only be the creature either of a statute governing the contract, or of an express term in the contract itself. Ordinarily, therefore, the absence of such power either as an express term in the contract or in the rules framed under some statute would mean that the master would have no power to suspend a workman and even if he does so he will have to pay wages during the so-called period of suspension. Where, however, there is power to suspend either in the contract of employment or in the statute or the rules framed thereunder, the suspension has the effect of temporarily suspending the relation of master and servant with the consequence that the servant is not bound to pay."

Therefore, his right to claim subsistence allowance or the employee's duty to pay the same really depends on the statute or rules made in this regard which in this case would be the Bye-laws.

13. The complaint relating to appointment of an enquiry officer who initiated disciplinary proceedings and the suspension order which was challenged in W.A.Nos.189 and 190 of 2010 must be dismissed in view of the Larger bench Judgment in Marappan's case. Paragraph 21 of the Judgment is important.

"21.From the above discussion, the following propositions emerge:

(i) If a particular co-operative society can be characterised as a 'State' within the meaning of Article 12 of the Constitution (applying the tests evolved by the Supreme Court in that behalf), it would also be 'an authority' within the meaning and for the purpose of Article 226 of the Constitution. In such a situation, an order passed by a society in violation of the bye-laws can be corrected by way of writ petition;

(ii) Applying the tests in *Ajay Hasia* it is held that a cooperative society carrying on banking business cannot be termed as an instrumentality of the State within the meaning of Article 12 of the Constitution;

(iii) Even if a society cannot be characterised as a 'state' within the meaning of Article 12 of the Constitution, a Writ would lie against it to enforce a statutory public duty cast upon the society. In such a case, it is unnecessary to go into the question whether the society is being treated as a 'person' or 'an authority' within the meaning of Article 226 of the Constitution and what is material is the nature of the statutory duty placed upon it and the Court will enforce what a public function or public duty. Although, it is not easy to define what a public function or public duty is, it can reasonably be said that such functions are similar to or closely related to those performable by the State in its sovereign capacity.

(iv) A society, which is not a 'State' would not normally be amenable to the writ jurisdiction under Article 226 of the Constitution, but in certain circumstances, a writ may issue to such private bodies or persons as there may be statutory provisions which need to be complied with by all concerned including societies. If they violate such statutory provisions a writ would be issued for compliance of those provisions.

(v) Where a Special officer is appointed in respect of a cooperative society which cannot be characterised as a 'State' a writ would lie when the case falls under Clauses (iii) and (iv) above.

(vi) The bye-laws made by a co-operative society registered under the Tamil Nadu Cooperative Societies Act, 1983 do not have the force of law.



Hence, where a society cannot be characterised as a 'State', the service conditions of its employees governed by its bye-laws cannot be enforced through a Writ Petition.

(vii) In the absence of special circumstances, the Court will not ordinarily exercise power under Article 226 of the Constitution of India when the Act provides for an alternative remedy.

(viii) The decision in M.Thanikkachalam Vs. Madhuranthagam Agricultural Cooperative Society, 2000 (4) CTC 556, is no longer good law, in view of the decision of the seven-Judge Bench of the Supreme Court in Pradeep Kumar Biswas case and the other decisions referred to here before."

The writ petitions are therefore not maintainable.

14. The only other question that remains is the direction for payment of subsistence allowance after holding that the other writ petitions were not maintainable. This question was already decided in the case of T.K.Ananda Sayanam Vs. The Joint Registrar, Cooperative Societies, Vellore Region, Vellore and others reported in 2007 5 CTC 1. The question before the Full bench was whether protection of Article 21 can be invoked in each and every case of suspension, termination or other orders passed in relation to services of employee of a cooperative society, the Full Bench after considering various decisions held as follows:

"14. Every illegal order of suspension or termination will not ipso facto amount to violation of Article 21. But there may be certain circumstances, as in a case of exclusion of an employee affected by HIV AIDS or an employee who has been rendered immobile by an accident or cases where the rights of huge number of employees are invoked or where their very existence is jeopardized, where the employee may justifiably invoke Article 21 of the Constitution and seek protection by filing a Writ Petition. But every case of suspension or deprivation of wages for a period of termination will not entitle the employee of a cooperative society to move the writ Court and contend that the right of protection under Article 21 has been violated. The employees have adequate statutory protection in law.

16. For every alleged or imagined invasion of his rights, an employee of a Cooperative society cannot move the writ court on the ground that his rights under Article 21 have been infringed. The effect of the Supreme Court case cited in Marappan's

case (cited supra) and the propositions set down in Marappan's case (cited supra) cannot be set at naught merely by mentioning Article 21, even if the order is illegal.

18. Therefore, every order affecting the service of a workman would not automatically amount to an infringement of his right under Article 21 enabling him to move the Writ Court. We cannot ignore the settled position that applications to secure performance of obligations owed by a Government or a society towards its employees or to resolve any private dispute cannot be decided on the basis of the Article 21. The appellant herein may perhaps have a good case on other grounds. But the order of suspension suspending him from the post of Secretary does not amount to infringement of Article 21 and while the decision in the judgment of the Division Bench in The Nazarath Urban Cooperative Bank Ltd., case (cited supra) may be right on the facts of that case, the observations made regarding the application of Article 21 need to be and are clarified as above. The mere fact that he was kept under suspension beyond one year without the approval of the Registrar cannot be said to violate Article 21. It must be seen whether the invocation of Article 21 is justified in the particular case and whether the order challenged by a workman of a Cooperative Society is of such a nature that it would truly take away his right under Article 21 of the Constitution and that it is taken away otherwise than by due process of law."

15. Therefore, the Full Bench has held that even if an order of suspension is illegal, that will not ipso facto amount to violation of Article 21 of the Constitution to justify filing writ petitions. Learned Single Judge also relied on the Larger bench decision of this Court in "K.Marappan Vs. The Deputy Registrar of Cooperative Societies, Namakkal and another" reported in 2006 (4) CTC 689, which held that the writ petitions are not maintainable. Learned Single Judge also referred to the interpretation of a similar bye-law by a Full bench of this Court in Palani Cooperative Sales Society Vs. Presiding officer in AIR 1975 Madras 241 and held that the words "at a time" will denote that it is only a temporary suspension and not a substantive punishment and therefore, there is no bar for the employer to extend such suspension. The Learned Single Judge held that in such circumstances, if at all there is any right for the petitioner to receive subsistence allowance, it can only be in terms of the Bye-laws of the respondent-Society. Even if the respondent had not filed the appeal, the respondent is entitled to support the above order. The principles of Order 41 Rule 22 of CPC can be applied in

this case. So even if the respondents had not filed an appeal, they may justifiably support the Learned Single Judge's Judgment on the facts of the case and the law. We do not think that the learned Single Judge had given any finding about the entitlement of the appellant. The learned Single Judge after dismissing all the three writ petitions on the ground of maintainability had merely observed that if at all the appellant has any right, he can receive the subsistence allowance only under bye-laws. This is in consonance with all the Supreme Court Judgments referred to above. Therefore, this cannot be construed that a direction has been granted to the petitioner in the writ petitions. Therefore, the writ appeals are dismissed.

16. We see no reason to interfere with the orders of the learned Single Judge. No costs. Consequently, connected M.Ps are also dismissed.

Sd/-  
Asst.Registrar

/True Copy/

Sub.Asst.Registrar

VJY

To

1.The Officer Incharge  
Central Registrar of Cooperative Societies,  
Department of Agriculture and Cooperative,  
Krishi Bhavan, Dr.Rajendra Prasad Road,  
New Delhi 110 001.

2. The Secretary,  
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+ 1 CC to Mr.Balan Haridas, Advocate, SR.21895  
+ 1 CC to Mr.K.S.Prabhakaran, Advocate, SR.21567  
+ 1 CC to Mr.R.Sivakumar, Advocate, SR.21352

W.A.NOS.189 to 191 of 2010  
and connected Mps.

GS (CO)  
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