

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.02.2020

CORAM :

THE HON'BLE MR.A.P.SAHI, CHIEF JUSTICE
AND
THE HON'BLE MR.JUSTICE SUBRAMONIUM PRASAD

W.A.No.1352 of 2019

1. The Registrar
The Co-operative Society
N.V.Natarajan Maligai
Periyar EVK High Road
Kilpauk, Chennai - 600 010.
 2. The Deputy Registrar
The Co-operative Society
The Officer of the Assistant Registrar
Sudhakaran Complex, Vellore Road
Tiruchengodu
Namakkal District - 637 211.
 3. The President
S.1067, Jamin Elampalli PACS
Jamin Elampalli Post
Solasiramani (via)
Paramathi Velur (TK)
Namakkal District - 637 210.
 4. The Administrator
S.1067, Jamin Elampalli PACS
Jamin Elampalli Post
Solasiramani (via)
Paramathi Velur (TK)
Namakkal District - 637 210.
- .. Appellants/Respondents

-vs-

M.Elango

.. Respondent/Respondents

PRAYER: Appeal under Clause 15 of the Letters Patent against the order of the learned Single Judge dated 25.10.2018 passed in W.P.No.1706 of 2018.

Prayer in WP.1706 of 2018: Writ petition filed under Article 226 of Constitution of India to issue a writ of mandamus directing the 3rd respondent to take proper steps on petitioners representation dt 18.1.2017 regarding the payment of Substantial Allowance and other allowances to the petitioner.

For Appellants : Mrs.Narmadha Sampath
Additional Advocate General
assisted by
Mr.L.P.Shanmughasundaram
Special Govt. Pleader

For Respondent : Mr.G.Murugendran

JUDGMENT
(Delivered by The Hon'ble Chief Justice)

The appellants, who are authorities of the State, have come up assailing the judgment of the learned Single Judge dated 25.10.2018 in this intra-court appeal contending that the respondent/writ petitioner, Secretary of a Primary Agricultural Co-operative Credit Society, on being suspended, is not entitled to subsistence allowance.

2. The learned Single Judge had allowed the writ petition following the judgment of a Division Bench of this Court in the case of Special Officer, D.K.81, Chennasandiram Primary Agricultural Co-operative Credit Society Ltd. v. P.Periyannan and another, 2015 Supreme (Madras) 766, which refers to the judgment in the case of K.Avanasiappan v. The Management of Thekkalur Primary Agricultural Co-operative Bank and others, CDJ 2011 MHC 6513 : 2011 Supreme (Madras) 4814.

3. We had heard the matter on two occasions earlier and in order to formulate the question, we had passed the following orders on 19.12.2019 and 6.1.2020:

Order dated 19.12.2019

"Heard learned Additional Advocate General for the appellants.

2. The challenge raised in this appeal is to the order dated 25.10.2018, whereby the writ petition filed by the respondent/ petitioner has

been disposed of with a direction to the appellants to consider grant of subsistence allowance during the suspension period in relation to the proceedings that had been undertaken against the respondent/petitioner after suspending him in terms of the provision of the Tamil Nadu Co-operative Societies Act, 1983 (for brevity, "the 1983 Act").

3. An interim stay has been granted by a Division Bench of this Court in the present appeal.

4. While proceeding to hear the matter, the definition of the word "officer" under Section 2 (19) of the 1983 Act was noticed by us, that is extracted herein under for ready reference:

"2(19) "officer" includes a president, vice-president, managing director, secretary, assistant secretary, member of board and any other person empowered under the rules or the by-laws to give directions in regard to the business of the registered society."

5. The respondent/petitioner is admittedly a Secretary of the Society, who is facing grave charges relating to misappropriation, which appears to have arisen on account of some audit exercise having been carried out, for which an enquiry was instituted in terms of Section 81 of the 1983 Act. The proceedings are in relation to the surcharge as provided for under Section 87 of the 1983 Act. The power to suspend is therefore contained in the aforesaid statutory provision and the Rules governing the same, which are contained in Chapter XII of the Tamil Nadu Co-operative Societies Rules, 1988. Rule 149 facilitates taking of such action through a Special By-law to be adopted with prior approval of the Registrar. Rule 149 also indicates that taking appropriate steps for meeting of any such situation in a disciplinary proceedings could be undertaken provided there is a Special By-law. Rule 149 is gainfully extracted herein under:

149. Conditions of service of paid officers and servants of Societies. - (1) Every society shall, taking into account its nature of business, volume of transaction and financial position, adopt, with the

prior approval of the Registrar, a Special by-law covering the service conditions of its employees. The special by-law shall, inter- alia prescribe the following:-

(i) Cadre strength and classification of various categories of posts and the qualifications required thereof for each such posts.

(ii) The method of recruitment for each such posts.

(iii) The scale of pay and allowances for each such posts.

(iv) Conditions of probation for each such posts.

(v) Duties and responsibilities for each such posts.

(vi) Leave of various kinds admissible and, the conditions thereto for each such posts.

(vii) The penalties that may be imposed upon, the procedure for taking disciplinary action and inflicting various kinds of punishments on an employee holding each such post and the authority competent to entertain and dispose of appeal made against an order of punishment imposed by the competent authority on a disciplinary proceedings

(viii) Conditions relating to acquisition and disposal of movable and immovable property:

Provided that in the case of the post, other than the post of manager, superintendent and above a minimum period of three years satisfactory service shall be prescribed for eligibility for promotion from one category to the immediate next higher category of post:

Provided further that no person shall be eligible for appointment to the post of

manager, superintendent and above by promotion, unless he has completed atleast one year of satisfactory service in the category of post in which he is working and not less than six years of satisfactory service in the category of posts in which he is working and the feeder category of post to which he is working combined together:

Provided also that the co-operative training at the appropriate level may be prescribed as a necessary qualification for specific categories of non-technical posts."

6. Learned Additional Advocate General appearing for the appellants has invited the attention of this Court to By-law No.31 of the Special By-laws relating to the service conditions of Society No.1067 Jamin Elampalli Primary Agricultural Cooperative Credit Society Limited, of which the respondent/petitioner is stated to have been the Secretary at the time when the incident occurred. It is, in this, background that the respondent/petitioner appears to have been suspended and on account of non-payment of subsistence allowance he has approached this Court for Mandamus that has been issued by the learned Single Judge.

7. While examining the issue as to whether the payment of subsistence allowance could be facilitated to the suspended Secretary of a Society, who falls within the definition of "officer", it was pointed out by learned Additional Advocate General appearing for the appellants that according to Special By-law No.31(2), subsistence allowance is payable under the Tamil Nadu Payment of Subsistence Allowance Act, 1981 (for brevity, "the 1981 Act"), but only in relation to the employees which excludes from its definition anybody employed in a managerial or administrative capacity. For this, learned Additional Advocate General has invited the attention of this Court to Section 2 of the definitions contained in the 1981 Act, which recites that terminology of "employee" as defined therein would not include any person who is employed mainly in a managerial or administrative capacity. Relevant provision of

Section 2 containing the aforesaid definition is extracted herein under for ready reference:

""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 drawn 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;"

8. On the strength of the aforesaid provision, the argument appears to be that since the respondent/petitioner does not fall within the definition "employee", he is not entitled to claim even subsistence allowance keeping in view the applicability of the 1981 Act, which according to learned Additional Advocate General excludes any provision for payment of subsistence allowance to an officer of the Society, including a Secretary.

9. Prima facie, we find that if the definition clause excludes a person employed in a managerial or administrative capacity, particularly, a Secretary, as involved in the present case, then in that event there is no prohibitory provision or any other provision indicating payment of subsistence allowance or its withholding either way. In the absence of any such provision and the fact that the respondent Secretary is the employee of the Society, this Court would further like to know as to whether the respondent/petitioner would be entitled to his full salary or if he has not received any such emoluments, then the provision which controls the same.

10. Learned Additional Advocate General prays for time. As prayed for by learned Additional Advocate General, list on 02.01.2020."

Order dated 06.01.2020

"Learned Additional Advocate General has invited the attention of the Court to a Division Bench judgment in the case of M.Kanagasabapathy v. The Special Officer and others, reported in (2008) 1 MLJ 270 to contend that the said Division Bench squarely answers the issue raised in the present appeal, which has not been noticed by the Division bench in the case of K.Avanasiappan v. The Manager of Thekkalur Primary Agricultural Co-operative Bank and others, reported in CDJ 2011 MHC 6513, that has been referred to in the impugned judgment.

2. Over and above this, the said judgment in the case of M.Kanagasabapathy (supra) has been followed, after dealing with the ratio of the judgment in the case of K.Avanasiappan (supra), in W.A.No.1552 of 2012, decided on 2.12.2016 [The Special Officer, 5558 Vadugapatty Primary Agricultural Co-operative Credit Society v. T.R.Murugan and another].

3. With the help of the aforesaid two decisions, learned Additional Advocate General contends that the query raised by the Court vide its order dated 19.12.2019 therefore is answered by the aforesaid two Division Bench judgments and consequently the appeal deserves to be allowed on the said basis.

4. Learned counsel for the first respondent prays for time to study the matter and then assist the Court.

Put up on 8.1.2020 as prayed for."

4. Learned Additional Advocate General appearing for the appellants, while clarifying the facts, has submitted that the respondent/writ petitioner came to be suspended on certain charges on 30.7.2016, and according to her instructions, he has now been finally terminated on 25.8.2019. The claim of subsistence allowance by the respondent/writ petitioner is

between the said period which has been, according to the learned counsel, erroneously allowed, as the society where the respondent/writ petitioner was working as a Secretary is governed by its Special Bye-laws framed under Rule 149 of the Tamil Nadu Co-operative Societies Rules, 1988 (for brevity "the 1988 Rules") framed under the Tamil Nadu Co-operative Societies Act, 1983 (for brevity "the 1983 Act").

5. Learned Additional Advocate General contends that as per the definition of the word "employee" under Bye-law 2(b) read with Bye-law 31(2), the Tamil Nadu Payment of Subsistence Allowance Act, 1981 (for brevity, "the 1981 Act") has been made applicable and as per the definition of the word "employee" contained in Section 2(a) of the 1981 Act, a Secretary, being a managerial/supervisory post, stands excluded from the applicability of the said Act, hence subsistence allowance is not payable to the Secretary of the society.

6. Learned Additional Advocate General has further contended that the argument on behalf of the learned counsel for the respondent/writ petitioner that Regulation 29(d)(i) of the Tamil Nadu Primary Agricultural Cooperative Banks Common Cadre Service Regulations, 2000 (for brevity, "the 2000 Regulations") promulgated by the State Government under G.O.Ms.55, Cooperation, Food and Consumer Protection Department, dated 24.3.2000, would govern the field of payment of subsistence allowance, as held by a Division Bench of this Court in the case of Special Officer, No.989, M.Pakkam Primary Agricultural Cooperative Bank v. M.Srinivasan and others, reported in (2009) 7 MLJ 1025, will not be applicable keeping in view the fact that the applicability of the said government order is only in respect of a cadre employee as defined in Regulation 29(d)(i) of the 2000 Regulations. In the instant case, the common cadre came to be abolished vide G.O.Ms.No.122, Cooperation Food and Consumer Protection (CN1) Department, dated 4.7.2008 and there was no common cadre as on the date of suspension of the respondent/ petitioner on 30.7.2016. She submits that the revival of the common cadre has taken place in the year 2019 and, therefore, any benefit under the 2000 Regulations and G.O.Ms.55, Cooperation, Food and Consumer Protection Department, dated 24.3.2000 would not be available to the respondent/petitioner and consequently, the judgment in the case of Special Officer, No.989, M.Pakkam Primary Agricultural Cooperative Bank v. M.Srinivasan and others (supra) or any other judgment on the same lines, as cited by the learned counsel for the respondent/petitioner, would be of no avail.

7. Learned Additional Advocate General has, in the above

background, urged that the judgment in the case of M.Kanagasabapathy v. Special Officer, Namakkal District and others, reported in (2008) 1 MLJ 270 would govern the field as on the date of the suspension of the respondent/petitioner, which decision has categorically held that the 1981 Act having been made applicable, and being a Special Act, would prevail over the 1983 Act and in the light of the submissions noted herein above, subsistence allowance would not be payable as the post of Secretary being a managerial/supervisory post stands excluded from the applicability of the 1981 Act. She has extensively invited the attention of the Court to paragraphs 32, 49, 51 to 54, 57 to 59 of the said judgment to substantiate her submissions.

8. Learned counsel has also invited the attention of the Court to the fact that the respondent/petitioner had committed serious financial irregularities and had been charged with misappropriation and acquisition of assets in his name and his wife's name out of such misappropriation and it is for this reason he was placed under suspension.

9. It is also her contention that a society of the nature presently involved is not a State within the meaning of Article 12 of the Constitution of India and, therefore, the writ petition ought not to have been entertained. She has further relied on the judgment of a Division Bench of this Court in Annamalai University Employees' Cooperative Thrift and Credit Society, Chidambaram v. Thirugananasambandam [W.A.No.160 of 2012 decided on 26.11.2013] to buttress her submissions.

10. It has been further clarified that the Cooperative society also does not fall within the definition of "establishment" under Section 2(c) of the 1981 Act.

11. Even financially, the society has been depleted of its finances and it is unable to discharge its obligations and, therefore, any payment of subsistence allowance to the respondent/petitioner would be an additional burden.

12. Responding to the aforesaid submissions, learned counsel for the respondent/petitioner has pitched his arguments by taking recourse to Article 21 of the Constitution of India and has invited the attention of the Court to the Division Bench judgment in the case of I.I.558, Kuthiraichandal Primary Co-operative Bank Ltd. v. A.Asokan and another, reported in (2009) 1 MLJ 18 to contend that the 1981 Act is not required to be pressed into service, inasmuch as the payment of subsistence allowance cannot be presumed to be excluded for an employee of a

co-operative society following the principles of Article 21 of the Constitution and G.O.Ms.55, Cooperation, Food and Consumer Protection Department, dated 24.3.2000 cannot be excluded in its applicability in the case of the respondent/petitioner.

13. The exclusion of the post of Secretary from the common cadre in the year 2008 will not create any difference, inasmuch as the Government itself has reverted back to the cadre position in the year 2019. It is after taking notice of the judgment in the case of M.Kanagasabapathy v. Special Officer, Namakkal District and others (supra) that the Division Bench in the later decision in the case of Special Officer, No.989, M.Pakkam Primary Agricultural Cooperative Bank v. M.Srinivasan and others (supra) has taken a correct view of applying the law on the facts of the present case. We may, however, point out that in the said Division Bench judgment relied on by the learned counsel for the respondent, the Secretary had been suspended on 18.5.2007, which is a date prior to the exclusion of the post of Secretary from the Common Cadre Regulations. The fact that the common cadre had been abolished in 2008 was not subject matter of concern in the aforesaid decision.

14. Learned Additional Advocate General has brought to the notice of the Court another judgment to point out that subsistence allowance was held not to be payable in terms of the 1981 Act, but has been held to be payable under the Bye-Laws, in the case of Special Officer, 5558, Vadugapatty Primary Agricultural Co-operative Credit Society v. T.R.Murugan and another [W.A.No.1552 of 2012 decided on 2.12.2016]. It is urged that the Court in spite of having noticed and considered the judgment of M.Kanagasabapathy v. Special Officer, Namakkal District and others (supra) has taken a different view and thus is in conflict.

15. We may at the outset clarify that the Regulations framed in exercise of the powers under 1983 Act and Rule 149 of the 1988 Rules framed thereunder, namely the 2000 Regulations, as promulgated by G.O.Ms.55, Cooperation, Food and Consumer Protection Department, dated 24.3.2000, prescribes payment of subsistence allowance in terms of Regulation 29(d)(i), which is extracted herein under:

"Regulation 29(d)(i): A cadre employee under suspension shall be entitled to a subsistence allowance as per the Payment of Subsistence Allowance Act, 1981.

Provided that no payment of the subsistence

allowance shall be made unless the member has furnished a certificate and the authority passing the order of suspension is satisfied that cadre employee was not engaged in any other employment, business, profession or vocation and other employment and had not earned remuneration therefor during the period of his suspension."

16. A cadre employee would include a Secretary as per the 2000 Regulations, where Regulation 3 categorically recites that the post of Secretary of the Primary Agricultural Cooperative Banks in the district concerned shall form the respective Primary Agricultural Cooperative Bank's common cadre service. Thus, the post falls within the common cadre and, accordingly, would be entitled to subsistence allowance as per the 2000 Regulations in terms of the 1981 Act.

17. The fact, however, remains that the common cadre came to be abolished vide G.O.Ms.No.122, Cooperation Food and Consumer Protection (CN1) Department, dated 4.7.2008 and therefore as on the date of the suspension of the respondent/writ petitioner, i.e., 30.7.2016, a Secretary was not within the common cadre definition, consequently, neither G.O.Ms.55, Cooperation, Food and Consumer Protection Department, dated 24.3.2000 nor Regulation 29(d)(i) can be applied on the facts of the present case. The judgment in the case of Special Officer, No.989, M.Pakkam Primary Agricultural Cooperative Bank v. M.Srinivasan and others (supra), which relies on the applicability of the said government order passed, proceeds only on the fact that the Secretary in that case had been suspended on 18.5.2007, a date prior to the abolishing of the cadre, therefore, will not come to the aid of the respondent/petitioner. The said judgment, therefore, stands distinguished in its applicability on the facts of the present case.

18. The learned Single Judge in the present case while proceeding to allow the writ petition relied on the Division Bench judgment in the case of Special Officer, D.K.81, Chennasandiram Primary Agricultural Co-operative Credit Society Ltd. v. P.Periyannan and another (supra). In the said case, the Secretary employee had been suspended on 19.3.2004, again long before the Common Cadre Regulations had been abolished, as noted above in the year 2008. The Common Cadre Regulations were, therefore, applicable on the facts of that case and, as noted above, once an employee is of the common cadre, then Regulation 29(d)(i) would be applicable. Again in the instant case, the suspension order is dated 30.7.2016, when the common cadre had

already been abolished. These aspects relating to the abolition of common cadre were overlooked and not taken into account when the judgment was delivered on 10.2.2015. This judgment would also therefore not apply on the facts of the present case.

19. The next question is as to whether the 1981 Act excludes a Secretary from the definition of the word "employee".

20. For this, we may refer to the Special Bye-laws relating to service conditions of the Employees of the Primary Agricultural Cooperative Credit Society framed in accordance with Rules 6(1)(mm) and 149 of the 1988 Rules read with the provisions of the Tamil Nadu Cooperative Societies (Third Permanent) Act, 2008. The Bye-laws have been placed before us and the definition clause in Bye-law 2(1)(b) defines an "employee" as follows:

"'Employee' means any person who is paid officer or servant of the Society but does not include a person employed on contract basis or on daily wages or outsourcing."

21. The same Bye-laws in disciplinary matters under Chapter VI thereof contains Bye-law 31, where the power of suspension and the procedure relating thereto has been indicated. Bye-law 31(2) empowers the authority to pay subsistence allowance in accordance with the provisions of the 1981 Act. Bye-laws 31(2) and (3) are extracted herein under:

"31(2) The authority competent to suspend an employee may grant to the employee suspended, subsistence allowance in accordance with the provisions of the Tamil Nadu Payment of Subsistence Allowance Act, 1981.

31(3) The period of suspension already undergone may also be awarded as a penalty to an employee to the extent considered necessary by the authority imposing the penalty."

22. It is here that the argument of the learned Additional Advocate General has to be countenanced, namely that the 1981 Act, which is a Special Act, excludes the applicability of the said Act to a managerial/supervisory post as per the definition under Section 2 of the 1981 Act, which is extracted herein under:

Section 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 fifteen thousand 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;

(b) "employer" means the owner of an establishment and includes any person entrusted with the supervision and control of employees in such establishment;

(c) "establishment" means any place where any industry, trade, business, undertaking, manufacture, occupation or service is carried on, and with respect to which the executive power of the State extends but does not include-

(i) any office or department of the Central or the State Government; or

(ii) a railway administration; or

(iii) any mine or oil-field; or

(iv) any major port; or

(v) any public sector undertaking of the Central Government.

Explanation.- For the purpose of this clause "any public sector undertaking of the Central Government" means an establishment owned, controlled or managed by-

(1) The Central Government or a department of the Central Government;

(2) a Government company as defined in section 617 of the Companies Act, 1956 (Central Act I of 1956) and owned or controlled by the Central Government;

(3) a Corporation established by or under a Central Act, which is owned, controlled or managed by the Central Government;

(d) "Government" means the State Government;

(e) "industry" means an industry as defined in section 2(j) of the Industrial Disputes Act, 1947 (Central Act XIV of 1947);

(f) "period of suspension" includes the period taken to obtain permission where such permission of the authority under sub-section (1) of section 33 of the Industrial Disputes Act, 1947 (Central Act XIV of 1947), is necessary before the employment of an employee is validly terminated;

(g) "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) an enquiry into grave charges against him is contemplated or is pending or no final order after the completion of the enquiry has been passed; or

(2) a complaint against him of any criminal offence is under investigation or trial or the complaint has not been finally disposed of;

(h) "wages" shall have the same meaning as in clause (rr) of section 2 of the Industrial Disputes Act, 1947 (Central Act XIV of 1947)."

23. A perusal of the said provision, therefore, indicates that a person who is employed in a managerial or administrative capacity is not included within the definition of "employee" and hence, by necessary implication the applicability of the 1981 Act is denied in respect of such an employee. In our opinion, the Special Act, namely the 1981 Act, does prevail over the general provisions of the 1983 Act or the Bye-laws framed under the 1983 Act and the 1988 Rules framed thereunder. To this extent, we agree with the ratio of the judgment in the case of M.Kanagasabapathy v. Special Officer, Namakkal District and others (supra). In order to appreciate the controversy, the relevant paragraphs of the said judgment, as relied on by the learned Additional Advocate General, deserve to be extracted herein under:

"32. From the extracts of the above decisions, the following principles emerge:

a. In determining the question whether a statute is a special or general one, the focus must be on the principal subject matter plus particular perspective with specific reference to the intendment of the Act.

b. What is the special or general is wholly the creature of the subject and context and may vary with the situations, circumstances and angle of vision.

c. When the legislature has given its attention to a separate subject and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly.

d. For certain purposes, the Act may be general or for certain other purposes it may be special and one cannot blur distinction when dealing with the finer points of law.

e. The general later law does not abrogate an earlier special one by mere implication without any intention of a particular intention to do so.

...

49. As stated earlier, the prime object of the enactment, namely, Act 30 of 1983, is for the organisation, registration, management, and supervision of Co-operative Societies in the State of Tamil Nadu. Certainly, the said Act does not mainly deal with the employer and employee relationship or their working or service conditions of employees in a broader perspective like the Industrial Dispute Act or other labour enactments.

.....

51. The contours of either Section 2(19) or other rights and obligations as provided under any of the provisions of Act 30 of 1983 in regard to an 'officer' if considered on the whole one can easily visualise that they are all in conjunction with the main purport of the enactment, namely, for the orderly development of the co-operative movement in

accordance with the co-operative principles, and the main object of the Act itself is for the establishment of co-operative societies in the fields of agriculture, industry, housing, banking etc., to cater to the socio-economic needs of the common man. The conjoint consideration of the various provisions of the Act 30 of 1983 would reveal that they are mainly concerned with the establishment and effective management of co-operative societies in the respective fields for which such societies are established. The purport and intent of the said Act can never be held to be a piece of legislation meant for regulation or welfare or working conditions or service conditions of the paid officers or servants of the society.

52. Act 30 of 1983 may be special in so far as it concerns the promotion of Co-operative movement and the better administration of the Co-operative Societies of different fields which would be governed by the provisions of the said Act. But the question is whether such a special enactment meant for the better administration of a co-operative society can be still held to be a special one when it comes to the question of comparing the same with the Act 43 of 1981 which out and out pertains only for the payment of subsistence allowance to a suspended employee pending disciplinary action.

53. As stated earlier, there is no specific provision, unlike the provisions contained in the Industrial Disputes Act 1947 or the Factories Act, or the Contract of Labour (Regulation and Abolition) Act or the workmen compensation Act, or Act 43 of 1981 providing for payment of subsistence allowance, which deals exclusively with the manner in which the service conditions of the workmen in an industry or to regulate workforce employed on contract basis or the payment of compensation in the event of employee sustaining injury as also the payment of subsistence allowance in the event of suspension of an employee pending disciplinary proceedings. Even though, power is available under Section 75(3) of the Act to the committee constituted by the State Government in respect of common cadre employees to place an employee under

suspension, there is no specific provision stipulating as to in what manner the period of such suspension should be dealt with when it comes to the question of payment of subsistence allowance.

54. It is true that invariably, when bye-laws are framed provisions are also made for payment of subsistence allowance to a suspended employee. We will separately deal with the scope and ambit of the applicability of the provisions contained in the bye-laws vis-a-vis any other statutory provision in the later part of our order. However, at this juncture, we wish to make it clear that any provision contained in the bye-laws of any registered society cannot have over-riding effect over a statutory provision dealing with a specific matter.

....

57. A consideration of different provisions contained in the Act and rules makes it abundantly clear that the said Act exclusively deals with payment of subsistence allowance and whoever falls within the definition of employer, establishment and industry as defined under Section 2(b), (c) and (e) would be governed by the provisions of the said Act. Similarly, whoever falls within the definition of 'employee' as defined under Section 2(a) would be entitled to receive the subsistence allowance for the period of suspension pending disciplinary proceedings.

58. When we examine the definition of 'establishment' under Section 2(c) of the Act, there can be no two opinion that any co-operative society would fall within the said definition as it is well settled that the meaning of an "industry" as defined under Section 2(e) of the Act means any place where any trade, business, occupation of service is carried on. Significantly the excluded establishments under Section 2(c) of the Act does not include any co-operative society. Therefore, Act 43 of 1981 would automatically apply to any co-operative society constituted under the provisions of the Act 30 of 1983. The only other requirement would be that whoever wants to invoke the provisions of the Act 43 of 1981 to claim payment

of subsistence allowance should satisfy the definition of "employee" as defined under Section 2 (a) of the Act.

59. Having regard to the main purport and intent of Tamil Nadu Act 43 of 1981 we can safely conclude that the said Act exclusively deals with the payment of subsistence allowance and none else. Though it can be stated that Act 30 of 1983 having regard to its purport and intent, namely, for the orderly development of the co-operative movement in different fields, it is a special enactment in that respect, when it comes to the question of comparing the said Act with Act 43 of 1981 it will have to be held that the said Act, namely, Act 43 of 1981 being a special enactment dealing only with payment of subsistence allowance, and having regard to its origin being earlier in point of time and by virtue of the application of the maxim 'Generalia Specialibus Non Derogant', the special Act would by necessary implication will have over riding effect on the general Act, namely, Act 30 of 1983. We say so because, though a detailed reference to the various provisions of Act 30 of 1983 disclose that the said Act is mainly meant to regulate proper establishment of a co-operative society and its management and administration after such establishment, the provisions relating to regulation of service conditions of the officers and employees are purely incidental and the said Act 30 of 1983 is not primarily meant for the regulation of the service conditions of the officers and employees of the co-operative society. It also does not specifically deal with the detail procedure as regards to suspension of an employee with particular reference to the period, wages and any other condition, in the course of his employment in any co-operative society."

24. To the aforesaid extent, the judgment in the case of K.Avanasiappan v. The Management of Thekkalur Primary Agricultural Co-operative Bank and others (supra) also holds that an officer not being an employee cannot claim subsistence allowance by virtue of the provisions of the 1981 Act. To the same effect is the conclusion drawn in the case of Special Officer, 5558, Vadugapatty Primary Agricultural Co-operative Credit Society v. T.R.Murugan (supra). There is, therefore, no

conflict on this issue. The difference has arisen on account of the fact that in the case of K.Avanasiappan v. The Management of Thekkalur Primary Agricultural Co-operative Bank and others (supra), the Secretary was found entitled to 25% subsistence allowance in terms of Bye-Law 12(c) as was found applicable to the society where the said Secretary was working. It is to this limited extent that the Bye-Laws were applied to extend 25% subsistence allowance to the Secretary in that case. It is to that extent only that 25% subsistence allowance was extended in the case of Special Officer, 5558, Vadugapatty Primary Agricultural Co-operative Credit Society v. T.R.Murugan (supra). The said cases, on facts, are therefore distinguishable from the present case, where Bye-Law 31 relating to suspension as applicable to this society where the respondent/writ petitioner is working does not make any provision for 25% subsistence allowance as was available in those cases. Consequently, the said judgments in effect are nowhere in conflict so as to give rise to any reference.

25. Having come to the aforesaid conclusion, we have to accept this contention of the learned Additional Advocate General that the 1981 Act excludes the applicability of the same in the case of a Secretary of a Primary Agricultural Co-operative Society.

26. However, there is the other side of the coin, namely that even if the 1981 Act excludes the applicability of the said Act, can otherwise subsistence allowance be claimed by a Secretary and it is here that we have to consider the arguments advanced on behalf of the respondent/petitioner that such a claim would be protected as a means of livelihood under Article 21 of the Constitution of India, inasmuch as an employee's services do not get terminated while under suspension and, therefore, he is entitled to subsistence allowance.

27. We may, therefore, refer to two decisions that throw light on the controversy, namely, I.I.558, Kuthiraichandal Primary Co-operative Bank Ltd. v. A.Asokan and another (supra) and Special Officer, 5558, Vadugapatty Primary Agricultural Co-operative Credit Society v. T.R.Murugan (supra), where also a Division Bench even though held that the 1981 Act does not apply, yet the Secretary would be entitled to subsistence allowance. On a perusal of the reasoning of the said Division Bench judgment, it is evident that heavy reliance had been placed on G.O.Ms.55, Cooperation, Food and Consumer Protection Department, dated 24.3.2000 and treating the Secretary to be a member of the common cadre subsistence allowance was extended.

28. We may now refer to the Apex Court judgments that were taken into account to hold that payment of subsistence allowance is protected under Article 21 of the Constitution of India. For this we may gainfully extract paragraphs 12 and 13 of the judgment in the case of I.I.558, Kuthiraichandal Primary Co-operative Bank Ltd. v. A.Asokan and another (supra) herein under:

"12. That apart, the payment of subsistence allowance is also to be considered as a fundamental right guaranteed by Article 21 of the Constitution, as it encompasses that the employee suspended pending inquiry should survive to maintain his family and also to effectively participate in the disciplinary proceedings. Unless subsistence allowance is paid, the employee would be deprived of his valuable right to effectively defend the disciplinary inquiry.

13. The Apex Court in Capt. M.Paul Anthony v. Bharat Gold Mines Ltd., and another (1999) 3 SCC 679, of course while considering the payment of subsistence allowance in a case of Government Servant, had in fact, observed that an act of non payment of subsistence allowance could be linked to slow poisoning and if the employee is not permitted to sustain himself on account of non payment of subsistence allowance, he would gradually be starved to death. Further, in Jagdamba Prasad Shukla V. State of U.P. and others (2000) 7 SCC 90, the Apex court has held that the payment of subsistence allowance is a matter of right and not a bounty."

29. Having traversed the entire law on the subject and the judgments, referred to above, the outcome is that the terms and conditions of the 1981 Act to pay subsistence allowance will not apply in the case of the respondent/writ petitioner. The second is that there is no Bye-law in the present case specifically indicating 25% subsistence allowance payable to a Secretary, as was in the case of K.Avanasiappan v. The Management of Thekkalur Primary Agricultural Co-operative Bank and others (supra), as followed in the case of Special Officer, 5558, Vadugapatty Primary Agricultural Co-operative Credit Society v. T.R.Murugan (supra). Thirdly, suspension can also be a measure

of punishment as defined in Bye-Law 28(1)(v) of the Bye-Laws applicable in the present case read with Bye-Law 31(3). We have been informed that the services of the respondent/writ petitioner have already been terminated on 25.8.2019. It is not known as to what are the terms of the said termination order and as to whether the period of suspension already undergone has been awarded as a penalty or not. Nonetheless, as per Bye-Law 31(2), the competent authority "may grant to the employee suspended, subsistence allowance". However, the same says that it is to be in accordance with the provisions of the 1981 Act. As held above, the provisions of the 1981 Act clearly exclude the applicability thereof to a Secretary, who is not in the definition of employee under the 1981 Act.

30. In the above background, the only argument left to be considered is as to whether the Apex Court judgments treating the payment of subsistence allowance as a right guaranteed under Article 21 of the Constitution of India can come to the aid of the respondent/writ petitioner or not.

31. To "subsist" means to manage to stay alive, especially with limited resources or money. The state of living as such is known as subsistence, which is indicative of the fact that one has enough resources to sustain life with basic minimum needs. This means of existence or continuance with meagre resources of livelihood for a salaried employee is known as a subsistence allowance, which is an advance payment to cover immediate living expenses while being kept away from service. It is, therefore, an income that is sufficient to provide bare necessities and is an adequacy of support that exists as a reality while undergoing a compulsory distress. The idea is to preserve sustenance at the minimum economic level to sustain a minimum standard of living. It is practically an allowance for maintenance granted under special circumstances. An employee of whatever rank, if is surviving only on his salary, then whatever be the standard or status of employment, a minimum sustenance is required for all employees. A managerial or secretarial cadre employee also has to maintain himself and may be his family, if he has one. It is in reality a surviving need, when employment is put in suspended animation, that is necessary whether it be an ordinary employee or one who may be enjoying a managerial capacity. This also depends upon the emoluments that are received by an employee and, therefore, it is a matter of assessment, as in the present case, as to what salary was the Secretary being paid. Thus, an universal application of the rule of not paying any subsistence allowance to an employee of the secretarial or managerial cadre may not be a correct approach to the fundamental of the necessity of subsistence

allowance. It cannot be accepted by applying a universal logic that a Secretary or a Manager ceases to have the need of basics to continue to live at the bare minimum on being suspended.

32. The underlying principle for making payment of subsistence allowance is to allow an individual to sustain himself. In the present context of the suspension of an employee, one has to keep in mind that services of an employee have not been snapped and the employer-employee relationship during suspension continues to subsist. There is a possibility of the employee being exonerated and he may in such circumstances be entitled to his entire emoluments of the said period. On the other hand, an employee can be found partially guilty and the employer may choose to deduct part of the emoluments by imposing a condition that the employee would not be entitled to any further emoluments, apart from what he has received during his period of suspension. It is, therefore, the discretion of the employer according to the Bye-Laws and Rules applicable, but, at the same time, it is the right of sustenance of an employee to receive subsistence allowance. As to what would be the ratio to which an employee may be entitled in the present context will have to be left to the discretion of the employer, as Bye-Law 31(2) indicates that the employer may pay subsistence allowance as he may deem fit. This discretion, however, should be exercised reasonably and may be subject to any such deductions in the event an employee is found to be ultimately guilty of heavy financial irregularities or misappropriations. On this ground, we therefore find favour with the respondent/writ petitioner that his representation for payment of subsistence allowance also deserves consideration in the background aforesaid. A total denial of subsistence allowance to a suspended employee, in our opinion, would be violative of Article 21 of the Constitution of India, unless it can be shown that payment of subsistence allowance is not warranted on the facts of a particular case, as illustrated above. We are conscious that a possible sense of injustice or inconvenience resulting in a temporary hardship by itself cannot be a ground to claim a right bereft of the statutory provisions, but where the very sustenance is a single salaried source, a total denial thereof may result in an abrupt punishment with hardly any justification thereby violating basic fundamental rights.

33. We, therefore, without approving the reasoning in paragraph (5) of the impugned judgment for grant of subsistence allowance, uphold the conclusion drawn by the learned Single Judge, but, at the same time, modify the impugned judgment dated 25.10.2018 in the light of the conclusions drawn herein above

with liberty to the appellants to pass an appropriate order on this count relating to the claim of the subsistence allowance of the respondent/writ petitioner, in the event no such order has been finally passed while passing the final order of termination. The said exercise be completed within six weeks from the date of receipt of a copy of this order.

The appeal stands disposed of accordingly. No costs. Consequently, C.M.P.No.9258 of 2019 is closed.

Sd/-

Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

sasi

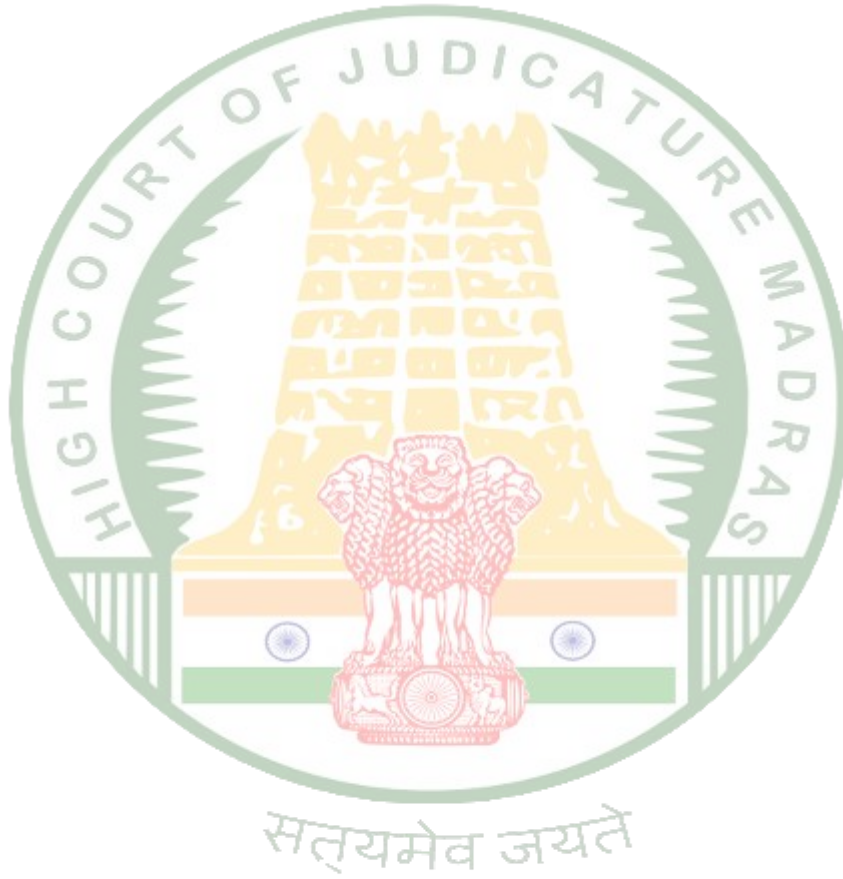
To

1. The Registrar
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2. The Deputy Registrar
The Co-operative Society
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+1cc to Mr.L.P.Shanmugasundaram, Advocate SR.10563
+1cc to Mr.G.Murugendran, Advocate SR.10221
+1cc to M/s.Spl Government Pleader(CO-OP) SR.10832

W.A.No.1352 of 2019

BS (CO)
CB(02/03/2020)



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