

IN THE INDUSTRIAL COURT, MUMBAI
BEFORE SHRI RAJESH K. KHOMANE, MEMBER,

COMPLAINT (ULP) NO. 214 OF 2023
CNR NO : MHICO1-001152-2023

Mr.Sachin Ganpat Gaikwad

...Complainant

Versus

M/s. Saryu Properties & Hotel
Private Limited & Ors.

...Respondents

ORDER (BELOW EXH.U-2)
(Delivered on 06.01.2025)

1. This is an application of the Complainant for getting subsistence allowance from the respondent for the period from February 2020 to July 2023.
2. In short, the case of the complainant is that he is an employee of the respondent company, which is private limited company engaged in the business of providing hotel services to its various customers. It is also engaged in the business of real estate market. Respondent No.2 is one of the hotel of respondent No.1 company. Respondent No. 3 is the General Manager of Respondent No.1 who looks after entire business activities of respondent No.1. Respondent No. 4 is the director of Respondent No.1 and 2.
3. Initially, the complainant was appointed on the post of 'Steward' on 22.12.2010 by the respondents. Thereafter, the Respondents promoted him as Banquet Captain. The complainant was getting salary of Rs.12,837/- per month. In the year 2011, he joined the trade union namely Bhartiya Kamgar Sena for various

demands. But, the respondents did not like the said act of the complainant and therefore, they started harassing the complainant. The respondents made false allegations against the complainant alleging that while working the complainant committed theft of the liquor bottles. Thus, on those allegations, the respondents on 23.10.2018 issued suspension order to the complainant and thereafter, given charge-sheet to the complainant on 22.11.2018. The complainant replied the suspension order as well as charge sheet. Since the date of suspension, the complainant tried to resume duty, but the respondent did not allow the complainant to resume his duty. The enquiry against the complainant was commenced on 18.12.2018 at the office of the respondents. The enquiry officer completed enquiry and submitted enquiry report. But, according to the complainant, the management failed to prove the charges leveled against him and therefore there is no scope for the management to give the punishment on the basis of proposed enquiry reports and findings of the enquiry officer which submitted on 19.02.2020.

4. The complainant has further averred that, he has filed a complaint before Ld. Labour Court at Mumbai, wherein he has challenged fairness of the enquiry and also prayed that no disciplinary action should be taken against him. The respondents have not taken any disciplinary action of termination of services of the complainant, however, the respondents failed to pay the subsistence allowance of the complainant from February 2020 till filing of the present complaint. The respondents are duty bound to pay subsistence

allowance to the complainant as per provisions of Model Standing Orders applicable to the employees of the respondent company. He was lastly paid a subsistence allowance on 31.01.2020. An amount of Rs.5,39,154/- is due as subsistence allowance for the period from February 2020 till July 2023. Thus, the complainant has prayed that the respondents kindly be directed to pay his subsistence allowance for the said period.

5. Respondent No.1 and 2 resisted the application by filing a common affidavit in reply at Exh. C-5. They have admitted that the complainant was their employee. But, according to them, the present complaint is not maintainable, since now the complainant is not their employee. The complainant himself admitted this fact while operating his provident fund account. The complainant does not fall under the definition of employee as contemplated under Section 3(5) of MRTU & PULP Act, 1971 and Section 2(s) of the Industrial Disputes Act, 1947. Therefore, this complaint is not maintainable.

6. They have further contended that, the complainant is not entitled to get payment of subsistence allowances as the complainant himself quit the employment of the respondents. Respondent No.1 establishment was severely affected on account of Covid-19 Pandemic. Thus, the hospitality and the aviation industry were mostly affected during this period. In view of stringent lock down conditions imposed by the Government of Maharashtra, more specifically on the hospitality and travel and tourism sectors, the entire operation of

respondent No.1 standstill with no income. Respondent No.1 was unable to meet the minimum mandatory expenses including the wages of its employees. Under such circumstances, Bhartiya Kamgar Sena on which the complainant claims to be a member have realized the difficulty faced by the hospitality industries and signed a memorandum of undertaking with respondent No.1 wherein it was agreed between the parties that till hotels are not fully operational the employees are not called upon to resume their work in the hotel, a salary equivalent to 22% of their gross monthly salary will be paid to them each month. Secondly, upon complete restart of the operations of the hotels, a salary equivalent to 40% of their gross monthly salary will be paid to them in lieu of their full month attendance. After 6 months restart the of full operations, the above mentioned 40% of gross salary understanding will be revised as per mutual understanding and keeping in mind the prevailing conditions of the hotel operations. Thus, the Bhartiya Kamgar Sena itself entered into a memorandum of understanding agreement. Therefore, the complainant who is claiming himself as member of that union can not claim 100% subsistence allowance for the period when the pandemic situation arise on account of Covid 19.

7. The respondents further contended that the complainant was found stealing the liquor bottles while working. Therefore, they suspended the complainant on 23.10.2018 and accordingly charge-sheet was issued against the complainant. The enquiry officer has filed his report and

findings. Thus, the respondents prayed for rejection of the interim relief application.

8. In view of the rival contentions, following points arise for my determination. My findings thereon with reasons are as follows :

<u>POINTS</u>	<u>FINDINGS</u>
1. Whether there is <i>prima facie</i> case in favour of the complainant?	: In the affirmative
2. Whether balance of convenience lies in favour of the complainant?	: In the affirmative
3. Whether irreparable loss would be caused to the complainant if interim reliefs are refused?	: In the affirmative
4. What order?	: As per final order

REASONS

As to Issue Nos. 1 to 3 :-

9. All the points are interconnected with each other; hence, they are discussed together. Mr. Gehlot, Advocate for the complainant urges that respondents have suspended the complainant on 23.10.2018 on false allegations. The respondents issued a charge-sheet against the complainant and now enquiry is completed and enquiry report alongwith findings is submitted by the enquiry officer. Till the year 2020, respondents have paid the subsistence allowance to the complainant, but thereafter respondents have stopped paying subsistence allowance. According to him, as per Model Standing Orders, the complainant is entitled to get 100% wages as subsistence allowance. Therefore, he prays for a subsistence allowance for the period from February 2020 to July 2023. In his

support, he has relied on following citation. **General Manager Greater Bombay Milk Scheme & Ors. vs. Government Milk Scheme Employees Union (2016 Law Suit (Bom) 2620)**. *In this case the union on behalf of its members who are the mazdoors and daily rated workmen of the respondent challenged the non-implementation of clause No.5 of settlement agreement which was executed between the union and the employer-respondent. It was the contention of the respondent- employer that the complaint was filed after 28 years from the date of execution of the settlement agreement, so, it is not within limitation. However, it is held that non-implementation of the clause No.5 of the settlement agreement is continuous cause of action.*

10. On the other hand, Mr. Lancy D'Souza, Advocate for the respondents submitted that the complainant himself quit services of the respondents. The respondent on the portal of the provident fund updated his status as ex-employee of the respondents. Therefore, the complainant is not in the employment of the respondents. Therefore, no question for granting or giving subsistence allowance to the complainant. He further argues that the complainant has committed theft of liquor bottles in the respondent Hotel. On such allegations, the complainant is suspended. Similarly, due to the Pandemic situation on account of Covid-19 diseases, there was no business activities of the respondents in the year 2020. Therefore, agreement of a memorandum of settlement was signed between Bhartiya Kamgar Sena and Respondents, wherein it was agreed that till full operation of the respondent hotel, no full wages would be given to the employees of the respondents. As such,

the complainant's claim of 100% subsistence allowances can not be granted. To support his argument he has relied on the following citations.

(i) **Association of Engineering Workers Bombay vs. Oriental Rubber Industries & Co. [1994-I-LLN-542-Bom. H.C.]**

“Wherein the Hon’ble Hogh Court has rejected the plea of the complainant that closure of an establishment gives rise to continuous cause of action and, as such, no period of limitation applies.”

(ii) **State of Tripura & Ors. vs. Arbinda Chakraborty & Ors. [(2014) 2-SCC (L&S) 200 S.C.]**

In this case, the employee had challenged his termination order after 13 years on the ground of unauthorized absence. However, the claim of the employee rejected on account of period of limitation. It is held that, “it is a settled legal position that the period of limitation would commenced from the date on which the cause of action takes place.”

(iii) **May and Baker Ltd. vs. Kishore Jaikishandas Icchaporia & Anr. [1991-II-L.L.N.-879-Bom. H.C.]**

The question in this case was regarding the basis for payment of subsistence allowance to a suspended employee, under the provisions of Industrial Employment (Standing Orders) Act, 1946, as amended in Maharashtra or under the certified standing orders. It is held that “it is clear from the provisions of Industrial Employment (Standing Orders) Act, 1946, that the model standing orders are applicable only until such time as amendments thereto have been proposed and certified. Once the amendment have been certified, the certified standing orders operate. An amendments to the model

standing orders can not, therefore, have effect until and unless modification of the certified standing orders to bring them into line with the amended model standing orders is proposed and certified.”

(iv) B.D.Shetty & Ors. vs. Ceat Ltd. & Anr, [(2002) 1- S. C.]

Wherein it is observed that “We have every good reason to accept the said view. It is plain from the very language of Section 10-A(3) that the words provisions of such other law necessarily refer to the law other than one covered by the very Act and Rules made thereunder. In this view, we reject the contention of the learned counsel for the appellants. Similarly, his argument that there is a practice with the respondent to make 100% subsistence allowance if inquiry is not completed within 180 days, and as such the appellants are also entitled accordingly, cannot be accepted in view of the specific provision contained in Section 10-A of the Act”.

(v) Amol Dilip Sable & Ors.vs. M/s.L.G.Balakrishnan & Bros. Ltd. [2018 (159) FLR 897-Bom. H.C.]

Wherein it is held that, “it is settled law that interim relief can not be of the nature of the final relief. As such, the disengagement of these petitioners will have to be subjected to the result of the pending complaint as there can not be an order of reinstatement, which would amount to granting of final relief.”

(vi) Mathuradas Mohta College of Science, Nagpur vs. R.T. Borkar & Ors. [(1996) SCC-Online Bom.433]

Wherein it is held, “that absence of explanation cause delay in filing the Appeal, the Tribunal has no jurisdiction to entertain the Appeal.”

(vii) Balkrishna Sadashiv Thakur & Ors. vs. Prabhakar Sadashiv Thakur & Ors. [(2021) SC Online Bom. 176]

It is observed that, “statutory appeal by respondents under Section 247 of Maharashtra Land Revenue Code challenging mutation entry filed after delay of more than 3 years and 2 months. No application for condonation of delay is filed. Entertainment of Appeal by S.D.O. (Appellate Authority) is a judicial error.”

11. I have considered the arguments of both parties. The complainant is claiming 100% subsistence allowance on the basis of Model Standing Orders. Before dealing with a claim of the complainant, it is required to make reference of relevant provisions of Model Standing Orders :

10-A. Payment of subsistence allowance :-

- (1) *Where any workman is suspended by the employer pending investigation or inquiry into complaints or charges of misconduct against him, the employer shall pay to such workman subsistence allowance-*
 - (a) *at the rate of fifty per cent of the wages which workman was entitled to immediately preceding the date of such suspension, for the first ninety days of suspension; and*
 - (b) *at the rate of seventy-five per cent of such wages for the remaining period of suspension if the delay in the completion of disciplinary proceedings against such workman is not directly attributable to the conduct of such workman.*
- (2) *If any dispute arises regarding the subsistence allowance payable to a workman under sub-section (1), the workman or the employer concerned may refer the dispute to the Labour Court, constituted under the Industrial Disputes Act, 1947 (14 of 1947), within the local limits of whose jurisdiction the industrial establishment*

wherein such workman is employed is situate and the Labour Court to which the dispute is so referred shall, after giving the parties an opportunity of being heard, decide the dispute and such decision shall be final and binding on the parties.

- (3) *Not with standing anything contained in the foregoing provisions of this section, where provisions relating to payment of subsistence allowance under any other law for the time being in force in any State are more beneficial than the provisions of this section, the provisions of such other law shall be applicable to the payment of subsistence allowance in that State.]*

12. On bare perusal of the above provisions, it appears that for initial three months from the date of suspension, the suspended employee is entitled to get 50% subsistence allowance and at the rate 75% for remaining period, if delay in the completion of enquiry proceeding is not on account of the employee. In the present matter, it is not in dispute that the complainant was in employment of the respondent. It is also not in dispute that by order dated 23.10.2018, the respondent suspended the services of the complainant and at that time of suspension, the complainant was working on the post of 'Banquete Captain'. It is also not in dispute that charge-sheet was issued to the complainant and enquiry is completed, the enquiry officer has submitted his report alongwith his findings. But, till today no any punishment has been awarded to the complainant. The complainant has challenged fairness of the enquiry by filing a complaint before 9th Labour Court, Mumbai. Till January 2020 the complainant received the subsistence allowance, but since February 2020 to July 2023, the respondents have not given subsistence allowance to the complainant. Therefore, the

complainant has claimed 100% subsistence allowance for such period.

13. On the other hand, the respondents have submitted that the complainant is not entitled to get subsistence allowance. First objection of the respondent is that complainant himself has shown his status as ex-employee. According to the respondents, the complainant himself admitted that he is not in the employment of the respondents. In support their contentions, the respondents have given instances in their written reply that on 30.11.2020, the complainant himself updated his status that he left the employment of the respondents. Thus, complainant himself made a declaration that he is not in the employment of the respondents. I have considered the contentions of the respondents. The downloaded copy of Employees Provident Fund Organization is filed on record. The date of joining of the complainant in the said copy is shown as 03.10.2019. The date of exit mentioned as 30.11.2020. No doubt, from bare perusal of said document, the entry which shows as date of exit, but, the question is that who has made this entry. Whether, it is permissible to the employee to enter his status on the said portal? This question can be decided after full-fledged hearing. If, it is the contention of the respondent that the complainant himself ceased the employment then the question arises whether such retirement can be tendered or accepted during the course of enquiry? Furthermore, no any documentary evidence on record to show that the complainant tendered his resignation to the respondents. Therefore, at this stage, it can not be believed that the complainant himself ceased or quit the employment of

the respondents.

14. Next submission of the respondents is that the respondent No.1 was not having any business during the pandemic situation arose on account of Covid-19 diseases. Therefore, union and the management entered into new agreement of settlement wherein it was decided between the parties that the employees are not called upon to resume their in the hotel till hotels are not fully operational and salary equivalent to 22% of their gross monthly salary will be paid to them each month. Secondly, upon complete restart of the operations of the hotels, a salary equivalent to 40% of their gross monthly salary will be paid to them in lieu of their full month attendance. At the end of 6 months of restart the of full operations, the above mentioned 40% of gross salary understanding will be revised as per mutual understanding and keeping in mind the prevailing conditions of the hotel operations.

15. Ld. Advocate for the respondents submits that, due to surge of Covid-19, business activities of the respondent company was completely closed. Therefore, employer and employee entered into new settlement of agreement and above terms and conditions were decided between them. According to him, there was no business activities during such period and 100% wages were not given to their regular employees by the respondents. So, the complainant who is suspended for such period, is not entitled to get 100% subsistence allowance. I have considered the submission of the Ld. Advocate for the respondents. It is contention of the respondent that there was a

settlement agreement between the union and management of the respondent. But no any document is filed on record to show that such an agreement was executed between them. Similarly, the provisions of subsistence allowance is for the survival of the suspended employee and his family members. Therefore, in view of provision of Section 10-A of Model Standing Orders, the complainant is entitled to get subsistence allowance at the rate of 75% for the period February 2020 to July 2023. Thus, the complainant has prima facie case, balance of convenience lies in favour of the complainant and the complainant would suffer irreparable loss if it is not granted. Therefore, I have replied point No.1 to 3 in the affirmative.

As to Point No.4:

16. In view of I replied point No.1 to 3 in the affirmative, the application deserves to be partly allowed. Accordingly, I pass the following order.

ORDER

1. Application (Exh.U-2) is partly allowed.
2. The respondent shall pay subsistence allowance at the rate of 75% to the complainant for the period February 2020 to July 2023.

Place: Mumbai
Date : 06.01.2025

ppkadam/-

Sd/-
(RAJESH K. KHOMANE)
Member
Industrial Court, Mumbai