IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8562 OF 2015

M/s. Hindustan Level Employees Union .. Petitioner
Versus
M/s. Hindustan Unilever Limited .. Respondent

....

- Ms. Jane Cox a/w. Mr. Jignesha Pandya i/by Mr. Bennet D'Costa, Advocates for Petitioner.
- Ms. Supriya Mujumdar a/w. Melvyn Fernandes, Advocates i/by Vaish Associates for Respondent.

……………..

CORAM : MILIND N. JADHAV, J.
RESERVED ON : DECEMBER 12, 2023.
PRONOUNCED ON : JANUARY 03, 2024.

JUDGMENT:

1. At the outset, Ms. Cox, learned Advocate appearing for the Petitioner seeks amendment to the Writ Petition to the extent of maintaining the challenge in the Writ Petition under the provisions of Article 227 of the Constitution on India in addition to the challenge under the provisions of Article 226. Proposed Draft Amendment is taken on record and marked **'X'** for identification. Petitioner is permitted to amend the Writ Petition to the extent of the Draft Amendment. Amendment shall be carried out in the body of the Writ Petition within a period of one week from today. Re-verification stands dispensed with.

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2. Petition raises an important point of law. Challenge in the Writ Petition is to the Award dated 13.08.2014 rejecting the Reference. Reference related to the Petitioner's claim for seeking subsistence allowance which was denied by the Respondent – Company on the ground that the suspended employee did not attend the factory premises to mark his attendance at the factory gate in the muster / register provided for the purpose during his suspension. Award has held that denial of subsistence allowance is not contrary to law and justified, since the employee did not attend the factory everyday and sign the muster / register provided therefor.

3. Cause of the employee is espoused by the recognized Union in the Respondent – Company. According to Petitioner, it is not a requirement under the law requiring and/or to call upon a suspended employee to mark his physical attendance and sign the muster everyday at the factory gate as a pre-requisite for being paid subsistence allowance. In the present case, the employee has not attended the factory each day and signed the muster due to which he has been denied subsistence allowance. This is upheld by the Labour Court.

4. Briefly stated, the facts necessary for the adjudication of the present case are as under:-

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4.1. The employee in question is one Mr. Natubhai Mohanlal Patel. Sometime in November 2002, Respondent – Company set up a Union called 'Hindustan Lever Limited Daman Karmachari Sangh' (**the Petitioner herein**). In and around February / March 2003, Respondent – Company sponsored another Union called 'Association of Chemical Workers Union'. In the year 2003, the long term settlement in existence with the Respondent – Company came to an end. At that time, officers of the Respondent – Company were forcing workmen to sign on membership forms of the 'Association of Chemical Workers Union'.

4.2. On 01.05.2003, the Petitioner – Union terminated the settlement under the provisions of law and submitted a fresh charter of demands. On 22.05.2003, Petitioner approached the office of the Commissioner of Labour for intervention in Wage Dispute Revision. Certain incident took place on 23.08.2003 when a police officer threatened Mr. Natubhai Patel (concerned workman) and compelled him to leave the factory premises so that the management of the Respondent – Company could force the other workmen to sign the settlement with the Respondent's sponsored Union.

4.3. On 24.08.2003, Respondent – Company signed the settlement with the sponsored Union.

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4.4. On 03.04.2004, an order of suspension was issue to Mr. Natubhai Patel alongwith a charge-sheet. Charge-sheet was also issued to five other employees who actively participated in formation of the Petitioner – Union.

4.5. On 23.04.2004, Petitioner - Union raised a demand for increase in wages against the Respondent – Company which was referred to the Labour Court, Daman. In the meanwhile, on 21.05.2004, domestic enquiry commenced and was held outside the factory at a far away location at Hotel Green View, Vapi, Gujarat.

4.6. On 15.09.2004, an application was filed by Petitioner – Union seeking subsistence allowance to Mr. Natubhai Patel. On the same date, Respondent – Company refused payment of subsistence allowance and shifted the venue of enquiry to another location at Hotel Regent Palace near Bhimpore village.

4.7. On 24.09.2004, Petitioner – Union represented to the Respondent – Company that Mr. Natubhai Patel was not employed nor earning any wages to sustain his livelihood during the enquiry proceedings. Between May 2004 and January 2007, the enquiry was abandoned / adjourned according to the Petitioner and resumed only in February, 2007. Demand was raised by the Petitioner - Union for subsistence allowance to be paid which the Respondent – Company refused. Between October 2007 and March 2008 conciliation

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proceedings were held resulting in a failure.

4.8. On 11.06.2008, order of Reference was made as under:-

> *"WHEREAS, the U.T. Administration of Daman & Diu is of the opinion that an Industrial Dispute exits between the Management of M/s.Hindustan Unilever Limited, Daman Detergents Factory, Survey No.34, Silver Industrial Estate, Village Bhimpore, Daman and its employee Shri Natubhai Mohanlal Patel in respect of the matter specified in the Schedule annexed hereto (herein after referred to as the 'said dispute')."*

4.9. On 28.11.2008, services of Mr. Natubhai Patel were terminated. The dispute that is referred for adjudication before the Reference Court in I.D.R. No.7 of 2008 pertains to the issue of subsistence allowance. The Reference Court framed the following issues and answered them after adjudication:-

Sr. No.	Points	Finding
1.	Whether the Reference is vague and incapable of being adjudication by this court?	.....In the Negative.
2.	Whether the First Party Company proves that condition put by them for making attendance everyday for entitlement of subsistence allowance is just, fair, bonafide and legal or not? And whether the company is entitled to put such condition against the second party workman and whether such condition is in consonance with the Section 10(A) of the IESO Act.?	.....In the Affirmative.
3.	Whether the Second Party workmen is entitled for 12% interest on the subsistence allowances and other allowances or not?	.....In the Negative.
4.	Whether the demand dated 21/12/2006 is required to be accepted or not?	.....In the Negative.

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5.	Is the claimant entitled to relief sought?	…..In the Negative.
6.	What order and award?	…..As per final order.

4.10. Issue Nos.1, 3, 4 and 5 were answered in the negative whereas issue No.2 was answered in the affirmative.

4.11. Hence, the present Writ Petition.

5. Ms. Cox, learned Advocate appearing for the Petitioner - Union would submit that the relevant statute does not lay down any condition / pre-condition for marking of physical attendance at the gate of the factory during the period of suspension. She would submit that the decision of the Labour Court holding that marking of physical attendance at the factory gate is in consonance with the provisions of Section 10(A) of the Industrial Employment (Standing Orders) Act, 1946 (for short the "**the said Act**") is contrary to the decision and judgment of the Supreme Court reported in 2002 (3) CLR 291. She would submit that the concerned workmen has specifically filed pleadings to convey that he was unemployed during the period of suspension before the Enquiry Officer, before the Conciliation Officer, before the Labour Court and during his evidence. She would submit that the concerned workman was not directed nor called upon to file any affidavit to state that he was not gainfully employed during the period of suspension before the Labour Court.

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5.1. In addition to the aforesaid aforesaid submissions, she has made the following submissions:-

(i) She would submit that in the absence of any applicable service Rules or Regulations there can be no external / onerous condition which can be imposed to record physical attendance everyday at the factory gate for being eligible to be paid subsistence allowance as held by the Supreme Court in the case of ***Anwarun Nisha Khatoon Vs. State of Bihar and Ors.***[1]. She would submit that the only requirement found under clause 14(4)(e) of the Central Rules, 1946 is that the workman should not take up any employment during the period of suspension. She would submit that there is no requirement in this regard for any certificate to be furnished and even in matters where there is such a rule for furnishing of a certificate, the Supreme Court has held that the same must be actually called for by the employer. She has drawn my attention to paragraph Nos.6 to 12 of the above decision which read thus:-

> ***"6.*** *The Registrar, Co-operative Society by Memo No. 7252 dated 30th October, 1999 rejected the claim for subsistence allowance. The appellant then filed C.W.J.C. No. 9095 of 2000 challenging the order of the Registrar. The High Court by an order dated 26th April, 2001 dismissed the writ petition. The appellant then filed a Letters Patent Appeal. This was dismissed by the impugned Order dated 27th July, 2001 on the ground that the appellant's husband was absent for 23 years and he was present for only one day. In our view, for reasons set out hereafter, the decision of the High Court cannot be sustained.*

1 AIR 2002 SC 2959

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The relevant portion of Rule 96 of the Bihar Service Code reads as follows:

> *"96. (1) A Government servant under suspension shall be entitled to the following payments, namely:*
>
> *(a) Subsistence grant at an amount equal to the leave which the Government servant would have drawn, if he had been on leave, on half average pay, or on half pay and in addition cost of living allowance based on such leave salary:*
>
> *xxxx xxxx xxxx"*
>
> *Thus, under this Rule subsistence allowance has to be paid for the period a Government servant is under suspension.*

7. *Mr. B.B. Singh relied upon Rule 96(2) which says that no payment under sub-rule (1) shall be paid unless the Government servant furnishes a certificate that he is not engaged in any other employment, business, profession or vocation. Mr. B.B. Singh submits that such a certificate was never submitted. He submits that for this reason the appellant's husband was not entitled to subsistence allowance. Mr. B.B. Singh also submits that the appellant's husband only reported at the headquarter assigned to him on 3rd June, 1968 and did not report at the headquarter on any other day during the period 4th August, 1967 to 25th July, 1990. Mr. B.B. Singh submitted that as he was not reporting at the headquarter, he was not entitled to subsistence allowance.*

8. *Mr. B.B. Singh relied upon the authority of the Patna High Court in the case of Ganesh Ram v. State of Bihar [(1995) 2 PLJR 690] wherein, after considering the abovementioned Rules, it has been held that after suspension it is not necessary that the employee must attend work. It is held that a suspended employee cannot be compelled to mark attendance. It has been held that the authority is, however, entitled to ensure itself about the presence of the suspended employee at the headquarter before making payment of subsistence allowance. It is held that in the event of a dispute, it will be for the employee to establish his presence at the headquarter.*

9. *In our view, this authority, far from assisting the respondents, is against them. This authority shows that there is no requirement to mark attendance. To us also no rule could be shown which required a suspended employee to mark attendance. The respondents can at the most ask for a certificate that the appellant's husband was not engaged in any other employment, business, profession or vocation. The appellant's husband having died, he could not have furnished such a certificate. At no stage have the respondents asked the appellant to give such a certificate. Thus the grant of subsistence allowance cannot be denied on the ground that such a certificate is not given.*

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> ***10.*** *This view of ours is supported by an authority of this Court in the case of Jagdamba Prasad Shukla v. State of U.P. [(2000) 7 SCC 90]. In this case, on identical facts, it has been held that if the State requires a certificate they should ask for it. It has been held that without asking for such a certificate the State cannot reject a claim for subsistence allowance.*
>
> ***11.*** *In the case of Capt. M. Paul Anthony v. Bharat Gold Mines Ltd. reported in (1999) 3 SCC 679 this Court has held that a suspended employee is entitled to subsistence allowance as a relationship of employer-employee subsists.*
>
> ***12.*** *For the above reasons, we hold that the appellant is entitled to receive subsistence allowance, which should have been paid to her husband. As the only ground for not paying the subsistence allowance is that a certificate required by Rule 96(2) has not been furnished, we direct the appellant to file an affidavit stating therein that her husband was not engaged in any other employment, business, profession or vocation. The subsistence allowance as per Rule 96 shall be released to the appellant within 4 weeks of receipt of such an affidavit."*

(ii) She would refer to and rely upon the decision of the Punjab and Haryana High Court in the case of ***Kamta Prasad and Anr. Vs. Presiding Officer, Labour Court, Gurgaon and Anr.***[2] wherein it is held that in the face of the provision of Section 10(A) of the said Act even though if a condition is laid down in the Standing Order with regard to marking of attendance, it cannot be relied upon by the Management to deny benefit of subsistence allowance to the workman. It is held that a statutory benefit granted to the workman under the said Act cannot be permitted to be curtailed by the Model Standing Order or the Certified Standing Order as the Standing Orders have to be in conformity with the provisions of the statute. In that case, Standing Orders 30(d) and 30(g) stipulated that it was obligatory for the workman to comply with

2 2003 (3) L.L.N. 430

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the condition to report for half an hour on every working day at the security gate at 10:00 a.m. and since the workman failed to report in terms of the Certified Standing Orders he was not entitled to be paid any subsistence allowance. The learned Single Judge after setting out the facts and the law held that his decision was fortified by a Division Bench judgment of our Court in the case of ***May and Baker Ltd. Vs. Kishore Jaikishandas Icchaporia and Anr.***[3] which held that the provisions of Section 10(A) would prevail over the Standing Orders 30(d) and 30(g). The relevant paragraph Nos.2, 4, 10, 11 to 14 and 18 are reproduced hereunder and read thus:-

> ***2.*** *The petitioners are both employed with M/s Amtek Auto, Ltd., Rozka Meo Industrial Area, Sohana, District Gurgaon (hereinafter referred to as the management). Petitioner No. 1 joined the management as a permanent workman on 23 November 1989. Petitioner No. 2 joined as permanent workman on 16 August 1990. On 9 October 1996, petitioner No. 1 was working as a Turner and drawing monthly wages of Rs. 3701. Petitioner No. 2 was working as an Operator and drawing monthly wages of Rs. 3153.00. Both the petitioners were suspended from service on 9 October 1996. On 10 October 1996, a chargesheet was served on the petitioners indicating that a regular departmental enquiry would be conducted against them. The enquiry proceedings commenced on 12 March 1997. The suspension orders were served on the petitioners on 25 October 1996. Departmental enquiry, according to the respondent-Management, concluded in March 1999. The report was received by the management on 9 November 2000. The enquiry officer has found the petitioners guilty of the charges. This report has not been served on the petitioners till today. Furthermore, no action has been taken on the enquiry report by the disciplinary authority. During the suspension period, the petitioners were entitled to be paid subsistence allowance at the rate of 50 per cent of the wages for the first three months, and at the rate of 75 per cent of the wages for the rest of the period of the suspension. The*

3 1991 (2) L.L.N. 879

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management has not paid any amount to the petitioners. Consequently, petitioners were compelled to file an application in the Labour Court under S. 33C(2) of the Industrial Disputes Act for computing the amount due on account of subsistence allowance from October, 1996 to December 1996. The management filed the written statement before the Labour Court, denying its liability to pay any amount. The management claimed that the petitioners had failed to mark their presence in the Security Office as required by the Certified Standing Orders and were, therefore, not entitled for any subsistence allowance. On 22 October 1997, the Labour Court framed the following two issues:

> *"(1) Whether the applicant is entitled to the benefits/ money as mentioned in the application?*
>
> *(2) Relief."*

……….

4. *It is stated by MW1 on behalf of the petitioners that they used to go to the factory, but they were not allowed to mark their attendance. The management had asked them to resign and they had been told that their attendance would not be marked. MW1 Ranbir Singh stated that the applicants had refused to accept the suspension order and the chargesheets. These were later given to them before the Labour-cum-Conciliation Officer, Gurgaon. He also stated that two other employees who were also placed under suspension, namely, A.K. Mittal and R.K. Sharma had been regularly coming to the factory for marking their attendance in accordance with the Certified Standing Orders. These workers had been paid the subsistence allowance.*

……...

10. *That being the position of law, the Labour Court ought to have decided the question as to whether the applicants would have been denied the subsistence allowance on the ground that they have failed to mark their presence at the security gate. This was not such a dispute which needed any complicated adjudication. The Labour Court had to decide as to whether S. 10A of the Act would prevail over the provisions of the Certified Standing Orders. A perusal of the Act shows that the Certified Standing Orders have to be made in conformity with the Model Standing Orders which have been set out in terms of S. 15(2)(b). The Standing Orders made by the employer have to be clarified under S. 4 of the Act. While certifying the Standing Orders, the certifying authority has to satisfy itself that the Standing Orders contain provisions for every matter set out in the schedule which is applicable to the industrial establishments. The Standing Orders have to be in conformity with the provisions of the Act. It is the mandatory function of the Certifying Officer or the appellate authority to adjudicate upon the fairness or reasonableness of the provisions of the*

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Standing Orders. Upon certification, the Standing Orders bind the management and the workman. Nevertheless the Model Standing Order or the Certified Standing Orders remain law made under the Act. In the present case, the claim of the petitioners is disputed by the respondent-management on the ground that the petitioners have failed to comply with the proviso to Standing Orders 30(d) and (g). The provisions with regard to the grant of subsistence allowance during the period of suspension is made in S. 10A of the Act. For facility of reference S. 10A of the Act and Standing Orders 30(d) and (g) are reproduced as under:-

> *"10A. Payment of subsistence allowance.— (1) Where any workman is suspended by the employer pending investigation or enquiry 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 the 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-sec (1), the workman or the employer concerned may refer the dispute to the Labour Court, constituted under the Industrial Disputes Act, 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) Notwithstanding 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.*
>
> *30 (d). A workman under suspension shall report for half an hour on every working day at the security gate at 10.00 A.M. to receive any communication which*

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> *may be tendered to him on behalf of the Manager, and get his attendance marked.*
>
> *30(g) A workman under suspension will be paid subsistence allowance at the rate of half his average pay calculated in accordance with the provisions of S. 2(aaa) of the Industrial Disputes Act, 1947.*
>
> *Provided that for the days the suspended workman fails to report in terms of Sub-cl. (d), or leaves the station without leave or is allowed leave without subsistence allowance in terms of Sub-cl. (g), he shall not be paid any subsistence allowance at all for those days. Provided further that if the enquiry proceedings go beyond a period of 90 days for which the suspended workman has been paid subsistence allowance, at the rate of 50 per cent of the average pay, he shall thereafter be paid subsistence allowance at the rate of ¾th of his average pay calculated in the like manner".*

11. *A perusal of S. 10A of the Act clearly shows that on suspension, the workman is entitled to subsistence allowance at the rate of 50 per cent of the wages which the workman was entitled to immediately preceding the date of suspension for the first 90 days of suspension. Thereafter, the workman is entitled to subsistence allowance at the rate of 75 per cent of such wages for the remaining period of suspension. The increased 75 per cent of the suspension allowance has to be paid to the workman, if the delay in completion of disciplinary proceedings is not directly attributable to the conduct of the workman. Nothing has been brought on record in the present proceedings to establish that the petitioners have in any manner been responsible for delay in the completion of disciplinary proceedings. Under the Act, there is no other condition which is to be satisfied by the workman for receipt of the suspension allowance. This right is, however, sought to be cut down under Standing Orders 30(d) and 30(g) and the proviso thereto. In my considered opinion, in the face of S. 10A of the Act, the condition laid down in aforesaid Standing Order 30(d) with regard to the attendance cannot be relied upon by the management for denying the benefit of subsistence allowance to the petitioners. A benefit granted to the workman under the Act cannot be permitted to be curtailed by the Model Standing Orders or the Certified Standing Orders. A similar view has been taken by a Division Bench of the Patna High Court in the case of Secretary, Bihar State Electricity Supply Workers, Union v. Presiding Officer, Industrial Tribunal, [1995 L. & I.C. 2752], has observed as under:*

> *"20. Section 10A of the Act has been newly inserted by Act 18 of 1982. From reading of the provision as a whole, it appears that this provision takes care of the employees who are put under suspension. The rate at*

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> *which subsistence allowance is to be paid has also been prescribed under this section itself. In such circumstances, in my opinion, the amendment of Cl. 30(d) cannot sustain and as such this should be deleted from the Standing Order".*

12. *A bare perusal of Standing Orders 30(d), 30(g) and the proviso shows that they are not in conformity with S. 10A of the Act. Therefore, the provisions of S. 10A would prevail over the Standing Orders 30(d) and 30(g) and the proviso. In this view of mine, I am fortified by a Division Bench judgment of the Bombay High Court in the case of May and Baker, Ltd. v. Kishore Jaikishandas Icchaporia, [1991 (2) L.L.N. 879]. In this case, the Division Bench was dealing with the situation where a suspended employee had been paid the subsistence allowance in accordance with the Certified Standing Orders. There was no dispute that the Certified Standing Orders are in conformity with S. 10A of the Act. The employee, however, in his application under S. 13A before the Labour Court had claimed subsistence allowance under the provisions of the Model Standing Orders. This plea was raised on the basis of Sub-sec. (3) of S. 10A. It was argued that the provision with regard to subsistence allowance was more beneficial under the Model Standing Orders than the provision under S. 10A. Model Standing Orders being "other law" as specified in Sub-sec. (3) of S. 10A of the Act, the suspended employee therein ought to be paid subsistence allowance under the Model Standing Orders. After considering the submissions made, the Division Bench held that the Model Standing Orders are applicable only until such times as amendment thereto has been propose and certified. Once the amendment has been certified, the Certified Standing Orders operate. Thereafter, the Division Bench observed as follows, in Para. 9, at pages 882 and 883:*

> *"There is no dispute that the payment that was made by the appellant to the first respondent was in accord not only with the provisions of the Certified Standing Orders applicable to their industrial establishment but also with those of S. 10A. It was urged by Smt. D'Souza learned counsel for the first respondent, that the first respondent was entitled to subsistence allowance as provided by the Model Standing Orders by reasons of Sub-sec. (3) of S. 10A because the Model Standing Order were "other law" within the meaning of Sub-sec. (3). We find the argument difficult to accept. The Model Standing Order, as also Certified Standing Orders, are law no doubt, but they are law made under the provisions of the Act. They are not provisions "under any other law". In our view, therefore, the provisions of S. 10A supervene in relation to the payment of subsistence of the Model Standing Orders".*

13. *A perusal of the aforesaid ratio clearly shows that Model*

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Standing Orders as also the Certified Standing Orders, are law made under the provisions of the Act. Therefore, the provisions of S. 10A supervene in relation to the payment of subsistence allowance over the provisions of the Model Standing Orders/Certified Standing Orders. The aforesaid decision has been followed by the Single Judge (F.I. Rebello, J.) in the case of S.M. Puthran v. Rallies India, Ltd., [1998 II C.L.R. 270]. After referring to the aforesaid ratio of the Division Bench, the Single Judge observed as follows:—

> *"…… It is inconceivable that the Legislature knowing that they have framed Model Standing Orders and/or have made provisions for Certified Standing Orders would yet provide for S. 10A and make the provisions of the Certified Standing Orders or Model Standing Orders under the Act override the provisions of S. 10A itself. Even in the judgments of Bank of India, Ltd. the Division Bench therein has followed the judgment of the learned Single Judge mentioned in the said judgment which took the view that when the Standing Orders are in conflict with S. 10A, then S. 10A must prevail over the Standing Orders. The same has been reiterated by the Division Bench of the Court in May and Baker, Ltd., [1991 (2) L.L.N. 879] (vide supra)".*

14. *That being so, the petitioners would be entitled to receive the subsistence allowance as calculated in terms of S. 10A. They cannot be compelled to mark their presence as required under Standing Order 30(d) and the proviso thereto.*

…….

18. *Keeping the aforesaid ratio of the Division Bench in view, I am of the considered opinion that the Labour Court committed an error of jurisdiction in not deciding the claim of the applicants on merits. The Labour Court ought to have adjudicated upon the claim on the ground that question of applicability of Standing Orders 30(d)(g) and the proviso thereto is incidental to the claim of the applicants under S. 10A of the Act. In view of the above, the writ petition is allowed. The impugned order passed by the Labour Court, dated 23 July 1999, is hereby quashed. The matter is remanded to the Labour Court with a direction to compute the subsistence allowance payable to the petitioners for the period October 1996 to December, 1996 in terms of S. 10A of the Act by ignoring the requirement of attendance stipulated in proviso to Certified Standing Orders 30(d) and 30(g). No costs. The Labour Court is directed to pass the necessary orders within a period of four weeks of the receipt of a copy of this order."*

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(iii) She has next decision relied upon the decision in the case of ***Manoj Kumar Panda Vs. Orrissa Air Products Ltd.***[4] wherein the the Division Bench of the Orissa High Court in a similarly placed case held that as per the provisions of Section 10(A) of the said Act read with clause 14(4)(b) and (e) of the Central Rules, 1946 there is no provision or requirement for marking of attendance at the factory gate during the period of suspension. Paragraph Nos.8 to 10 of this decision are relevant in this regard and reproduced below:-

> *"**8.** Despite repeated query from this Court, Learned Counsel for the Company failed to show that there is any requirement under any Rules that a suspended workman has to report for duty everyday or to the sign the attendance register and to receive direction and communication from the Company during the period of suspension. In the absence of any such Rule, it is difficult for this Court to sustain the stipulation to that effect in the suspension order. Learned Counsel also referred to Section 10A of the Industrial Employment (Standing Order) Act, 1946 (hereinafter called the 'said Act'). Section 10A of the Act reads as follows:—*
>
>> *"10A. Payment of subsistence allowance.*
>>
>> *(1) Where any workmen is suspended by the employer pending investigation or inquiry into complaints or charge 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 the 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 the 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*

4 2008 II LLJ 800 (Ori)

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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) Notwithstanding anything contained in the foregoing provisions of this Section where provisions relating to the 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 Sections, the provisions of such other law shall be applicable to the payment of subsistence allowance in the state,"

9. *The rate of payment of subsistence allowance is made clear in the said statutory provisions. Here, admittedly, the Appellant has not been paid anything by way of subsistence allowance.*

10. *The relevant Rule under the Industrial Employment (Standing Order) Rules on which reliance was placed by the Learned Counsel for the Company is Rule 14(e). The said Rule is as follows:*

"14(e). The payment of subsistence allowance under this Standing Order shall be subject to the workman concerned not taking up any employment during the period of suspension"."

(iv) She has next relied upon the decision in the case of ***Jagdamba Prasad Shukla Vs. State of U.P. and Ors.***[5] wherein the Supreme Court has held that payment of subsistence allowance in accordance with the rules in a case of suspension is not a bounty but a right and the employee is entitled to be paid the subsistence

5 (2000) 7 SCC 90

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allowance. Paragraph Nos.7 and 8 of the decision are relevant and reproduced herein under:-

> *"7.* Reverting now to the other reason which prevailed with the High Court, namely, the appellant having not furnished a certificate stating that he is not engaged in any other employment, business, profession or vocation and having thus not complied with Rule 53(2) of the Financial Hand Book, it may be noticed that at no stage, the appellant was told that he had to furnish such a certificate, and that he could not be paid subsistence allowance without it. It was not the case of the respondents that in response to the appellant's request for payment of subsistence allowance, he was asked to furnish such a certificate and since he did not furnish it, the amount of subsistence allowance was not paid to him. Therefore, the second reason for rejecting the appellant's contention for non-payment of subsistence allowance also does not deserve to be sustained.
>
> *8. The payment of subsistence allowance, in accordance with the Rules, to an employee under suspension is not a bounty. It is a right. An employee is entitled to be paid the subsistence allowance. No justifiable ground has been made out for non-payment of the subsistence allowance all through the period of suspension i.e. from suspension till removal. One of the reasons for not appearing in enquiry as intimated to the authorities was the financial crunch on account of non-payment of subsistence allowance and the other was the illness of the appellant. The appellant in reply to show cause notice stated that even if he was to appear in enquiry against medical advice, he was unable to appear for want of funds on account of non-payment of subsistence allowance. It is a clear case of breach of principles of natural justice on account of the denial of reasonable opportunity to the appellant to defend himself in the departmental enquiry. Thus, the departmental enquiry and the consequent order of removal from service are quashed."*

5.2. On the basis of the aforesaid submissions and case citations, she would submit that the impugned Award deserves to be quashed and set aside.

6. ***PER-CONTRA***, Ms. Mujumdar, learned Advocate appearing for the Respondent – Company would strongly oppose the submissions

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of the Petitioner - Union and would contend that in the suspension notice dated 03.04.2004, the concerned employee, Mr. Natubhai Patel was directed to report at the factory gate everyday at 11:00 a.m. and mark his attendance in the register provided for that purpose and it was stipulated that in case he failed to mark his attendance he would be treated as absent for the day and no subsistence allowance would be payable to him for that day. She would submit that in this background the dispute raised by the Petitioner – Union in demand No.4 regarding payment of subsistence allowance to Mr. Natubhai Patel was agitated by the Petitioner - Union before the Conciliation Officer and this is the only grievance which was agitated. She would submit that during the conciliation, Mr. Natubhai Patel did not contest that he had chosen to not mark his attendance everyday as directed in his suspension order for being entitled to subsistence allowance. However, the conciliation failed and dispute IDR No.7 of 2008 was referred to the Labour Court on the above issue. She has drawn my attention to the issues framed by the Labour Court and would submit that in so far as issue No.2 is concerned, the Labour Court has returned a finding in paragraph No.20 of the Award that as per provisions of clause 4(e) of Schedule - I of the Model Standing Orders (Central), the workman has to satisfy that he was not in employment during the suspension period to claim subsistence allowance. Taking this further, she would submit that as a natural corollary, the condition of marking

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attendance in the suspension order is therefore just, fair, bonafide and legal as held by the Labour Court. She would submit that the Labour Court has held that it can be therefore said to be in consonance with the provisions of Section 10(A) of the said Act. She would submit that the Labour Court held that non-payment of subsistence allowance in this case is not against any provision of law since it found that the condition of marking attendance at the factory gate stipulated by the Respondent - Company is not unfair and against the law.

6.1. She would submit that Respondent – Company is permitted under the statute to stipulate a just, fair and *bonafide* condition in consonance with the prevailing law for entitlement of subsistence allowance.

6.2. In support of her above submissions, she would submit that the Model Standing Orders provide that payment of subsistence allowance is on the condition that the workman concerned is not gainfully employed elsewhere and there is no further provision with respect to the manner in which an organization must satisfy that the workman was not gainfully employed elsewhere during the period of suspension.

6.3. She would submit that unless there is a specific restrictive provision barring the employer from stipulating such conditions, the employer would be entitled to impose such stipulations to give effect to

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the Model Standing Orders by ensuring that the stipulation is fair, reasonable and *bonafide.* She would therefore submit that there is no illegality in the stipulation requiring the suspended workman to mark attendance at the gate everyday to prove that he is not gainfully employed elsewhere during his suspension.

6.4. Next, she has relied upon the decision of the Patna High Court in the case of ***Ganesh Ram and Ors. Vs. The State of Bihar and Ors.***[6] wherein while deciding whether a suspended employee could be asked to mark his attendance every day at the head-quarters fixed for him, it was held that a suspended employee was entitled to subsistence allowance only upon production of a certificate to the effect that he was not gainfully employed at any other place. The Patna High Court further held that although the rules referred therein did not provide for marking of attendance by a suspended employee, there was however, nothing in the rules prohibiting the concerned authority from requiring the suspended employee to mark his presence everyday and further that the suspended employee was required to be present at the head quarters and if he was absent from the head quarters, he may not be entitled to subsistence allowance during the period when he was absent. The Patna High Court further held that the requirement to mark the attendance everyday was to ensure that the suspended employee is present at the head quarters and mere marking of

6 1995-I L.L.N. 1074

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attendance is different than requiring a suspended employee to work during the period of suspension. She would thus submit that unless there is a restrictive clause contained in the law, the employer may require the employee / workman to mark his attendance every day for the purpose of ensuring that he was not gainfully employed during his suspension period.

6.5. Next, she would submit that the stipulation is reasonable and within legal bounds and the same is evident from the fact that various legislations have recognized such conditions by incorporating the same in the Rules / Regulations for eg. Rule 33(4) of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 (**"MEPS Rules"**) which provides that an employee under suspension shall not leave the head-quarters during the period of suspension without the prior approval of the CEO or the President, as the case may be, and if the employee fails to abide by the aforesaid condition, he would not be entitled to claim the subsistence allowance. Similarly, Uttar Pradesh State Textile Corporation Conduct, Control and Disciplinary Rules, 1992 (**"Disciplinary Rules"**) provide that subsistence allowance would be payable only when the employee, if required, presents himself every day at the place of work or such other place as mentioned in the order. Further, the employee, under suspension would have to furnish a certificate that he is not engaged in other employment, business, profession or vocation for entitlement of

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subsistence allowance. In support thereof, she has relied on the decision of the Supreme Court in the case of U.P. State Textile Corp. Ltd. v. P.C. Chaturvedi, (2005) 8 SCC 211, wherein in paragraph No.16 of the judgment, *inter alia,* the Supreme Court observed that Rule 41 of the Disciplinary Rules, 1992 provides that the subsistence allowance is payable only when the employee if required presents himself everyday at the place of work and for establishing that the employee had presented himself at the place of work, the authorities had clearly stipulated a condition that the attendance register was to be signed. No explanation was given by the employee in that case as to why he did not sign the register. The Supreme Court therefore, held that such a condition cannot be lightly brushed aside as technical and / or inconsequential. As the employee had not signed the attendance register even though specifically required in the order of suspension, the Supreme Court held that the High Court was not justified in coming to a conclusion that the non-signing was not a consequential or a *bonafide* lapse.

6.6. She would next submit that the above judgment of the Supreme Court was relied upon by this Court (Aurangabad Bench) in the matter of ***Ashok s/o. Sahaji Gulbhile Vs. The Secretary, Gramvikas Shikshan Prasarak Mandal & Ors.***, in respect of similar rules contained in the MEPS Rules, to observe that in the absence of specific instruction or prior intimation to the workman that he would not be entitled for

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subsistence allowance if he did not mark his daily attendance, the employer was not justified in denying the subsistence allowance. She would submit that this Court further noted that requirement of attendance was contained in the Disciplinary Rules itself, however, it has noted that the employer would not be entitled to deny subsistence allowance if neither the Rules nor the suspension order provide for a condition of marking attendance. Hence she would submit that in the instant case, the condition to mark the attendance in the register was clearly stated by the Respondent – Company in the suspension notice itself and Mr. Natubhai Patel was also cognizant about the pre-condition and has also duly admitted the same during the proceedings.

6.7. In light of the above judgments Ms. Mujumdar would submit that it is amply clear that the condition stipulated in the suspension notice requiring Mr. Natubhai Patel to mark his attendance everyday at the factory gate for entitlement to subsistence allowance is fair, reasonable and *bonafide* and in furtherance to serve the purpose / intent of the law i.e., to ensure that the concerned workman should not be gainfully employed during the suspension period.

6.8. The next submission is that Mr. Natubhai Patel by his own conduct is deemed to have accepted the condition stipulated in the suspension notice and therefore in the absence of challenge to the said notice is now estopped from raising any grievance with respect to the

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same. In this regard, she would submit that no reasons are set out by the Petitioner – Union for not marking the attendance and on the contrary, Mr. Natubhai Patel accepted the condition and marked attendance from April 2004 till April 2005 and received payment of subsistence allowance in lieu thereof. She would submit that Mr. Natubhai Patel raised grievance in respect of non-payment only before the Enquiry Officer for the first time on the ground that the condition stipulated in the suspension notice was unlawful, however, when the matter was placed during reference before Conciliation Officer as well as the Labour Court, there was no challenge to the suspension notice in respect of the condition but only demand regarding payment of wages, as set out above. She would therefore submit that Mr. Natubhai Patel by his conduct was deemed to have accepted the condition when he abided by it on his volition and also did not challenge the suspension notice.

6.9. She would therefore submit that the condition stipulated in the suspension notice is unchallenged and since the same is accepted and partly abided by Mr. Natubhai Patel, the plea of illegality of the suspension notice is misconceived, *malafide* and an after-thought. She would submit that thus the concerned employee is deemed to have waived his right to challenge the legality of the suspension notice and is estopped from making any grievance in respect of the same after marking his attendance and receiving payments for certain periods.

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Therefore she would submit that, it does not lie in the mouth of the Petitioner to contend that non-payment of subsistence allowance for the period when no attendance was marked is in violation of his fundamental rights.

6.10. The next submission that is advanced is that the onus of proving that the workman Mr. Natubhai Patel was not gainfully employed in any other employment during his suspension period is on the Petitioner - Union or the workman irrespective of whether any condition is stipulated or otherwise. She would submit that this obligation is not discharged by the Petitioner/ workman; that assuming without admitting that the concerned employee was not legally entitled to stipulate any condition for payment of subsistence allowance, the employee would still be under an obligation to prove that he was not gainfully employed during his suspension period for entitlement of subsistence allowance, especially, in the present case, where, for a period of 1 year Mr. Natubhai Patel has marked his attendance and has also participated in the enquiry proceeding; that Mr. Natubhai Patel has failed to prove how he managed his subsistence when he was not paid any subsistence allowance.

6.11. She would submit that the Petitioner has neither pleaded in the statement of claim that he was not gainfully employed during his suspension, nor has he produced any document before the Respondent

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- Company, the Enquiry officer or the Labour Court regarding his non-employment during the period of suspension.

6.12. She has next drawn my attention to the statement of claim of Mr. Natubhai Patel which is at Exhibit – H Page No. 33 onward in the Writ Petition and would submit that bare perusal of the statement of claim of the employee would show that the employee has made no averment regarding the fact of him not being gainfully employed during his suspension; that the only fact that is highlighted is that the Petitioner was opposed to the idea of marking attendance everyday at the gate under the pretext that the said condition was illegal. She would next submit that the same is so deposed in his affidavit of evidence.

6.13. She would submit that, no such demand regarding withdrawal or setting aside of this condition for subsistence allowance was raised by the Petitioner / employee. She submits that it was for the first time in the affidavit of evidence that Mr. Natubhai Patel deposed that he had declared before the Enquiry Officer and the Respondent - Company that he was not gainfully employed during the period of suspension and further Mr. Natubhai Patel also went ahead to depose that an affidavit regarding the same was filed before the Conciliation Officer, however, the proof of such declaration / affidavit was neither produced with the statement of claim nor with the affidavit of

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evidence.

6.14. She has next drawn my attention to the cross-examination of Mr. Natubhai Patel and has submitted that it is clear that despite being aware that he was required to mark attendance at the gate of the Respondent - Company everyday for entitlement to subsistence allowance, as per the prevalent practice of the Respondent - Company, he chose not to mark the attendance. She would submit that, this reflects the defiance of the concerned employee to adhere to conditions which are not harsh but reasonable. She would further submit that Mr. Natubhai Patel also failed to show that he was not gainfully employed during the period of suspension and therefore, the Respondent - Company is justified in not paying him the subsistence allowance. She would submit that it is an admitted position that the other workmen suspended with him complied with the condition and made no grievance in respect of subsistence allowance and it was only Mr. Natubhai Patel who has acted with *malafide* intent and is attempting to gain undue advantage of his own shortcoming.

6.15. In support of her above submissions, she has referred to and relied upon the following decisions of the Supreme Court and the various High Courts:-

(i) ***Kendriya Vidyalaya Sanghtan and Anr. Vs. S.C. Sharma***[7];

7 (2005) 2 SCC 363

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(ii) ***U.P. State Brassware Corporation Ltd. and Anr. Vs. Uday Narain Pandey***[8];

(iii) ***Talwara Cooperative Credit and Service Society Ltd. Vs. Sushil Kumar***[9];

(iv) ***Hindustan Motors Ltd. Vs. Tapan Kumar Bhattacharya and Anr.***[10];

(v) ***National Gandhi Museum Vs. Sudhir Sharma***[11];

(vi) ***Salim Ali Centre For Ornithology & Natural History, Coimbatore and Anr. Vs. Dr. Mathew K. Sebastian***[12]; and

(vii) ***K.S. Periyaswamy Vs. Bharath Earth Movers Ltd., Banglore***[13];

(viii) ***U.P. State Textile Corporation Ltd. Vs. P.C. Chaturvedi and Ors.***[14]; and

(ix) ***Ashok S/o Shahaji Gulbhile Vs. The Secretary and Ors.***[15].

6.16. While refereeing to the above judgments, she would submit that when the question of determining the entitlement of subsistence allowance is concerned the employee has to show that he was not gainfully employed and the initial burden is on him. She would submit that though it was for the employer to raise the plea about the

8 (2006) 1 SCC 479
9 (2008) 9 SCC 486
10 (2002) 6 SCC 41
11 (2021) 12 SCC 439
12 2022 SCC Online SC 451
13 2006 (1) L.L.N. 610
14 (2005) 8 SCC 211
15 WP No.2438 of 2012 decided on 20.03.2015

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employee not being gainfully employed during the suspension period, having regard to the provisions of Section 106 of the Indian Evidence Act, 1872, such a plea if raised by the workman, then the burden of proof would be on the workman as it is a negative burden and only if the same is discharged by the workman, the onus of proof would shift onto the employer.

6.17. Finally, she would submit that the requirement of workman signing the attendance register at the factory gate during the period of suspension is a customary practice followed by the Company for all its workmen / employees and the Respondent - Company in its affidavit of evidence filed through its witness Ms. Tanvi Shah has deposed that the requirement of marking attendance every day at the gate was followed for all suspended workmen of the Respondent - Company and has been a prevalent practice for many years and hence it has become a rule, custom and usage in the Respondent - Company and Mr. Natubhai Patel could not be absolved from it; Mr. Natubhai Patel himself has admitted in his deposition that the said practice was followed in the case of other suspended workmen by the Respondent - Company.

6.18. She would therefore submit that the practice of requiring a suspended workman to mark his attendance every day for showing that the suspended workman was not gainfully employed elsewhere

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during his suspension is a fair, reasonable and *bonafide* condition, which has been recognized by the Supreme Court as well as High Courts as demonstrated in the judgments cited above and accordingly, in the event of failure of the concerned employee to prove that he was not gainfully employed elsewhere during his suspension period, the Respondent - Company is justified in denying him the subsistence allowance during the period when he did not mark his attendance. She would therefore submit that the Petition is meritless and not maintainable and hence deserves to be dismissed with costs.

7. I have heard Ms. Cox, learned Advocate for Petitioner – Union and Ms. Mujumdar, learned Advocate for Respondent – Company and with their able assistance perused the record and pleadings of the present case. Submissions made by the learned Advocates have received due consideration of this Court.

8. In the present case, it is seen that the only dispute pertains to the issue of non-payment of subsistence allowance in view of an unfulfilled condition stipulated by the Respondent – Company in the suspension order. *Prima facie,* it is seen that before the Enquiry Officer, before the Conciliation officer, before the Labour Court in pleadings after the Reference is made and during the evidence in the Reference proceedings, employee Mr. Natubhai Patel had repeatedly demanded and raised a grievance about non-payment of subsistence allowance to

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him. There is no dispute about this fact.

9. What is pertinent to note is that whether the condition in the suspension order can be such that a statutory benefit granted to the employee / workman can be permitted to be curtailed by the condition. In this regard at the outset, let us analyse the statutory provision of Section 10(A) of the said Act which is applicable in the present case. Section 10(A) of the said Act reads thus:-

> *"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) Notwithstanding 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."*

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10. As against the above, let us see the condition which is stipulated in the suspension order issued to the workman in the present case. The said condition is found in the suspension pending enquiry order which is at Exhibit "A" - page No.18 of the Petition in the last unnumbered paragraph therein which reads thus:-

> *"Your suspension pending enquiry will continue till the enquiry is completed and the decision is made thereupon. You are advised to report at the factory gate everyday at 11.00 a.m. and mark your attendance in the register provided for this purpose. Please note that in case you fail to mark your attendance, you will be treated as absent for the day and no subsistence allowance will be payable to you for that day."*

11. It is seen that immediately thereafter on 24.09.2004 a letter is addressed by the Union office bearers / departmental representatives for Mr. Natubhai Patel for payment of subsistence allowance. It is next seen that on 21.08.2007, a letter is addressed by the Vice President of the Petitioner – Union to the Respondent – Company once again raising the issue of non-payment of subsistence allowance which was clearly in violation of the provisions of Section 10(A) of the said Act. This letter is annexed as Exhibit "D" - page No.27 to the Petition. Thereafter at Exhibit "F" - page No.31 is the Conciliation Failure Report dated 05.05.2008 wherein it has been recorded by the Conciliation Officer that the Management has further stated that they are ready to pay the subsistence allowance to Mr. Natubhai Patel when he marks his attendance at the factory gate as per the practice of the Respondent - Company to show that he is not gainfully employed

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elsewhere and it also records that Mr.Natubhai Patel has submitted his written statement stating that he was not employed anywhere during his suspension period.

12. In view of the above rival position, the question for adjudication is whether the act of the Respondent – Company is in consonance with the provisions of Section 10(A) of the said Act. As seen above, Section 10(A) refers to payment of subsistence allowance during the period of suspension. From reading Section 10(A) of the said Act, it appears that the provision is a beneficial enactment to take care of employees who are placed under suspension and they are required to be paid the prescribed 50% wages as contemplated for the period under suspension. In the present case, the Respondent - Company has argued that it is a long standing customary practice of the Respondent - Company to require marking of attendance at the factory gate because of which subsistence allowance is denied to Mr. Natubhai Patel. Therefore, the question before me is whether such a customary practice of requiring the employee to mark his attendance at the factory gate without the support of any rule, regulation, standing order or statutory enactment is maintainable in the face of the statutory provision of Section 10(A) of the said Act. I am afraid it is not. The Respondent - Company cannot lay down and insist on a customary practice followed by the Company to prevail upon the existing statutory provisions of law. The argument of the Respondent -

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Company is difficult to accept. A customary practice cannot be equated as a provision under any law or a provision under any other law and the provisions of Section 10(A) of the said Act clearly supervene in relation to the payment of subsistence allowance over the alleged customary practice followed by the Respondent - Company. Once it is found that the said customary practice is in clear conflict with the provisions of Section 10(A) of the said Act, the claim of the employee being entitled to subsistence allowance cannot be permitted to be defeated on the basis of a customary practice followed by the Respondent - Company.

13. The Labour Court in the impugned Award in paragraph No.20 thereof has taken a parochial view of the aforementioned issue which was before it for adjudication. Once the Petitioner places on record its grievance for non-payment of subsistence allowance it cannot be held that no contention has been raised about the condition put by the employer that it is against the provisions of law. The findings given in paragraph No.20, that the evidence of the employee is silent about the provisions of law according to which the condition of attendance at the gate of the factory everyday during the period of suspension is illegal cannot be sustained. It cannot be held by the Court that because such a condition was put by the employer which was to the knowledge of the employee, the said condition was to be followed by the employee. Any condition put by the employer and

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more specifically a condition directly relating to entitlement of subsistence allowance has to be within the parameters and four corners of Section 10(A) of the said Act only. In the present case, the provision of clause 4(e) of Schedule - I of the Model Standing Orders (central) require the employee to satisfy that he was not in employment during the suspension period to claim the subsistence allowance. This provision cannot be stretched to the extent of the employer requiring satisfaction of a pre-condition of marking attendance at the gate of the factory everyday during the period of suspension. The condition stipulated by the Respondent - Company is an illegal condition and deserves to be dismissed. It is an unfair, unjust and *malafide* condition which is contrary to the provisions of Section 10(A) of the said Act. In fact, the findings returned in paragraph No.20 of the impugned Award dated 13.08.2014 are unreasoned findings which do not satisfy the statutory provisions at all and deserve to be quashed and set aside. None of the judgments referred to and relied upon by the Respondent – Company have addressed the aforementioned legal issue of requiring marking of attendance everyday during the period of suspension. What is required under the law is for the suspended employee to inform the employer that he is not gainfully employed elsewhere and nothing more. Once the statutory provisions does not provide for requiring marking of attendance everyday such introduction of a stipulation as per customary practice is illegal in law, no matter what

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the concerned employer desire from introducing such a condition. In the present case, the said restrictive condition cannot be made a pre-condition to the extent of claiming that it was for ensuring that the employee was not gainfully employed during the period of suspension. Such an interpretation and argument deserves to be rejected and dismissed in the first instance itself. Such a stipulation is unreasonable and cannot be within the four corners of the statutory provisions.

14. In the written submissions submitted by the Respondent - Company it has been specifically submitted that such a requirement of signing the attendance register at the gate during the period of suspension is a customary practice followed by the Respondent - Company for all the workmen and even though the workman in his evidence / deposition has admitted that the Respondent - Company had followed such a practice, that cannot be held against the workman. It cannot be argued by the Respondent - Company that by virtue of customary practice prevalent for many years, it has become a rule, custom or usage. It cannot be and should not be equated with the fact of proving whether the workman was not gainfully employed during the period of suspension.

15. In view of the above observations and findings and the decisions referred to and relied upon by the Petitioner as alluded to herein above, the Writ Petition stands allowed in terms of prayer

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clauses ‘a’, ‘b’ and ‘c’ which read thus:-

> *“a) that this Hon’ble Court may be pleased to quash and set aside the Order dated 13.08.2014 marked as **EXHIBIT - “M”** passed by the Hon’ble Civil Judge, Senior Division, Daman;*
>
> *b) that this Hon’ble Court may be pleased to declare that the Respondents were required to pay the Petitioner his subsistence allowance from the date of suspension till the date of his termination without the requirement that he attends the company during the period of suspension;*
>
> *c) that this Hon’ble Court may be pleased to direct the Respondents to pay the Petitioner his subsistence allowance from the date of suspension till the date of his termination with 10% interest.”*

16. Writ Petition is allowed with the following directions:-

(i) The impugned Award dated 13.08.2014 is quashed and set aside and it is declared that Mr. Natubhai Patel, the concerned employee is entitled to payment of subsistence allowance from the date of suspension till the date of his termination alongwith interest @ 10% per annum (simple interest) from the date on which each payment was due and payable till the same is paid over to him;

(ii) It is directed that Petitioner shall compute the details of payment and inform the same to the Respondent - Company alongwith an authenticated copy of this judgment within a period of one week from today; and

(iii) The Respondent Company is directed to pay the entire

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amount as computed and entitled to alongwith interest to the concerned employee Mr. Natubhai Patel within a period of one week thereafter.

17. In view of the above, Writ Petition is disposed.

[MILIND N. JADHAV, J.]

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