



**PAYMENT OF SUBSISTENCE ALLOWANCE AND PENDING OF DISCIPLINARY PROCEEDINGS AGAINST CIVIL SERVANTS SUSPENDED ON CHARGE OF CRIMINAL OFFENCE – IMPACT ON PUBLIC ADMINISTRATION.**

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**INTRODUCTION:**

Subsistence allowance is an allowance under which a particular percentage of the entire wage is provided to the workmen by the employer during the period he is suspended from his employment due to an investigation pending against him for any misconduct or wrongful activities carried out by him. The allowance is paid in order to fulfill his and his family's basic means of livelihood. The Supreme Court and the High Courts have adjudicated upon cases involving 'subsistence allowance' and have considered it as a right of a Civil Servant under Article 21 of the Constitution. Hence in this paper we are going to discuss about the legal provisions regarding subsistence allowance in India, a brief history of how the courts have dealt with cases involving 'subsistence allowance' and how it affects the Civil Service Administration.

**OBJECTIVE:**

The object of this article is to bring to light, the effect that suspension and subsistence allowance has on the functioning of Administration of the Government. The impact of Departmental proceeding in matters where the enquiry is conducted either by the Police Authority or Judicial Authority.

**PAYMENT OF SUBSISTENCE ALLOWANCE**

The provisions for subsistence allowance in India is under section 10 A of the Industrial Employment (Standing Orders) Act, 1946. The provisions of the act clearly state that if there are disciplinary proceedings carried out against a Civil Servant and he has been suspended from service then in such cases the workmen is entitled to an allowance of 50% of his wage preceding the date of suspension for a period of ninety days. Further, the workmen is entitled to get an allowance of 75% of the wage in case of further delay which is not caused due to the conduct of

the workmen. A maximum of 180 days should be permitted to complete the disciplinary proceedings. In case of any dispute regarding the subsistence allowance between the employer and the workmen either of the parties can approach the Labour Court within the jurisdiction of the parties. Lastly, if there are any provisions given under the State Legislations that are more beneficial then such provisions should be followed.

As the Central government has made an amendment to the Labour laws and passed 3 new codes, provision for subsistence allowance has been included under the Industrial Relations Code, 2020. Under Section 38 of the Code the provision has been included and is same as the previous provision under the Industrial Employment (Standing Orders) Act, 1946. The only addition that has been included under the code is that a time limits for completion of the disciplinary or investigations should be within a period of 90 days.

The State governments also have provisions for subsistence allowance in their respective legislations and can be applied and availed as and when required. The State of Tamil Nadu and few other States have made 100% of last drawn wage as allowance for civil servants you are suspended beyond a period of 180 days.

### **IS SUBSISTENCE ALLOWANCE AVAIALABE TO ALL THE GOVERNMENT CIVIL SERVANTS?**

All suspended Government Civil servants are entitled to Subsistence Allowance. Article 21 of the Constitution is a basic right that is available to all persons in India and if the Supreme Court of India has mandated the 'right to live with dignity' as a right to life all the civil servants of a industry should be entitled to get the provision of subsistence allowance. But there is no legislation as such that mandates the right of subsistence allowance to all the civil servants of the industry/factory. The only reason that the Supreme Court has emphasized on subsistence allowance being a right under Article 21 is to ensure that an civil servant could survive and meet basic expenses for livelihood. Hence, if the allowance is not granted to civil servants working in a managerial position or supervisory position it would be difficult for them to survive as well because even, they rely on their salaries and that is the only source of income for them to meet their basic and necessary expenses. If during the period they are suspended and are not paid any allowance their right to live with dignity would be affected. This also leads to discrimination among the civil servants. It would be a violation of Article 14 of the constitution which deal with equality. Even though under certain circumstance based on intelligible differentia there can be differential treatment given under certain circumstance, the act of not providing subsistence allowance to a set of civil servants will not qualify under the exception. As there is no reasonable nexus between the discrimination and it is not based on intelligible differentia because the right to

live with dignity is a right available to every citizen and any violation based on it would be against the principles of the Constitution.

But the recent case law of M. Elango, by the Madras High Court has laid the foundation to prohibit any such violation under the Constitution. In this case as the secretary of a Cooperative Society was suspended for several irregularities. During the period he was suspended he was not paid any allowance because he was working in a managerial and administrative capacity and hence did not qualify as a 'workman' under the definition of the act to avail the right of subsistence allowance. Hence, filed an appeal in the High Court. The court was of the opinion that every person working under an organization has to fulfil his basic needs and if during suspension of his employment he is not paid any allowance he will not be able to sustain himself therefore every civil servant is entitled to such allowance through which he can sustain himself and fulfill his basic needs.

### **SUSPENSION OF AN CIVIL SERVANT**

Suspension of a civil servant means keeping an civil servant away from work-place temporarily for reasons of discipline. However, the suspension does not mean removal from service of employment. The suspension of an civil servant will be based on the grounds of misconduct, violation of rules of the **Government**, causing damage to the property of the public/Government etc. During the suspension period, the civil servant cannot perform duty till the claim is resolved. There are lot of differences between "suspension" and "dismissal" where the suspension is temporary and dismissal is permanent decision either by rule of the Government or by law. We will have a look at the suspension of a civil servant in detail.

### **CONDITIONS ON SUSPENDING AN CIVIL SERVANT**

The suspension of a civil servant can be performed under the following conditions:

### **SUSPENSION PENDING DOMESTIC ENQUIRY**

If a civil servant has committed misconduct inside the work premises, then such civil servant will be suspended immediately under pending investigations. This is called Suspension Pending Enquiry. The suspension order will be issued along with charge-sheet, the charge-sheet must follow within 7 days of issue of the suspension order.

## **SUSPENSION PENDING COURT'S ORDER**

If the civil servant has accused in a court of law for any **criminal offence**, the concerned authority is liable to suspend a civil servant under suspension pending court's order.

## **SUSPENSION AS PUNISHMENT**

Even though an civil servant is not suspended under pending enquiry, if it is decided to suspend an civil servant for the misconduct committed by the civil servant, the concerned authority may do so after the conclusion of the enquiry. In such cases, the suspended civil servant will not be allowed to receive any payment during the suspension.

## **RIGHT TO SUSPEND AN CIVIL SERVANT**

The right to suspend a civil servant during the pendency of an enquiry against the civil servant are regulated under the provisions regulating the conditions of service. During the suspension, a civil servant is only prevented from discharging the duties of his office for the time being.

## **SUSPENSION ALLOWANCE**

During the suspension, the service of a civil servant is not permanently deprived. The civil servant still continues to be a member of the service in spite of the order of suspension. Further, during the period of his suspension, the civil servant is paid with allowance known as "suspension allowance" or subsistence allowance at the rate fixed by the Legislation.

## **IMPACT OF SUBSITENCE ALLOWANCE BEING PAID TO ALL SUSPENDED EMPLOYEEES.**

- A. On interaction with numerous Government Authorities, Suspended Civil servants and other Government Officials it is understood that the staffs therein are burdened to work on behalf of the suspended Civil Servant despite carrying on their assigned duty. The payment of Subsistence Allowance demoralizes the government staff who are putting their best effort for the department as the suspended civil servant having been suspended on ground of vigilance and anti corruption and other major criminal offences enjoy pay without working. In certain department, the subsistence allowance is paid from and out of the revenue generated by the concerned department and from the Government Grants. Many such departments are not financially independent and suspended civil servants of such departments add financial burden to such department. The Officers further express that they are burdened to handle the disciplinary proceedings in the Department, litigation filed by suspended civil servants before the Court of Law, the criminal Proceedings before the investigation Authority and Before the Court of Law, further work to generate income from the

Department to pay the Subsistence Allowance to the suspended civil servants apart from his regular work assigned for his designation.

- B. The civil servant is expected to act with utmost good faith and loyalty to public during the course of his employment. Any criminal breach committed during the course of his employment, he is liable to be enquired and punished by the investigating authority viz., the Police and any Special Authority created for that purpose. In most circumstances the departmental proceedings are kept in abeyance awaiting report or the final order from such Authority. Till such time the concerned Government Department is faced with lot of hardship and difficulties viz., shortage of man power and financial burden to such department. The existing staffs are forced to cover up the work of the suspended civil servant and also the department is burdened to pay subsistence allowance to such erring civil servant.
- C. The constitution guarantees removal of civil servant only after proper department enquiry. In offences relating to grave nature the enquiry is conducted by the investigating authority and after trial the punishment if need be is imposed by the Court. In such cases, Departments hands are tied as they need to rely upon the outcome of the criminal proceedings and till such time the departmental enquiry is merely kept pending by adjourning the enquiry time to time thereby under utilizing the time of Departmental Authority. It is understood that huge sum of money is spent by the Government towards the departmental enquiry alone when the criminal case was pending. Therefore it goes without saying that huge amount would be spent on conducting the entire departmental proceedings.
- D. In this situation and considering the difficulty faced by the various sectors of Civil servants it is high time that certain changes and amendments can be made to the existing legal set up to suit the existing situation. It is imperative to bring to the attention of the Government the anguish and distress expressed by various people on these issues.
- E. The Constitution of India and its debates which is as follows:

*Article 311 Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State*

*(1) No person who is a member of a civil service of the Union or an all India service or a civil service of a State or holds a civil post under the Union or a*

*State shall be dismissed or removed by a authority subordinate to that by which he was appointed*

***(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges***

*Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:*

***Provided further that this clause shall not apply***

***(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or***

***(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or***

***(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State, it is not expedient to hold such inquiry***

***(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause ( 2 ), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final.***

Further more on reading the Constituent Assemble Debates held on 08.09.1949, it makes the intention of the Constitution Makers very clear. The word of Bharat Rathna Dr. B.R. Ambedkar makes it enlightening that

*“So far as clause (2) is concerned, I have no doubt in my mind that everybody who has got common sense would agree that this is the best proviso that could have been devised for the protection of the persons engaged in the civil service of the State. The question has been raised that any person who has been convicted in any criminal case need not be given notice. There, again, I must submit that there has been a mistake, because, the regulations made by a State may well*

*provide that although a person is convicted of a criminal offence, if that offence does not involve moral turpitude, he need not be dismissed from the State service. It is perfectly open to Parliament to so legislate. It is not in every criminal charge, for instance, under the motoring law or under some trivial law made by Parliament or by a State making a certain act an offence, that that would necessarily be a ground for dismissal. It would be open to Parliament to say in what cases there need not be any dismissal. It would be perfectly open to Parliament to exclude political offences. This clause in so many words merely deals with the question of giving notice. Parliament may exempt punishment for offences of a political character, exempt offences which do not involve moral turpitude. That liberty of the Parliament is not touched or restricted by sub-clause (a). I want to make this clear.”*

- F. Thereby it would be prudent to bifurcate the offences committed by the civil servant into two and pay subsistence allowance to the civil servants who have not committed offence that involves moral turpitude. The payment of subsistence allowance has made the civil servants more lethargic and carefree in their employment. This also adds on financial burden to the Government and also work pressure to the existing civil servants. The Government is forced to pay subsistence allowance to all its suspended civil servants. Most of the suspended civil servants are suspended on any one of the following grounds
- i. Irregularities committed during the course of the employment
  - ii. Civil servant committing criminal offence.
- G. These civil servants suspended on the ground of committing criminal offence are further categorized viz., for any criminal offence committed during the course of official duty and for any criminal offences committed outside the scope of employment. We are now concerned with civil servants who are remanded in police custody for more than 48 hours for offence committed during the scope of employment as the same involves moral turpitude. These civil servants create financial burden to the State and work burden to the existing civil servants and consequently affect smooth Public Administration.
- H. A civil servant suspended on ground of offence under Vigilance and Anti Corruption Act and other major criminal offences which are of grave nature and investigating authority having seized of the matter the final decision is always subject to the outcome of the Criminal Proceedings conducted by the Court. These offences are committed by the civil servant beyond the scope of his employment and have breached the minimum ethical value a government civil servant should hold. Such civil servants may be relieved from



services without subsistence allowance, thereby giving opportunity to another person to fill up the vacancy. The Authority after the Judgement passed by the Hon'ble Court may pass appropriate order with regard to the service of the Civil Servant. In order to protect the interest of such civil servants, such civil servants may avail the remedy provided under Section 250 Cr.P.C for claim of compensation for false institution of Case. With regard to keeping the departmental enquiry in Abeyance the Hon'ble Supreme Court has acceded to the same on certain conditions.

- I. A civil servant suspended in the year 2005 for an offence under the Vigilance and Anti Corruption Act is getting subsistence allowance till date as the criminal case is pending. This is creating financial burden to the Government and also work burden to the other civil servants. In another case a teacher who was suspended for an offence under POCSO Act after receiving subsistence allowance for 6 years from 2011 was convicted for 55 years jail imprisonment in the year 2017.
- J. A Civil Servant once suspended for a grave criminal offence is out of service for prolonged period mainly due to the pendency of criminal investigation and legal proceedings before the Investigating Authority and Hon'ble Court. The delay in investigation and legal proceedings is due the pendency of numerous matters and the delay cannot be curtailed easily. During this prolonged proceedings the suspended civil servant enjoys subsistence allowance for the entire period without performing his duties. The allowance for civil servant is paid from and out of the Tax money collected from the Public. The tax money is drained into payment of such allowance without the civil servant performing his duty towards public.
- K. The views of the Hon'ble Supreme and High Court on this proposition of Law is as follows:

#### **CASE LAWS:**

In **Capt. M Paul Anthony v. Bharat Gold Mines Ltd, (1999) 3 SCC 679** where this Court reviewed the case law on the subject to identify the following broad principles for application in the facts and circumstances of a given case:

- (i) Departmental proceedings and proceedings in a criminal case can proceed simultaneously as there is no bar in their being conducted simultaneously, though separately.
- (ii) **If the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in the criminal case against the delinquent employee is of a grave nature which involves complicated questions of law and fact, it would be desirable to stay the departmental proceedings till the conclusion of the criminal case.**



In **State of Rajasthan v. B.K.Meena 1996(6) SCC 417**, where this Court reiterated that there was no legal bar for both proceedings to go on simultaneously unless there is a likelihood of the employee suffering prejudice in the criminal trial. **What is significant is that the likelihood of prejudice itself is hedged by providing that not only should the charge be grave but even the case must involve complicated questions of law and fact.**

In **M/S Stanzen Toyotetsu India P.Ltd vs Girish V & Ors (2014) 3 SCC 636** held that “Suffice it to say that while there is no legal bar to the holding of the disciplinary proceedings and the criminal trial simultaneously, stay of disciplinary proceedings may be an advisable course in cases where the criminal charge against the employee is grave and continuance of the disciplinary proceedings is likely to prejudice their defence before the criminal Court. Gravity of the charge is, however, not by itself enough to determine the question unless the charge involves complicated question of law and fact. The Court examining the question must also keep in mind that criminal trials get prolonged indefinitely especially where the number of accused arraigned for trial is large as is the case at hand and so are the number of witnesses cited by the prosecution. The Court, therefore, has to draw a balance between the need for a fair trial to the accused on the one hand and the competing demand for an expeditious conclusion of the on-going disciplinary proceedings on the other. An early conclusion of the disciplinary proceedings has itself been seen by this Court to be in the interest of the civil servants. In the circumstances and taking into consideration all aspects mentioned above as also keeping in view the fact that all the three Courts below have exercised their discretion in favour of staying the on-going disciplinary proceedings, we do not consider it fit to vacate the said order straightaway. Interests of justice would, in our opinion, be sufficiently served if we direct the Court dealing with the criminal charges against the respondents to conclude the proceedings as expeditiously as possible

In **K.Veeramani vs The Government Of Tamil Nadu CDJ 2019 MHC 1312**, the Hon’ble Madras High Court held that this Court is of an opinion that, simultaneous proceedings are certainly permissible and only in certain circumstances, the Competent Authorities have to take a decision whether to continue the departmental disciplinary proceedings during the pendency of the criminal case against an employee. If the files, documents and witnesses are available with the disciplinary authority, there is no impediment to continue the departmental disciplinary proceedings, conclude the same and pass final orders in the disciplinary proceedings. If no files are available with the disciplinary authority as well as in the department, then the Competent Authorities is empowered to keep the departmental disciplinary proceedings in abeyance till the final disposal of the criminal case by the Competent Criminal Court of Law.

**CONCLUSION:**

Based on all that have been discussed above, it is imperative and it is high time we revisit the concept of payment of subsistence allowance to such suspended civil servants and the procedures adopted in such disciplinary proceedings shall also be reconsidered. As stated earlier it would be prudent to bifurcate the offences committed by the civil servant into two and pay subsistence allowance to the civil servants who have not committed offence that involves moral turpitude. Treating the Civil Servant having committed offence that involves moral turpitude and Civil Servant having committed offence that does not involves moral turpitude on same pedestrian would not be appropriate and the Hon'ble Courts/Government Authority while deciding such case need to consider the nature of offence and grant relief accordingly. The Hon'ble Court/Government Authority while guaranteeing right to life and dignity and right of equality to such suspended Civil Servants needs to consider whether this payment of Subsistence Allowance is a right to life and dignity or right to luxury. There are many citizens for whom a dignified life is still a farfetched dream. In such circumstance extending soft corner to such civil servant with criminal record would be inequality. The Civil servant who has been suspended for an offence involving moral turpitude shall be relieved from service without any subsistence allowance and a person from wait list shall be accommodated in his/her place on temporary basis and salary to such newly joined civil servant shall be paid from and out of the Subsistence allowance that was intended to be paid to the suspended civil servant. The payment of subsistence allowance has made the civil servants more lethargic and carefree in their employment. This also adds on financial burden to the Government and also work pressure to the existing civil servants. The Government is forced to pay subsistence allowance to all its suspended civil servants. Therefore it is appropriate to amend the exiting Legislations to keep the Departmental Enquiry in abeyance till the disposal of Criminal Proceedings and exempt payment of Subsistence Allowance to such civil servant in matters involving offences of grave nature.

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