

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN

MONDAY, THE 08TH DAY OF OCTOBER 2018 / 16TH ASWINA, 1940

WP(C).No. 6102 of 2018

PETITIONER:

JOJU J MANGALY,
AGED 56 YEARS, SON OF LATE JOSE K. MANGALY, RESIDING
AT HOUSE NO.33-548 D (NEW NO.13-1865),
OPP. ARCHANA FARM, A.R.CAMP ROAD,
MARIKUNNU P.O,
KOZHIKODE - 673 012.

BY ADV. SRI.JACOB ABRAHAM

RESPONDENTS:

- 1 STATE OF KERALA
REPRESENTED BY THE SECRETARY TO GOVERNMENT, CO-
OPERATION DEPARTMENT, GOVERNMENT
SECRETARIAT, THIRUVANANTHAPURAM - 695 001.
- 2 REGISTRAR OF CO-OPERATIVE SOCIETIES
OFFICE OF THE REGISTRAR OF CO-OPERATIVE
SOCIETIES, THIRUVANANTHAPURAM - 695 001.
- 3 KERALA CO-OP MILK MARKETING FEDERATION LTD.
REPRESENTED BY ITS MANAGING DIRECTOR, MILMA BHAVAN,
PATTOM PALACE P.O., THIRUVANANTHAPURAM - 695 004.
- 4 MALABAR REGIONAL CO-OP MILK PRODUCERS UNION LD
REPRESENTED BY ITS MANAGING DIRECTOR, PERINGOLOM,
KUNNAMANGALAM P.O., KOZHIKODE - 673 571.
- 5 DIRECTOR
DAIRY DEVELOPMENT DEPARTMENT, PATTOM PALACE,
THIRUVANANTHAPURAM - 695004.
(ADDITIONAL 5TH RESPONDENT)

BY ADV. SMT.LATHA ANAND SC MRCMPU LTD.

SMT C.S.SHEEJA, SENIOR GOVERNMENT PLEADER

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR
ADMISSION ON 08.10.2018, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

JUDGMENT

The petitioner, who took voluntary retirement on 05.12.2017, while working as Senior Manager in the 4th respondent Malabar Regional Co-operative Milk Producers' Union, which is a Society registered under the Kerala Co-operative Societies Act, 1969 has filed this writ petition under Article 226 of the Constitution of India, seeking a writ of certiorari to quash Ext.P13 letter dated 25.01.2018 of the 4th respondent and seeking a declaration that he is eligible to get gratuity as per Ext.P5 master policy issued by the Life Insurance Corporation of India and an order directing the 4th respondent to pay him the balance amount of gratuity amounting to Rs.18,87,065/-, together with interest at the rate of 12% per annum from 05.01.2018, within a time limit to be fixed by this Court.

2. A counter affidavit has been filed on behalf of the 4th respondent opposing the reliefs sought for in this writ petition.

3. Subsequent to the filing of this writ petition, the salary of the petitioner was revised with retrospective effect. In order to incorporate appropriate relief, in view of revision of pay, the petitioner filed I.A.No.14627 of 2018 to amend the writ petition by incorporating additional statement of facts, grounds and reliefs and the same was allowed by order dated 13.08.2018. Pursuant to the said order, the petitioner has also filed amended writ petition.

4. Heard the learned counsel for the petitioner, the learned Senior Government Pleader for respondents 1, 2 and additional 5th respondent and also the learned Standing Counsel for respondents 3 and 4.

5. The issue raised in this writ petition regarding the entitlement of the employees of the Co-operative Societies covered by the provisions under the Payment of Gratuity Act to receive better terms under Section 4(5) of the said Act is now settled by the decision of the Full Bench of

this Court in **Chandrasekharan Nair G. and others v. Kerala State Co-operative Agricultural and Rural Development Bank Ltd. and others (2017 (4) KLT 276)**. Paragraphs 5 to 8 of the said decision read thus;

"5. The liability to pay gratuity does not get shifted to the insurer by the compulsory insurance and the effect is only that the maturity value of the master policy would go to the credit of the dues of the employee. Any amount in excess of the gratuity due would also go to the employee since the contract of insurance would fall within the ambit of Section 4(5) of the Central Act. Any deficit in the amount due as gratuity to the employee after payment by the insurer has to be met by the employer only as the liability squarely rests on him under Section 4(2) of the Central Act. The insurer cannot be made liable to pay any amount in excess of the maturity value of the master policy as the same would be dependent on the premium paid to him. The compulsory insurance under S.4A of the Central Act is only to facilitate the employer to discharge his liability and the premium paid is part of the wages only. Of course the wording of the second proviso to Rule 59(iii) of the Rules gives rise to a

doubt that the employee would be pinned down to the amount of gratuity specified in the Central Act. Such an interpretation would render Section 4(5) of the Central Act otiose whereunder the employee has a right to receive better terms of gratuity under any award or agreement or contract with the employer. The provisions of the Central Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other enactment or instrument or contract. The overriding effect of the Central Act over other enactments is explicit from Section 14 of the Central Act which is to the following effect:

"14. Act to override other enactments, etc.- The provisions of this Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act."

6. The co-operative societies wherein the employees are engaged is Entry 32 of List II - State List and gratuity to which a claim is laid is Entry 24 of List III - Concurrent List of the Seventh Schedule to the Constitution of India. The Central Act which is the law made by the Parliament shall

prevail over the law made by the Legislature of the State i.e. the second proviso to Rule 59(iii) of the Rules. The inconsistency between laws made by Parliament and laws made by the Legislatures of States can be ironed out by calling in aid Article 254 of the Constitution of India. The same reads as follows:

"254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States.-- (1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament, which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of Clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any

provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State."

(emphasis supplied)

There is no case that the second proviso to Rule 59(iii) of the Rules made by the Legislature of the State has received the assent of the President in order to prevail in the State under Article 254(2) of the Constitution of India. Every amendment to the State Act or the Rules has also to obtain the assent of the President which is absent in regard to the second proviso to Rule 59(iii) of the Rules. The irresistible conclusion is that Section 4(5) of the Central Act which enables an employee to opt for a better terms of gratuity will prevail over the second proviso to Rule 59(iii) of the Rules. Only

the case of employees who are both covered under the Central Act and the Rules framed under the State Act is dealt with in this bunch of writ petitions since the Central Act does not apply to all establishments. Section 1(3)(b) of the Central Act is categorical that the same applies only to an establishment in which ten or more persons are employed or were employed during the preceding twelve months.

7. The dominant intention of the Central Act is to provide for a scheme for the payment of gratuity to employees engaged in factories, mines, oilfields, plantations, ports, railway companies, shops or other establishments. The dominant intention of the State Act is to provide for the orderly development of the co-operative societies in the State as self-governing democratic institutions. A provision in the Central Act to give effect to its dominant purpose may incidentally be on the same subject as covered by the provision in the State Act. But such partial coverage of the same area in a different context and to achieve a different purpose does not bring about the repugnancy which is intended to be covered by Article 254(2) of the Constitution. We shall quote the decision in *Vijay Kumar Sharma v. State of Karnataka*, 1990 KHC 805 wherein it is held as follows:

"53. The aforesaid review of the

authorities makes it clear that whenever repugnancy between the State and Central legislation is alleged, what has to be first examined is whether the two legislations cover or relate to the same subject matter. The test for determining the same is the usual one, namely, to find out the dominant intention of the two legislations. If the dominant intention i.e. the pith and substance of the two legislations is different, they cover different subject matters. If the subject matters covered by the legislations are thus different, then merely because the two legislations refer to some allied or cognate subjects they do not cover the same field. The legislation, to be on the same subject matter must further cover the entire field covered by the other. A provision in one legislation to give effect to its dominant purpose may incidentally be on the same subject as covered by the provision of the other legislation. But such partial coverage of the same area in a different context and to achieve a different purpose does not bring about the repugnancy which is intended to be covered by Article 254(2). Both the legislations must be

substantially on the same subject to attract the article."

(emphasis supplied)

There is no repugnancy (in the sense that one Act cannot be obeyed without disobeying the other) and therefore every endeavor has to be made to reconcile the provisions and give a harmonious construction.

8. The following decisions were cited at the Bar by the counsel for either sides:

(i) Retnavalli v. Ambalapadu Service Cooperative Bank Ltd. [2005 (3) KLT 320]

(ii) Nedupuzha Service Co-operative Bank Ltd. v. Rugmini [2011 (3) KLT 134 (DB)]

(iii) Mathew Korah v. Kaduthuruthy Urban Co-operative Bank [2013 (4) KLT 558]

(iv) The Travancore Cements Employees' Co-operative Bank Ltd. v. Ramachandran Nair [2014 (1) KLT 889 (DB)] and

(v) Life Insurance Corporation of India v. K.P.Varughese [ILR 2015 (3) Kerala 420 (DB)].

None of the above decisions dealt with the second proviso to Rule 59(iii) of the Rules substituted with effect from 2.11.2010 only and hence do not help to resolve the controversy in this bunch of cases. The second proviso to Rule 59(iii) of the Rules

referable to the amount received out of any scheme implemented by a society shall be construed in the context explained above. The employee in other words is entitled to the higher amount if he has opted in terms of Section 4(5) of the Central Act even if a lesser amount is due under Section 4(2) thereof. The decision in Nedupuzha's case (supra) to the extent that excess amount if any received by the employer under the policy would inure to the employee is affirmed. The said decision does not lay down the proposition that the entitlement of the employee is confined to the amount received under the policy even if it falls short of the statutory limit. Circular No.5/2016 and similar circulars issued by the Registrar of Co-operative Societies stem out of a misconception of the statutory provisions and are quashed to this extent. The reference is answered accordingly and the writ petitions shall be posted before the single Judge as per roster for disposal dependent on individual facts."

6. In **Chandrasekharan Nair's case (supra)**, the Full Bench of this Court held that, the liability to pay gratuity does not get shifted to the insurer by the compulsory insurance and the effect is only that the maturity value of the

master policy would go to the credit of the dues of the employee. Any amount in excess of the gratuity due would also go to the employee since the contract of insurance would fall within the ambit of Section 4(5) of the Central Act. Any deficit in the amount due as gratuity to the employee after payment by the insurer has to be met by the employer only as the liability squarely rests on him under Section 4(2) of the Central Act. The insurer cannot be made liable to pay any amount in excess of the maturity value of the master policy as the same would be dependent on the premium paid to him. The compulsory insurance under Section 4A of the Central Act is only to facilitate the employer to discharge his liability and the premium paid is part of the wages only.

7. In **Chandrasekharan Nair's case (supra)** the Full Bench held further that, the wording of the second proviso to Rule 59(iii) of the Rules, of course, gives rise to a doubt that the employee would be pinned down to the amount of gratuity

specified in the Central Act. Such an interpretation would render Section 4(5) of the Central Act otiose whereunder the employee has a right to receive better terms of gratuity under any award or agreement or contract with the employer. The provisions of the Central Act or any rule made thereunder shall have effect, notwithstanding anything inconsistent therewith contained in any other enactment or instrument or contract. The overriding effect of the Central Act over other enactments is explicit from Section 14 of the Central Act. The Co-operative Societies wherein the employees are engaged is Entry 32 of List II-State List and gratuity to which a claim is laid is Entry 24 of List III-Concurrent List of the Seventh Schedule to the Constitution of India. The Central Act, which is the law made by the Parliament shall prevail over the law made by the Legislature of the State, i.e., the second proviso to Rule 59(iii) of the Rules. The inconsistency between laws made by Parliament and laws made by

the Legislatures of States can be ironed out by calling in aid Article 254 of the Constitution of India. There is no case that the second proviso to Rule 59(iii) of the Rules made by the Legislature of the State has received the assent of the President in order to prevail in the State under Article 254(2) of the Constitution of India. Every amendment to the State Act or the Rules has also to obtain the assent of the President which is absent in regard to the second proviso to Rule 59(iii) of the Rules. Therefore, the irresistible conclusion is that Section 4(5) of the Central Act, which enables an employee to opt for a better term of gratuity will prevail over the second proviso to Rule 59(iii) of the Rules.

8. In **Chandrasekharan Nair's case (supra)**, the Full Bench held that, the second proviso to Rule 59(iii) of the Rules referable to the amount received out of any scheme implemented by a society shall be construed in the context explained above. The employee in other words is

entitled to the higher amount if he has opted in terms of Section 4(5) of the Central Act even if a lesser amount is due under Section 4(2) thereof.

The Full Bench affirmed the decision of the Division Bench in **Nedupuzha's case (2011 (3) KLT 134)** to the extent that excess amount, if any, received by the employer under the policy would inure to the employee. The Full Bench noticed that, the said decision does not lay down the proposition that the entitlement of the employee is confined to the amount received under the policy, even if it falls short of the statutory limit, and that, Circular No.5/2016 and similar circulars issued by the Registrar of Co-operative Societies stem out of a misconception of the statutory provisions and are therefore quashed to that extent. The Full Bench has made it clear that, it has dealt with only the case of employees who are both covered under the Central Act and the Rules framed under the State Act, since the Central Act does not apply to all establishments.

9. In view of the law laid down by the Full Bench of this Court in **Chandrasekharan Nair's case (supra)**, an employee of a Co-operative Society, who is covered both under the Payment of Gratuity Act, 1972 and the Kerala Co-operative Societies Rules, 1969 framed under the Kerala Co-operative Societies Act, 1969 is entitled to the higher amount, if he has opted in terms of Section 4(5) of the Payment of Gratuity Act, even if a lesser amount is due under Section 4(2) thereof. Therefore, the excess amount, if any, received by the employer Society under the policy would inure to the benefit of such an employee.

10. The judgment of the Full Bench in **Chandrasekharan Nair's case (supra)** is affirmed by the Apex Court in SLP (C) No.9446-9451/2018, after notice to the other side on admission.

11. In W.A.No.524 of 2018 and connected cases dated 12.07.2018), a Division Bench of this Court, after referring to the law laid down by the Full Bench in **Chandrasekharan Nair's case (supra)**, held

that, in view of the second proviso, with regard to societies to which the Payment of Gratuity Act is applicable, in view of Section 4(5) thereof, if a better term of gratuity is available, the restriction under the first proviso does not apply. However, in cases of societies to which the Payment of Gratuity Act is not applicable, since there is no provision in the Co-operative Societies Act or Rules akin to Section 4(5) of the Gratuity Act, the maximum amount payable cannot in view of the first and second provisos, exceed fifteen months pay as stipulated in first proviso even if any special scheme has been opted by the society for payment of gratuity. The Division Bench held further that, when the eligibility of the respective employees, who are the writ petitioners, to claim gratuity is not under challenge, the employees need not be relegated for a further adjudication proceedings under Section 7 of the Payment of Gratuity Act. The Division Bench has also held that, though non-payment gratuity

was in view of the circulars in vogue and on a bonafide mis-interpretation of law, the omission could not be considered wilful or deliberate. However, since the amounts due to the employees were in the hands of the employers who were enjoying the benefit of the same they are bound to pay simple interest at the rate of 6% per annum. Paragraphs 5 to 8 of the said judgment read thus;

"5. Sub Rule (iii) to Rule 59 of The Kerala Co-operative Societies Rules and the provisos thereto read as follows:-

"(iii) when an employee who has put in at least 5 years satisfactory service is retired voluntarily from service or if he is permanently disabled while in service or if he dies while in service the society shall pay to him or to his legal heirs as the case may be a gratuity not exceeding half months pay for every completed year of service. Provided that in no case shall the gratuity exceed fifteen months pay.

Provided further that the amount of gratuity payable shall not exceed the amount which an employee is eligible as per the Payment of Gratuity Act, 1972 (Central Act 39 of 1972) or under the Act and these Rules, whichever is applicable irrespective of the amount received out of any scheme chosen or implemented by a

society for the purpose.”

The first proviso puts a cap on the maximum amount of gratuity payable. The second proviso provides that, notwithstanding any scheme chosen by the Bank, as regards societies covered by the Gratuity Act, the maximum amount payable will be the eligible amount under the Gratuity Act; as regards societies covered by the Societies Act, the maximum amount payable shall be the maximum amount eligible under that Act. Interpreting the second proviso, the Full Bench held that, in cases where the Gratuity Act applies, in view of Section 4(5) thereof, the entire amount due under the Scheme shall be payable to the employee. Section 4(5) of the Gratuity Act acknowledges the right of the employee to receive better terms of gratuity irrespective of the restrictions regarding the quantum fixed in Section 4 of that Act. Therefore, as held by the Full Bench, in view of the second proviso, with regard to societies to which the Payment of Gratuity Act is applicable, in view of Section 4(5) thereof, if a better term of gratuity is available, the restriction under the first proviso does not apply. However, in cases of societies to which the Payment of Gratuity Act is not applicable, since there is no provision in the Co-operative Societies Act or Rules akin to Section 4(5)

of the Gratuity Act, the maximum amount payable cannot in view of the first and second provisos, exceed fifteen months pay as stipulated in first proviso even if any special scheme has been opted by the society for payment of gratuity.

6. To put it pithily, if the Payment of Gratuity Act is applicable, in view of Section 4(5) of the said Act, the employee shall be entitled to the entire amounts due under the special terms of gratuity irrespective of any restriction regarding the quantum and in cases of societies not covered by the Central Act, the restriction under the first proviso applies irrespective of the availability of any scheme.

7. As regards the contention regarding adjudication, the only issue that has arisen for determination in these writ appeals is the right of the employees to receive the better terms of gratuity in terms of the LIC scheme. In none of these cases, the very eligibility of the respective employees-writ petitioners to claim gratuity is challenged. Under such circumstances, we do not think that they are to be relegated for a further adjudicatory proceeding under Section 7 of the Gratuity Act.

8. As regards the liability to pay interest, as contended by the appellants, the non-payment was in view of the circulars in

vogue and on a bonafide misinterpretation of the law. Though Section 7 and 8 of the Gratuity Act provide for payment of interest for non-payment of gratuity within the time stipulated, the omission could not be considered wilful or deliberate. Hence they need not be burdened with the liability for interest at the rates as prescribed under the Gratuity Act. However, the fact remains that the amounts due to the employees were in the hands of the appellants and they were enjoying the benefit of the same. They are bound to pay it to the employees with reasonable interest. We fix the rate of interest at 6% per annum, simple interest."

(Underline supplied)

12. Today, when this case is taken up for consideration, the learned counsel for respondents 3 and 4 would submit that the 4th respondent Co-operative Milk Producers' Union has already taken a decision to disburse the balance gratuity amounting to Rs.18,87,065/- payable to the petitioner, within one month.

13. In such circumstances, this writ petition is disposed of, in terms of the submission made by the learned counsel for the 4th respondent that the

balance gratuity payable to the petitioner amounting to Rs.18,87,065/- shall be disbursed to the petitioner, within a period of one month.

In view of the judgment of the Division Bench of this Court in W.A.No.524 of 2018 and connected cases, the petitioner will be entitled for interest for delayed payment of gratuity at the rate of 6% per annum from the date on which the amount of gratuity was released to the 4th respondent Bank by the Life Insurance Corporation of India.

Sd/-

**ANIL K.NARENDRAN
JUDGE**

APPENDIX

PETITIONER'S EXHIBITS:

EXHIBIT P1	THE TRUE COPY OF THE KCMF LTD'S ORDER NO. PER/305/83/428 DATED 22.1.1985
EXHIBIT P2	THE TRUE COPY OF THE RESOLUTION NO.6 OF MRCMPU LTD. PASSED ON 16.1.1993
EXHIBIT P3	TRUE COPY OF THE TRUST DEED
EXHIBIT P4	THE TRUE COPY OF THE RULES OF THE SCHEME DATED 25.2.1993
EXHIBIT P5	THE TRUE COPY OF THE LIC MASTER POLICY NO. GGI 86906

- EXHIBIT P6 THE TRUE COPY OF THE KCMMF LTD'S ORDER NO. PER/50/89/7872 DATED 7.6.2010
- EXHIBIT P7 THE TRUE COPY OF THE 2ND RESPONDENT'S CIRCULAR NO.5/2016 DATED 26.2.2016
- EXHIBIT P8 THE TRUE COPY OF THE ORDER GO(P)NO.183/79/AD DATED 27.4.1979 OF THE AGRICULTURE (ANIMAL HUSBANDRY) DEPARTMENT.
- EXHIBIT P9 THE TRUE COPY OF THE MRCMPU LTD'S LETTER TO REGISTRAR OF CO-OP SOCIETIES BEARING NO. MRU/PER/15/92/IV/1221 DATED 19.8.2016
- EXHIBIT P10 THE TRUE COPY OF THE MRCMPU LTD'S LETTER TO THE PRL SECRETARY TO GOVT. AGRICULTURE (DAIRY) DEPARTMENT NO.MRU/PER/15/92/IV/1222 DATED 19.8.2016
- EXHIBIT P11 THE TRUE COPY OF THE ORDER NO.MRU/PER/51/90/1746 DATED 5.12.2017 OF MRCMPU LTD.
- EXHIBIT P12 THE TRUE COPY OF THE PETITIONER'S REQUEST TO THE MANAGING DIRECTOR OF MRCMPU LTD. DATED 4.1.2018
- EXHIBIT P13 THE TRUE COPY OF THE MANAGING DIRECTOR'S LETTER NO.MRU/PER/51/90/96 DATED 25.1.2018 ISSUED TO THE PETITIONER.
- EXHIBIT P14 TRUE COPY OF THE ORDER NO.PER/208/86 DATED 14.4.2018 OF THE THIRD RESPONDENT.
- EXHIBIT P15 TRUE COPY OF THE 4TH RESPONDENT'S CERTIFICATE NO.MRU/PER/51/90/1041 DATED 6.8.2018.

RESPONDENTS' EXHIBITS:

- EXHIBIT R4 (A) TRUE COPY OF THE GOVERNMENT LETTER NO. 105/D2/2016/DD DATED 23.01.2017.
- EXHIBIT R4 (B) TRUE COPY OF THE LETTER DATED 29.01.2018 SUBMITTED TO GOVERNMENT.

EXHIBIT R3(A)

TRUE COPY OF THE GOVERNMENT LETTER NO.
105/D2/2016/DD DATED 23.01.2017.

EXHIBIT R3(B)

TRUE COPY OF THE LETTER DATED
29.01.2018
SUBMITTED TO GOVERNMENT.

//TRUE COPY//

P.A. TO JUDGE

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