

Central Administrative Tribunal
Principal Bench

O.A. 1799/97

New Delhi this the 13 th day of February, 1998

Hon'ble Shri S.R. Adige, Vice Chairman(A).
Hon'ble Smt. Lakshmi Swaminathan, Member(J).

Shri O.S. Chauhan,
C/o B-17, Ramprastha Colony,
P.O. Chandar Nagar,
Ghaziabad (UP).

... Applicant.

By Advocate Mrs. Avnish Ahlawat with S/Shri O.P. Khokha and
S.C. Luthra.

Versus

Union of India, through

1. Secretary,
Ministry of Personnel, Public
Grievances and Pensions,
Govt. of India,
New Delhi.
2. Secretary,
Ministry of Home Affairs,
Govt. of India,
New Delhi.
3. Secretary,
Union Public Service Commission,
Dholpur House,
New Delhi.

... Respondents.

By Advocate Shri V.S.R. Krishna:

O R D E R

Hon'ble Smt. Lakshmi Swaminathan, Member(J).

The applicant has filed this application under Section 19 of the Administrative Tribunal's Act, 1985 being aggrieved by the order dated 6.12.1996 dismissing him from service. According to him, the inquiry has not been held in accordance with the rules. He has particularly challenged the impugned order on the ground that an ex parte inquiry had been held against him and he had not been paid subsistence allowance during the period of his suspension for over seven

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years. In this application, with the consent of the parties, the only issue which was argued was regarding the question whether holding of the ex parte inquiry before passing the impugned order of dismissal was valid or not.

2. The applicant belongs to the Indian Administrative Service (Union Territory Cadre) and was working as Managing Director of Arunachal Pradesh Industrial Development and Financial Corporation (hereinafter referred to as the Corporation), when he was placed under suspension by the Ministry of Home Affairs order dated 5.3.1986. By order dated 4.4.1986, it was ordered that subject to the applicant furnishing a certificate that he is not engaged in any other employment, business or vocation, he was entitled to draw subsistence allowance at the rates mentioned therein. According to the applicant, he gave the necessary certificate to the officer in the Corporation for making payment of the subsistence allowance on 30.4.1986 and again on 12.6.1986. The applicant has submitted that thereafter the Govt. of Arunachal Pradesh informed the Liason Commissioner, Arunachal subsistence allowance and to pay the same to him regularly. The applicant's grievance is that in spite of those letters, he was not paid subsistence allowance between 1986 and 1993 although, according to him, he had complied with the formalities of submitting the necessary certificates that he was not engaged in any other business, profession or vocation and he, therefore, ought to have been paid the same.

3. The respondents had initiated inquiry against the applicant vide Memorandum dated 9.6.1989. To this, the applicant states that he has submitted a reply on 21.6.1989 stating, inter alia, that he would join the inquiry after he

is paid the subsistence allowance. The applicant contends that in spite of his letters to the respondents to pay him the subsistence allowance, failing which he will not be able to appear at the inquiry, the Inquiry Officer conducted the ex-parte inquiry and submitted his report on 30.11.1992. In this report, the Inquiry Officer had stated that he has written a number of registered letters to the applicant to submit his written brief but none was received from him. According to the applicant, he received the first part of the subsistence allowance of Rs.983/- only in March, 1993. Mrs. Avnish Ahlawat, learned counsel for the applicant, has very vehemently contended that the ex-parte inquiry was in violation of the rules as the applicant could not be expected to take part in the inquiry unless he had been paid the subsistence allowance in the meantime. She relies on the judgement of the Supreme Court in **Ghanshyam Dass Shrivastava Vs. State of MP** (AIR 1973 SC 1183). In this case, the petitioner had sent a letter to the Enquiry Officer informing that unless he was paid the subsistence allowance he would not be able to face the inquiry proceedings because of acute shortage of funds. The Supreme Court has held that on the facts of the case since there was nothing on record to show that he had any other source of income except the pay, as he did not receive subsistence allowance and, therefore, could not attend the inquiry, the inquiry proceedings during those days were vitiated as also the report of the Inquiry Officer based on that evidence. It was, therefore, held that the dismissal order passed was in violation of the provisions of Article 311(2) of the Constitution as he did not get reasonable opportunity of defending himself in the inquiry proceedings.

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4. The learned counsel for the applicant has also relied on the Government of India Instructions 41 (Swamy's Compilation of CCS (CCA) Rules, 21st Edition, page 70) under Rule 14 of the CCS (CCA) Rules, 1965. She has contended that after the applicant has been placed under suspension, the respondents having not paid him subsistence allowance, they could not have recourse to the ex-parte proceedings as he has already written to them that he was unable to participate in the inquiry without this payment due to his financial constraints. The applicant's suspension was revoked by order dated 24.8.1995 and he was reinstated in service from the same date. After conclusion of the departmental inquiry which has been held ex parte the applicant was dismissed from service by order dated 6.12.1996 against which he had filed a memorial on 31.3.1997 which has been rejected by the President by order dated 19.8.1997.

5. The respondents have filed their reply and we have also heard Shri V.S.R. Krishna, learned counsel. He has taken a preliminary objection that the application is not maintainable as there has been no amendment of the pleadings to impugn the latest order passed by the President in the Memorial submitted to him on 19.8.1997 or the State Government has been impleaded which is a necessary party. The learned counsel relying on the judgement of **Trojan and Co. Vs. N.N. Nagappa Chettiar** (AIR 1953 SC 235), has submitted that the decision cannot be based on any ground outside the pleadings. As regards the main contention raised by the applicant regarding non payment of the subsistence allowance, the respondents have submitted that he was sanctioned the allowance, subject to his furnishing a certificate that he was not engaged in any other employment,

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business or vocation as per Rule 4(1) of the AIS (Discipline and Appeal) Rules, 1969 by the Ministry of Home Affairs order dated 4.4.1986. They have submitted that his Headquarter was shifted from Itanagar to Delhi at his request. They have also submitted that upon review his subsistence allowance was increased by the Ministry of Home Affairs order dated 14.8.1986. According to them, they had taken up the matter with the Corporation which had intimated that the applicant was yet to furnish the required certificate. Shri V.S.R. Krishna, learned counsel, has also submitted that the applicant has only impleaded the Government of India through Secretary, Ministry of Personnel, Public Grievances and Pensions, the Ministry of Home Affairs and the UPSC, but the State Government of Arunachal Pradesh has not been impleaded and, therefore, he has submitted that it is not possible to make submissions on behalf of the State Government or the Corporation. He has submitted that the applicant has failed to furnish the required certificate, which was finally given through the Corporation by letter dated 13.1.1989. Thereafter, they had entered into repeated correspondence with the State Government requesting them to pay the subsistence allowance to the applicant. They have also submitted that there are no documents to support his contentions that he had all along been submitting the necessary certificates to the concerned authority for drawing the subsistence allowance. In the meantime, the Inquiry Officer who had been appointed to inquire into the charges framed against the applicant had initiated the proceedings by notice dated 9.6.1989. He has been paid subsistence allowance in 1993 with effect from 5.3.1986. They have submitted that the delay in making payment of subsistence allowance was entirely attributable to the applicant. They

18

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have also referred to the fact that the State Government of Arunachal Pradesh had refused to pay him the subsistence allowance as he was guilty of falsification/misappropriation of huge amounts of money from advances he had drawn from the Corporation. Shri V.S.R. Krishna, learned counsel, has relying on the judgement of the Supreme Court in **State Bank of Patiala Vs. S.K. Sharma** (JT 1996(3) SC 172), submitted that there was also no prejudice caused to the applicant. He has drawn attention to the representations dated 7.7.1993, 18.11.1993 (Annexures A-46 to A-49) in which while referring to the ex-parte proceedings conducted by the Inquiry Officer, the applicant had not at all taken the ground urged in the present application, or there is even a whisper in it, namely, that the ex-parte inquiry proceedings had been vitiated because he could not attend the enquiry as he was not given the subsistence allowance. The learned counsel, therefore, submits that this ground is an after thought and taking into account the totality of the facts and circumstances of the case, including the contents of the charges which have been held proved and as no prejudice has at all been caused to him there is no merit in this application and the same may therefore, be dismissed.

6. We have carefully considered the pleadings and the submissions made by the learned counsel for the parties.

7. As mentioned above, the only issue which has been raised in this application is with regard to whether the non-payment of subsistence allowance to the applicant and holding of an ex parte inquiry has vitiated the penalty order of dismissal dated 6.12.1986 against the applicant which justifies ^{our intervention} in the case.

13

8. In **Ghanshyam Dass's case (supra)**, the Supreme Court has held that if a Government servant under suspension has pleaded his inability to attend the enquiry on account of non-payment of subsistence allowance, the inquiry conducted against him *ex parte*, could be prima facie construed as denial of reasonable opportunity of defending himself. The Court held that it is true that his affidavit does not give any particulars about his source of income and the estimate of expenses to be incurred in the inquiry. But it would prima facie suggest that he had no other sources of income except his pay. If he had no other source of income, he could not invent them for the purpose of mentioning them in the affidavit. *It was also held that B.* More significantly, the Government affidavit does not allege that he had any other source of income except pay. Taking into account the materials on record, the Supreme Court, therefore, came to the conclusion that as the applicant had no other source of income except pay and he had not received his subsistence allowance, he could not attend the inquiry and hence the same was vitiated as he had not received reasonable opportunity of defending himself.

9. Following the judgement of the Supreme Court in **Ghanshyam Dass's case (supra)**, the Government of India have issued Instructions 41 under Rule 14 of the CCS (CCA) Rules, vide DOPT O.M. dated 6.10.1976 in which the following portion is relevant:

"....it may be impressed on all authorities concerned that they should make timely payment of subsistence allowance to Government servants who are placed under suspension so that they may not be

put to financial difficulties. It may be noted that by its very nature subsistence allowance is meant for the subsistence of a suspended Government servant and his family during the period as he is not allowed to perform any duty and thereby earn a salary. Keeping this in view, all concerned authorities should take prompt steps to ensure that after a Government servant is placed under suspension, he receives subsistence allowance without delay."

10. The applicant in this case has been placed under suspension w.e.f. 5.3.1986. Fundamental Rule 53(2) provides that no payment of subsistence allowance under sub-rule (1) shall be made to a Government servant under suspension unless he furnishes a certificate that he is not engaged in any employment, business, profession or vocation. According to the applicant, he has been submitting these certificates from 1986 to the respondents, the State Government of Arunachal Pradesh and the Corporation but he had not received the subsistence allowance. Neither the State Government of Arunachal Pradesh nor the Corporation are parties before us and the respondents have submitted that they had received a copy of the certificate sent to the Corporation in respect of drawing subsistence allowance sent by applicant's letter dated 13.1.1989. The respondents have also submitted that by the Ministry of Home Affairs order dated 4.4.1986 they have submitted that he was sanctioned the subsistence allowance subject to his furnishing this certificate. In view of the fact that the State Government has not been impleaded, we have no reason to doubt the contention of the respondents

13

that till 13.1.1989 they had not received the necessary certificate from the applicant and thereafter they were in continuous correspondence with the State Government to release the subsistence allowance in accordance with the instructions. However, it appears from what has been stated by the respondents that the State Government has not released the amounts as according to them the applicant owes the Corporation about Rs.12 lacs as he had misappropriated a large amount of money. In the facts and circumstances, we find substance in the contention of Shri V.S.R. Krishna, learned counsel that the State Government of Arunachal Pradesh was a necessary party but as they have not ^{been} impleaded, this itself is a ground to dismiss the application. In the facts and circumstances of the case, however, it is necessary to see whether the applicant has been given a reasonable opportunity of defending himself, as held in **Ghanshyam Dass's case(supra)**.

11. During this time, the inquiry proceedings against the applicant had been initiated by Memo dated 8.6.1989 and the Inquiry Officer had submitted his report on 30.11.1992. There is no doubt that under the Government of India/DOP&T instructions dated 6.10.1976, the Government servant under suspension is entitled for timely payment of subsistence allowance, subject to his furnishing the certificate as required under FR 53. ^{However} ~~And~~, this has not been done in the present case although the applicant states that he has been submitting the certificates. Normally, therefore, one would have ^{also} applied the judgement of the Supreme Court in **Ghanshyam Dass's case (supra)**, but it is necessary to examine the facts of this case a little more closely. In the beginning, according to the applicant himself, he has

submitted the necessary certificates to some officers of the Corporation and/or the State Govt. who are not parties before us. Further, it is significant to note that in the subsequent submissions made by the applicant himself on 7.7.93 and 18.11.93, after receipt of the Inquiry Officer's report which was submitted after holding the ex-parte proceedings against him, he has made no mention at all that the proceedings have been vitiated or that he has been prejudiced as a result of the non-payment of subsistence allowance which prevented him from taking part in the inquiry. From the materials on record, it is also not possible to say whether the officers of the Corporation/State Government of Arunachal Pradesh to whom the applicant alleges that he has submitted the necessary certificates of his non-engagement in other employment, business, profession or vocation earlier have been received by them or not. In the circumstances of the case, we cannot also come to a categorical conclusion that the delay in payment of the subsistence allowance has not been caused by the applicant's own action. If, as alleged by the learned counsel for the applicant the applicant was, in fact, in dire financial constraints because of non-payment of the subsistence allowance as a result of which he could not even attend the inquiry is to be believed, then it is difficult to understand why this ground was not at all taken by him at the time he made his representation against the ex parte inquiry report in 1993 itself. The judgement of the Supreme Court in **Ghanshyam Dass's case(supra)** also shows that the decision of the Supreme Court was based on the facts of the case in which the Court held that on the basis of the affidavit submitted by the petitioner giving his source of income it would prima facie suggest that he had no other source of income except

18

his pay, and reference was also made to the fact that the Government affidavit also did not show that he has other sources of income other than pay. In the facts and circumstances of the case, the applicant having not taken this ground earlier, and waited till after the Presidential order dismissing him from service was passed on 6.12.1996, we are not impressed by this argument of the applicant based on **Ghanshyam Dass's Case (supra)** that he has been prejudiced or that he has been denied a reasonable opportunity of hearing.

12. In this regard, it will also be relevant to note the observations of the Supreme Court in the recent decision of **State Bank of Patiala Vs. S K Sharma (Supra)**. In this case, the court has dealt with in detail a number of grounds which should be kept in view ^{by Courts/Tribunals} while dealing with the disciplinary inquiry and the punishment imposed on an employee. It has been held that an order passed imposing a punishment on an employee consequent upon a disciplinary/departmental inquiry in violation of the rules/regulations/statutory provisions governing such inquiries should not be set aside automatically. The Court or the Tribunal should inquire whether (a) the provision violated is of a substantive nature or (b) whether it is procedural in character. In the case of a substantive provision, the test of prejudice would not be applicable but in case of violation of the procedural provision that test will become applicable, as held by the Supreme Court as follows:

"(3) In the case of violation of a procedural provision, the position is this: procedural provisions are generally meant for affording a

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reasonable and adequate opportunity to the delinquent officer/employee. They are, generally speaking, conceived in his interest. Violation of any and every procedural provision cannot be said to automatically vitiate the enquiry held or order passed. Except cases falling under 'no notice', 'no opportunity' and 'no hearing' categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice, viz., whether such violation has prejudiced the delinquent officer/employee in defending himself properly and effectively. If it is found that he has been so prejudiced, appropriate orders have to be made to repair and remedy the prejudice including setting aside the enquiry and/or the order of punishment. If no prejudice is established to have resulted therefrom, it is obvious, no interference is called for. In this connection, it may be remembered that there may be certain procedural provisions which are of a fundamental character, whose violation is by itself proof of prejudice. The Court may not insist on proof of prejudice in such cases. As explained in the body of the judgement, take a case where there is a provision expressly providing that after the evidence of the employer/government is over, the employee shall be given an opportunity to lead defence in his evidence, and in a given case, the enquiry officer does not give that opportunity in spite of the delinquent officer/employee asking for it, the prejudice is self-evident. No proof of prejudice

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22

as such need be called for in such a case. To repeat, the test is one of prejudice, i.e., whether the person has received a fair hearing considering all things. Now, this very aspect can also be looked at from the point of view of directory and mandatory provisions, if one is so inclined. The principle stated under (4) hereinbelow is only another way of looking at the same aspect as is dealt with herein and not a different or distinct principle".

(emphasis added)

13. Applying the above salutary tests laid down by the Supreme Court to the facts of the present case, we find that the applicant had been put under suspension on 5.3.1986, and admittedly he had not been given any subsistence allowance till January, 1993, when he received the amount of over Rs.2 lacs as mentioned during the hearing. Even then he had not taken any steps to agitate the matter before the respondents till submission of his Memorial dated 16.1.1997 or before the Tribunal till filing of this Original Application on 4.8.1997 to challenge the dismissal order dated 6.12.1996. His Headquarters had also been changed from Itanagar to New Delhi during the relevant time w.e.f. 9.7.1986. Coupled with this, taking into account the nature of the charges held proved, the conduct of the inquiry and the applicants own representations submitted immediately after the Inquiry Officer's report in 1993, we are unable to perusade ourselves to accept the applicant's contention that he was not in a position to attend the inquiry because of non payment of the subsistence allowance or that he has not been given a

reasonable opportunity to defend his case on this account. As mentioned above, the only ground which has been pressed by the learned counsel for the applicant for setting aside the impugned order of dismissal is that the departmental enquiry has been totally vitiated because they held an ex-parte enquiry which he was unable to attend on account of his financial constraints due to non-payment of the subsistence allowance. We are of the view that the facts in this case are distinguishable from the judgement of the Supreme Court in **Ghanshyam Dass's case (supra)** which has been relied upon by the applicant. Accordingly, the instructions issued by the Government, following this judgement will also not assist the applicant so as to come to the conclusion that the inquiry and the consequent dismissal order should be set aside automatically only on this ground as submitted on behalf of the applicant. The facts of the case, therefore, do not warrant holding that the inquiry held or the ^{penalty} order passed stands automatically vitiated.

14. For the reasons given above, we find no merit in this application justifying any interference in the matter. The application is accordingly dismissed. No order as to costs.

Lakshmi Swaminathan

(Smt. Lakshmi Swaminathan)
Member (J)

S.R. Adige

(S.R. Adige)
Vice Chairman (A)

SRD