1572/88

FINAL ORDER

CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH:NEW DELHI

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PRESENT

The Hon'ble Mr.Justice Ram Pal Singh, Vice-Chairman
and
The Hon'ble Shri R.Venkatesan, Administrative Member

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Original Application No.1572 of 1988
-do- No.58 of 1988
-do- No.551 of 1988
-do- No.548 of 1988
-do- No.944 of 1988
-do- No.1574 of 1988
-do- No.1818 of 1988
-do- No.74 of 1988
-do- No.310 of 1989

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C.L.Malik	.. Applicant in	OA 1572 of 1988
Madan Lal Tiwari	.. -do-	OA 50 of 1988
Kalu Ram 'D'	.. -do-	OA 551 of 1988
Balu Lal Sharma	.. -do-	OA 548 of 1988
A.Michael	.. -do-	OA 944 of 1988
Gopal Singh	.. - do-	OA 1574 of 1988
B.R.Sharma	.. -do-	OA 1016 of 1988
Basant Lal	.. -do-	OA 74 of 1988
Tara Singh	.. -do-	OA 310 of 1989

-Vs.-

1. Union of India, through
   Chairman, Railway Board,
   Rail Bhavan, New Delhi

2. The General Manager,
   Northern Railway, Baroda
   House, New Delhi .. Respondents

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M/s G.D.Bhandari

.. Advocate for the applicants

Sh. Romesh Gautam with
Sh.O.P.Kshatriya .. Advocate for the respondents

Order pronounced by the

Hon'ble Shri R.Venkatesan, Administrative Member

The applicants in this batch of cases have a common cause of action and common prayer for relief. Accordingly, they are dealt with by this common order.

2. The applicants belong to what are known as Running Staff in Railways and include categories such as Drivers, Shunters, Fireman, Guards and Brake's Man, who are directly connected with the charge of moving trains. They have been entitled all along to an allowance known as "Running Allowance" which has been defined under Rule 507 of the Indian Railway Establishment Code as "an allowance ordinarily granted to running staff for the performance of duties directly connected with the charge of moving trains and includes of 'mileage allowance or allowance in lieu of mileage', but excludes special compensatory allowances etc, This mileage allowance is paid on the mileage basis

calculated at rates per 100 miles or on the basis of per day of 8 hours of duty". Although running allowance varies from month to month depending on the mileage or the number of days covered, the actual running allowance drawn subject to a ceiling percentage related to the basic pay of the employee, which was fixed at 75% for a long time, was allowed to count as pay for the purpose of leave salary, medical attendance and treatment, educational assistance and, most importantly, retiral benefits. It was also counted for certain other purposes, such as passes and PTOs, House Rent Allowance and City Compensatory Allowance, up to the same percentage. The provisions relating to the counting of the running allowance, up to 75% of the basic pay for various purposes were incorporated formally in various rules of the Indian Railway Establishment Code.

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3. It has been averred by the respondents that prior to the recommendations of the revised pay scales, effective from 1.1.1973 after the Third Pay Commission, ~~in most cases~~ the actual average running allowance earned by the running staff vastly exceeded 75% of the basic pay in almost all cases and therefore retirement benefits were paid on the basis of basic pay plus 75% of the basic pay in practically all the cases. As the revised scales from 1st January 1973 had raised the pay scales of running staff, the Railways considered that a revised ceiling percentage had to be fixed ~~for~~ after this date. This entailed a lot of detailed exercise. Pending this, interim orders were issued on 21.1.1974 in which it was stated that the question of revision of rules for the regularisation of various allowances consequent upon the introduction of the revised pay scales under Railway Services (Revised Pay) Rules, 1973 is under consideration of the Board. It was further stated that pending final decision thereon, the Board had decided

Ramakrishna

as under:-

(i) Treatment of Running Allowance for various purposes in case of Running Staff

The existing quantum of Running Allowance based on the prevailing percentage laid down for various purposes with reference to the pay of the Running Staff in Authorised Scales of Pay may be allowed to continue(emphasis added)

2. The payments as above will be provisional subject to adjustment on the basis of final orders ".

SUbsequently, by orders dt.22.3.1976, as modified by another subsequent order of 23.6.1976, the Railways have fixed the percentage of running allowance counting for the purpose of leave salary, medical attendance and treatment, educational assistance and retirement benefits as the pay plus actual amount of running allowance drawn, subject to a maximum of 45% of pay for those running staff who are drawing pay in the revised pay scales.

These orders were given effect to from 1.4.1976.

4. Certain running staff, some retired and some working, moved the Delhi High Court in a writ petition seeking annulment of the above order dt.22.3.1976 which reduced the quantum of running allowance for retirement and other benefits from the prescribed maximum of 75% to 45% of pay and prayed for the restoration of the percentage of 75%. That writ petition was transferred to this Tribunal and was heard and decided by the Delhi Bench on 6.8.1986. The order of the Tribunal quashed the impugned order of the Railways dt.22.3.1976 and directed the Railways to continue to make payment beyond 31.3.1976 of certain allowances, including retirement and other specified benefits, by treating the running allowance for various purposes in accordance with the interim orders of the Railway Ministry dt.21.1.1974 "till such time as the relevant rules in this regard are or havebeen amended in accordance with law, if so advised". The ground on which

this Tribunal gave the above order was that it was not permissible to amend the statutory rules by executive orders or instructions, as had been done in the present case.

5. The respondents thereafter have amended the relevant rules of the Indian Railway Establishment Code, by orders dt.17.12.1987. Under these orders, the revised percentage of pay, representing the pay element in the running allowance /as counting for pension etc. notified in the executive orders of 22.3.1976, which had been quashed by the order of this Tribunal, were formally given statutory force, with effect from the same date on which the executive instructions were earlier given effect to/ viz. 1.4.1976. These were subsequently notified in the Gazette of India dt.5.12.1988.

6. The applicants in the present batch of applications have come before this Tribunal again challenging the letter dt.22.3.1976

as well as the amendments to the rules of the Indian Railway Establishment Code, and with a prayer to allow the running allowance to count for the purpose of retiral and other benefits in terms of the letter dt.21.1.1974, which has been referred to.

7. The learned counsel for the applicants advanced the following main arguments in support of the above prayer:-

(i) The letter dt.17.12.1987 issued by the Ministry of Railways announcing corrections to the various rules of the Indian Railway Establishment Code was stated to have been issued by the President in exercise of the powers conferred by proviso to Art.309 of the Constitution of India. But they were actually issued by a Director of the Railway Board. According to counsel, the orders had not been issued by competent authority.

(ii) It had been stated in the above said order that "it is certified that retrospective effect given to these rules will not adversely affect any employee to whom

these rules apply". It was contended that retrospective effect would affect the employees and therefore in view of the certificate, only prospective effect could be given.

(iii) The counsel then contended that the order dt. 19.12.1987 was not a formal notification and quoted case law on the subject to the effect that publication is a condition-precedent for operation of amended rules.

8. The learned counsel prayed that in the light of the submissions made by him, the application may be allowed.

9. The learned counsel for the respondents referred to the judgement of this Tribunal dt.6.8.1986 and pointed out that the Tribunal had not held the amendment to be invalid on merits, but had quashed the amending order only on the ground that an executive instruction/ order cannot amend a statutory rule. The learned counsel would say that this Tribunal

merely
had directed the respondents to continue to make payment of retirement and other benefits as also allowances, treating the running allowance in accordance with the earlier orders of 21.1.1974 till such time as the relevant rules in this regard are or have been amended in accordance with law, if so advised. This clearly showed that the Tribunal gave liberty to the respondents to amend the rules formally and give effect to the impugned order. The respondents had proceeded to do that. The learned counsel refuted the contention of of the applicant that the amendment of the rules had not been duly publicised. In this behalf, the learned counsel for the respondents produced a copy of the Gazette Notification in the Gazette of India dt.5.12.1988 in which the said amendment which had been initially issued on 17.12.1987 had been formally notified and published.

He therefore stated that the revised rules had become effective and valid.

10. The counsel for the respondents also refuted the contention that consequent upon the issue of the amendment, ~~some of~~ the employees had been adversely affected. In this behalf the learned counsel produced a comparative statement showing the emoluments calculated in terms of the Railway Board's order dt.21.1.1974 and in terms of the amending orders dt.22.3.1976 to show that there was a significant improvement in the quantum of running allowance that would count as pay for various purposes as well as in the pay itself and in the total emoluments, consequent on the introduction of the revised pay scales and the issue of the order dt.22.3.1976. We reproduce the table showing the comparison of emoluments of pay and running allowance counting as pay as worked out by the respondents:

	Emoluments calculated in terms of Board's Order No.PC III/73/RA dt.21.1.1974 (i.e. pay in revised scale + 75% of pay in authorised scale)					Emoluments calculated in terms of Board's Order No.PC III/75/RA/1 dt.22.3.1976 (i.e. Pay in revised scale + 45% of pay in revised scale)		
Category	Scale (Rs.) Revised	Authorised	Pay Min./Max	75% of pay in A.S. Min./Max.	Total	Pay in revised scale	45% of pay in revised scale	Total
Guard Gr.'A'	425-600	205-280	425	153.75	578.75	425	191.25	616.25
			600	210	810			
Guard Gr.'B'	330-560	150-240	330	112.5	442.5	330	148.5	478.5
			560	180.0	740	560	252.0	812
Guard Gr.'C'	330-530	130-225	330	97.50	427.5	330	148.5	478.5
			530	168.75	698.75	530	238.5	768.5

11. The learned counsel for the respondents pointed out that in terms of the Railway Board's order dt.21.1.1974 (which we have extracted earlier), the running allowance that would count for the purpose of pay was limited to 75% of the pay in the Authorised Scales, as per the rules and not the pay in the revised pay scale which had come into effect on 1.1.1973. The Authorised Scales were the scales of pay introduced by the

Second Pay Commission and were much lower than the revised pay scales introduced after the Third Pay Commission, which would now be taken into account under the order dt.22.3.1976 and the amendment to the Rules dt.17.12.1987 which formally gave effect to it.

12. The counsel contended that it would be clear from the comparative tabulation(reproduced above) that the prayer of the applicants was therefore totally misconceived and was based on a misunderstanding of the effect of the Railway Board's order dt.21.1.1974. If the Board's order dt.21.1.1974 were to be strictly implemented as prayed for by the applicants, there might be cases where they would suffer a reduction in emoluments.

13. The learned counsel then contended that the Govt. had the power to amend the rules retrospectively, without the consent of the Govt. servant, when it did not entail any adverse civil consequence on the employees. He referred to the decision of the Supreme Court in Roshanlal Tandon-Vs.-Union of India(1967(1)-SLR-832) wherein it was

held by the Supreme Court that although the origin of Govt. service is contractual and there is an offer and acceptance in every case, but once appointed to a post, the Govt. servant acquired a status and his rights and obligations were no longer determined by the consent of both parties, but by Statutes or the Statutory Rules, which may be framed and altered unilaterally by the Govt., without consent of the employee. The learned counsel contended that the applications were therefore without merit and had to be dismissed.

14. We find that the present case has been filed by certain retired Running Staff who claim that they were not given the benefit of the judgement of this Tribunal dt.6.8.1986, which was allowed only to the applicants in that transferred application. They have essentially prayed for the same relief which was given to the applicants in that case. In this behalf, it will be useful to reproduce the relevant paragraphs of the judgement of this Tribunal in the earlier matter, which

after dealing with various contentions and arguments advanced by the petitioners therein, the Tribunal finally allowed the petition only on the following grounds:

"10. The next challenge of the petitioner is about the legality of the impugned order, i.e. as to whether the impugned order dt.22.3.1976 issued by the Railway Ministry is a statutory order passed by the President. This order has been annexed by the respondents as Annexure R-3 to their counter affidavit which is reproduced as under.

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A bare reading of the aforesaid order makes it abundantly clear that the same is patently an executive order or instruction. The mere fact that it is issued with the sanction or approval of the President does not clothe it with the character of statutory rule. Statutory Rules are framed by the President in exercise of powers conferred upon him under proviso to Article 309 of the Constitution and they are legally required to be notified in the official Gazette. It is a settled law that a mere executive instruction cannot amend or derogate from a statutory rule. There are catena of cases to reiterate and support this view. In Prem Prakash - Vs.- Union of India and thers (1984)(2)-SLJ-376 (Supreme Court), it was held that administrative instructions cannot be

allowed to prevail over statutory rules if the former are contrary to the latter. In the case of B.N.Nagarajan - Vs.- State of Karnataka, reported in 1979(3)-SLR-116(Supreme Court) it was observed that what could not be done under the Rules could not be allowed to be done by an executive fiat and that such a course is not permissible because an act done in exercise of executive power of the Govt. cannot over ride Rules framed under Art.309 of the Constitution. In yet another case - Sant Ram Sharma - Vs.- State of Rajasthan and others reported in AIR 1976-SC-1910, it was observed by the Supreme Court that if Rules are silent on any particular point, the Government can fill up the gap and supplement the Rules by issuing executive instructions. But Government cannot issue such instructions if the same go contrary to any provision of the Rules nor can the Govt. amend or supersede Statutory Rules by administrative instructions. The Delhi High Court has also confirmed the above observations of the Supreme Court in the case of D.K.Gupta - Vs.- M.C.D and others, reported as 1979(3)-SLR-416(Delhi) when it reiterates that the statutory rules cannot be modified by executive instructions.

11. It is thus evident that where a sphere is covered by statutory rules, Govt. cannot exercise its inherent discretionary or executive powers in a manner contrary to Constitutional and Statutory provisions. There is no scope to exercise of any inherent or executive power if there be proper provisions covering the sphere in which such inherent powers are sought to be exercised and in any event no such exercise can be done in violation of such provisions. This principle is uniformly and universally settled and sanctified by the decisions of the Supreme Court and various High Courts, as noted above.

In the instant case, the respondents have merely produced a copy of the 1985 Edition of the Railway Establishment Code and have sought to place reliance on Para 909 of the Code which nowhere indicates as to when the said amendment relied upon was incorporated amending the earlier statutory rule, which provides for 75% of the running allowance to be counted as pay for purposes of retirement benefits, leave salary, medical attendance and educational assistance.

12. Viewed in the light of the above discussions and for the foregoing reasons, we hold that the impugned order dt.22.3.1976 is a mere executive order or instruction and as such the same cannot be accepted to be a statutory amendment of the existing Rules governing the running allowance.

13. In the result, the petition is allowed and the impugned order dt.22.3.1976 is quashed. The respondents are directed to continue to make payment beyond 31.3.1976 of certain allowances including retirement and other specified benefits by treating the running allowance for various purposes in accordance with the Railway Ministry's letter No.PC III/73/RA dt.21.1.1974 till such time as the relevant rules in this regard are or have been amended in accordance with law, if so advised. There will be no order as to costs".

15. It would be clear from the above order that this Tribunal quashed the order dt.22.3.1976 only on the ground that the statutory rules cannot be amended by an executive instruction and not on any of the various other grounds of the petitioners therein. The final

paragraph of the order which we have quoted above, make it abundantly clear that the relief granted was only till such time as the relevant rules are amended in accordance with law.

16 We find that the respondents have been able to show that they have acted in accordance with the order of this Tribunal and have amended the rules formally. The publication in the Gazette of India meets the legal requirement of promulgation/publication practised in a recognisable way, which was held to be a sine qua non for the operation of amended rules in Harla - Vs.- State of Rajasthan (AIR 1951-SC-467), which was cited by the counsel for the respondents. We may also cite that the judgement of the Supreme Court in State of Maharashtra -Vs.- Mayer Hans George (AIR 1955-SC-722) in support of this.

17. The contention of the counsel for the applicants that the order has not been issued by the competent authority cannot also be sustained. It is well settled that where an order is passed

in the name of the President, it is not necessary that it should have been personally approved by him. It is enough if the order has been passed by the competent functionary authorised in this behalf by the Rules of Business. If the order is expressed to be in the name of the President and authenticated by an official authorised in that behalf, the Court has to presume that it was passed by the Competent authority. We accept the averments of the counsel for the averments of the respondents that the order has been Gazetted and that it has been subsequently issued by the official authorised in that behalf.

18. We shall take up the argument of the learned counsel for the applicant that the rules cannot be amended retrospectively and that the interests of the persons covered by the rules are affected adversely. It maybe noted that the counsel refuted the certificate in the amending order that retrospective effect given to the rules will not adversely affect any employee to whom the rules apply. But the applicants have not been able to show

that they have been in any way adversely affected in terms of their total emoluments or even in regard to the quantum of the running allowance counting as pay, consequent upon issue of the impugned amendment of the rules. They have not disproved or disputed the computation made by the respondents which we have reproduced above, in support of their contention that the applicants have been affected by the impugned order/amended rules. It will not be in accordance with the Statutory Rules to hold that the percentage of 75% should be applied to the revised pay after the Third Pay Commission recommendations. We do not therefore find that the amended rules involve the applicants in any adverse civil consequences such as reduction in emoluments or recovery of over-payments. The amendment is legally valid and has been properly notified.

19. We notice that in terms of the interim order dt.21.1.1974, the running allowance counting as pay for various purposes should be limited to the existing quantum based on the prevailing percentage of pay in the Authorised scales of pay.

Lastly,

The expression "Authorised Scales of Pay" in which the word "Authorised" is used with capital letters at the beginning, can only be taken to mean the specific scales of pay, as contained in the Railway Establishment Code or in the Railway Establishment Manual. The provisions contained in the Indian Railway Establishment Manual - Second Edition, relevant for the period in question, indicate the Authorised Scales of Pay for various categories, which were nothing but the old scales prior to 1.1.1973 and these have been adopted by the respondents in their working sheet, cited supra. Therefore, the new pay scales introduced after 1.1.1973 could not be taken as the Authorised Pay Scales for the purpose of the order dt.21.1.1974, in the absence of formal amendment to the relevant provisions. We therefore hold that the argument of the applicants is based on a misinterpretation of the order dt.21.1.1974, as pointed out by the

respondents.

20. In the result, the applications fail and it is dismissed with no order as to costs.

(R.VENKATESAN)
ADMINISTRATIVE MEMBER

(RAM PAL SINGH)
VICE CHAIRMAN

23.10.91

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NOTE:- Pl. see R.A file record in this case.