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**CENTRAL ADMINISTRATIVE TRIBUNAL  
ERNAKULAM BENCH**

O.A.No.112/09

Monday this the 14<sup>th</sup> day of December 2009

**C O R A M :**

**HON'BLE Mr.GEORGE PARACKEN, JUDICIAL MEMBER**

K.Prasanna Kumar,  
S/o.Kochu Krishnan,  
(Ex.Head Clerk/Personnel Branch,  
Railway Divisional Office, Southern Railway,  
Trivandrum Division).  
Residing at Radha Madhavam,  
GNRI-3, Sreegovinda Lane,  
Kodunganoor Post, Thiruvananthapuram.

...Applicant

(By Advocate Mr.T.C.Govindaswamy)

**V e r s u s**

1. Union of India represented by the General Manager,  
Southern Railway, Headquarters P.O.,  
Park Town P.O., Chennai – 3.
2. The Divisional Personnel Officer,  
Southern Railway, Trivandrum Divisional Office,  
Thiruvananthapuram – 695 014. ...Respondents

(By Advocate Mr.Thomas Mathew Nellimoottil)

This application having been heard on 14<sup>th</sup> December 2009 this  
Tribunal on the same day delivered the following :-

**O R D E R**

**HON'BLE Mr.GEORGE PARACKEN, JUDICIAL MEMBER**

The applicant is aggrieved by the Annexure A-1 order dated  
20.12.2008 by which he was denied the grant of fixation of pay in the  
revised scale of pay as notified by the Railway Services (Revised Pay)  
Rules, 1997.



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2. The brief facts of the case are that the applicant was removed from service with effect from 9.10.1995 on culmination of the departmental proceedings held against him. The aforesaid order of removal was challenged before this Tribunal in O.A.721/98 and by Annexure A-2 order dated 23.1.2001 this Tribunal set aside the same and directed the respondents to reinstate him in service forthwith and to give the consequential benefits including the arrears of pay and allowances. However, liberty was given to the respondents to resume the proceedings from the stage of receipt of the enquiry report and to complete it in accordance with law. The respondents challenged the aforesaid order before the Hon'ble High Court of Kerala in O.P.No.10822/01. Thereafter, the respondents, vide Annexure A-3 memorandum dated 12.4.2001 reinstated the applicant in service with immediate effect and placed him under deemed suspension in terms of Rule 5(4) of the Railway Servant's (Discipline & Appeal) Rules, 1968 with effect from 9.10.1995 ie., from the date of his removal from service and continued to remain under suspension until further orders. The aforesaid Annexure A-3 order was also challenged before this Tribunal in O.A.124/02 and the same was set aside vide Annexure A-4 order dated 18.6.2004 with a direction to the respondents to permit the applicant to continue in service forthwith revoking the order of suspension. In compliance of the said Annexure A-4 order, the respondents issued Annexure A-5 memorandum dated 2.8.2004 revoking the suspension and reinstated the applicant in service with immediate effect. According to the applicant, he joined back for duties on 5.8.2004. Thereafter, the respondents passed the Annexure A-7 penalty advise dated 12.8.2004 again removing the applicant from service with effect from



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13.8.2004. Later, the Hon'ble High Court of Kerala vide its Annexure A-6 judgment dated 17.2.2005 disposed of O.P.No.10822/01 (S) (supra) and held that the period from the date of removal (9.10.1995) to the date of the present order of removal ie., 13.8.2004 shall be treated as suspension. .

3. Thereafter, the respondents paid the subsistence allowance for the period from 9.10.1995 to 13.8.2004 to the applicant during the year 2006, as if the applicant had continued to be on suspension till that date. The subsistence allowance was calculated on the basis of the pre-revised pay drawn by him as on 8.10.1995 ignoring the facts that the pay was revised with effect from 1.1.1996 as per the recommendations of the V Central Pay Commission and the applicant was reinstated in service on 5.8.2004. The subsistence allowance was also granted to him only at the rate of 50% of the pay and allowances without increasing the same to the extent of 75% on completion of 3 months from 9.10.1995. Aggrieved by the aforesaid action, the applicant submitted a representation on 30.11.2006. It is in response to the aforesaid representation that the respondents have issued the Annexure A-1 impugned order stating that the applicant was on suspension throughout the period from the date of first removal from service (ie. 9.10.1995) to the date of the second removal (ie. 13.8.2004). The Hon'ble High Court of Kerala also in its judgment dated 17.2.2005 in O.P.No.10822/01 (S) was pleased to opine that the period from 9.10.1995 to 13.8.2004 was to be treated as suspension. Based on the aforesaid judgment of the Hon'ble High Court of Kerala, the disciplinary authority has treated the period from 9.10.1995 to 13.8.2004 as suspension. However, as per Note-3 of Rule 7 of Railway Services (Revised Pay) Rules, 1997, in



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the case of Railway servant placed under suspension he shall continue to draw subsistence allowance based on existing scale of pay and his pay in the revised scale of pay will be subject to final order on the pending disciplinary proceedings. The applicant has challenged the aforesaid Annexure A-1 in this O.A and relied upon the Annexure A-8 decision of the Full Bench of this Tribunal in J.S.Kharat Vs. Union of India and others (at Full Bench Judgments 2002-2003 page 169). The questions raised in the said O.A was "(a) whether second proviso to rule 6(1) of the Railway Servants (Revised Pay) Rules, 1986 and whether the provisions in note 3 to rule 7 of CCS (Revised Pay) Rules, 1997 would imply that the ratios in the cases of Swarnamba, 1988 (2) SLR 641, Khajuria 1991 (3) SLJ 168 and Misra (1993) 24 ATC 248 would apply to government servants under suspension at the relevant time? (b) any other issue considered germane to the issue by the Larger Bench." The decision was that the Government servant during suspension is entitled for subsistence allowance on the basis of revised pay scale where the revised pay scale comes into effect during his suspension period. The operative part of the said order was as under :-

"13. The above decisions indicate that Courts and Tribunals while considering applicability of revised pay scale for subsistence allowance payable to a suspended Government servant pending disciplinary proceedings or criminal trial have enforced payment on the basis of revised pay scale, the view taken in Kadpate's case (supra) cited alone being to the contrary.

14. Rule 1303 of Railway Establishment Code (Vo.II) came up for consideration together with Rule 1342 before Supreme Court of India in R.P.Kapur Vs. Union of India & Ors. [1999 SCC (L&S) 1440] while dealing with the claim of a Railway servant who remained suspended pending disciplinary proceedings and was awarded major penalty of compulsory retirement. There the Railway servant suspended on 21.1.1982 and the penalty of



compulsory retirement became effective on 25.11.1992. In that case the Railway Administration paid subsistence allowance on the basis of revised pay scale w.e.f 1.1.1986, but when it came to computation of his pension, the Railway Administration directed computation for average emoluments which he drew 10 months before the date of suspension. The Apex Court examined the argument advanced and interpreted Rule 1342 read with Rule 1303 of Indian Railway Establishment Code and held that the Full Basic Pay will also be "emoluments in the case of a person under suspension, it being the amount drawn month by month by government Servant." It further held that "in view of the definition of pay being interpreted by the Supreme Court, which includes "emoluments" in the case of person under suspension, if we read it with Rule 1342 (1) (a) of Indian Railway Establishment Code (Vol.II), the employee's right is not limited for subsistence allowance to only the half average pay, but also to half pay he would have drawn on the basis of leave salary when pay includes emoluments in respect of employee under suspension. It is to be read under rule 1342 (a) as Leave Salary which the Railway Servant would have drawn while on leave". The Supreme Court of India gave effect to it in para 31 when it declared the appellant entitled to have his pension fixed on the basis of revised pay scale. If for computation of pension under Rule 1342 the pension of a Railway employee is to be calculated on the basis of revised pay scale keeping in view the 'half pay he would have drawn on the basis of leave salary' then there is no reason why same test be not applied to a government servant for subsistence allowance to be paid under rule 1303 of Railway Establishment Code (Vol.II) or Rule 53 (1) of Fundamental Rules. He is also to be paid an amount every month equal to the leave salary which he would have drawn if he had been on leave on half average pay and therefore on revision of pay scale the subsistence allowance should be paid every month on revised pay scale. If any contrary view is taken then it will lead to discrimination for which there can be no reasonable basis. This is essential as the factors for constituting Pay Commissions and its object to revise pay scale of Government servants will stand taken care of. It is fair enough as during suspension period it is not open for an employee to go for any other employment when he is facing Departmental Proceedings or Criminal Prosecutions which goes on employee will fail in providing minimum requirement to his family for maintenance as well as defending himself in proceedings. As referred earlier, in the case of A.Raghavan Vs. Tamil Nadu Civil Supplies Corporation Ltd. (supra) the Madras High Court gave relief to suspended employee despite two Pay Commission reporting that subsistence allowance to employees are not to be given on revised pay scale during suspension period. Thus, in view of above judicial pronouncement, we consider that a government servant during suspension is entitled for subsistence allowance on the basis of revised pay scale, where a revised pay scale comes into effect during his suspension. If any contrary view is taken then it will frustrate the very purpose for which subsistence allowance is paid.



15. It is relevant to mention here that nothing from rules has been pointed out by counsel for respondents to show that a government servant under suspension is not to be dealt with under revised pay scale and it is only the Railway Board letter which deprives suspended employees of Railways from being paid subsistence allowance on revised pay scale. As the learned counsel for respondents could not point out any rule to that effect, but relies upon Railway Board's letter, in absence of any rule in RS Pay Rules or CCS Pay Rules, the Railway Board could not have excluded a class or category of persons whom rules did not exclude. Even if letter of Railway Board is considered otherwise then it cannot stand the test of a reasonable classification for achieving intended object. When its reasonableness is examined, we find that an employee suspended before 1.1.1986 will be getting subsistence allowance only on the basis of pay scale before its revision on 1.1.1986 and another employee of same category who was suspended between 1.1.1986 to 31.1.1995 will get subsistence allowance on revised pay scale effective from 1.1.1986 to 1.1.1996, then it will give rise to an anomalous situation. Thus, while having been suspended before 1.1.1986 from similar pose, a suspended employee will not get the subsistence allowance on revised pay scale while he who was suspended holding that very post on or after 1.1.1986, he will be getting higher amount due to suspension being after revision of pay scale and still higher if suspension is on or after 1.1.1996 due to revision by Fifth Pay Commission though the position of the two to maintain family and himself remains same. When we test this difference in payment of subsistence allowance on the touchstone of reasonableness it cannot stand. With passage of time, the inflation and fluctuations in price index will defeat the object for which subsistence allowance is paid. The necessities for living of the two with same status and dignity, but one is paid lesser than other. As stated earlier, if the rules are to be construed keeping in view the object for which it has to fulfil, the minimum requirement of the two and save the Rule in respect of amount of subsistence allowance to be paid from frustrating the very object for which it is framed, the employee suspended before revision of pay scale is to be kept at par with similar government employees who has been suspended after revision of pay scale. Therefore, the payment of subsistence allowance on the basis of scale of pay before revision cannot be a reasonable classification keeping in view the object to be achieved in paying subsistence allowance. For aforesaid reasons also we consider that a suspended employee is entitled for subsistence allowance on revised pay scale and his subsistence allowance which is payable month to month has to be paid on the basis of revised pay scale which he would have been entitled had he been in service and the case of Swarnamba (supra), Khajuria (supra) and Misra (supra) will apply to government servants under suspension at relevant time."

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4. As far as the claim of the applicant for increasing the subsistence allowance, the applicant has submitted that in terms of Rule 1342 of the Indian Railway Establishment Code Volume II the respondents are bound to enhance the subsistence allowance payable to him to an amount equal to 75% of the pay and allowances on completion of three months from the date of the initial order of suspension. The aforesaid rule is reproduced as under :-

1342. (F.R.53) Pay during suspension.-(1) A railway Servant under suspension or deemed to have been placed under suspension by an order of the competent authority shall be entitled to the following payments, namely-

(a) A subsistence allowance at an amount equal to the leave salary which the Railway servant would have drawn if he had been on leave on half average pay or on half pay and in addition dearness allowance, if admissible, on the basis of such leave salary.

Provided that where the period of suspension exceeds 3 months, the authority which made or is deemed to have made the order of suspension shall be competent to vary the amount of subsistence allowance for any period subsequent to the period of the first 3 months as follows:

(i) the amount of subsistence allowance may be increased by a suitable amount, not exceeding 50 per cent of the subsistence allowance admissible during the period of the first three months, if, in the opinion of the said authority, the period of suspension has been prolonged for reasons, to be recorded in writing, not directly attributable to the railway servant;

(ii) the amount of subsistence allowance may be reduced by a suitable amount not exceeding 50 percent of the subsistence allowance admissible during the period of the first three months, if, in the opinion of the said authority, the period of suspension has been prolonged due to reasons, to be recorded in writing, directly attributable to the railway servant;

(iii) the rate of dearness allowance will be based on the increased or, as the case may be, decreased amount of subsistence allowance admissible under sub-clauses(i) and (ii) above

(b) Any other compensatory allowances admissible from time to time on the basis of pay of which the railway servant was in receipt on the date of suspension subject to the fulfillment of other conditions laid down for the draw of such allowances.



(2) No payment under sub-rule (1) shall be made unless the railway servant furnishes a certificate that he is not engaged in any other employment business, profession or vocation.

Provided that in the case of a Railway servant dismissed, removed or compulsorily retired from service, who is deemed to have been placed or to continue to be under suspension from the date of such dismissal or removal or compulsory retirement, under sub-rule (3) or sub-rule (4) of rule 5 of Railway Servants (Discipline and Appeal) Rules 1968, and who fails to produce such a certificate for any period or periods during which he is deemed to be placed or to continue to be under suspension, he shall be entitled to the subsistence allowance and other allowances equal to the subsistence allowance and other allowances equal to the amount by which his earnings during such period or periods as the case may be, fall short of the amount of subsistence allowance and other allowances that would otherwise be admissible to him where the subsistence and other allowances admissible to him are equal to or less than the amount earned by him, nothing in this proviso shall apply to him.

5. The counsel for the applicant has also relied upon the orders of the Mumbai Bench of this Tribunal in (i) O.A. 198/99 – M.D.Dole Vs. Union of India and others dated 13.4.2000 [ATJ 2000 (3) 209] and (ii) O.A.266/02 – Amar Bahadur Mishra Vs. Union of India and others dated 6.5.2003 [SLJ (CAT) 2004 (3) 25].

6. In the case of M.D.Dole (supra) it was held as under :-

"5. It is therefore, seen that normally after the expiry of three months, the subsistence allowance should be increased by 25%. That means, for the first three months he will be getting 50% of the basic pay plus dearness allowance and this has to be increased by 25% and therefore the total amount comes to 75% of basic pay plus dearness allowance, this is the normal rule. But this enhancement may not be granted and it can even be reduced provided the prolonged suspension was directly attributable to the government servant concerned.

6. In this case, the applicant himself has given a representation dated 25.9.1997 complaining that the suspension has been continued for 10 months and the enquiry is not completed and this is contrary to rules and also sought revocation of suspension order.



Though the respondents have filed two written statements, they have not even alleged that the applicant's conduct was responsible for the prolonged suspension period or delay in the completion of the disciplinary enquiry. Therefore, on facts there is no allegation that applicant was responsible for the delayed suspension or delay in conduct of the enquiry. If that is so, by virtue of the rule mentioned above, normally the subsistence allowance should have been enhanced by 25%.

7. The learned counsel for the respondents has placed before us the concerned file and he has also relied on Exhibits R-1, R-2 and R-3. No doubt review has been held for continuation of suspension and we are not for a moment concerned with it. The concerned file shows that status quo of the subsistence allowance is ordered to be continued. We do not find anywhere in the record that the Competent Authority mentioned that suspension is prolonged due to the applicant or that the disciplinary enquiry is delayed due to the conduct of the applicant. When there is no allegation, much less proof, then the Competent Authority has no right to deny the 25% enhancement in the subsistence allowance as mentioned in the rule mentioned above. Even Ex.R-1, R-2, and R-3 speak about reviewing of continuation of suspension and then mentioning that same subsistence allowance will continue. No order is passed that because of the applicant's conduct there is delay in the departmental enquiry and therefore, he is not entitled to increase in the subsistence allowance. In the absence of such a finding, the applicant cannot be denied increase in subsistence allowance as provided under the rules.

8. The applicant's also invited our attention to an unreported judgment dated 22.11.1994 in O.A.606/94 of Cuttack Bench of this Tribunal in the case of Daitari Sethi Vs. Union of India and others, where in an identical point, the Division Bench took the view that if no opinion is formed that delay in the departmental enquiry was due to the conduct of the Officer, then he is entitled to be paid the subsistence allowance at the enhanced rate as provided in the rules.

9. Another submission of the respondents counsel is that the OA has become infructuous after the Competent Authority has passed the order at Ex.6 dated 7.7.1999. There is no merit in this submission. The order dated 7.7.1999 is about treating the period of suspension. We are not concerned about that question. We are concerned about the rate of subsistence allowance and the order dated 7.7.1999 does not say anything about rate of subsistence allowance.

After going through the materials on record, we are satisfied that the respondents have not made out any case for withholding the increase in the subsistence allowance as provided in the rules and therefore, the normal rules should follow and the applicant is entitled to get 75% (less 50% already paid) of salary with permissible allowance, as provided under FR 53 (1) (ii) (a) (i) for the period from 19.11.1996 till the date of compulsory retirement



and pay the said amount to the applicant within a period of three months from the date of receipt of copy of this order. The claim for interest is hereby rejected. In the circumstances of the case, there will be no order as to costs."

7. In Amar Bahadur Mishra's case, it was held as under :-

"19. The Apex Court in the case of Nelson Motis Vs. Union of India, AIR 1992 SC 1981 = 1992 (3) SLJ 65 (SC) was considering the constitutional validity of Rule 10(4) of CCS (CCA) Rules. It had been argued before the Apex court that with a view to save the sub-rule, its application has to be limited to cases in which the government servant has been, during the pendency of disciplinary proceedings, under suspension. The Apex Court negatived the plea. It appears that Sunder Dass was cited. The Apex Court held in Para 12 of its judgment.

*"The case of Divisional Personnel Officer, Western Railway, Kota Vs. Sunder Dass (AIR 1981 SC 2177) is again of no help. The facts stated in the judgment leave no room for doubt that the question which has been agitated before us did not arise for consideration there, as the Government servant was actually under suspension. Interpreting the relevant rules of Indian Railway Establishment Code the Supreme Court agreed with the department and allowed the appeal."*

20. As noted by the Apex Court in this judgment also the applicant was under suspension and the case was distinguished. As indicated in Para 18 above the case arose out of orders under Payment of Wages Act and the sole question was whether employee was on duty or under suspension. The said decision can be an authority only for what it has decided and for nothing more. The Hyderabad judgment in Contempt Applications cannot have persuasive value in view of Apex Court decision in Vyagar's Singh's case.

21. As far as the question of review being prospective is concerned the matter is concluded by two decisions of this Tribunal. It is well settled that a co-ordinate Bench is bound by the decisions of the earlier co-ordinate Benches. No arguments have been advanced as to why the same are incorrect.

22. As far as the grounds mentioned in the impugned order are concerned it appears that same have been relied upon without giving a notice to the applicants. The applicants have introduced certain facts in rejoinder which could have been included in OA also.

23. In view of what has been discussed above, the impugned order is set aside. The respondent had earlier been asked to pass an order, which has been passed after dismissal of the applicant from service. Hence we further direct that applicant is entitled to



75% of his pay as subsistence allowance w.e.f. 16.12.1995 the same be paid to him. The said exercise shall be completed within two months of the receipt of the order. No costs."

8. The respondents in their reply has submitted that as per Note 3 of Rule 7 of Railway Services (Revised Pay) Rules, 1997, in the case of a Railway servant placed under suspension, he shall continue to draw subsistence allowance based on the existing scale of pay and his pay in the revised scale of pay will be subject to the final order on the pending disciplinary proceedings. As the applicant was under suspension at the relevant point of time i.e., on 1.1.1996, when the Railway Services (Revised Pay) Rules, 1997 came into force, he is not entitled to the grant of fixation of pay in the revised scale of pay. Moreover, the Hon'ble High Court in its Annexure A-6 judgment dated 17.2.2005 has held that the period from the date of removal (9.10.1995) to the date of the present order of removal i.e. from 9.10.1995 to 13.8.2004 is to be treated as suspension only. The said findings were made after hearing the applicant and after taking into account the subsequent departmental proceedings which culminated in the removal of the applicant. The applicant's stand that he was de-facto reinstated in service is hit by res-judicata and estoppel. Since the departmental proceedings against him resulted in his removal with effect from 13.8.2004, which has been upheld by this Tribunal in the order in O.A.738/05, no further changes are called for in the matter of fixation of pay/subsistence allowance under the Note 3 of Rule 7 of Railway Services (Revised Pay) Rules, 1997 and hence, the decision conveyed as per the Annexure A-1 needs to be upheld. Further, they have submitted that the applicant has not cited any rule which permits payment of subsistence allowance in the



Revised Pay in a case wherein the disciplinary case was pending as on the effective date. As far as the prayer for enhancement of subsistence allowance to 75% is concerned, they have rejected the contention of the applicant that the delay in finalising the disciplinary proceedings was not on his part but it was on the part of the respondents. They have also submitted that the applicant is not entitled to be granted any subsistence allowance, as he was gainfully employed during the period in question. He was practicing as a lawyer for sometime and thereafter he was employed in the Government of Kerala as a Psychotherapist in the District Hospital, Palakkad from 16.8.2004 to 22.5.2007. Thus, the non-employment certificate given by the applicant for the drawal of the subsistence allowance at the rate of 50% is not true. The respondents could not verify the veracity of the non-employment certificate at the relevant point of time and the fact of his employment could be ascertained only at a later date. Thus, the payment of 50% subsistence allowance made to him was not admissible to him. Hence, the present prayer for enhancement of subsistence allowance to 75%, if allowed, will be a drain in the exchequer and the same needs to be averted.

9. I have heard the learned counsel for the parties. In my considered view, the applicant's case is fully covered by the judgments/orders relied upon by the applicant's counsel. Accordingly, in the normal course the applicant would have been entitled to be granted the subsistence allowance for the period from 1.1.1996 to 13.8.2004 with reference to the pay in the 5<sup>th</sup> Central Pay Commission scales of pay and for consequential arrears thereof. He also would have been entitled for increase in the

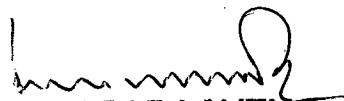


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subsistence allowance to 75% in terms of the provisions contained in Rule 1342 of the Indian Railway Establishment Code Vol.II. However, the respondents have stated in their reply that they have the information that the applicant was gainfully engaged during his suspension period from 9.8.1995 to 13.8.2004. This factual position has to be verified. The applicant shall therefore, file a sworn affidavit before the respondents disclosing the details regarding employment and the income, if any received by him during the aforesaid period. Thereafter, the respondents shall calculate the subsistence allowance including the arrears payable to him in accordance with the rules and pay the same within a period of two months.

10. With the aforesaid directions this O.A is disposed of. There shall be no order as to costs.

(Dated this the 14<sup>th</sup> day of December 2009)

  
GEORGE PARACKEN  
JUDICIAL MEMBER

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