

CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH, MUMBAI

ORIGINAL APPLICATION NO. : 246/2000

Date of Decision : 10th September 2001.

A.B.Mishra

Applicant

Shri G.S.Walia

Advocate for the
Applicant.

VERSUS

Union of India & Ors.

Respondents

Shri S.C.Dhawan

Advocate for the
Respondents

CORAM :

The Hon'ble Shri S.L.Jain, Member (J)

- (i) To be referred to the reporter or not ? yes
- (ii) Whether it needs to be circulated to other ~~No~~ Benches of the Tribunal ?
- (iii) Library yes

S.L.JAIN
(S.L.JAIN)
MEMBER (J)

mrj.

CENTRAL ADMINISTRATIVE TRIBUNAL

MUMBAI BENCH, MUMBAI

OA.NO.246/2000

Dated this the 10th day of September 2001.

CORAM : Hon'ble Shri S.L.Jain, Member (J)

Amar Bahadur Mishra,
Chargeman Grade-A,
Chief Workshop Manager,
Central Railway,
Parel, Mumbai.

...Applicant

By Advocate Shri G.S.Walia

vs.

1. Union of India through
General Manager,
Central Railway,
Hqrs. Office, Mumbai C.S.T.,
Mumbai.
2. Chief Workshop Manager,
Central Railway,
Parel, Mumbai.

...Respondents

By Advocate Shri S.C.Dhawan

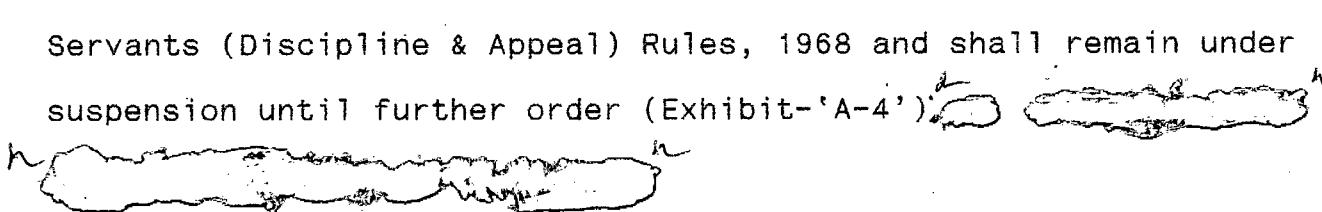
O R D E R

{Per : Shri S.L.Jain, Member (J)}

This is an application under Section 19 of the Administrative Tribunals Act, 1985 seeking the relief that the applicant is entitled to subsistence allowance @ 75% w.e.f. 16.12.1995 and onwards with a direction to the respondents to pay the same.

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2. There is no impugned order.
3. The applicant was working as Chargeman Grade-'A', was served with chargesheet dated 7.6.1994 and after enquiry he was removed from service on 16.9.1995. After exhausting the departmental remedies, the removal was challenged by the applicant in OA.NO.1008/96 which was decided on 16.6.1999 allowing the OA.
4. Writ Petition No.2319/99 was filed in Hon'ble High Court of Bombay against the said order in OA.No.1008/96 and in interim order dated 29.10.1999, the Hon'ble High Court has modified the order of the Tribunal dated 16.6.1999 to the extent that instead of back wages, the respondent (Applicant) is entitled to payment of subsistence allowance from the date of his removal, i.e. 16.9.1995 till the enquiry is completed.
5. The applicant after reinstatement is deemed to have been placed under suspension vide order dated 4.11.1999 of the respondents w.e.f. 16.9.1995 in terms of Rule 5 (4) of Railway Servants (Discipline & Appeal) Rules, 1968 and shall remain under suspension until further order (Exhibit-'A-4')

6. *On representation dated 30.10.99 & 15.11.99*
The respondents have paid subsistence allowance 50% for the entire period on 21.3.2000 instead of 75% from 16.12.1995 onwards which the applicant claims to be illegal, arbitrary, unconstitutional and discriminatory. Hence, this OA. for the above said relief.

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7. The claim is resisted by the respondents

8. The learned counsel for the respondents relied on 1981 SCC (L&S) 650, Divisional Personnel Officer, Western Railway, Kota vs. Sunder Dass, decided on 16.10.1981 and argued that Rule 1706 (4) Indian Railway Establishment Code was subject of consideration before the Apex Court and the Apex Court has held that in view of fresh enquiry, the employee is entitled only to subsistence allowance being 50% of his wages for the period of suspension until the final order of disposal and not the full wages.

After perusal of the said authority, I am of considered view that question of review after suspension after three months/six months was not subject of the consideration. As such the said question is not at all dealt in the said authority. A judgement on a question of law can be treated as precedent if the said question was subject matter for consideration and it has been decided. { (1991) 4 SCC 139, State of U.P. & Anr. vs. Synthetics and Chemicals Ltd. & Anr. }.

9. The learned counsel for the respondents relied on an order passed in OA.No.37/91 in C.P.No.38/93 by CAT, Hyderabad decided on 11.11.1993 and argued that only 50% of the subsistence allowance was provided to the employee during deemed suspension period. It is observed by the Bench "the respondents have admitted their mistake in paying 75% subsistence allowance in

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certain cases in the case of deemed suspension period. It is needless to point out that mistake committed has got to be rectified. The respondents eagered to correct their mistake". It is worth mentioning that in the Contempt matters, the scope is limited one. Against the same order in contempt, a review was filed which was rejected by circulation on 8.3.1994.

10. The learned counsel for the applicant relied on 1986 (3) SLR 292, Gajraj Singh, Block Development and Panchayat Officer vs. The State of Haryana & Ors. decided by Punjab & Haryana High Court and argued that in a case of suspension beyond a period of six months as a result of pendency of criminal case, petitioner entitled to increase in the subsistence allowance by 50% of the subsistence allowance admissible to him. It is further held that in case of revision of pay by the Pay Commission, even a person who is under suspension is entitled to revise his pay scale. The perusal of the authority makes it clear that the case of revision of pay relates to 4th Pay Commission.

11. The learned counsel for the applicant relied on 1999 (3) (CAT) A.I.SLJ 111, A.Vasu, Ex.UDC/AFK vs. Union of India & Ors. decided on 26.8.1997 by CAT, Mumbai, (Single Bench) which lays down the proposition that in case of deemed suspension, the respondents are bound to undertake a deemed review of the subsistence allowance and they could not have denied the enhancement of the subsistence allowance except for valid reasons relatable to FR 53.

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12. 1993 (24) ATC 243, Umesh Chandra Misra vs. Union of India & Ors. decided on 14.10.1992, the Apex Court has held that Departmental Rules requiring periodical review of amount of subsistence allowance depending upon whether or not prolongation of suspension was attributable to the Government employee - Amount to be increased from 50% to 75% upon such consideration. It has been further held that if there is a revision of pay scale, the allowance to be determined according to revised scale. The learned counsel for the applicant has drawn my attention to para 9 of the said decision and argued that 75% of the subsistence allowance was ordered to be paid.

13. The learned counsel for the applicant relied on 2000 SCC (L&S) 422, Ram Lakhan & Ors. vs. Presiding Officer & Ors. decided on 17.11.1999, in which the Apex Court in case of employees of Swatantra Bharat Mill has observed as under :-

" "Just as the employer has no control over the disposal of the application under Section 33(1) of the I.D.Act, so also the employee has no control over the disposal of that application. Whether the employee would be retained in service or removed would be dependent upon the fate of the application. While the Management can afford to wait for the disposal of that application, it would be impossible for an employee who survives only on his salary to wait for the disposal of that application for an indefinite period. It would not be possible for him to sustain himself. It is in this light that the right to receive reduced salary (subsistence allowance) for the period of suspension has to be read along with the right of the Management to place the employee under suspension pending disposal of the application under Section 33(1) of the I.D.Act.

Therefore, subsistence allowance shall be paid to the appellants for the whole of the period of suspension at such rates as is provided under the Standing Orders or the Service Rules and if there is no such provision, they would be entitled to be paid full salary even during the period of suspension."

There is no doubt about the right of the Management to suspend and the right of the employee to receive subsistence allowance as they are intertwined and both must survive together. On perusal of para 22 of the said authority, I find that the subsistence allowance was ordered to be paid as such as is provided under the Standing Orders or the Service Rules and in absence of such provisions, full salary during the period of suspension.

14. The learned counsel for the applicant relied on an order passed by this Bench in OA.No.976/94 decided on 10.2.2000 where one of us was a party to the decision (Bench consisting of Hon'ble Shri B.N.Bahadur and Shri S.L.Jain) where it has been held that an employee who is under deemed suspension is entitled to subsistence allowance at the enhanced rate of 75% instead of 50%.

15. It is true that the Rule 1706 (4) was subject of consideration before the Apex Court in case of Sunder Dass but question of review was not subject of consideration. Rule 2043 F.R. 53 deals with pay during suspension. Sub clause (i) (ii) (a) (i) deals with increase in subsistence allowance after a period of 12 months (the period - which has been amended from time to time).

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16. The Railway Servants (Discipline & Appeal) Rules, 1968 which is in force since 1.10.1968, Rule 5 (4) is worth mentioning which is as under :-

" Where a penalty of dismissal, removal or compulsory retirement from service imposed upon a Railway servant, is set aside or declared or rendered void in consequence of or by a decision of a court of law and the disciplinary authority on consideration of the circumstances of the case, decides to hold a further inquiry against him on the allegations on which the penalty of dismissal, removal or compulsory retirement, was originally imposed, the Railway servant shall be deemed to have been placed under suspension by the competent authority from the date of the original order of dismissal, removal or compulsory retirement and shall continue to remain under suspension until further orders."

17. After suspension, subsistence allowance is ^{to be} determined in view of Rule 2043 R II FR.53 which is as under :-

" A Railway servant under suspension shall be entitled to the following payments :-

(i) -----
(ii) in the case of Railway servant other than mentioned in clause (i) :

(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 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 3 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.

(3) Second Review - Rule 2043, RII (1342 of 1987 Ed) does not specifically provide for a second or subsequent review, yet there is no objection to such review(s) being made by the competent authority. The subsistence allowance, may on subsequent review(s) be increased or decreased upto 50% of the amount of subsistence allowance initially granted, according to circumstances of each case. Subsequent reviews can be made at any time at the discretion of the competent authority.

In a case where the subsistence allowance has been increased up to 50 per cent of the initial amount as a result of the first review, it is permissible to reduce the amount of subsistence allowance upto 50 per cent of the amount of the subsistence allowance initially granted, if the period of suspension has been prolonged for reasons directly attributable to the Railway servant, i.e., by his adopting dilatory tactics.

Similarly in a case where the amount of subsistence allowance has been reduced after the review, the same can be increased upto 50 per cent of the amount initially granted, if the period of suspension has been prolonged for reasons not directly attributable to the Railway servant and the Railway servant has given up the dilatory tactics."

18. As there appears to no review of Subsistence Allowance after a period of three months, the respondents are directed to review the matter in accordance with law. As there is no impugned order, the Tribunal is not supposed to exercise the jurisdiction vested in Respondent for the reason that Tribunal's

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jurisdiction is limited one, i.e. in case of an inaction - a direction to act and in case of exercise of jurisdiction - illegally or irregularly to set aside the order. Hence, in my considered opinion, it is a fit case where respondents can be directed to consider the matter afresh in the light of the law stated above and pass an order within three months from the date of receipt of copy of the order and in case the applicant is aggrieved by the said decision, he may agitate the matter in accordance with law. The OA. is disposed of accordingly. No order as to costs.

A.C.D.

(S.L.JAIN)

MEMBER (J)

mrj.