

CENTRAL ADMINISTRATIVE TRIBUNAL  
MUMBAI BENCH MUMBAI

ORIGINAL APPLICATION NO:343/98

DATE OF DECISION: 19.12.2000

Smt.J.S.Aiyer

Applicant.

Shri N.Y.Gupte

Advocate for

Applicant.

Versus

The Union of India and others

Respondents.

Shri M.I. Sethna

Advocate for

along with Shri V.D.Vadhavkar

Respondents

CORAM

Hon'ble Shri B.N.Bahadur, Member (A)

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

(1) To be referred to the Reporter or not? yes

(2) Whether it needs to be circulated to no other Benches of the Tribunal?

(3) Library. yes

S.L.JAIN  
(S.L.JAIN)  
Member (J)

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CENTRAL ADMINISTRATIVE TRIBUNAL  
MUMBAI BENCH, MUMBAI.

ORIGINAL APPLICATION NO:343/98

Tuesday the 19<sup>th</sup> day of DECEMBER 2000

CORAM: Hon'ble Shri B.N.Bahadur, Member (A)

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

Smt. Jayanti S. Aiyer  
5/48, Parag,  
K.A. Subramanyam Road,  
Matunga, Bombay.

...Applicant.

By Advocate Shri N.Y. Gupte.

V/s

1. Union of India through  
Ministry of Finance  
Department of Revenue,  
North Block, New Delhi.
2. Chief Commissioner of  
Income Tax, Patna,  
C.R. Bldg., Birchand Patel Marg.,  
Patna. ...Respondents.

By Advocate Shri M.I. Sethna alongwith Shri Vadhavkar.

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 for quashing the orders No. F. 14011/27/87-V&L Govt.of India, Ministry of Finance, Department of Revenue, New Delhi dated 13/14th April 1993 by which the applicant is compulsorily retired with immediate effect with a direction to the respondents to reinstate the applicant to her original post of Deputy Commissioner of IncomeTax with continuity of service with all consequential benefits i.e. full back salary, allowance, promotion with effect from 13th April 1987.

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2. The applicant was working as I.A.C. (Assistant) at Jamshedpur. She was served with the suspension order dated 13th July 1987 pending enquiry, her headquarter during suspension period was mentioned at Jamshedpur. She was served with the charge sheet dated 4th December 1987. After appointment of an Enquiry Officer and the Presenting Officer, after an exparte enquiry, vide order dated 13/14the April 1993 No. F. 14011/27/87 V & L Govt. of India Ministry of Fincnace, Department of Revenue New Delhi the applicant was compulsorily retired with immediate effect. The Applicant submitted petitions to Finance Minister, the applicant was directed to submit the memorial in accordance with the procedure prescribed and she submitted the same on 20th December 1993, which was not replied. The applicant filed this OA on 21.12.1995.

3. The ground for setting aside the exparte order is that the applicant was not paid subsistance allowance during her suspension period i.e. 13th July 1987 till the impugned order dated 13/14 April 1993 is passed.

4. One of the objections of the respondents is that OA. is barred by time.

5. The applicant has filed this OA. on 21.12.1995. The order which is challenged by this OA. is dated 13/14.4.1993. As it is not filed within one year, it is barred by time. After the order dated 13/14.4.1993, the applicant approached vide a written letter to the Hon'ble Finance Minister and in reply to the said

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letter, the Finance Minister vide letter dated 10.11.1995 stated that the matter is under consideration. The applicant alleged that CCS Rules do not provide for memorial, various legal advisers to whom the applicant has approached for such memorial, in view of Ex-'M' which is dated 20.12.1993 continued to keep the file with them for months for drafting a memorial and ultimately returned the files stating that the memorial could not be drafted as the same cannot be filed in the case of the applicant and hence a delay in filing the present application. Alleging the same facts, the applicant has filed a Misc. Petition for condonation of delay.

6. In view of Rule 29 of CCS (CCA) Rules, a revision lies either on his or its own motion or otherwise. The Ministry of Finance, Department of Revenue has replied that "earlier he is requested to file a proper memorial in accordance with the prescribed procedure." Thus, the applicant explains the delay in filing the OA. Had the applicant filed the memorial, a matter for condonation of delay may come for consideration. On perusal of the OA., we do not find that any memorial was filed by the applicant. We have perused the OA. and we do not find that when the legal advisers of the applicant returned the file to the applicant stating the fact that memorial is not provided as the same was not applicable in the case of the applicant. In absence of the facts, not of file, the OA. well in time certainly leads us to a grey area and to assume the facts for delay condonation which are not on record. Hence, we are of the considered view that there is no reason to condone the delay in filing the OA. Hence, the OA. is barred by time.

7. Assuming for arguments sake that we have condoned the delay in filing of the OA., our finding on merits of the claim is as under.

8. After service of the charge sheet on the applicant, appointment of enquiry officer and the presenting officer the first date fixed for Disciplinary enquiry is 16.1.1989. In view of order-sheet dated 28.11.1988, on 16.1.1989 and thereafter upto 6.10.1989 the enquiry was conducted at Delhi, on 10.11.1989, 18.1.1990 the enquiry was conducted at Panji Goa for which the applicant was having due notice of hearing.

9. The examination of the proceedings of the enquiry is necessary in view of the submission of the learned counsel for the applicant that as no subsistence allowance was paid to the applicant, hence she was unable to appear/attend the Departmental enquiry. It is further necessary to arrive to a conclusion that when the charged officer came to know that order regarding subsistence allowance has been passed and till the said date, what was the progress in the Departmental enquiry.

10. On 16.1.1989 the enquiry officer has recorded the fact that he has received the letter dated 10.1.1989 on 13.1.1989 from the charged officer raising number of objections regarding the inquiry proceedings, which he referred to the Disciplinary Authority for necessary action and till the receipt of the reply, the hearing is adjourned.

11. On 16.2.1989 the Enquiry officer has recorded the order sheet which is as under :-

"Since all the objections have now been met with and one pertaining to subsistence allowance is dependent upon the CO furnishing the requisite non-employment certificate, the PH can now be fixed.  
and the enquiry is fixed for 7.4.1989."

12. The charged officer in her letter dated 10.1.1989 has raised amongst others the following objection :-

"Order dated 13th July 1987, purported to be an order under Rule 10 (1) of the C.C.S. (CCA) Rules 1965 is incorrect and it does not conform to the standard form of order of suspension prescribed by the Home Ministry. The words "Orders regarding subsistence Allowance admissible to him during the period of suspension will issue separately" do not appear in the said order.

Further an order of suspension should be followed by an order granting Subsistence Allowance, which is a mandatory provision, has been flouted in my case. So far, I have not been served with an Order granting Subsistence Allowance thereby preventing me from claiming and receiving Subsistence allowance since the date of suspension. To be more emphatic, I may repeat here that I have not received any Subsistence Allowance whatsoever till now. Worst, still, I have not been paid even the salary for the period 1.7.1987 to 15.7.1987 when I was on regular duty. Unless the Subsistence Allowance and arrears of salary are paid to me, it will not be possible for me to undertake any journey and participate in the inquiry proceedings, even if such proceedings are ordered afresh removing the above mentioned anomaly."

13. Thus the learned counsel for the applicant argued that till 10.1.1989 no order for subsistence allowance was passed and the respondents were awaiting for the non-employment certificate from the applicant to pass the order regarding subsistence allowance. We do not agree to the submission of the learned counsel for the applicant in this respect for the reason that the order of subsistence allowance was passed on 17.7.1987 but it was not communicated to the applicant till the said date.

14. On perusal of the order sheet dated 31.3.1989, we find that a letter which was sent by C.O. to the Enquiry Officer dated 22.3.1989 was dealt by the Enquiry Officer, the copy of the letter dated 9.2.1989 sent by Under Secretary, Department of Revenue to the Charge Officer vide registered post A/D which the Charged Officer claimed to have not received was ordered to sent to the Charged Officer. The relevant part of the order sheet is as under :-

"I am in receipt of letter dt. 22/3/89 from the CO pointing out that she has not yet received the detailed reply sent to her by the Under Secretary, Department of Revenue, vide his letter dt. 9/2/89. From a copy of the said letter received in this office, it is seen that letter dt. 9/2/89 was sent to the CO vide Registered AD. However as per the request of the CO, I am enclosing herewith a copy of the said letter. With regard to the objection of the CO that furnishing of Non Employment Certificate by her is dependent upon a mandatory order granting subsistence allowance, I have been informed that the Ministry of Finance, Department of Revenue, has already passed such an order on 17.7.1987 which had been sent to the CO at Jamshedpur and which fact was also intimated to her vide memorandum F.No. C-14011/27/87 V & L (Pt.) deciding the appeal on the order of suspension. This memorandum was sent to the CO at her Bombay address. I am also enclosing herewith copies of both these communications.

The hearing was order to proceed as scheduled on 7.4.1989."

15. From the above facts it can be said with every certainty that the Charged Officer was aware of the order of subsistence allowance and even assuming, if not aware, after receipt of the copy of the said order, she came to know of the same before 7.4.1989.

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16. The proceeding in Departmental Enquiry on 7.4.1989 and earlier to it reveals that no exparte steps were taken till then and ample opportunity is provided to the applicant to inspect the documents by 23.5.1989, submission of defence list by 6.6.1989 and only after recording interim orders which are not necessary to refer, the date of hearing was fixed which is 3rd to 5th October 1989, on the said dates, the evidence was recorded of ten witnesses, thereafter the enquiry was conducted at Panji -Goa on 10.11.1989 but adjourned to 23.12.1989 and on the said date two witnesses were examined.

17. All the above facts leads us to conclude that the order regarding payment of subsistence allowance was passed on 17.7.1987 but it might have not communicated to the applicant earlier to 7.4.1989, hence at the best the applicant can claim that as she was not aware of the order of passing of the subsistence allowance, hence she did not claim the subsistence allowance by producing the non-employment certificate but afterwards there was no reason for the applicant to allege the said fact when she did not file any non-employment certificate to the respondents which was necessary to receive the amount of subsistence allowance.

18. It is worth mentioning that by the said date in the departmental enquiry no steps were taken. During the whole enquiry, she did not obtain the subsistence allowance. If she had submitted the non-employment certificate, had there been a refusal to pay the same without any reason, we must have held that non payment of the subsistence allowance has prejudiced the defence case.

19. For ready reference, F.R. 53(2) is necessary to be mentioned which is as under :-

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

20. The right to subsistence allowance accrues as soon as the applicant is suspended but payment of the subsistence allowance depends on the fact that the applicant submits a non-employment certificate. As it was not submitted by the applicant, even though there is no payment of subsistence allowance, now the applicant is estopped to challenge the same as it is due to her in-action in not receiving the same.

21. The learned counsel for the applicant relied on JT 2000 (9) SC 457, Jagdamba Prasad Shukla vs. State of U.P. & Ors. and argued that if a Government servant does not participate in enquiry proceedings on grounds of illness and non-payment of subsistence allowance, refusal on grounds of non-furnishing certificate of no employment certificate and also that no address was furnished, the order of removal was bad for want of opportunity and deserves to be quashed. We have perused the same authority and we are of the considered opinion that the said authority does not apply to the facts of the present case, the reason being that the respondents were insisting for furnishing the no employment certificate and this is the defence of the respondents, while in that authority referred by the learned counsel for the applicant, it was not the case of the respondents that such a no employment certificate was asked to be furnished and this was not the defence raised by the respondents.

22. We agree with the learned counsel for the applicant in view of 1999 (3) SCC 679 that payment of subsistence allowance within the suspension period is a fundamental right under Article 309 of the Constitution.

23. Keeping in view the above proposition, we are of the considered view that the applicant intentionally avoided to receive the subsistence allowance by not filing the no employment certificate probably with a view either to drag on the disciplinary proceedings or to take such a plea after conclusion of the disciplinary proceedings if an occasion arises therefor.

24. In the result, we are of the considered opinion that there is no merit in the OA. which is liable to be dismissed and is dismissed accordingly with no order as to costs.

*SLJ*  
(S.L.JAIN)

MEMBER (J)

*Bn Bahadur*  
(B.N.BAHADUR)

MEMBER (A)

ns/mrj.