

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL : HYDERABAD BENCH  
AT HYDERABAD



C.P.No.38/93

in

M.A.No.674/92

in

O.A.No.37/91

Date of Order: 11.11.93

BETWEEN:

M.A.K.Jilani

-- Applicant

A N D

P.Rajgopal Naidu,  
Divisional Mechanical Engineer,  
(Loco), South Central Railway,  
Vijayawada.

-- Respondent.

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Counsel for the Applicant

-- Mr.G.V.Subba Rao

Counsel for the Respondent

-- Mr.N.R.Devraj

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CORAM:

HON'BLE SHRI A.B.GORTHY : MEMBER (ADMN.)

HON'BLE SHRI T.CHANDRASEKHARA REDDY : MEMBER (JUDL.)

(12)  
C.P. 38 of 1993  
in  
M.A. 674 of 1992  
in  
O.A. 37 of 1991

Date of Decision: 11. 11. 9

O R D E R

[As per Hon'ble Shri T. Chandrashekhara Reddy, Member(J) ]

This CP is filed under Section 17 of the Central Administrative Tribunals Act, to take action against the respondents for having committed con-tempt of the orders dt. 3.8.92 passed in MA 674 of 1992 in OA 37 of 1991.

2. The facts giving rise to this CP in brief, are as follows:

3. The petitioner herein was removed from service w.e.f. 25.1.1988 vide orders dt. 19.1.88, passed by the competent authority as a measure of punishment in the departmental proceeding that was held as against the petitioner by the competent authority. The removal order passed against the petitioner was confirmed by the appellate authority on 14.5.90. The petitioner filed O.A. 37/91 on the file of this Tribunal challenging the order dt.19.1.88 that was confirmed by the appellate authority as per its order dated 14.5.90. OA 37/91 was allowed by this Tribunal on 19.2.91 on the ground that enquiry report was not furnished to the delinquent employee, and directed the respondents to reinstate the petitioner into service and left it open to the department to proceed against the petitioner from the stage of supplying inquiry report. In compliance of the order dt. 19.2.91 passed

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in OA 37/91, the petitioner was reinstated into service w.e.f. 25.1.88 and was kept under deemed suspension with effect from the same date i.e. 25.1.88 and was paid subsistence allowance at the rate of 50% from 25.1.88 upto 31.12.1991. Aggrieved by the action of the respondents, the petitioner filed MA 674/92 contending that, he is entitled to get subsistence allowance at the rate of 75% w.e.f. 26.4.1988. MA 674/92 filed by the petitioner was disposed of by an order dated 3.8.92 as follows:

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Since we had been from the records that no reasons had been recorded by the competent authority to deny enhancement of the subsistence allowance, we direct the respondents to compute the subsistence allowance due to the applicant in accordance with the rules and pay the difference due to the applicant in accordance with the rules and pay the difference if any to the applicant. The MA No. 674/92 is accordingly disposed of with no order as to costs."

So, as could be seen from the above direction in the MA 674/92, subsistence allowance has to be paid by the respondents to the petitioner for the deemed suspension period, in accordance with rules. According to the petitioner, when the dismissal ~~order~~ or removal order is set aside on the ground of non-compliance of Article 311 of the Constitution and not on merits, the Railway administration has an option either to drop the disciplinary proceedings and reinstate the petitioner into service or to continue with the departmental proceedings. According to the petitioner as the

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disciplinary proceedings have been continued after his reinstatement into service, that the petitioner is entitled to be paid 75% subsistence allowance for the deemed suspension period.

4. Counter is filed by the respondents opposing this OA.

5. In the counter filed by the respondents, it is maintained that for the deemed suspension <sup>period</sup> the subsistence allowance can never exceed 50% and it is only, the normal subsistence allowance that has to be paid to a Railway servant when he is under deemed suspension and that, the petitioner does not have a right to ask for enhancement of the subsistence allowance ~~at~~ 75% for the deemed suspension period and that the respondents have not committed any contempt by paying subsistence allowance to the petitioner at the rate of 50% which action is valid in law and so, the CP is liable to be dismissed.

6. We have heard Mr. GV . Subba Rao, counsel for the applicant and Mr. NR. Devaraj, Standing Counsel for the respondents.

7. The fact, that the applicant was removed from service w.e.f. 25.1.1988 as a measure of punishment is not disputed in this CP. It is also not disputed in this CP, that, by virtue of the orders dated 19.2.91 in OA 37/91 setting aside the order of removal from service that the disciplinary proceedings were continued as against the petitioner. 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

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authority, on consideration of the circumstances of the case, decides to hold a further enquiry 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. Rule 5 to Railway Servants (Discipline & Appeal Rule) Rules, 1968 deals with deemed suspension or automatic suspension. As already pointed out, the petitioner having been kept under deemed suspension by an order dated 24.12.91 is an admitted fact in this CP. Admittedly, the applicant had been kept under deemed suspension w.e.f. 25.1.1988. As already pointed out, it is the contention of the applicant that for the deemed suspension period w.e.f. 25.1.1988, he is entitled for subsistence allowance at the rate of 75%. In view of the contention raised on behalf of the applicant, it will be appropriate to refer to Rule 1342 of the Indian Railway Establishment Code Vol. II which reads as follows:

"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 an half pay and in addition, dearness allowance, if admissible, on the basis

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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 first 3 months as follows:

- (i) the amount of subsistence allowance may be increased by a suitable amount not exceeding 50% 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 per cent of the subsistence allowance admissible during the period of 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.

FR 53 and Rule 1342 of the Railway Establishment Code Vol. II are one and the same. A close reading of the above would make it clear, that if a railway servant is kept under suspension, the subsistence allowance can be varied where the period of suspension exceeds three months for reasons mentioned to the proviso (i) (ii) of

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the above rule, When a person is kept under deemed suspension the competent authority can vary subsistence allowance subsequent to the period of the first three months from the date of deemed suspension order for reasons as laid down in clause (i) (ii) of the proviso to rule 1342. Prior to 24.12.1991 in this case, admittedly, there was no deemed suspension order passed against the applicant. It is needless to point out, the question of varying the subsistence allowance order, arises only if an order for subsistence allowance already exists. As already pointed out, the order keeping the applicant under deemed suspension has been passed only on 24.12.91. So, a Railway servant who is kept initially under deemed suspension Under rule 1342 of the Railway establishment Manual will be entitled only to normal subsistence allowance (50%) for the entire deemed suspension period. It could also be seen from the said rule 1342 that a Railway servant does not appear to have a right for 75% of subsistence allowance w.e.f. the date he comes under deemed suspension. It is only after expiry of the first three months of period of the deemed suspension order that a Railway Servant can claim enhancement of subsistence allowance beyond the normal rate of 50% of subsistence allowance. The enhancement of subsistence allowance at the rate of 75% as claimed in this case from the date of deemed suspension order <sup>in the deemed suspension period</sup> appears to be in contravention of the provisions of the Railway Establishment Manual. However, it will be open for the petitioner to claim enhanced subsistence allowance in accordance with Rule 1342 of the Railway Establishment Code Vol. II after the subsequent period

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of three months from 24.12.1991. But the applicant does not have a right as already pointed out to claim subsistence allowance at the rate of 75% prior to 24.12.91 for deemed suspension period. So, in not paying subsistence allowance at the rate of 75% as claimed by the applicant, the respondents do not appear to have committed any contempt. In this connection, we may also refer to a decision of the Supreme Court reported in 1981 (3) SLR 142 Divisional Personnel Officer Western Rly., Vs Sunder Das, In the said case a Railway employee was placed under suspension, pending disciplinary proceeding. He was dismissed from service later on. But dismissal order was set aside by the court on the grounds of violation of principle of natural justice. Thereupon, a fresh inquiry was held as against the same charges, and as a result there of was dismissed from service. As no fresh order of suspension was passed when fresh enquiry was held, the Railway servant therein claimed full wages from the date of first dismissal order till the date of fresh dismissal order. The Supreme Court relying on rule 1706 (4) of the old Indian Railway Establishment Code were held that the Railway servant should be deemed to have continued to remain under suspension during the first enquiry and as such was entitled only to a subsistence allowance for the entire period of suspension equal to 50% as his wages and not to full wages. The Supreme Court in the said decision had extended rule 1706 Clause (4) as the old Indian Railway Establishment Code, which is as under:

"Where a penalty of dismissal, removal or compulsory retirement from service is 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 a consideration of the circumstances of the case decides to hold a further inquiry against him on the allegations on which the penalty of



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dismissal, removal or compulsory retirement was originally imposed, the railway servant shall be deemed to have been under suspension by the competent authority mentioned in Rule 1705, from the date of the original order of dismissal, removal or compulsory retirement and shall continue to remain under suspension until further orders."

It is evident from the facts that the Supreme Court in the above case was dealing with a case of a Railway servant who had been kept under deemed suspension. We are also dealing here with the case of a railway servant who was placed under deemed suspension. In view of the above said Supreme Court decision where it has been decided that an employees who is placed under deemed suspension has to be paid only 50% of subsistence allowance only, for the deemed suspension period there is no reason why the same principle should not be applied to the case on hand also. As already pointed out, the applicant had come under deemed suspension purely by operation of law as the removal order dated 19.1.88 was set aside by the orders of this Tribunal in OA 37/91. So, prior to 25.12.91, there was only order of removal dated 19.1.88. As the removal order dt. 19.1.88 was set aside, the applicant came under deemed suspension with effect from 25.1.88 as per orders dated 24.12.1991.

It is not the deemed suspension period that has to be taken into consideration for varying the subsistence allowance to the advantage or disadvantage on the railway servant but the date of deemed suspension order alone that has got to be taken into consideration for varying the subsistence allowance, in accordance with clauses (i) and (ii)

of the proviso of rule 1342 of the Indian Railway Establishment Code Vol II ..10

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8. In para 6&7 of the CP it is contended by the applicant as follows:

9. "In a number of cases, it is submitted where the removal orders have been set aside based on the judgement in Premanth Sharma and Ramzan Khan, the applicants therein were reinstated and kept under deemed suspension. To quote a few instances-

1. OA No. 172/88 D Bhaskara Rao Vs DSO and other removed from service w.e.f. 25.3.82 kept under deemed suspension, subsistence allowance paid at 75% of towards.
2. OA605/88 D. Venkateswarlu Vs Railways removed from service w.e.f. 20.8.85 kept under deemed suspension subsistence allowance paid at 75% afterwards.
3. OA 529 of 88 SA Samad Loco Khalasi Vs Rly suspended from 23.7.87 and paid subsistence allowance at 75% after 90 days.

All these employees belong to Vijayawada Division and Rule 1342 was applied in these cases. It is not understood the basis for not applying the same rule in the payment of subsistence allowance at 75% after the completion of 90 days of deemed suspension. In the order issued by the DRM/BZA in respect of the above three cases, it was clearly mentioned that his suspension beyond three months was prolonged not directly attributable to the railway servant.

10. In my case also, the date of removal from service is 25.1.1988 and I have been kept under deemed suspension from 25.1.1988 and from 26.4.1988, I am entitled for subsistence at 75% of pay. I cannot be discriminated and singled out for a different treatment by the respondents when the rule is very clear and implemented in a number of cases."

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In answer to the above contention of the petitioner in the CP, the respondents have averred in their counter as follows:

"The applicant has quoted in the contempt petition 3 instances wherein the concerned Disciplinary authority has reviewed subsistence allowance under Rule 1342 for the period prior to date of judgement when the case was pending before the Hon'ble Tribunal. While every enhancement or reduction in the quantum of subsistence allowance to be paid is made based on the merits of the case, it is substituted that if an incorrect decision has taken by any authority either because all the rules not available before him due to erroneous understanding of the rule position, nobody can claim benefit out of the same. The applicant can claim only such benefits which are due to him under any rule. Hence, it is for the applicant to establish his right to substantiate his claim".

So, as seen from the said averments made in the counter of the respondents, the respondents have admitted their <sup>their</sup> ~~mistake~~ <sup>mistake</sup> of ~~having committed~~ <sup>the</sup> in paying 75% subsistence allowance in certain cases. <sup>for the deemed suspension period</sup> It is needless to point out that the mistake committed has got to be rectified. The respondents appear to be eager to correct their mistake.

11. So far discrimination is concerned, we may mention that jurisdiction of this Tribunal cannot be exercised to commit any illegality. The respondents action certainly is not valid in certain cases in granting subsistence allowance at the rate of 75% to the Railway servant for the deemed suspension period. Because in certain cases respondents have committed

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mistake, or illegality, as already pointed out, this Tribunal cannot exercise its jurisdiction to perpetuate the said illegality because it was committed in some other cases. So, there cannot be any justification in directing the respondents to continue to act in the same illegal manner in the case of the contempt petitioner as well, in the interest of equality before law.

12. One must remember that there is equality before law and not before law and not before lawlessness. The action of the respondents in granting 75% of the subsistence allowance for deemed suspension period is not valid. From an action that is not valid in law, it is not open for the contempt petitioner to complain that he is discriminated. It is not open for the contempt petitioner to take advantage of the mistake that has been committed by the respondents in the other cases and seek from this Tribunal the same benefit which the others got for which they are not entitled in Law. So, as already pointed out, we see no contempt having been committed by the respondents in sanctioning normal subsistence allowance for the deemed suspension period.

13. One more contention that is urged is that the respondents have committed contempt by conducting de-novo enquiry when the direction of this Tribunal was only to continue the enquiry from the stage of the supply of the enquiry report. The applicant in this OA has pleaded in OA 37/91 that he had been denied reasonable opportunity to defend the case since the enquiry was conducted ex parte. So, in all fairness to give opportunity to the applicant, the respondents seem to have taken steps.

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On one hand, the contempt petitioner complains that enquiry had been held exparte, but when the respondents have taken steps to give an opportunity to the applicant the contempt petitioner complains that the order of this Tribunal is being violated. It is not open for the contempt petitioner to blow hot and cold. On one hand, the contempt petitioner points out a defect in the enquiry and when the said defect is sought to be rectified, the contempt petitioner complains that there is contempt in implementing the orders of this Tribunal.

14. It is needless to point out to take action under the Contempt of Courts Act there must be wilfull disobedience to the orders of this Tribunal. As could be seen from the counter of the respondents from para 2 at page 7, the respondents only seem to be anxious to give a fair opportunity to the applicant in accordance with law in participation of the enquiry. The action of the respondents in giving fair opportunity to the applicant to participate in the enquiry cannot be said to be in any way prejudicial to the applicant. As a matter of fact, the opportunity, which the respondents want to provide to the applicant very much protects the interests of the applicant. We see no contempt having been committed in taking steps to provide reasonable opportunity to the applicant in accordance with law to participate in the enquiry. So, we see no merits to this CP and hence, this CP is liable to be dismissed and is accordingly dismissed leaving the parties to bear their own costs.

CERTIFIED TO BE TRUE COPY

Date.....

Court Officer

Central Administrative Tribunal  
Hyderabad Bench  
Hyderabad.

05/11/91  
S/O  
DPO

: 14 :

Copy to: ~~Sri~~ P. Rajagopal Vaidu,

1. Divisional Mechanical Engineer/Loco/S.C.Railway,  
Divisional Office, Vijayawada.

2. One copy to Sri. G.V.Subba Rao, advocate, CAT, Hyd.
3. One copy to Sri. N.R.Devareaj, SC for Rlys, CAT, Hyd.
4. One copy to Library, CAT, Hyd.
5. One spare copy.

Rsm/-

C.P. no. 38/93

M.A. in no. 674/92

Case Number	04. 37/91
Date of Judgment	11-11-93
Copy made ready on	23-11-93
Section Officer (I)	

Returned RASR 2884/94

Reg. - Review application

Service to be made on the  
standing counsel for the  
applicant.

In the C. A. T.

Hyd Bench

in days time

Ar  
7/11/94  
for DCS

Objection Complied  
with

16/11  
for N.R. Devaraj  
S. R.

RP

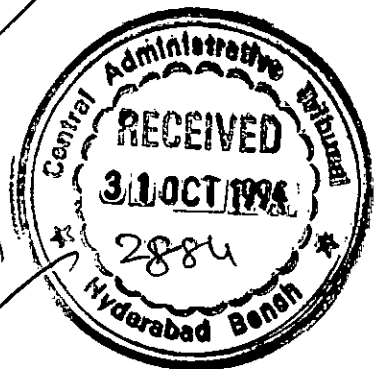
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Review Affidavit

Goslo  
16/11/94



Rile & Co.

N.R. DEVARAJ  
Advocate &  
Standing Counsel for Railways  
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