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CENTRAL ADMINISTRATIVE TRIBUNAL: HYDERABAD BENCH :
AT HYDERABAD.

O.A.NO.289 OF 1997. DATE OF ORDER:-5th MARCH,1998.

BETWEEN :

Zamin Ali,S/o Rushtom Ali,
aged about 48 years,
Working as Driver,
Mail Motor Service,
(Postal) Hyderabad. .. APPLICANT

AND

1. Union of India, rep.by
Chief Post Master General,
A.P.Circle, Hyderabad-500 001.

2. Director of Postal Services,
City Region (HCR),Office of the
Chief Post Master General,
A.P. Circle, Hyderabad - 500 001.

3. Manager,Mail Motor Services(MMS),
Hyderabad - 500 195. .. RESPONDENTS.

COUNSEL FOR THE APPLICANT : MR.B.S.A.SATYANARAYANA

COUNSEL FOR THE RESPONDENTS : MR. N.R. DEVARAJ,SrCGSC.

C O R A M :

HONOURABLE MR.H.RAJENDRA PRASAD,MEMBER(ADMINISTRATIVE)

HONOURABLE MR.B.S.JAI PARAMESHWAR,MEMBER(JUDICIAL)

O R D E R.

(Per Hon.Mr. B.S.Jai Parameshwar, Member(Judicial)).

1. Heard Mr.B.S.A. Satyanarayana, the learned counsel for the applicant and Mr. N.R.Devaraj, the learned Standing Counsel for the respondents.

2. This is an application under Section 19 of the Administrative Tribunals Act. The application was filed on 3.3.1997.

3. The facts giving raise to this O.A. may, in brief, be stated thus :-

(a) The applicant was working as T/S Driver in MMS Postal, Hyderabad under the control of the respondent No.3.

(b) He remained absent from duties for a period of 27 days. For the said misconduct, the applicant was placed under suspension effective from 5.2.1985. A major penalty charge memo. was served on him for his unauthorised absence.

(c) A detailed inquiry was conducted and the Inquiry Officer submitted his report holding the charges levelled against the applicant as proved. The disciplinary authority i.e. the respondent No.3 accepted the findings of the Inquiry Officer and imposed the penalty of removal of the applicant from service with effect from 30.4.1991.

(d) The applicant challenged the said punishment in the appeal before the respondent No.2. The respondent No.2,however, modified the punishment of removal into that of compulsory retirement from service. Thus the applicant was compulsorily retired from service from 20.11.1991. At this juncture, it may be noted that even though the appellate authority compulsorily retired the applicant from service, the respondents failed to pay pension and other benefits to the applicant as per the orders of the appellate authority.

(e) The applicant filed O.A.No.101 of 1992 before this Tribunal challenging the punishment of compulsory retirement imposed on him by the respondent No.2. This Tribunal dismissed the said O.A. Being aggrieved by the said dismissal, the applicant approached the Hon'ble Supreme Court in Civil Appeal No.4366 of 1994. On 9.5.1994 the Hon'ble Supreme Court was pleased to accept the appeal and to give directions as under :-

" The appeal is, therefore, partly allowed and instead of compulsory retirement the penalty of withholding of two increments without cumulative effect would be imposed on the appellant. The appellant would be re-instated with continuity of service but would not be entitled to back wages."

(f) After the disposal of the appeal by the Supreme Court, the applicant was reinstated into service with effect from 1.9.1994. However, it is submitted that the applicant did not join the post offered to him but joined the duties at Hyderabad on 16.11.1994.

(g) Thus his pay was fixed at Rs.1100/- in the scale of pay of Rs.975-1660/-.

(h) After the decision of the Hon'ble Supreme Court, the applicant submitted a representation for certain reliefs based on it. He was also not satisfied with the fixation of pay at Rs. 1100/- per month at the time of his reinstatement.

(i) He filed O.A.No.434 of 1996 before this Tribunal claiming certain reliefs which eventually based on the decision of the Hon'ble Supreme Court. On 29.10.1996 this Tribunal considered each and every reliefs claimed by the applicant in the O.A. and gave certain directions.

(j) While implementing the directions of this Tribunal in OA No.434/96, the respondents issued the order dated 20.1.1997 Annexure/1(at page 14) of the O.A.

(k) The applicant was not satisfied with the said order dated 20.1.1997. Hence he has filed this O.A. for the following reliefs:-

(i) To declare the action of the respondents in denying the benefit of continuous service to the applicant as illegal, arbitrary, and violative of Supreme Court judgment and in consequence direct the respondents to :-

(a) treat the period of absence of the applicant from 5.2.85 to 8.5.94 as continuing service with consequential benefits like accrual of leave, increments, promotion ;

(b) treat the period of absence of the applicant as duty with full pay from 9.5.94 to 16.11.94;

(c) implement the order of compulsory retirement with suitable pension if it is not accepted to treat the period as deemed suspension; and

(d) fix the pay of the applicant at the stage of Rs.1,440/- as on 1.2.95 in the scale of Rs.975-1660/-;

4. He has challenged the order dated 20.1.1997 on the following grounds :-

(a) The respondents unjustifiably denied the benefit of continuous service and consequential benefits with accrual of leave, increments, pay fixation, promotion, HRA and CCA etc. in violation of the Supreme Court judgment dated 9.5.1994.

(b) The action of the respondents is violative of Rule 129 of P & T Manual Vol -III and FRs 54, 54-A, 54-B and Rule 10(3) and (4) of the CCS (CCA) Rules,1965 and also violative of Articles 14 and 16 of the Constitution of India.

5. The respondents have filed their counter stating that the applicant was reinstated and posted as Driver at MMS, Nellore in accordance with the orders dated 25.8.1994; that the applicant expressed his inability to join at Nellore vide his representation dated 14.9.1994 and prayed for posting him at Hyderabad; that the applicant was reinstated as Driver in MMS, Hyderabad effective from 16.11.1994; that there was no vacant post of Driver available at MMS, Hyderabad from 24.5.1994 till the date of death of one Arun H.Badkar on

that date
4.11.1994;and/ 24.5.1994 is the date on which a copy of the judgment of the Hon'ble Supreme Court was furnished to the respndent. The respondents submit that notional pay fixation is not admissible as the period was treated as non-duty by the competent authority as per rules; that the applicant was not compulsorily retired as stated by him; that since the official has not been exonerated of the charges levelled against him, the period of absence from 30.4.1991 to 15.11.1994 was treated as non-duty under the provisions of FR 54(2) read with the directions of the Hon'ble Supreme Court of India and of
/this Bench dated 29.10.1996. They further submit that the period of absence of the applicant from 7.9.1994 to 15.11.1994 was regularised after granting leave vide Office Memo No.MSE/60/PF/96-97 dated 2.1.1997. They submit that as per the directions of the Hon'ble Supreme Court, the applicant was required to be reinstated into service with continuity of service but without back wages. Accordingly, they submit that he was reinstated into service and his pay and allowances for the period from 1.9.1994 to 15.11.1994 have been paid to the applicant and his service was regularised. The period of absence of the applicant from 5.2.1985 to 31.8.1994 was treated as non-duty vide Office Memo No.MSC/66/PF/95/96 dated 25.10.1995. Hence no notional fixation was permissible; that in view of the directions of the Hon'ble Supreme Court, the applicant is not entitled to any benefits. They have fully complied with the directions of this Tribunal dated 29.10.1996 in O.A.No.434/96. The period of absence was treated as suspension and the period of absence from 30.4.1991 to

16.11.1994 was treated as the period not spent on duty vide Memo dated 25.10.1995 and that there are no merits in this O.A.

6. It is an admitted fact that the disciplinary authority removed the applicant from service and the appellate authority modified the said punishment to that of compulsory retirement. However, the Hon'ble Supreme Court modified the said punishment to that of reduction in pay by two stages.

7. According to FR 54(1)(a) of the Fundamental Rules, the authorities are required to consider whether the applicant is entitled to pay and allowances for the period of his absence from duty including the period of suspension preceding his dismissal, removal or compulsory retirement, as the case may be. The said rule reads as follows :

> " F.R.54(1) When a Government servant who has been dismissed, removed or compulsorily retired is reinstated as a result of appeal or review or would have been so reinstated(but for his retirement on superannuation while under suspension or not), the authority competent to order reinstatement shall consider and make a specific order -
>
> (a) regarding the pay and allowances to be paid to the Government servant for the period of his absence from duty including the period of suspension preceding his dismissal, removal, or compulsory retirement, as the case may be; and
>
> (b) whether or not the said period shall be treated as a period spent on duty."

The learned counsel for the applicant brought to our notice that the authorities in the impugned order dated 20.1.97 have failed to specify whether or not the said period would be treated as a period spent on duty as required undlfer F.R.54(1)(b) of the Fundamental Rules. Further, he submits that even though the appellate

authority had imposed the punishment of compulsory retirement effective from 20.11.1991, the applicant was not paid any pension and pensionary benefits from 20.11.1991 till the date of his reinstatement. It is his case that in view of the modification of the said punishment by the Hon'ble Supreme Court, the authorities are required to treat and specify it as deemed suspension.

8. The following dates are required to be noticed by us for understanding the case of the applicant.

(a)	5.2.1985	The applicant was placed under suspension
(b)	30.4.1991	The applicant was removed from service.
(c)	20.11.1991	The appellate authority modified the punishment of removal to that of compulsory retirement from the said date.
(d)	9.5.1994	The Hon'ble Supreme Court set aside the punishment of compulsory retirement and in its place, imposed the punishment of withholding of two increments without cumulative effect.
(e)	24.5.1994	The respondents were supplied with the copy of the judgment of the Hon'ble Supreme Court.
(f)	1.9.1994	The applicant was given a posting. However, he did not comply with the posting order.
(g)	16.11.1994	The applicant reported for duty at Hyderabad.
(h)	5.2.1985 to 19.11.1991	The applicant was entitled to subsistence allowance as per rules.
(i)	20.11.1991 to 8.5.1994	The applicant is entitled to pension and pensionary benefits on the basis of the imposition of the punishment of compulsory retirement by the appellate authority.
(j)	24.5.1994 to 1.9.1994	The applicant is entitled to full pay and allowances as there was delay on the part of the respondents to give him posting order on the basis of the decision of the Hon'ble Supreme Court.

(k)	2.9.1994 to 16.11.1994	The applicant cannot claim anything as he himself failed to obey the posting order. It is submitted that the applicant submiteted a leave application for the said period and the leave was sanctioned.

9. Keeping all these dates in view, we must consider, whether the reliefs claimed by the applicant in the O.A.No.434/96 were complied as per the directions of this Tribunal dated 29.10.1996.

10. The impugned order dated 20.1.1997 has been passed in accordance with the directions given by this Tribunal in O.A.No.434 of 1996. F.R.53(1) clearly states that a Government servant under suspension or deemed to have been placed under suspension by an order of the appointing authority shall be entitled to the payments as detailed in clauses (i) and (ii) of the said FR 53(1). When the Hon'ble Supreme Court set aside the punishment of compulsory retirement on 9.5.1994, the logical conclusion is that the applicant was placed under deemed suspension from 20.11.1991 to 8.5.1994. Therefore, under FR 53 the applicant is entitled to subsistence allowance.

11. In view of the decision of the Hon'ble Supreme Court to withhold two annual increments of the applicant without cumulative effect, the appellate authority should modify his order and issue the order in conformity with the directions of the Hon'ble Supreme Court. The learned counsel for the applicant submitted that the authorities while considering his claims made in O.A. had not properly interpreted the Fundamental Rules, particularly, F.R.54(1)(b) and also unjustifiably denied the subsistence allowance for the period from 20.11.1991 to 8.5.1994.

Even though they denied the subsistence allowance for the said period, they failed to indicade as per FR 54(1)(b) whether or not the said period shall be treated as a period spent on duty.

12. In O.A.No.434 of 1996 and also in this O.A. thelearned counsel for the respondents took a stand that the interpretation of the order of the Hon'ble Supreme Court is that the applicant is not entitled to back wages and that he can only be reinstated into service notionally from 20.11.1991 and his two annual increments would be withheld. In beteween the period, the applicant is not entitled to any kind of payments. Thus it is submitted that "without back wages" means the applicant is not entitled to get anything including the subsistence allowance.

13. In our humble view, interpretation of the decision of the Hon'ble Supreme Court by the respondents' counsel causes injustsice to the applicant. No doubt, 'wages' is a wide term which may include all the remunerations payable and paid including the subsistence allowance.

14. In the case of Regional Director, ESI Corporation v. Popular Automobilies, reported in 1997 SCC (L&S) 1842, the Hon'ble Supreme Court was considering whether an employer is under the obligation to make contribution to the ESI Corporation when his employee was under suspension. The employer had taken a stand that since the employee was suspended he was no longer under obligation to contribute to the ESI Corporation . Therefore, their Lordships considered payment of subsistence allowance and the obligation of

the employer to contribute to the ESI Corporation even though the employee was under suspension. The Hon'ble Supreme Court in paras 9 to 11 has been pleased observe as follows :-

> "9. ... ... It is axiomatic to say that during suspension period pending enquiry the employer-employee relationship does not come to an end. It would come to an end only when after enquiry his services on proof of misconduct are ordered to be terminated. Till then he continues to be an employee for all purposes subject to only two consequences flowing from such interim suspension, namely, in the first place the employee will remain prohibited from actually offering his services and discharging his duties as the employer does not want him to do so and secondly during the period of suspension pending enquiry the remuneration payable to the employee will get curtailed and will be treated as subsistence allowance as legally permissible under the rules and which may range from 50% at the lowest to even 100% of the wages at the highest if the suspension continues beyond the requisite period as contemplated by the service rules and regulations concerned. It is also to be kept in view and there is no dispute on this aspect that even during suspension when the employee is being paid subsistence allowance and not full wages he remains entitled to get all the benefits as available to working employees on the same basis as laid down by various provisions of Chapter V. It is not as if a suspended employee gets lesser benefits as compared to a working employee under the provisions of the said chapter. They stand on a par. It is also to be appreciated that subsistence allowance is not to be refunded by the suspended employee whatever may ultimately be the result of the domestic enquiry. Hence only because the total remuneration paid to the suspended employee gets reduced to 50% or to any higher percentage going up to 100% it is not possible to appreciate as to how it can be said that on the amount of subsistence allowance received by him permanently he is not bound to contribute any amount to the Corporation and equally the employer of such a suspended employee is also not bound to make his parallel contribution as per the rates provided under the Act especially when all the benefits of statutory insurance covewrage are made available by the Corporation to such a suspended emplloyee. However, great reliance was placed by learned counsel for the respondents on a decision of this Court in the case of BALA SUBREAHMANYA RAJA RAM v. B.C.PATIL, wherein it has been observed that the word "remuneration" means the amount

payable for service rendered. The aforesaid observation was made in the context of the Payment of Wages Act with which this Court was concerned in the said decision. We fail to appreciate how the said decision can be of any real assistance to the respondents in the present cases as the term "wages" as defined by Section 2 sub-section (22) of the Act means all remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied,were fulfilled. Thus it is a more comprehensive definition which takes in its sweep in the first part all remuneration paid or payable to the employee. Therefore, the amount payable to an employee or actually paid to an employee if the terms of the contract of employment were fulfilled would constitute wages. A regular employee who is willing to work and whose services are taken by the employer gets the remuneration for the work actually done by him under the contract of employement. But in case of a suspended employee he gets lesser amount by way of susbstence allowance but that is also as a remuneration for being continued on the roll of employment as an employee and so far as he is concerned, he cannot be said to have not fulfilled his part of the terms of contract of employment as he is willing to offer his services but it is the employer who prohibits him from actually giving his services under the contract of employment. The situation almost resembles to grant of half-pay leave or leave on even more than half pay as the case may be. Therefore, it cannot be said that the suspended employee does not fulfil his part of the contract of employment or commits breach of any of the terms of the contract of employment. The prohibition, if any, is imposed by the employer against him and that prohibition in the absence of any rules and regulations governing the payment of remuneration during suspension to the employee concerned would have entitled the suspended employee to get the full remuneration because he was ready and willing to perform his part of the contract of employment but it was the employer who prohibited him from performing his duties. But if there is a valid service regulation which reduces the scale of remuneration during suspension, the employee gets that reduced permissible scale of remuneration by way of subsistence allowance. All the same it cannot be said that it is not the remuneration paid to him though at a reduced rate.

10. It is also to be appreciated that a suspended employee who gets all the benefits under the Act, may in given contingencies remain suspended for a number of years pending the enquiry and in the meantime may be entitled to draw 100% of wages as subsistence allowance

under the relevant service rules and regulations. Under these circumstances, even though he may get full wages by way of subsistence allowance and even though he may be entitled to all the benefits under the Act he may not be required to contribute anything if the contention of the learned counsel for the respondents is accepted and ultimately if he is removed from service after the decision in the departmental enquiry he would walk away with all benefits under the Act without any corresponding obligation to contribute towards the said benefits. On the other hand, if he is fully exonerated and reinstated in service and in the meantime if he had contributed proportionately to the extent of subsistence allowance earned by him the balance of remuneration which maybe paid to him for the back period may make him liable to contribute only remaining proportionate amount of contribution to the extent of additional remuneration paid to him to make up for the difference between the full wages for the period of erstwhile suspension in question and the actual subsistence allowance given to him and for which he had already contributed earlier. In either case the employer will also remain liable to give his proportionate contribution along with the employee's contribution both on subsistence allowance amount as well as on balance of wages paid up to the employee later on. If the suspended employee is ultimately removed from service, there would arise no occasion for such employee to make additional contribution on any extra amount other than subsistence allowance received by him and equally the employer would not be called upon to make proportionate contribution on any extra amount save and except on such subsistence allowance received by the employee concerned.The interpretation canvassed by learned counsel for the respondents would create an anomalous situation as aforesaid while the submission canvassed by learned counsel for the appellant-Corporation would avoid the same and would fructify and enhance the benevolent purpose underlying the enactment of this welfare legislation.

11. In this connection one submission of learned counsel for the respondents requires to be noted. He submitted, placing reliance on the inclusive part of the definition of the term "wages" in Section 2 sub-section (22) of the Act, that in a case where the employee is ready to work but the employer does not allow him to workby imposing lock-out or lay-off, payment made to such employee gets covered only by the inclusive part of the deinition which means that otherwise it would not have been covered by the first part of the definition. That similar is the situation where the workman is suspended pending enquiry and payment is made

to him by way of subsistence allowance.In such a case also the employee is ready to work but the employer does not allow him towork. On the analogy of the payment made during the period of lockOout or lay-off, such subsistence allowance would also not be covered by the first part of the definition and as the inclusive part of the definition does not mention subsistence allowance, it should be treated to be outside the sweep of Section 2 sub-section (22) of the Act. In our view, this submission does not stand scrutiny. It has to be kept in view, as noted earlier, that subsistence allowance paid to a suspended employee is not recoverable or refundable even though ultimately the suspended employee is removed from service on the proof of misconduct for which he was proceeded against in departmental enquiry. The Kerala Payment of Subsistence Allowance Act,1972 also clearly provides in Section 3 sub-section (2) that an employee shall not in any event be liable to refund or forfeit any part of the subsistence allowance admissible to him under sub-section (1). But even apart from the said statutory provision onthe general principles applicable to subsistence allowance paid to an employee pending departmental enquiry no such allowance is refundable by him in case the employee gets ultimately removed from service on proof of misconduct. So far as the submission of learned counsel for the respondents on the inclusive part of the definition is concerned, it has to be kept in view that if the first part of the definition of "wages" will include all remuneration paid or payable in cash to an employee if the terms of contract of employment, express or implied, werefulfilled and consequently even if an employee is suspended as per the service regulations by the employer pending enquiry it cannot be said that the employee has committed breach of any of the terms of the contract of employment. Nor can it be said that the employer has committed breach of any of the terms of the contract of employment as the service rules applicable to the employee would be part and parcel of his conditions of employment and acting on the said service rules if the employer prohibits the employee from reporting for duty and doing actual work the employer cannot be said to be committing breach of any of the terms of the contract of employment. Thus neither party can be said to have committed breach of any of the terms of the contract of employment when legally permissible suspension pending enquiry is imposed by the employer on the employee. Such is not the case when a lock-out or a lay-off is imposed by the employer as in case of lock-out the employer commits breach of the contract of employment by refusing to give work to the employee for no fault of his. Similarly

> in case of lay-off the employees are refused work by the employer for no fault of the employees.Therefore, in either case the employer would be committing breach of the terms of the contract of employment by his own act which may be justified or otherwise. Under these circumstances, therefore, but for the inclusive part of the definition encompassing payment made to an employee in respect of any period of lock-out or lay-off, the said payment would not have been covered by the definition of "wages" under Section 2 sub-section (22) of the Act. The first part of the said definition obviously would not apply to such a case as terms of the contract of employment cannot be said to be complied with at least by the employer in such an eventuality. Such is not the case when the employer acting as per terms of employment governing the employees suspends him pending enquiry."

15. Though the subsistence allowance can be included within the term "wages", in view of the observations made by the Hon'ble Supreme Court, the applicant is entitled to subsistence allowance for the period from 20.11.1991 to 8.5.1994. This is moreso when the respondents categorically admitted that the applicant was not paid any pension and pentionary benefits when the appellate authority modified the punishment of removal to that of compulsory retirement. That means, between 20.11.1991 and 8.5.1994 neither the applicant was paid subsistence allowance nor pension and pensionary benefits in accordance with the decision of the appellate authority. The applicant cannot be made to suffer at both ends by neithergettingthe pension as per the directions of the appellate authority nor getting any subsistence allowance in view of the fact that the punishment of compulsory retirement was later modified by the Hon'ble Supreme Court and that as a consequence thereof, the applicant has been under deemed suspension in accordance with F.R.53 of the Fundamental Rules.

16. It is submitted by the learned counsel for the applicant that the respondent No.2, the appellate authority has not so far modified the order in accordance with the directions of the Hon'ble Supreme

Court.

17. Having regard to these facts, we feel that the respondents have not complied with the directions given in O.A.No.434 of 1996 dated 29.10.1996. The impugned order dated 20.1.1997 suffers from legal infirmities. Hence it is liable to be set aside.

18. We make it clear that either the applicant or the respondents may move the Tribunal for clarification of the decision dated 29.10.1996 in view of the decision of the Hon'ble Supreme Court cited above, for, in our humble view, the applicant cannot be penalised both the ways i.e. depriving the pension and pensionary benefits and also the subsistence allowance for the period from 20.11.1991 to 8.5.1994.

19. In this view of the matter, we set aside the order dated 20.1.1997.

20. We direct the respondents to implement the decision in O.A.No.434 of 1996 dated 29.10.1996 in accordance with law and preferably within 4(four) months from the date of receipt of a copy of this order. In case they feel any difficulty in implementing the said directions, either of the parties may file a clarificatory petition before the Tribunal.

21. With the aforesaid observations, the O.A. is allowed. No order as to costs.

5.3.98

(B.S.JAI PARAMESHWAR)
MEMBER(JUDICIAL)

(H.RAJENDRA PRASAD)
MEMBER(ADMINISTRATIVE)

05 MAR 98

DATED THE 5th MARCH,1998.

Deputy Registrar

DJ/

To

1. The Chief Postmaster General,
   A.P.Circle, Union of India,
   Hyderabad-1.

2. The Director of Postal Services,
   City Region (HCR), O/o the Chief Post Master
   General, A.P.Circle, Hyderabad-1.

3. The Manager, Mail Motor Services(MMS)
   Hyderabad.

4. One copy to Mr.B.S.A.Satyanarayana, Advocate, CAT.Hyd.

5. One copy to Mr.N.R.Devraj, Sr.CGSC. CAT.Hyd.

6. One copy to HBSJP.M(J) CAT.Hyd.

7. One spare copy.

8. One copy to DR(A) CAT.Hyd.

pvm.

2/3/98

I Court

TYPED BY CHECKED BY

COMPARED BY APPROVED BY

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
HYDERABAD BENCH AT HYDERABAD

THE HON'BLE MR.JUSTICE
VICE-CHAIRMAN

AND

THE HON'BLE MR.H.RAJENDRA PRASAD:M(A)

The Hon'ble MR B S Jaiparameswar : M(J)

DATED: 5-3-1998

~~ORDER~~/JUDGMENT:

M.A./R.A./C.A.No.

in

O.A.No. 289/97

T.A.No. (W.P)

Admitted and Interim directions
Issued.

Allowed

Disposed of with direction

Dismissed.

Dismissed as withdrawn

Dismissed for Default.

Ordered/Rejected.

No order as to costs.

pvm.