

**Central Administrative Tribunal
Principal Bench**

OA NO. 3937/2013

Order reserved on : 22.01.2016

Order Pronounced on : 10.03.2016

Hon'ble Mr. A.K.Bhardwaj , Member (J)
Hon'ble Mr. V. N. Gaur, Member (A)

Chand Singh
S/o Sh. Chhelu Ram,
R/o H.No. 1625-E, Dhansa Bus Stand,
Najafgarh, New Delhi-43.

- Applicant

(By Advocate: Sh. Yogesh Sharma)

Vs.

1. Union of India through
The Secretary,
Ministry of Health & Family Welfare,
Govt. of India,
Nirman Bhawan, New Delhi.
2. The Director General of Health of Health Services,
Directorate General of Health Services
Ministry of Health & Family Welfare,
Govt. of India,
Nirman Bhawan, New Delhi.
3. The Director,
National Centre for Disease Centre,
Directorate General of Health Services
Govt. of India,
22-Shamnath Marg,
Delhi-54.

- Respondents

(By Advocate: Sh. H.K.Gangwani)

ORDER**Hon'ble Shri V.N.Gaur, Member (A)**

The applicant has filed the present OA with the following prayer:

- (i) That the Hon'ble Tribunal may graciously be pleased to pass an order of quashing the impugned order dt. 16.9.2013 and undated order in file No.721 (Annex.A/2) and consequently, pass an order directing the respondents grant the pension to the applicant as per the last pay of the applicant and as per the Govt. of India instruction as per recommendation of 6th CPC.
- (ii) That the Hon'ble Tribunal may graciously be pleased to pass an order directing the respondents to grant the subsistence allowance to the applicant in the revised pay scale w.e.f. 01.01.1986 and w.e.f. 1.1.1996 till his retirement with all consequential benefits, including the arrears of difference of subsistence allowances and bonus and special pay etc. during suspension period.
- (iii) That the Hon'ble Tribunal may further graciously be pleased to pass an order directing the respondents to fix the pension of the applicant on the basis of last monthly salary of the applicant in the revised pay scale with all consequential benefits including the arrears of difference of the amount of the pension with interest.
- (iv) That the Hon'ble Tribunal may further graciously be pleased to pass an order directing the respondents to release the leave encashment amount and gratuity amount of the applicant with interest from the date of retirement till payment at the rate of 18% PA.
- (v) That the Hon'ble Tribunal may further graciously be pleased to pass an order directing the respondents to grant all the pay and allowance during the suspension period, after granting the increments and fixation of pay with all consequential benefits.

- (vi) Any other relief which the Hon'ble Tribunal deem fit and proper may also be granted to the applicant with the cost of litigation and with interest on arrears.

2. The facts of the case in brief are that the applicant who was working as UDC under respondent no.3 was arrested on 29.01.1985 in connection with a criminal case and was released on bail on 12.09.1985. He was placed under deemed suspension w.e.f. 19.01.1985 and granted subsistence allowance @ 50% which was later raised to 75% of pay. The applicant superannuated on 31.12.1996. He was acquitted in the criminal case of Addl. Session Judge, Tis Hazari by judgment dated 1.2.2000 but the State filed an appeal before the Hon'ble High Court and the same is still pending. During the period of suspension the Government has revised the pay scale of the post of the applicant twice on the recommendations of 4th and 5th Pay Commissions. But the subsistence allowance of the applicant continued to be paid on the basis of his pay on the date of his suspension in 1985.

3. Learned counsel for the applicant submitted that the applicant had rendered more than 25 years of qualifying service on the date of his suspension, and therefore, he was entitled to maximum pension which is admissible to the applicant on the basis of qualifying service up to the date immediately preceding the date of his suspension in terms of Rule 69 of CCS Pension

Rules. The respondents have, however, granted pension on the basis of the subsistence allowance being given to the applicant @ 75% of his pay.

4. Learned counsel further submitted that the applicant was also entitled for revision of pay on the basis of the recommendations of 4th and 5th Pay Commissions effective from 01.01.1986 and 01.01.1996 and consequent revision of pension. His repeated representations in this regard have not been accepted by the respondents and the latest communication for continuation of pension at the old rates was issued on 16.09.2013 (Impugned). According to the learned counsel this issue was no more res integra because a Full Bench of this Tribunal in its order dated 26.08.2002 – **J.S.Kharat vs. Union of India**, 2002 (3) ATJ 276 had taken a view that a suspended employee was entitled to subsistence allowance on the basis of revised pay scale, which is payable month by month on the basis of the pay scale which he would have been entitled to had he been in service. Similar view was taken by this Tribunal in **A.U.Gopi vs. Union of India & Ors.**, 2006 (2) ATJ 114. In OA No.159/2013 – **Sanjay Dawar & ors. vs. Govt. of NCT of Delhi**, this Tribunal had after taking note of OA No.4158/2012 and OA No.2546/2006 had reiterated its view that the applicant was entitled to grant of increments of pay for the period during which he remained under suspension. Learned counsel also referred to the order of this Tribunal in OA

No.688/2013 decided on 11.11.2014 which was authored by one of us [Member (J)] as a part of a different Bench.

5. Learned counsel for the applicant submitted that the respondents were withholding the payment of leave encashment which was due to the applicant. Rule 39 (3) of CCS (Leave) Rules authorised the competent authority to withhold whole or part of cash equivalent of earned leave in the case of a Government servant who retires from service on attaining the age of retirement while under suspension of disciplinary or criminal proceedings are pending against him, if in the view of such authority there is a possibility of some money becoming recoverable from him on conclusion of the proceedings against him. In the present case there is no such averment by the respondents that there is any likelihood of money being recovered from the applicant and hence there is no justification of withholding of leave encashment.

6. Learned counsel for the respondents did not make any submission with regard to the applicant's averment that his pension has not been fixed in accordance with Rule 69 of CCS Pension Rules. With regard to the leave encashment he submitted that leave encashment was also a part of the retirement dues which can be released only when the criminal case against him is finally disposed of. Though the applicant was acquitted by the Court of Additional Sessions Judge, the State

has filed an appeal before the Delhi High Court and it is trite that for the purposes of release of pensionary benefits, revision of pay etc. the criminal case will be deemed to be continuing till it is disposed of by the Hon'ble High Court. He further submitted that the respondents are following the Government of India's decision dated 27.08.1958 reproduced at Sl. No.2 below FR-53 in Swamy's Compilation of Fundamental Rules. According to that decision the revision of scale of pay has been placed into two classes:

- (i) where the applicant has been suspended after the effective date of revision of pay and
- (ii) where the Government servant was already under suspension at the time of revision of pay.

7. In the latter case, the benefit of the revised pay scale can be given to him only after the finalisation of the criminal case and the decision with regard to the period of suspension whether it is treated on duty or not. The respondents are, therefore, not in a position to consider the request of the applicant for giving him benefit of the revision of pay following the recommendations of the Pay Commissions. With regard to the orders of this Tribunal cited by the applicant, learned counsel submitted that the main stress of the earlier orders of the Tribunal is the pronouncement by the Full Bench in J.S.Kharat (supra). However, the view taken by the Full Bench has already been over turned by the Hon'ble Supreme

Court in **Union of India vs. R.K.Chopra**, Civil Appeal No.1096/2010. In that case the Hon'ble Supreme Court has upheld the action taken by the Government to withhold the benefit of pay revision of suspended employee till the conclusion of the departmental proceedings in terms of Note 3 under Rule 7 of Revised Pay Rules and FR 53 (1) (ii) (a) along with the clarification by OM dated 27.08.1958. The applicant has to, therefore, await for finalisation of a criminal case in the Hon'ble High Court.

8. Rejoining the argument, learned counsel for the applicant submitted that R.K.Chopra (supra) had already been noted by this Tribunal in para 5 of the order in OA No.688/2013 by stating that this judgment was already considered in OA No.3470/2011. Thereafter the Tribunal discussed the Full Bench decision in J.S.Kharat (supra) and agreed with the view taken by the Coordinate Benches and the Full Bench. The Tribunal, therefore, in this case also will be bound by the view already taken on this issue in other similar cases.

9. We have heard the learned counsels and perused the record.

10. The main issue before us is whether the applicant who has been under suspension since 1985 till the date of his retirement is entitled for revision of subsistence allowance on the basis of pay revision following the recommendations of 4th, 5th and 6th Pay

Commissions. In support of his contention that such revision ought to have been done, learned counsel has mainly relied on J.S.Kharat (supra) and A.U.Gopi (supra).

11. In J.S.Kharat (supra) the reference made to Full Bench was in respect of proviso to Rule 6 (1) of the Railway Servants (Revised Pay) Rules, 1986 and Note 3 to Rule 7 of CCS (Revised Pay) Rules, 1997, which are analogous to Note 3 under Rule 7 of RP Rules referred to earlier. The Full Bench after discussing **Namdeo Sitaram Kadpate vs. Union of India**, 1997 (2) ATJ 296, **Sumer Chand Khajuria vs. State and others**, 1991 (3) AISLJ 168, **Swarnamba B.R. vs. Karnataka State Agricultural Marketing Board**, 1988 (2) SLR 541, **Umesh Chand Misra vs. Union of India**, (1993) 24 ATC 243, **Khem Chand vs. Union of India**, 1963 Supp. 1 SCR 229, **State of Maharashtra vs. Chandrabhan Tale**, (1983) 3 SCC 387, **Jagdamba Prasad Shukla Vs. State of U.P and others**, (2000) 7 SCC 90]; **P.L. Shah vs. Union of India and Anr.**, 1989- 1 L.L.N. 546, **Umesh Chandra Misra vs. Union of India**, (1993) 24 ATC 243, **A. Raghavan vs. Tamil Nadu Civil Supplies Corporation Ltd.**, 1995-II L.L.N. 1084, **B.B.Lakshmanan vs. Union of India & Anr.**, OA No.1730 of 1992 dt. 3.2.1994 (249, Swamy's CL Digest 1994), **P.Xavier vs. Chief Personnel Officer and Anr.**, O.A. No.1497 of 1993 dt. 28.06.1995 and **R.P. Kapur Vs. Union of India & Ors.**, 1999 (2) SCSLJ 252 concluded that a Government servant during

suspension is entitled for subsistence allowance on the basis of revised pay scale where revised pay scale came into effect during his suspension. It further noted that nothing from rules have been pointed out by counsel for respondents to show that Government servant under suspension was not to be dealt with under revised pay scales. It was only the Railway Board letter which deprived suspended employees from Railways to pay subsistence allowance on the revised pay scale. The relevant extract from the order of Full Bench is reproduced below:

“14. 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 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. ... 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 stand 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 cases of Swarnamba (supra),

Khajuria (supra) and Misra (supra) will apply to government servants under suspension at relevant time.”

12. In R.K.Chopra (supra) the Hon’ble Supreme Court dealt with the Full Bench order of this Tribunal in J.S.Kharat (supra) and discussed the Supreme Court judgments referred to in the Full Bench order. Hon’ble Apex Court noted that in none of the aforesaid judgments the validity of Note 3 to Rule 7 of Revised Pay Rules came up for consideration. After making a reference to FR 53 and the Government of India decision dated 27.08.1958, the Court took a view that if the revision of pay took effect from the date prior to the date of suspension then the employee would be entitled to benefit of implementing the pay and subsistence allowance for the period of suspension but if the revision of scale of pay was with effect from a date falling within the period of suspension then the period of revision of pay and subsistence allowance will accrue to him only after reinstatement depending on the fact that period of suspension has been treated on duty or not. The Hon’ble Supreme Court held that the Tribunal and High Court had committed an error in holding that the applicant was entitled to revised pay rules. The relevant portion of judgment in R.K.Chopra (supra) is reproduced below:

“7. We notice both the High Court as well as the Tribunal has placed heavy reliance on the order of Full Bench of the tribunal in **J.S. Kharat's** case (supra) and took the view that the delinquent officer would be entitled to enhanced subsistence allowance on the basis of the upward revision of pay based on the 5th Central Pay Commission Report, implemented by the Revised Pay Rules. Reference was also

made to the decisions of this Court in *State of Maharashtra vs. Chandrabhan Tale* [(1983) 3 SCC 387]; *Khem Chand vs. Union of India* [1963 Supp. 1 SCR 229]; *Jagdamba Prasad Shukla Vs. State of U.P and others* [(2000) 7 SCC 90]; *P.L. Shah vs. Union of India and Anr.* [(1989) 1 SCC 546]; *R.P. Kapur Vs. Union of India & Ors.* [(1999) 8 SCC 110]; and *Umesh Chandra Misra vs. Union of India* [1993 Supp. (2) SCC 210]

8. We notice that in none of the aforesaid judgments the validity of Note 3 to rule 7 of the Revised Pay Rules came up for consideration. In *Chandrabhan's case* (supra), this Court was examining the validity of the second proviso to Rule 151 (1) (ii) (b) of the Bombay Civil Service Rules, 1959 which prescribed payment of subsistence allowance at the rate of Rs. 1 per month. Court struck down the proviso as void and unreasonable and ordered that the Civil Servant is entitled to the normal subsistence allowance. The above ruling is of no assistance to the respondent.

9. In *Khem Chand's case* this Court was examining the validity of Rule 12(4) of the CCS (CC&A) Rules 1957 which has nothing do with the question involved in the present case. This Court was generally explaining the scope and effect of a suspension order stating that the real effect of a suspension order is that though a Government servant continues to be a member of the Service he is not permitted to work during the period of suspension and he is entitled to subsistence allowance which is normally less than the salary.

10. In *Jagdamba Prasad Shukla's case* (supra) subsistence allowance was denied to the Government Servant since he had omitted to furnish the certificate as required under the U.P. Fundamental Rules 53(2) indicating that he was not employed elsewhere during the period of suspension. Non payment of subsistence allowance, this Court held, has vitiated the departmental enquiry and the consequent removal order.

11. In *P.L. Shah's case* (supra) this Court was dealing with a case of reduction of subsistence allowance from 50% to 25% of salary. Order was challenged before the Tribunal which dismissed the petition on the ground of delay. This Court set aside the orders of the Tribunal and the matter was remanded for fresh consideration, holding that the subsistence allowance should be sufficient for the bare sustenance in this world in which prices of the necessities of life are increasing every day on account of conditions of inflation obtaining in the country. It was held that since Government Servant cannot engage himself in any other activity during the period of suspension and the amount of subsistence allowance payable to the Government Servant be reviewed from time to time when proceedings drag on long time even though there may be no express rule insisting of such review.

12. In *R.P. Kapur's case* (supra), this Court was dealing with the scope of Railway Services (Pension) Rules, 1993 and the effect of Note 1 and proviso to Rule 50 and the Court took the view that the above-mentioned proviso is not applicable to a case of compulsory retirement. The scope of Note 3 to Rule 7 was not in issue in *R.P. Kapur's case*.

13. In Umesh Chandra Misra's case (supra), this Court was dealing with the case of a railway employee who was denied subsistence allowance at the rate of 75% of the salary for the period from May 20, 1976 to February 17, 1977 and this Court directed the respondents to pay him the subsistence allowance from November 20, 1975 to May 19, 1976 at the rate of 50 per cent of the salary and from May 20, 1976 to February 17, 1977 at the rate of 75 per cent of the salary with interest on both the amounts with a further direction that the subsistence allowance be paid on the basis of the revised scale of pay. The legality of Note 3 to Rule 7 was never an issue in that case.

14. The claim for payment of subsistence allowance of a Government servant is dealt with in Chapter VIII of Fundamental Rules. FR 53 which relevant for our purpose reads follows:-

"F.R.53.(1) 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 following payments, namely:-

(i) xxxx xxxx xxxx xxxx

(ii) in the case of any other Government servant--

(a) a subsistence allowance at an amount equal to the leave salary which the Government 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 three 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 three 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 Government 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 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 Government servant;

(iii) the rate of dearness allowance will be based on the increased or, as the case may be, the 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 Government servant was

in receipt on the date of suspension subject to the fulfillment of other conditions laid down for the drawal of such allowances.

XXXX XXXX XXXX

15. The said Rule provides that the Government servant under suspension shall be entitled to subsistence allowance at an amount equal to the leave salary which the Government 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. The proviso to Rule 53 (1)(ii) (a) says that where the period of suspension exceeds three months, the authority is competent to vary the amount subject to some restrictions.

16. We may in this connection refer to a Government of India order G.M.O.M. No. F-2(36)-Ests/-III/58 dated 27th August, 1958 given in the Swamy's compilation of Fundamental and supplementary Rules, which deals with the revision of scale of pay while a Government Servant is under suspension. The two categories of cases have been dealt with in that Office Memorandum. One refers to cases in which the revised scale of pay takes effect from a date prior to the date of suspension and other cases in which the revised scales of pay takes effect from a date falling within the period of suspension. Office Memorandum reads as follows:-

"(2) Revision of scale of pay while under suspension

--A question having arisen as to whether a Government servant under suspension might be given an option to elect any revised scales of pay which might be introduced in respect of the post held by him immediately prior to suspension is revised, the Government of India have decided as follows:-

1. Cases in which the revised scale of pay takes effect from a date prior to the date of suspension.

In such cases the Government servant should be allowed to exercise the option under FR 23 even if the period during which he is exercise the option falls within the period of suspension. He will be entitled to the benefit of increase in pay, if any, in respect of the duty period before suspension, and also in the subsistence allowance, for the period of suspension, as a result of such option.

2. Cases in which the revised scale of pay takes effect from a date falling within the period of suspension.

(a) Under suspension a Government servant retains a lien on his substantive post. As the expression 'holder of a post' occurring in FR 23 includes also a person who holds a lien or a suspended lien on the post even though he may not be actually holding the post, such a Government servant should be allowed the option under FR 23 even while under suspension. The benefit of option will, however, practically accrue to him in respect of the period of suspension, only after his reinstatement depending on the fact whether the period of suspension is treated as duty or not.

(b) A Government servant who does not retain a lien on a post the pay of which is changed, is not entitled to exercise the option under FR 23. If, however, he is reinstated in the post and the period of suspension is treated as duty, he may be allowed to exercise the option after such reinstatement. In such cases, if there is a time-limit prescribed for exercising the option and such period had already expired during the period of suspension, a relaxation may be made in each individual case for extending the period during which the option may be exercised.

17. The above mentioned Rules as well as the Memorandum makes it clear that if there is a revision of scale of pay in respect of a post held by a Government Servant, prior to the suspension period, he is permitted to exercise option under FR 23, even if the period during which he is to exercise the option falls within the period of suspension and then, he will be entitled to the benefit of increase in pay and also in subsistence allowance for the period of suspension, as a result of such option. But if the revised scale of pay takes effect from a date falling within the period of suspension then, the benefit of option, for revised scale of pay will accrue to him in respect of the period of suspension only after his reinstatement depending on the fact whether the period of suspension is treated as duty or not. In the present case, the Revised Pay Rules, came into force on 1st day of January, 1996 when the respondent was under suspension. Therefore, even if he had exercised his option under FR 23 for the benefit of the above pay revision, the same would have accrued to him only after his reinstatement depending on the fact whether the period of suspension is treated as 'on duty' or not. So far as the respondent is concerned, he was dismissed from service on 4.8.2005, therefore the question of the benefit of the revised pay and the subsistence allowance thereon on the basis of Revised Pay Rules did not accrue to him.

18. The Revised pay Rules, which came into force on 01.01.1996 in our view are in conformity with the FR 53 and the above-mentioned Office Memorandum issued by the Government of India.

19. Rule 5 of Revised Pay Rules deals with drawal of pay in the revised scales which reads as follows:-

"5. Drawal of pay in the revised scales.-- Save as otherwise provided in these rules, a Government servant shall draw pay in the revised scale applicable to the post to which he is appointed:

Provided that a Government servant may elect to continue to draw pay in the existing scale until the date on which he earns his next or any subsequent increment in the existing scale or until he vacates his post or ceases to draw pay in that scale.

xxxx xxxx xxxx Rule 6 which deals exercise of option reads as follows:-

6. Exercise of Option.---- (1) The option under the proviso to Rule 5 shall be exercised in writing in the form appended to the Second Schedule so as to reach the authority mentioned in sub-rule (2) within three months of the date of publication of these rules or where an existing scale has been revised by any order

made subsequent to that date, within three months of the date of such order.

Provided that.--

(i) in the case of a Government servant who is, on the date of such publication or, as the case may be, date of such order, out of India on leave or deputation or foreign service or active service, the said option shall be exercised in writing so as to reach the said authority within three months of the date of his taking charge of his post in India; and

(ii) where a Government servant is under suspension on the 1st day of January, 1996, the option may be exercised within three months of the date of his return to his duty if that date is later than the date prescribed in this sub-rule.

xxxx xxxx xxxxx

20. On a combined reading of Rules 5 and 6, it is clear that a Government servant under suspension on the 1st day of January, 1996 is entitled to exercise his option within three months of the date of his return to duty if that date is later than the date prescribed in the sub rule and if the intimation is not received he is deemed to have elected to be governed by the revised scale of pay with effect on and from the 1st day of January, 1996 on his return to duty. Respondent herein did not return to duty since he was dismissed from service and hence there was no question either exercising the option or the application of the deeming provision.

21. Rule 7 deals with the fixation of initial pay in the revised scale , which reads as follows:-

"7. Fixation of initial pay in the revised scale. - (1) The initial pay of a Government servant who elects, or is deemed to have elected under sub-rule (3) of the Rule 6 to be governed by the revised scale on and from the 1st day of January, 1996, shall, unless in any case the President by special order otherwise directs, be fixed separately in respect of his substantive pay in the permanent post on which he holds a lien or would have held a lien if it had not been suspended, and in respect of his pay in the officiating post held by him, in the following manner, namely:-

xxx	xxx	xxx
xxx	xxx	xxx

Note 3. Where a Government servant is on leave on st the 1 day of January, 1996, he shall become entitled to pay in the revised scale of pay from the date he joins duty. In case of Government servant 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."

22. The word "Existing scale" has been defined under Rule 3 (2) which reads as under:

"existing scale" in relation to a Government servant means the present scale applicable to the post held by the Government servant (or as the case may be, personal scale applicable to him)

as on the 1st day of January, 1996 whether in a substantive or officiating capacity."

23. The word 'Revised scale' has been defined under Rule 3(5), which reads as under:

"revised scale" in relation to any post specified in column 2 of the First Schedule means the scale of pay specified against that post in column 4, thereof unless a different revised scale is notified separately for that post;"

24. Note 3 under Rule 7, therefore, indicates when a Government servant was on leave on 1.1.1996, he would become entitled to pay in the revised scale of pay from the date he joined the duty.

However, in the case of a Government servant under suspension, he would continue to draw subsistence allowance based on the then existing scale of pay and his pay in the revised scale of pay would be subject to final order on the pending disciplinary proceedings.

25. The Revised Pay Rules were framed by the President of India in exercise of the powers conferred by the proviso to Article 309 and clause 5 of Article 148 of the Constitution. The proviso to Article 309 enables the President to make Rules to regulate the recruitment and conditions of service of the persons mentioned therein. The Rules framed by the President of India in exercise of the powers conferred by the proviso to Article 309 have the force of law. Further, Note 3 to Rule 7 of Revised Pay Rules, 1997 were not challenged.

26. On a combined reading of Note 3 to Rule 7 of the Revised Pay Rules and FR 53(1)(ii)(a) with the clarification with Office Memorandum dated 27th August, 1958 it is clear that if the revision of pay takes effect from a date prior to the date of suspension of a Government servant then he would be entitled to benefit of increment in pay and in the subsistence allowance for the period of suspension, but if the revision scale of pay takes effect from a date falling within the period of suspension then the benefit of revision of pay and the subsistence allowances will accrue to him, only after reinstatement depending on the fact whether the period of suspension is treated as duty or not. In view of the clear distinction drawn by the Rule making authority between the cases in which the Revised scale of pay takes effect from a date prior to the date of suspension and a date falling within the period of suspension, the plea of discrimination raised cannot be sustained especially when there is no challenge to the Rules. The benefit of pay revision and the consequent revision of subsistence allowance stand postponed till the conclusion of the departmental proceedings, if the pay revision has come into effect while the Government servant is under suspension. So far as the present case is concerned, the Revised Pay Rules came into force on 1st January, 1996 when the respondent was under suspension and later he was dismissed from service on 04.08.2005 and hence the benefit of pay revision or the revision of subsistence allowance did not accrue to him. The Tribunal as well as the High Court have committed an error in holding that the respondent is entitled to the benefit of Revised Pay Rules. We, therefore, allow the appeal and set aside those orders."

13. Learned counsel for applicant has argued that this Tribunal had already taken into account R.K.Chopra (supra) in its order dated 11.11.2014 in OA No.688/2013. The order passed in OA No.688/2013 reads as follows :

“Being in respectful agreement with the view taken by the Co-ordinate Benches and bound by Full Bench of this Tribunal in aforementioned OAs, we allow the prayer made in Para 8(a) and (b) of the OA.”

14. It can be seen that the Tribunal had only gone by the Full Bench judgment in J.S.Kharat (supra) and other orders of this Tribunal which were based on J.S.Kharat (supra). The R.K. Chopra (supra) was not discussed in that order. It made reference to OA No.3470/2011 wherein R.K. Chopra had been discussed. The relevant para of OA No.688/2013 is reproduced below:

“5. On merits, the issue of re-calculation of subsistence allowance of a suspended employee after grant of increment could be addressed to by this Tribunal in OA No.3470/2011 (ibid), wherein having referred to the judgment of Honble Supreme Court in Union of India Vs. R.K. Chopra (2010) (1) SCC 763), this Tribunal viewed that in terms of Note 3 below Rule 7 of CCS (Revised Pay) Rules, 2008, the applicant was entitled to annual increments falling on 1.07.2004, 1.07.2005, 1.07.2006 and 1.07.2007.”

15. For the sake of easy reference the order of this Tribunal in OA No.3470/2011 is reproduced in full:-

“The applicant, a Dy. Supdt. Grade-II in Central Jail Tihar, has filed this Application under Section 19 of the Administrative Tribunals Act, 1985 praying for following reliefs :-

“8.1 To direct the respondents to release the annual increments falling on 01.07.2004, 01.07.2005, 01.07.2006 & 01.07.2007 when the applicant was under suspension & on the basis of pay

so arrived recalculate the subsistence allowance & pay the arrears.

8.2 To direct the respondents to refix applicant's pay in the wake of 6th CPC w.e.f. 01.01.2006 on the basis of pay arrived notionally after calculating the increments due on 01.07.04 & 01.07.05 & pay the arrears as a consequence thereof.

8.3 To direct the respondents to pay interest on the arrears @ 10% p.a.

8.4 Any other relief or relief(s) which the Hon'ble Tribunal may deem fit under the circumstances."

2. The applicant was placed under suspension on 21.2.2004 by respondent no.1 in contemplation of departmental enquiry. The applicant challenged his suspension order dated 21.2.2004 as extended from time to time in OA No.1798/2005. The said OA was allowed vide order dated 17.5.2006 by holding that no review was conducted within 90 days from the date sub rules (6) and (7) of Rule 10 of CCS (CCA) Rules, came into force. The suspension was thus held illegal and consequently quashed. The applicant was retrospectively reinstated w.e.f. 30.8.2004 but again suspended w.e.f. 31.8.2006. The second suspension was revoked on 21.2.2008. The applicant was getting basic pay of Rs.7950/- at the time of his initial suspension on 21.2.2004. His pay upon reinstatement on 21.2.2008 was fixed at Rs.7950/-, the pay he was drawing on 21.2.2004. The applicant claims that he ought to have been granted initial increment issued on 1.7.2004, 1.7.2005, 1.7.2006 and 1.7.2007 and his subsistence allowance during the suspension period should have been on the basis of enhanced pay by addition of annual increments as aforesaid. The applicant made a representation in this regard on 13.6.2007. In the meantime, he came to know about the case of one Shri P.C. Mishra, DANICS official who was granted increments during the suspension period pursuant to this Tribunal order in OA No.1056/2008 decided on 7.11.2008. The applicant then made a further representation on 26.11.2008 forwarding a copy of the judgment in the case of Shri P.C. Misra. The case of Shri P.C. Mishra was unsuccessfully contested by the department in the High Court and the Hon'ble Supreme Court. The respondents have not replied to the representations of the applicant. Feeling aggrieved, he has filed the present Application wherein besides seeking directions for release of annual increments during the suspension period, the applicant has also sought direction for revision of his pay in the wake of 6th CPC's recommendations w.e.f. 1.1.2006.

3. Opposing the applicants claim in their counter reply, the respondents have raised the preliminary objection on the ground of limitation contending that the Application is barred by limitation. A number of cases have been referred to in this regard. It has further been submitted that there are no specific orders in the service rules for grant of annual increments during the period of suspension unless the period of suspension is decided as duty. The disciplinary proceedings are not completed in the instant case. The period of suspension has not yet been decided. It has further been submitted that Hon'ble Supreme Court has held in Union of India vs. R.K. Chopra, 2010 (1)

SCC 763, that if the revision of pay takes effect from a date prior to the date of suspension of a Government servant then he would be entitled to benefit of increment in pay and subsistence allowance for the period of suspension, but if the revision of scales of pay takes effect from a date following the period of suspension then the benefit of revision of pay and subsistence allowance will accrue to him only after reinstatement depending on the fact whether the period of suspension is to be treated as period spent on duty or not. The respondents have further submitted that the order dated 27.10.2009 issued by the Chief Secretary, Delhi, clearly states that pay of the applicant be reduced by two stages in the time scale of pay for a period of one year w.e.f. 1.11.2009 and it has further been ordered that the official will not earn increment of pay during the period of reduction and that on the expiry of the said period, the reduction will have the effect of postponing his future increments of pay.

4. At the hearing learned counsel for both the parties reiterated their averments made by them in their respective pleadings.

5. As regards limitation, the applicant has declared that Application is within limitation as this is a matter of pay fixation for which cause of action would be continuing one from month to month. Furthermore, the case of Shri P.C. Mishra based on which the applicant claims relief in this case could become final only when appeal thereagainst was dismissed by Delhi High Court in Writ Petition (Civil) No.9042/2009 and further SLP thereagainst was also dismissed by the Apex Court. As soon as the applicant came to know about this, he filed the present Application. Furthermore, the representations made by the applicant in the matter continue to be pending consideration with the respondents. In these premises, we do not think this Application is liable to be dismissed at the very threshold on the ground of limitation.

6. In P.C. Mishra vs. Union of India and others (OA No.1056/2008 decided on 7.11.2008), this Tribunal has held that since the increment was not being withheld on any ground by the competent authority, there appeared to be no reason why the increment due to the applicant even during the period of his suspension should not be released. While taking that view, the Tribunal has relied upon OA No.349/1990 in the matter of U. Ganga Raju vs. DRM SCR, Vijawada and others decided on 12.2.1999 wherein it has been held that it would be fit and proper to sanction increments to a government servant during the suspension period purely for the purpose of calculating subsistence allowance and payment of subsistence allowance, unless increment has been withheld by order of competent authority. The order in P.C. Mishra case has been upheld by the High Court of Delhi in CWP No.9042/2009 decided on 15.2.2010.

7. In view of the aforesaid, we are of the considered opinion that the applicant is entitled to release of annual increments from time to time for the purpose of grant of subsistence allowance. As regards, refixation of applicant's pay in the wake of recommendations of 6th CPC w.e.f. 1.1.2006, the same needs to be dealt with in view of the Hon'ble Supreme Court decision in the case of Union of India vs. R.K. Chopra (supra). Due regard should be given in this regard to Note 3 Rule 7 of CCS (Revised Pay) Rules, 2008. Since the revision of scales of pay took effect from the date following then the period of suspension,

the benefit of revision of pay and subsistence allowance would accrue to the applicant only after reinstatement depending upon the facts that whether the period of suspension is to be treated as period spent on duty or not. Though second suspension of the applicant was revoked on 21.2.2008, neither parity has brought on record what transpires thereafter how the period of suspension was dealt with and also how the pay of the applicant has been revised in the wake of 6th CPC's recommendations. As a matter of fact, the applicant has linked up this matter with his suspension as he was under suspension when 6th CPC's recommendations came into force. When at the hearing, learned counsel for the applicant did not point out as to how the applicant's pay has been refixed in the wake of 6th CPC's recommendations though a period of 5 to 6 years have elapsed since 6th CPC's recommendations came into force. In the absence of material information in this regard, we left this matter to be pursued by the applicant in appropriate proceedings in case he still has any grievance in this regard.

8. As regards the order of penalty dated 27.7.2009 is concerned, that would not make any material difference since it would operate prospectively and would not have any bearing on the matter pertaining to the applicants suspension period from 2004 to 2008. Though interest on arrears has been claimed yet the applicant has neither made any averment in this Applicant nor advanced any arguments at the hearing in support of his claim.

9. After having bestowed our careful consideration to the submissions made by both the parties and having due regard to the facts and circumstances of the case, we are of the considered opinion that there is no warrant for issuance of any directions with regard to payment of interest on arrears in the facts and circumstance of the case.

10. In the facts and circumstances and for the reasons stated above, this Application is partly allowed in terms of prayer made in para 8.1 of the Application and the amount being so due and admissible to the applicant shall be released by the respondents within a period of three months from the date of receipt of a certified copy of this order. No order as to costs."

16. As can be seen from the order in OA No.3470/2011, this Tribunal did not allow revision of pay on the basis of 6th Pay Commission for want of some material information with regard to pay fixation when the applicant in that case was retrospectively reinstated w.e.f. 30.08.2004 but again suspended w.e.f. 30.08.2006. The suspension was revoked on 21.02.2008. The Tribunal had left that question open and only allowed the annual

increments falling on 01.07.2004, 01.07.2005, 01.07.2006, 01.07.2007 and 01.07.2008, i.e., without revision of pay scale after 6th Pay Commission. The increments on 01.07.2004, 01.07.2005 & 01.07.2006 the applicant would have earned in any case since he was not under suspension.

17. It can be therefore inferred that the order in OA No.688/2013 did not get any support from the order in OA No.3470/2011, which had made a reference to R.K.Chopra (supra) but did not pass any order on the revision of pay during the suspension period of a Government servant. Further, there cannot be any dispute that where there is a direct judgment of Hon'ble Supreme Court on the subject, we are bound to follow that order and not bound by the order passed by a Coordinate Bench specially when the Coordinate Bench has not given any finding of its own. In view of the legal position as discussed in the preceding paras, we do not find any infirmity in the decision taken by the respondents in regulating the subsistence allowance of the applicant in terms of Sub-Para 2 (2) of the Government of India decision dated 27.08.1958 quoted below FR 53.

18. The leave encashment of an employee who retires while under suspension is regulated by Rule 39 (3) of the CCS (Leave) Rules, which provides as under:

“(3) The authority competent to grant leave may withhold whole or part of cash equivalent of earned leave in the case of a Government servant

who retires from service on attaining the age of retirement while under suspension or while disciplinary or criminal proceedings are pending against him, if in the view of such authority there is a possibility of some money becoming recoverable from him on conclusion of the proceedings against him. On conclusion of the proceedings, he will become eligible to the amount so withheld after adjustment of Government dues, if any.”

19. The respondents have not stated whether there is any possibility of some money becoming recoverable from the applicant after the conclusion of the proceedings against him in the Hon’ble High Court. Only a bland statement has been made in para 4.8 of the counter reply reproduced below:

“It is respectfully to (sic.) submitted that since leave encashment after retirement also covered under Pensionary benefits and hence not paid in the absence of final conclusion of the case.”

19. Applicant has also submitted that his provisional pension has been fixed on the basis of 75% of subsistence allowance and not in accordance with Rule 69 of CCS Pension Rules. The applicant has placed on record Last Pay Certificate and the Provisional Pension Payment Order (PPO) dated 11.03.1997. However, there is no averment from the respondents on this issue.

20. We, therefore, direct the respondents to examine the contentions of the applicant with regard to the leave encashment and pass an order stating whether there is a possibility of any money being recoverable after the finalisation of the criminal

proceedings against him. If the conclusion is in negative, the respondent shall release the leave encashment dues as per procedure and other relevant instructions. We further direct the respondents to fix his pension in accordance with Rule 69 of CCS Pension Rules and other applicable rules and pay him the arrears, if it becomes due following the re-fixation of his pension. The respondents may be reminded that the applicant is about 80 years old and therefore the above exercise must be completed as expeditiously as possible but not later than six weeks from the date of receipt of a copy this order. No costs.

(V.N. Gaur)
Member (A)

(A.K.Bhardwaj)
Member (J)

March 10, 2016

‘sd’