

**CENTRAL ADMINISTRATIVE TRIBUNAL,
ERNAKULAM BENCH**

Original Application No.180/01003/2015

Tuesday, this the 11th day of December, 2018

C O R A M :

**HON'BLE Mr.E.K.BHARAT BHUSHAN, ADMINISTRATIVE MEMBER
HON'BLE Mr.ASHISH KALIA, JUDICIAL MEMBER**

Dr.S.Shina,
D/o.N.Swaminathan,
Divisional Medical Officer,
Railway Health Unit,
Ernakulam Junction.
Residing at Flat No.3-B, IHDC,
'Nakshathra Maliga',
Kunhan Bava Road,
Vyttila P.O., Kochi – 682 019.Applicant

(By Advocate – Mr.T.C.Govindaswamy)

v e r s u s

1. Union of India
represented by the General Manager,
Southern Railway, Headquarters Office,
Park Town P.O., Chennai – 600 003.
2. The Chief Personnel Officer,
Southern Railway, Headquarters Office,
Park Town P.O., Chennai – 600 003.
3. The Divisional Personnel Officer,
Southern Railway, Thiruvananthapuram Division,
Thiruvananthapuram – 695 014.
4. The Railway Board,
Rail Bhavan, New Delhi – 110 001,
represented by its Chairman.Respondents

(By Advocates – Mr.Sunil Jacob Jose)

This application having been heard on 5th December 2018, the Tribunal on 11th December 2018 delivered the following :

ORDER

Per : Mr.E.K.BHARAT BHUSHAN, ADMINISTRATIVE MEMBER

O.A.No.180/1003/2015 is filed by Dr.S.Shina, Divisional Medical Officer, Railway Health Unit, Ernakulam against the action taken by the respondent organization for recovering non-practising allowance and annual increments granted to her when she was on duly sanctioned study leave from 17.8.2011 to 20.3.2014 for undergoing PG Course in Ophthalmology.

She seeks the following reliefs :

1. Declare that the action on the part of the respondents in recovering as over payment, the annual increments drawn on 1.7.2012 and 1.7.2013 while the applicant was on study leave, is illegal, contrary to law and unconstitutional.
2. Direct the respondents to draw the annual increments on due on 1.7.2012 and 1.7.2013 with effect from these dates and direct further to refund the amounts already recovered with interest calculated @ 12% per annum from the date of such recovery.
3. Declare that the applicant is entitled to draw non-practicing allowance during the period of the applicant's study leave from 17.8.2011 to 21.3.2014 and direct the respondents accordingly.
4. Declare that the action of the respondents in recovering the non-practicing allowance granted to the applicant during the period of her study leave from 17.8.2011 to 21.3.2014 is illegal and unconstitutional and direct the respondents accordingly.
5. Direct the respondents to refund the amount of non-practicing allowance already recovered from the applicant's salary with interest calculated at the rate of 12% per annum from the date of such recovery up to the date of full and final settlement of the same.
6. Award costs of and incidental to this application.
7. Pass such other orders or directions as deemed just, fit and necessary in the facts and circumstances of the case.

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2. The applicant while working as Divisional Medical Officer at Railway Health Unit proceeded on study leave from 17.8.2011 to 21.3.2014 for undergoing PG Course in Ophthalmology which she completed successfully within the sanctioned period. As is norm in the respondent organization, she had drawn annual increments as also non-practising allowance that she was entitled to. Once she joined back, the respondents acted to recover the alleged over payment of Rs.48000/- disbursed as annual increments to her and followed this up by recovering non-practising allowance that was granted to her during her study leave at the rate of Rs.16000/- per month. The annual increments due to applicant on 1.7.2012 and 1.7.2013 were drawn as a matter of course and paid to the applicant. Similarly, non-practising allowance at the rate of 25% of the Band Pay and Grade Pay was also drawn. It was at this stage, on her return that she was proceeded with recovery without any prior notice.

3. She made a representation to the 3rd respondent on 1.11.2015 stating that recovery of non-practising allowance already granted to her is arbitrary and discriminatory (Annexure A-4). She also enclosed with the representation, a copy of the Memorandum bearing F.No.508/GAZ/MD/BFR dated 3.2.1999 supporting the grant of non-practising allowance to be paid during the period of study leave (Annexure A-5). She also narrated cases of similarly placed persons who were paid the non-practising allowance. It appears that her entreaties fell on deaf ears and

the respondents proceeded with recovery as is seen from the pay slip for the month of November, 2015 issued from the office of the 3rd respondent (Annexure A-6).

4. The applicant believes that objection by Audit Wing was the reason why the authorities decided to act against her. She has produced extracts from Rule 556 of Chapter 5 of the Indian Railway Establishment Code, Vol.I relating to study leave, it reads :

“556 Study Leave :- Study leave may be granted in accordance with the rules prescribed in Appendix V to railway servants to enable them to study scientific, technical or similar problems or to undergo special courses of instruction. Such leave is not debited against the leave account.

Counting of study leave for promotion, pension, seniority, leave and increments -

(1) Study leave shall count as service for promotion, pension and seniority. It shall also count as service for increments as provided in rules.

(2) The period spent on study leave shall not count for earning leave other than half pay leave under the Liberalized Leave Rules.”

5. Further Rule 7 of the Study Leave Rules goes on to describe as follows :

“Rule 7 : Leave salary during study leave : (1) During study leave availed outside India a Railway servant shall draw leave salary equal to the pay (without allowances other than dearness allowance) that the Railway servant drew while on duty immediately before proceeding on such leave, in addition to the study allowance admissible in accordance with the provisions of rules 8 to 10.

2(a) During study leaves availed in India, a Railway servant shall draw leave salary equal to the pay (without allowances other than dearness allowances) that the Railway servant drew while on duty immediately before proceeding on such leave.

(b) Payment of leave salary at full rate under clause (a) shall be subject to furnishing of a certificate by the Railway servant to the effect that he is not in receipt of any scholarship, stipend or remuneration in respect of any part time employment.

(c) The amount, if any received by a Railway servant during the period of study leave as scholarship or stipend or remuneration in respect of any part time employment as envisaged in sub-rule (2) of rule 8, shall be adjusted against the leave salary payable under this sub-rule subject to the condition that the leave salary shall not be reduced to an amount less than that payable as leave salary during half pay leave.

(d) No study allowance shall be paid during study leave for courses of study in India.”

6. The applicant believes that the authorities have taken the worst interpretation of Rule 7 (2) (a) “a Railway servant shall draw leave salary equal to the pay (without allowances other than dearness allowances)” (emphasis supplied). The applicant contends that “non-practising allowance” is to be treated as “pay”. She calls to her assistance Rule 103 (44) which is extracted as below :

“Special pay means an addition of the nature of pay, to the emoluments of a post or of a Railway servant, granted in consideration of -

- (a) the specially arduous nature of duties or
- (b) a specific addition to the work or responsibility and includes non-practicing allowance granted to doctors in lieu of private practice.”

7. In short, she contends that non-practising allowance which is a special pay which included in the definition of term 'pay' is not a special pay granted in view of applicant's personal qualification, but taken into consideration the specific addition to the work or responsibility and in lieu of private practice. The relevant orders of the Railway Board are produced at Annexure A-7, Annexure A-8 and Annexure A-9.

8. Starting with preliminary objection that as the recovery has been effected as a result of audit objection, the Audit Authorities having not been arrayed as respondents, it is further maintained that the O.A is filed in violation of Rule 21 (1) (b) of the Administrative Tribunals Act, 1985 as six months waiting period had not passed since the filing of the representation mentioned at Annexure A-4 before she approached this Tribunal.

9. In so far as merits raised in the O.A are concerned, it is maintained by the respondents that Rule 7 (2) (a) of Appendix V of IREC Vol.I stipulates that when study leave is availed in India a Railway servant shall draw leave salary equal to the pay (without allowances other than dearness allowances). The non-practising allowance being an allowance as the name suggests cannot be clubbed as pay. In so far as the recovery relating to alleged over payment of annual increments, it is submitted that "*steps are being taken to grant increments as per para 556 (2) of IREC, Vol.I during the study leave.*"

10. We have heard Shri.T.C.Govindaswamy, learned counsel for the applicant and Shri.Sunil Jacob Jose, learned counsel for the respondents. The applicant had proceeded on study leave after due sanction of her controlling officer. On her return it was decided to recover the two increments that she had drawn as well as the non-practising allowance which had been granted to her. The reason for the same is stated to be the views expressed by the Audit Authorities. What is more, the recovery was

effected without giving any notice to the applicant (the contention made being not denied by the respondents).

11. In so far as the contention raised regarding the non-joining of the Audit Authorities as respondents and the O.A being filed in violation of Rule 21 (1) (b) of the Administrative Tribunals Act, 1985 are concerned, they are found to be not valid. Non-practising allowance is a perquisite granted to a medical practitioner, who, while proceeding on study leave, does not undertake private practice. We are of the view that this allowance is more in the nature of pay. Non-practising allowance granted to doctors is not a mere allowance as contained in Rule 7(2)(a) referred to by the applicant. It is a special pay as per Rule 103(44) of the Indian Railway Establishment Code, Vol.I Again quoting from Rule 103(44) "*special pay means an addition of the nature of pay.....includes non-practising allowance granted to doctors in lieu of private practice*". The authorities appear to have failed to grant this favourable interpretation to the rules. Non-practising allowance is a facility which is available to a specific category of employee and cannot be considered as an allowance *per se*. Hence the authorities were at fault in taking a view that non-practising allowance is merely an allowance. Again, no justification whatsoever is brought by the respondents to justify the withdrawal of two increments that the applicant had drawn. Thus the applicant is fully eligible to get the two increments that she has been ordered to forfeit.

12. With due regard to the facts before us and the pleadings made by the respective counsel, we conclude that the O.A has merit and we allow the reliefs sought. We direct that the sum recovered will be refunded to the applicant within a period of three months from the date of receipt of a copy of this order. The amounts will be accompanied with 6% interest per annum from the date of recovery. The O.A is allowed. No order as to costs.

(Dated this the 11th day of December 2018)

ASHISH KALIA
JUDICIAL MEMBER

E.K.BHARAT BHUSHAN
ADMINISTRATIVE MEMBER

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List of Annexures in O.A.No.180/01003/2015

1. **Annexure A1** – True copy of the Memorandum bearing No.P(G) 508/VIII/Dr.SS dated 14.11.2011 issued by the 1st respondent sanctioning the study leave to the applicant.
2. **Annexure A2** – True copy of the Office Order bearing No.HPB(O) 222/2014 dated 19.3.2014, issued from the office of the first respondent.
3. **Annexure A3** – True copy of the pay slip of the applicant for the month of October 2015 issued from the Office of the 3rd respondent.
4. **Annexure A4** – True copy of the representation dated 1.11.2015 addressed to the 3rd respondent.
5. **Annexure A5** – True copy of the Memorandum bearing F.No.508/GAZ/MD/BFR dated 3.2.1999 issued by the Chief Personnel Officer, South Central Railway, Secunderabad.
6. **Annexure A5(a)** – A legible typed copy of Annexure A-5.
7. **Annexure A6** – True copy of the pay slip for the month of November 2015, issued from the Office of the 3rd respondent.
8. **Annexure A7** – True copy of the Railway Board Order bearing RBE No.50/98 dated 31.3.1998.
9. **Annexure A8** – True copy of the Railway Board Order bearing RBE No.74/98 dated 13.4.1998.
10. **Annexure A9** - True copy of the Railway Board Order bearing RBE No.122/2008 dated 22.9.2008.
