

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.5507 of 2001

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Ram Niwas Sharma, son of Sri Chandradeo Sharma, resident of village Baijalpur,
P. S. Uphara, District Aurgangabad, presently posted at the Senior Selection Grade
Assistant in the Regional Office of Bihar Pollution Control Board, Deoghar

.... Petitioner/s

Versus

1. Bihar State Pollution Control Board, Beltron Bhawan, Bailey Road, Patna
through its Chairman.
2. The Chairman, Bihar State Pollution Control Board, Beltron Bhawan, Bailey
Road, Patna-23.
3. Member Secretary, Bihar State Pollution Control Board, Beltron Bhawan,
Bailey Road, Patna-23.
4. The Regional Officer, Bihar State Pollution Control Board, Regional Office,
Brahamasia , Deoghar.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Pushkar Narain Shahi, Sr. Advocate

For the Respondent/s : Mr. Shivendra Kishore, Sr. Advocate

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**CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH**

CAV JUDGMENT

Date: 30-10-2015

Whether an employee can claim by way of right, subsistence allowance for the period during which he remained under suspension as a measure of punishment, is the solitary question to be addressed in the present writ application preferred under Article 226 of the Constitution of India.

2. The petitioner, at the relevant point of time, was working as an Assistant in Bihar State Pollution Control Board, Patna (hereinafter referred to as the Board). No dispute has been raised on behalf of the parties over the fact that Bihar Service Code, 1950

(hereinafter referred to as the Code) which defines the conditions under which salaries and other allowances are earned by service under the State Government, is applicable mutatis mutandis to the employees of the Board. There is also no dispute over the fact that 'suspension' is one of the punishments which can be imposed upon an employee of the Board.

3. The facts relevant for adjudication in the present case are short and are not at all in dispute, which are thus:-

(i) On the allegation of certain misconduct, the petitioner was put under suspension, by an order, dated 13.02.1992, and a departmental proceeding was initiated against him, thereafter. By an order, dated 25.05.1992, he was dismissed from service on the basis of the departmental proceeding so held. The said order, dated 25.05.1992, was challenged by the petitioner by filing an application under Article 226 of the Constitution of India before this Court, giving rise to CWJC No. 7748 of 1992. His challenge to the order of dismissal was on several grounds including the ground of violation of principles of the natural justice, bias against the disciplinary authority and incompetence of the disciplinary authority to pass the order. I need not go into the nature of misconduct entailing which the petitioner's dismissal from service, as those facts are not much relevant for the purpose of present adjudication.

4. As would be evident from the averment made in paragraph 8 of the writ application, by way of consent order, dated 22.05.1998, this Court disposed of the writ application, aforementioned, in following terms:-

“The petitioner will be reinstated on the post of Assistant in the Bihar State Pollution Control Board (in short, the Board) w.e.f. 1.6.1998. He will submit his joining in the Head Office on 1.6.1998 and become entitled to salary from that date, even though the Board does not issue any formal order of posting. The petitioner however will not be entitled to salary from the date of order of dismissal is 25.5.1992 upto 31.05.1998. The aforesaid period will be treated as period under suspension by way of punishment. The petitioner however will be entitled to continuing of service. In other wards, the intervening period will not be treated as breach in service for the purpose of seniority promotion etc. The petitioner agrees to be posted outside Patna for the present.

This writ application stands disposed of in the above terms”.

(Underling to emphasize)

5. It would be evident from the order aforesaid, dated 22.05.1998, that this Court while disposing of the writ application, in most unambiguous terms held that the period 25.05.1992 upto 31.05.1998 will be treated as “period under suspension by way of punishment”. The Court further observed “ the petitioner, however, would not be entitled to salary from the date of order of dismissal, i.e., 25.05.1992 upto 31.05.1998”.



6. The sole plea which the petitioner has taken in the present writ application is that by the said order, dated 22.05.1998, this Court directed for his reinstatement with effect from 01.06.1998 making it clear that the period during which the petitioner was under the order of dismissal shall be treated to be period under suspension by way of punishment. He has accordingly sought a direction from this Court to the Respondent Board for payment of subsistence allowance for the period in question invoking Rule 96 of the Bihar Service Code.

7. Mr. Pushkar Narain Shahi, learned Senior Counsel appearing on behalf of the petitioner has relied on Rule 96 of the Code to submit that for the period of suspension, though as a measure of punishment, the petitioner lawfully entitled to subsistence allowance in terms of Rule 96 of the Code. He has contended that for the purpose of payment of allowance during the period of suspension, the Bihar Service Code does not make any distinction between an 'interim suspension' during the pendency of any enquiry or a contemplated enquiry and 'suspension by way of punishment'. He has submitted that suspension of an employee does not amount to cessation of master servant relationship and, therefore, an employee is entitled to receive the emoluments, in the nature of subsistence allowance during the period he remained under suspension, albeit by way of punishment.

8. Mr. Shahi, learned senior counsel has placed reliance on a Constitution Bench decision of Supreme court in case of ***Khem Chand Vs. Union of India (AIR 1963 SC 687)*** to submit that a Government employee does not cease to be a member of service while under suspension.

9. Mr. Shivendra Kishore, learned Senior Counsel representing the Board, on the other hand, would refer to Rule 97 of the Code in order to contend that discretion lies with the competent authority, in case of reinstatement of an employee dismissed from service in respect of payment of allowances to the employee for the period of his absence from duty and whether or not the said period shall be treated as a period spent on duty. He has submitted that there is utter difference between interim suspension during the pendency of a departmental enquiry and suspension by way of punishment. According to him, whereas an employee of the Board will be entitled to subsistence allowance in accordance with Rule 96 of the Code, for the period during which he remains under suspension in contemplation of a disciplinary proceeding or during such proceeding against him, in the event an order of suspension is passed as a measure of punishment, he will not be entitled to such allowance.

10. He has placed reliance upon a Supreme court decision in case of ***Umesh Chandra Mishra, Vs. Union of India (1993) Suppl.***

2 SCC 210) in support of his submission that there would be no question of payment of subsistence allowance where suspension is imposed as a measure of punishment and not pending disciplinary proceeding.

11. For the purpose of better appreciation of rival submissions advanced on behalf of the parties, I consider it appropriate to reproduce hereinbelow, Rules 96 and 97 of the Bihar Service Code:-

“96. (1) A Government servant under suspension shall be entitled to the following payments, namely:-

(a) Subsistence grant 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 cost of leaving allowance based on such leave-salary:

Provided that where the period of suspension exceeds twelve months, the authority which made or is deemed to have made the order of suspension, shall be competent to vary the amount of subsistence grant for any period subsequent to the period of the first twelve months, as follows-

- (i) the amount of subsistence grant may be increased by a suitable amount not exceeding 50 per cent of the subsistence grant admissible during the period of the first twelve 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 grant may be reduced by a suitable amount, not exceeding 50 per cent of the subsistence grant admissible during the period of the first twelve 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 cost of living allowance will be based on the increased or as the case may be, the decreased amount of subsistence grant admissible under sub-clause (i) and (ii) above.
- (b) (Any other compensatory allowance to which a Government servant may be entitled from time to time on the basis of pay which he received on the date of suspension:

Provided that the Government servant shall not be entitled to that compensatory allowance unless the said authority is satisfied that the Government servant continues to meet the expenditure for which they are granted.

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

(3) The subsistence grant shall be subject to a minimum limit of Rs. 10 per month.

97. (1) When a Government servant who has been dismissed, removed or suspended, reinstated, the authority competent to order the reinstatement shall consider and make specific order-

- (a) regarding the pay and allowances to be paid to the Government servant for the period of his absence from duty, and
- (b) whether or not the said period shall be treated as a period spent on duty.

(2) Where the authority mentioned in sub-rule (1), is of opinion that the Government servant has been fully exonerated, or in the case of suspension, that it was wholly unjustified, the Government servant shall be given full pay and allowance to which he would have been entitled has he not been dismissed, removed or suspended, as the case may be)

(3) In other cases, the Government servant shall be given such proportion of such pay and allowances as such competent authority may prescribed;

Provided that the payment of allowances under clause (2) or clause (3) shall be subject to all other conditions under which such allowance are admissible

(4) In a case falling under clause (2) the period of absence from duty shall be treated as a period spent on duty for all purposes.

(5) In a case falling under clause the period of absence

from duty shall not be treated as a period spent on duty, unless such competent authority specifically directs that it shall be so treated for any specified purpose:

Provided that if the Government servant so desires such authority may direct that the period of absence from duty shall be converted into leave of any kind due and admissible to the Government servant”.

12. Rules 96 and 97 of the Code are under Section (iv) of the Bihar Service Code which deals with payment in cases of dismissal, removal or suspension. Rule 96 of the Code deal with the general entitlement of a Government servant under suspension whereas Rule 97 of the Code deals with a situation where the Government servant is required reinstated after an earlier order of dismissal, removal or suspension from service inoperative, set aside or varied for any reason by a competent authority or by operation of statutory provision. Rule 97 of the Code authorizes the competent authority to order reinstatement of a Government servant who was under the orders of dismissal/removal/suspension, to take a decision and pass an order with respect to the pay and allowances to be paid to the Government servant for the period of his absence from duty. It further authorizes such competent authority to take a decision whether or not the said period shall be treated as a period spent on duty. Rules 97(2) of the Code mandates that a Government servant shall be given full pay and allowances to which he would have been entitled to had



he not been dismissed, removed or suspended, in case the competent authority arrives at a conclusion that the Government servant has been fully exonerated or in case of suspension, it was fully unjustified. Sub Rule (3) of Rule 97 of the Code provides that in cases other than those mentioned in Sub-rule (2), the Government servant shall be given proportionate amount of such pay and allowance as the competent authority may prescribe. Rule 96 of the Code deals with entitlement of a Government servant while under suspension. The two Rules operate in two different situations. Whereas Rule 96 of the Code deals with payment of “subsistence grant at an amount equal to leave salary which the Government servant would have drawn, had he been on leave, during the period of his suspension, Rule 97 deals with a situation where a Government servant is being reinstated consequent upon an order dismissal/removal/suspension previously passed against him, becoming inoperative. A conjoint reading of Rule 96 and Rule 97 of the Code leads me to a conclusion that the situation as envisaged in Rule 96 is pre-dismissal/removal from service of a Government employee whereas Rule 97 deals with post-reinstatement of a Government servant upon an order of dismissal/removal/suspension becoming inoperative.

13. The two provisions of the Bihar Service Code can be better understood by way of an illustration. A competent authority may put



a Government servant under suspension in contemplation of a departmental proceeding or during the pendency of such proceeding. A Government servant may also be placed under suspension or deemed suspension on the ground of pendency of a criminal charge or his detention in connection with a criminal case. If the suspension is in contemplation of a departmental proceeding or during the pendency of a departmental proceeding, Rule 96 of the Code will apply with full force. Thereafter, if upon conclusion of departmental enquiry, he is exonerated of the charge and is required to be reinstated, the competent authority will be required to take a decision, in exercise of the power conferred upon him under Rule 97 of the Code for the purpose of passing an order, (i) regarding pay and allowances to be paid to the such Government servant during the period of his absence from duty, by virtue of the order of suspension and (ii) whether such period has to be treated as period spent on duty. In the event, as a result of departmental proceeding initiated against a Government servant, he is dismissed and removed from service but by virtue of certain subsequent order by higher/appellate authority or an order of the Court is required to be reinstated, the competent authority will be required to take decision and pass final orders as envisaged under Rule 97 of the Code for the purpose of payment of pay and allowances and for treating the said period as spent on duty or

otherwise. Whereas Rule 96 of the Code deals with subsistence allowance during the period of suspension, Rule 97 of the Code deals with payment of pay and allowances upon his reinstatement.

14. Reverting back to the question posed in the very beginning, which the present case involves, i.e., as to whether in a situation where an order of suspension is made by way of punishment, a Government servant would still be entitled to payment of subsistence allowance by invoking Rule 96 of the Bihar Service Code. Upon conjoint reading of Rules 96 & 97 of the Code, I am of the view that Rule 96 of the Code does not deal with and does not entitle an employee any subsistence allowance for the period of suspension by way of punishment. The suspension as referred to under Rule 96 of the Code means interim suspension and not by way of punishment. It would, in my opinion, be irrational to give an interpretation to Rule 96 of the Bihar Service Code in a manner that would entitle a Government servant subsistence allowance during the period he had to remain under suspension, by way of penalty, on the basis of his proved misconduct.

15. Mr. Shivendra Kishore, learned Senior Counsel has rightly relied upon Supreme Court decision in case of ***Umesh Chandra Mishra Vs. Union of India*** (supra) wherein it held that a suspension pending disciplinary enquiry alone can entitle an employee for

payment of subsistence allowance. Paragraph 5 of the said decision is relevant for the said purpose and is being extracted hereinbelow:-

“5. It was then contended on his behalf that in any case the order itself directs the period from May 10, 1974 to October 3, 1974 to be treated as a period of suspension and hence the appellant is entitled at least to the subsistence allowance. This argument is also misconceived because the period is directed to be treated as suspension as and by way of punishment. It is not suspension pending disciplinary inquiry which alone can entitle an employee for subsistence allowance. Suspension is also one of the punishments and the suspension imposed on the appellant was by way of punishment. Hence the appellant is not entitled to any subsistence allowance during the said period.”

16. I do not find much force in the submission made by Mr. Pushkar Narain Shahi, learned senior counsel appearing on behalf of the petitioner in support of his submission, placing reliance on Constitution Bench decision of the Supreme Court in case of ***Khem Chand vs. Union of India*** (supra). In the said decision, validity of Rule 12(4) of the Central Civil Services (Classification, Control & Appeal) Rules, 1957 was under challenge which provided for deemed suspension of a Government servant in case, penalty of dismissal/removal/compulsory retirement from service was set aside or declared or rendered void in consequence of or by a decision of Court of law and the disciplinary authority, decides to hold further enquiry against him, on the same allegation on which the penalty of dismissal/removal/compulsory retirement was originally imposed.

Upholding the said provision, the Supreme court observed in paragraph 15 as follows:-

“15.....When that order of dismissal was set aside the appellant’s service revived; and so long as another order of dismissal is not made or the service of the appellant is not terminated by some other means, the appellant continues to be a member of the service and the order of suspension in no way affects this position. The real effect of the order of suspension is that though he continued to be a member of the Government service he was not permitted to work, and further, during the period of his suspension he was paid only some allowances- generally called “subsistence allowance” which is normally less than his salary- instead of the pay and allowances he would have been entitled to if he had not been suspended. There is no doubt that the order of suspension affects a government servant injuriously. There is no basis for thinking however that because of the order of suspension he ceases to be a member of the service. The Provision in R. 12(4) that in certain circumstances the Government servant shall be deemed to have been placed under suspension from the date of the original order of dismissal and shall continue to remain under suspension until further orders, does not in any way go against the declaration made by this Court. The contention that the impugned Rule contravenes Arts. 142 or 144 therefore untenable”.

17. The observations so made by Supreme Court as extracted hereinabove do not at all support the case of the petitioner.

18. Situated thus, and on the basis of the discussion as above, I am of the considered view that an employee cannot be held entitled to subsistence allowance during the period of suspension if

the order of suspension passed against him is as a measure of punishment. An employee is held entitled and given the benefit of subsistence grant during the period when a charge of misconduct is levelled against him. He is entitled to payment of subsistence allowance till he is not held guilty of a misconduct. Once his misconduct is proved, the disciplinary authority has discretion to impose any of the punishments prescribed under the rules including punishment of suspension, if the extant rule permits.

19. In the present case, the disciplinary authority after holding the petitioner guilty of misconduct decided to impose upon him the punishment of termination of his service. The said punishment of termination from service was substituted by this Court by 'suspension', by the order dated 22.05.1998, passed in CWJC No. 7748 of 1992. This Court did not disturb the finding of the disciplinary authority as regards the petitioner's misconduct. The order was passed with the consent of the parties. In my opinion, in such circumstance, the petitioner's claim for subsistence allowance for the period 25.05.1992 to 31.05.1998 cannot be sustained.

20. I accordingly, do not find any merit in this application which is accordingly, dismissed.

ArunKumar/-

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(Chakradhari Sharan Singh, J)