

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment delivered on: May 12, 2015.

+ W.P.(C) 4458/2014 & CM APPL. No.8891/2014

DDA

..... Petitioner

Through Mr. Arun Birbal & Mr. Sanjay
Singh, Advocates

versus

BBS YADAV

..... Respondent

Through Mr. Anish Shrestha & Mr. Sudhir
Kumar, Advocates

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

HON'BLE MR. JUSTICE I.S.MEHTA

JUDGMENT

KAILASH GAMBHIR, J. (ORAL)

1. The instant Writ Petition has been filed by the petitioner/ DDA under Article 226 of the Constitution of India to challenge the order dated 14.08.2013 passed by the learned Central Administrative Tribunal, Principal Bench, New Delhi (*hereinafter referred to as the 'CAT'*) in Original Application (*in short 'OA'*) No.3848/2013 preferred by the respondent.

2. In OA No.3548/2012 preferred by the respondent, he sought the following reliefs:

i. *That the Hon'ble Tribunal may graciously be pleased to pass an order of quashing of impugned order dated*

07.05.2012, order dated 02.01.2012 and consequently pass an order directing the respondent to grant the subsistence allowance to the applicant in the revised pay scale w.e.f. 01.01.2006 till 26.01.2010 with all consequential benefits, including the arrears of difference of subsistence allowance and bonus and special pay etc. during suspension period.

ii. That the Hon'ble Tribunal may graciously be pleased to pass an order of quashing of impugned order dated 03.08.2010 only to the extent by which the applicant has been granted the subsistence allowance only @ 50% and consequently pass an order directing the respondent to review and to consider the subsistence allowance of the applicant by granting the same @ 75% after completion of three months from the date of suspension with all consequential benefits.

iii. That the Hon'ble Tribunal may graciously be pleased to pass an order directing the respondents to grant all the pay and allowance during the suspension period, after granting due increments and fixation of pay with all consequential benefits.

iv. 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."

3. The learned Tribunal after placing reliance on its decision given by a Larger Bench in the case of ***J.S. Kharat v. Union of India & Ors.***, reported in ***2002 (3) ATJ 276***, found the respondent entitled for revision in the subsistence allowance during the period when he remained under suspension and accordingly allowed prayer para- i) of the said OA by directing the DDA to comply with the same within a period of three months from the date of receipt of a copy of the said order. With regard to the relief claimed by the respondent in terms of prayer part- ii) seeking

direction for reconsideration of his case for the grant of subsistence allowance @ 75% after completion of three months from the date of his suspension with all consequential benefits, the learned Tribunal left the same to the direction of the Competent Authority of the DDA to take decision in this regard in due course.

4. Assailing the legality and correctness of the impugned order dated 14.08.2013, Mr. Arun Birbal, the learned counsel for the petitioner/ DDA vehemently contended that in the impugned order, the learned Tribunal has followed the decision of its Larger Bench in the case of *J.S. Kharat (supra)*, but the view taken by the Larger Bench of the learned Tribunal in the said case was not approved by the Hon'ble Supreme Court in their decision reported as *Union of India v. R.K. Chopra, (2010) 2 SCC 763*. The learned counsel thus submits that in view of the authoritative pronouncement of the Hon'ble Supreme Court in *R.K. Chopra's (supra)* case, the respondent is not entitled to the grant of relief for enhancement of subsistence allowance w.e.f. 01.01.2006. The learned counsel submits that the learned Tribunal also did not appreciate the fact that the Hon'ble Lt. Governor in its order dated 20.07.2012 had directed that the period of absence of the respondent from duty upto the date reinstatement will not

be treated as spent on duty and this period was ordered to be regulated as provided under FR 54 (4), subject to the conditions laid down under FR 54(5), (6), (7) and (8) and therefore, in the light of the said direction, the respondent was clearly not entitled to the benefit of revision of pay in the subsistence allowance. The learned counsel also argued that pursuant to the order dated 20.07.2012 passed by the Hon'ble Lt. Governor, a fresh disciplinary proceeding against the respondent was contemplated but no fresh chargesheet was issued to the respondent in view of the meeting held at Raj Niwas on 11.04.2013 between the officials of the DDA with the delegation of the Joint Action Committee of DDA Trade Unions and Engineers and as an outcome of the deliberation which took place between them, the Hon'ble Lt. Governor directed that no fresh chargesheet need be issued to the respondent in the matter and the period for which the respondent remained absent on account of dismissal/removal, action may be taken as per rules on the principle of "no work, no pay" laid down by the Hon'ble Supreme Court. The contention raised by the learned counsel for the petitioner is that the respondent cannot be allowed to blow hot and cold in the same breath as he has already taken advantage of the said direction passed by the Hon'ble Lt. Governor and yet he is challenging another part of the same order. Based on these

submission, the learned counsel for the petitioner strongly urges for setting aside of the order passed by the learned Tribunal in O.A.No. 3848/2013.

5. Opposing the present Writ Petition, Mr. Anish Shrestha, the learned counsel for the respondent strongly pleaded for upholding the order passed by the learned Tribunal. The learned counsel submitted that there is no illegality or any kind of perversity in the order passed by the learned Tribunal, therefore, the same may not be interfered with by this Court while exercising the power of judicial review.

6. We have heard the learned counsel for the parties at considerable length and have given our conscious consideration to the arguments advanced by them.

7. The facts are not in dispute between the parties and the same may be briefly recapitulated to appreciate the controversy that has arisen as well as to understand the controversy still surviving between the parties.

8. The respondent was working as a Junior Engineer (Civil). After complaints of misconduct against the respondent were received, he was placed on suspension vide order dated 27.05.1998 and subsequently was

dismissed vide order dated 26.05.2000 passed by Commissioner (Personnel). The respondent had filed an appeal against the dismissal order which was dismissed by the Appellate Authority. In the revision petition filed before the VC, DDA, the penalty was reduced to 'Compulsory Retirement' vide order dated 16.02.2001.

9. Feeling aggrieved by the order of compulsorily retirement, the respondent had preferred a Writ Petition before this Court vide W.P.(C) No. 3126/2006. In the year 2007, the DDA was brought within the ambit of the learned Tribunal and accordingly the said Writ Petition was transferred for adjudication to the learned Tribunal and was registered as T.A. No. 103/2007. The Ld. CAT vide order dated 12.05.2009 quashed both the aforementioned orders on ground that disciplinary authority before differing with the findings recorded by the enquiry officer did not supply a copy of the disagreement note to the respondent. The learned CAT however, allowed DDA to proceed against the respondent in accordance with law.

10. The Disciplinary Authority had reconsidered the matter in the light of the direction given by the learned Tribunal and accordingly a copy of disagreement note was supplied to the respondent on or around

09.09.2009. The respondent made his representation in response to the disagreement note vide his representation dated 17.09.2009. After having taken into consideration the said representation filed by the respondent, the Disciplinary Authority passed a fresh penalty order dated 27.01.2010 thereby dismissing him from service. The respondent accordingly remained under deemed suspension w.e.f. 26.05.2000 till 26.01.2010.

11. Aggrieved by the said order of dismissal dated 27.01.2010, the respondent had filed an appeal before the Hon'ble Lt. Governor and vide order dated 20.07.2012 the Hon'ble Lt. Governor had set aside the order of dismissal, suspension order, chargesheet and also the order appointing the Inquiry/ Presenting officer on the ground that the Commissioner (Pers.) of DDA was neither competent to impose any penalty nor to frame charges against the respondents or to even appoint the Inquiry Officer and the Presiding Officer as under the relevant regulations, the competent Authority was Vice Chairman, DDA for the post of Junior Engineer. The Hon'ble Lt. Governor by the said order permitted the Disciplinary Authority to proceed a fresh against the respondent in accordance with rule. The Hon'ble Lt. Governor in its order also observed that the period of absence from the period upto the date of his reinstatement would not

be treated as spent on duty and directed the DDA to regulate the said period as provided under FR 54 (4), subject to the conditions laid down under FR 54(5), (6), (7) and (8).

12. No fresh disciplinary proceedings pursuant to the order dated 20.07.2012 of the Hon'ble Lt. Governor were initiated. A meeting was however, held between the officials of the DDA and the delegation of the Joint Action Committee of DDA, Trade Unions and Engineers at the Raj Niwas on 11.04.2013 wherein the Hon'ble Lt. Governor gave direction that no fresh charge sheet need to be issued to the respondent and the issue with regard to the period for which the respondent remained absent on account of dismissal to be decided by the DDA as per rules on the principle of "no work, no pay" laid down by the Hon'ble Supreme Court.

13. By an order dated 3rd August, 2010 passed by the Competent Authority, a sum of Rs.9,99,226/- was paid to the respondent towards subsistence allowance for the period 26.05.2000 to 26.01.2010 and this subsistence allowance was granted to the respondent @ 50% taking into account his leave salary which he would have drawn had he been on leave on half average pay and half pay alongwith dearness allowance thereon and another compensatory allowance admissible to him on the

date of his deemed suspension. The respondent had filed a representation dated 01.10.2010 seeking enhancement of subsistence allowance from 50% to 75% on the revised pay scale for the period from April, 1999 to January, 2000 but the said request of the respondent was rejected by the petitioner by order dated 02.01.2012. Against this order dated 02.01.2012, the respondent had filed an OA No.419/2012 which was disposed of by the learned Tribunal vide order dated 09.02.2012 with the direction to the petitioner herein to examine and decide the claim of the respondent in view of the Larger Bench decision of the learned Tribunal in *J.S. Kharat's case (supra)*. Fresh order dated 07.05.2012 was passed by the petitioner and the same was again challenged by the respondent in OA No. 3848/2012 and now under challenge is the order dated 14.08.2013 passed by the learned Tribunal in the said OA.

14. The issues for determination before this Court is whether the respondent is entitled to revised subsistence allowance during the period of his suspension w.e.f. 01.01.2006 till 26.01.2010 and whether the respondent should be granted enhancement of his subsistence allowance during the period of absence from duty.

15. As per the Government of India order G.M.O.M. No. F-2 (36) –

Ests/- III/58 dated 27.07.1958, there are two categories of cases. One refers to the cases in which **the revised scale of pay takes effect from a date prior to the date of suspension** and other refers to the cases in which, the revised scale of pay takes effect from a date falling within the period of suspension. There is no doubt that the respondent falls in the latter category. The relevant portion of the afore-mentioned O.M is reproduced hereinunder:

(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. (Underlining Supplied)

(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.

16. The aforementioned rules make it clear that the benefit of exercising option available under FR 23 would be available only to a “holder of post” under Rule FR 23. A holder of post is defined as follows:

“The expression "holder of a post" occurring in this rule applies also to a person who is not actually holding the post, the pay of which is changed, provided he has a lien or a suspended lien on that post.”

17. Therefore, a “holder of post” shall include a suspended employee who is subsequently reinstated depending on the fact that whether the

period of absence from duty is treated as period spent on duty or not. Hence, a suspended employee must be re-instated and his period of suspension must also be treated as on duty.

18. It is evident from the documents available on record, that the respondent falls under the aforementioned Rule 2(a). The Impugned order dated 07.05.2012 passed by the Vice- Chairman, DDA denied the petitioner any relief on the ground that he cannot exercise the option for revision of scale of pay under FR-23 in view of the fact that he was dismissed from service without re-instatement from suspension. The relevant portion of the aforesaid order is reproduced hereinunder:

*“Since, Shri. B.B.S. Yadav has **been dismissed from service without reinstatement from suspension and accordingly had neither retained his lien on the post held by him, nor the period of his suspension has been treated as on duty**, he is not entitled to exercise the option for revision of scale of pay under FR-23, in view of the above instructions of the government.”(Emphasis Supplied)*

19. However, approximately two months after the afore-mentioned order, the Hon’ble Lt. Governor passed the order dated 20.07.2012 wherein he quashed the earlier orders of suspension and reinstated the respondent in the following terms:

*“11. It is further ordered that the period of absence of duty up to the date of reinstatement, consequent upon this order, will **not be treated as spent on duty**, and in pursuance to provisions of FR 54 (1) (a) & (b), this period is ordered to be regulated as provided under FR 54 (4), subject to the conditions laid down under FR 54(5), (6), (7) & (8).*

(Emphasis supplied)

20. To further elaborate the rules, reliance may be placed on the decision rendered by the **Hon’ble Supreme Court** in the case of ***Union of India vs. R.K. Chopra, AIR 2010 SC 649*** wherein the Apex Court made the following observations in the paragraph 26:

“26...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.” (Underlining Supplied)

21. It is thus clear that the respondent, after the afore-mentioned order dated 20.07.2012 was reinstated in service. However, the same order treats his suspension period as period spent not on duty thereby disentitling the respondent from availing the benefits of exercising the option under FR-23, consequently, also disentitling him from availing the revised subsistence allowance. The case of the respondent is thus squarely covered by the said decision of the Hon’ble Supreme Court in ***R.K. Chopra’s case (supra)*** and reliance placed by the learned Tribunal on the decision of its Larger Bench in the case of ***J.S. Kharat’s case (supra)*** was highly misplaced and therefore, the same deserves to be set aside and to that extent, the present Writ Petition filed by the petitioner is allowed. So far as the issue relating to the enhancement of subsistence allowance from 50% to 75% is concerned, the direction given by the learned Tribunal is that it is left to the discretion of the Competent Authority to take decision in due course and we accordingly direct the petitioner herein to take a decision on the said claim of the respondent for

the enhancement of subsistence allowance from 50% to 75% strictly in accordance with the applicable rules and in accordance with rule.

22. With the above direction, the present Writ Petition and all the pending applications are disposed of.

KAILASH GAMBHIR, J.

I.S.MEHTA, J.

May 12, 2015

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