

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

+ **WRIT PETITION (CIVIL) No. 12109/2015**

% **Reserved on:** 7th November, 2016
Date of Decision: 8th December, 2016

GOVERNMENT OF NCT OF DELHIPetitioner
Through Nemo.

Versus

RAM NATHRespondents
Through Mr. T.D. Yadav, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MS. JUSTICE SUNITA GUPTA

SANJIV KHANNA, J.

The respondent-Ram Nath was appointed as a Lower Division Clerk in 1975 in the Government of NCT of Delhi, the petitioner herein. He was promoted as Upper Division Clerk in 1980, Head Clerk in 1992 and Grade-I Superintendent in 2005.

2. In 2005 and 2006, the Central Bureau of Investigation registered several cases/FIRs regarding illegality in the revival of defunct Cooperative Group Housing Societies in Delhi against a number of persons, including the respondent.

3. The respondent was placed under suspension with effect from 6th January, 2006, which was extended from time to time till 12th March 2010,

when he was allowed to rejoin service. The respondent subsequently retired from service on 31st January, 2012.

4. Post retirement, the respondent filed OA No. 2884/2013 before the Principal Bench of the Central Administrative Tribunal (Tribunal, for short) praying for the following reliefs:-

“(i) To direct the respondents to release all the pensionary benefits like leave encashment, gratuity and commutation of pension and other benefits.

(ii) To direct the respondents to grant annual increment during suspension period after revocation of suspension order against applicant and also direct the respondent to revise all the pensionary benefits as per VIth Pay Commission recommendation.

(iii) To direct the respondents to grant 24% interest on delayed payment of all retirement benefits.

(iv) To direct the respondents to revise all the pensionary benefits after granting prayer (ii) to the applicant.

(v) To direct the respondents to give all consequential benefits to the applicant like arrears etc.

(vi) To pass any other order(s) as may be deemed fit and proper in the facts and circumstances of the case.

(vii) Award cost.”

5. The Tribunal in the impugned order dated 16.12.2014, recording that criminal proceedings were pending and the respondent was facing prosecution as an accused on the date of his retirement, i.e., 31st January, 2012 rejected most of the prayers, holding that provisional pension in terms of Rule 69(1)(b) of the Central Civil Service (Pension) Rules, 1972 was

payable. The impugned order observes that leave encashment, etc., would be payable on the conclusion of the proceedings if the respondent is eligible and subject to adjustments. Withholding of gratuity, it has been held, was in accordance with the law in view of Rule 69(1)(c) of the aforesaid Pension Rules. The prayer for commutation of pension, at the stage, would also not be acceptable. The General Provident Fund and also Central Government Employees Group Insurance Scheme amounts had been paid in May and August, 2012.

6. However, on the question of entitlement to annual increments during the period of suspension, the prayer made by the respondent has been accepted, directing that the annual increments should be granted and included in the salary as payable to the respondent on rejoining service. The Tribunal in the impugned order has relied upon the following observations in

Balvantray Ratilal Patel versus State of Maharashtra, AIR 1968 SC 800:-

“4.On general principles therefore the government like any other employer, would have a right to suspend a public servant in one of two ways. It may suspend any public servant pending departmental enquiry or pending criminal proceedings; this may be called interim suspension. The Government may also proceed to hold a departmental enquiry and after his being found guilty order suspension as a punishment if the rules so permit. This will be suspension as a penalty. As we have already pointed out, the question as to what amount should be paid to the public servant during the period of interim suspension or suspension as a

punishment will depend upon the provisions of the statute or statutory rules made in that connection.”

Reliance has been placed upon the observations of the Allahabad High Court in *Mritunjai Singh versus State of U.P. and Others*, AIR 1971 Allahabad 214 which read:

" 15. We now come to the last point, namely, whether the petitioner should be allowed to earn his increment due during the suspension. In that connection again my attention was drawn to the same authority of the Supreme Court which has already been referred to as the first authority, namely, that relating to *The Management Hotel Imperial*. [A.I.R. 1959 S.C. 1342.] It has been laid down therein that the suspension has the effect of temporarily suspending the relation of master and servant with the consequence that the servant is not bound to render service and the master is not bound to pay. Emphasis is laid down on the words ‘master is not bound to pay’ on behalf of the State and it is said that if the master is not bound to pay during the suspension how can the servant claim that he is entitled to earn his increment during the period of suspension. The matter, however, has been clarified in the later authority of Balvantrai Ratilal Patel [A.I.R. 1968 Supreme Court 800.] where it is indicated that even if there is no express term of suspension in the contract of employment, the employer has power to suspend his employee and it amounts to the issuing of an order to the employee which, because such contract is subsisting, the employee must obey. This shows that the contract of service subsists during the period of suspension and if the contract subsists, even though there is suspension, the employee remains in service and if he remains in service, he is entitled to all benefits of service even though he is not expected to work during the period of suspension. Rule 24 of the Financial Hand Book Volume II issued under the

authority of the Govt. of the Uttar Pradesh in Chap. IV Part II provides that an increment shall ordinarily be drawn as a matter of course unless it is withheld. An increment may be withheld from a government servant by the Government, or by any authority to whom the Government may delegate this power under, Rule 6, if his conduct has not been good or his work has not been satisfactory. In ordering the withholding of an increment, the withholding authority shall state the period for which it is withheld, and whether the post-poning shall have the effect of post-poning future increments. As the contract of the service of the petitioner continued even though he was under suspension, the increment should be allowed ordinarily to be drawn unless it is withheld in the manner provided under Rule 25. As it is not the case of the opposite parties that it has been so withheld, the petitioner is entitled to the increments during the pendency of his suspension and the subsistence allowance shall be calculated accordingly, it being 1/3rd of the pay plus dearness allowance."

The decision of Hyderabad Bench of the Tribunal in *U Ganga Raju vs. Divisional Manager, S.C. Railway, Vijayawada and Ors.*, 1992(3) AISLJ CAT 235, was also relied.

7. The Government of NCT of Delhi has filed the present writ petition impugning the order dated 16.12.2014 insofar as they have been directed to grant annual increments to the respondent for the suspension period between 6th January, 2006 to 12th March, 2010.

8. Suspension of an employee does not terminate the employer-employee relationship. As per Section 6 of the General Clauses Act, 1987,

power to appoint includes the power to suspend. The power to suspend is specifically conferred on the Government departments under the Central Civil Services (Classification Control and Appeal) Rules, 1965. An employee, when suspended, is debarred from performing his duties, though he continues to be subjected to the same disciplinary rules and penalties as applicable prior to his suspension. In *Balvantray Ratilal Patel* (supra), the Supreme Court drew a clear distinction between suspending the contract of service of an employee and suspending an officer from performing the duties of his office during the subsistence of a contract, elucidated that the latter is always an implied term of any contract of service. When an employee is suspended in the latter sense, the contract of service still subsists, but the employee must not do anything in discharge of the duties of his office. This being a direction of the employer must be obeyed. Such orders of suspension can be passed when an employee is facing enquiry for his alleged misconduct. An employee, during the suspension period would be entitled to full remuneration, subject to a term of the contract or a statutory provision or rules framed and applicable.

9. We would examine the Rule position applicable to the respondent. Rule 10 of the Central Civil Services (Revised Pay) Rules, 2008, pertaining to increments is applicable to the present case and reads:-

10. ***Date of next increment in the revised pay structure-*** There will be a uniform date of annual increment, viz. 1st July of every year. Employees completing 6 months and above in the revised pay structure as on 1st of July will be eligible to be granted the increment. The first increment after fixation of pay on 1.1.2006 in the revised pay structure will be granted on 1.7.2006 for those employees for whom the date of next increment was between 1st July, 2006 to 1st January, 2007.

Provided that in the case of persons who had been drawing maximum of the existing scale for more than a year as on the 1st day of January, 2006, the next increment in the revised pay structure shall be allowed on the 1st day of January, 2006. Thereafter, the provision of Rule 10 would apply.

Provided that in cases where an employee reached the maximum of his pay band, shall be placed in the next higher pay band after one year of reaching such a maximum. At the time of placement in the higher pay band, benefit of one increment will be provided. Thereafter, he will continue to move in the higher pay band till his pay in the pay band reaches the maximum of PB-4, after which no further increments will be granted.”

As per Rule 10, a unified date has been fixed for grant of annual increment, i.e., 1st July of every year. The first increment after 1st January, 2006 in the revised pay structure would be payable with effect from 1st July, 2006. As noticed above, in the present case, the petitioner was suspended with effect from 6th January, 2006, which had continued till 12th March, 2010. If the petitioner had not been suspended, he would have been entitled to first increment on 1st July, 2006 and accordingly each year thereafter. However, in the present case, the petitioner was suspended before 1st July,

2006 and was entitled to subsistence allowance under Fundamental Rule 53 of the Fundamental Rules and Supplementary Rules (FRSR, for short) which reads as under:-

“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) in the case of a Commissioned Officer of the Indian Medical Department or a Warrant Officer in Civil employ who is liable to revert to Military duty, the pay and allowances to which he would have been entitled had he been suspended while in military employment;

(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 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 allowance admissible from time to time on the basis of pay of which the Government servant was in receipt on the date of suspension:

Provided that the government servant shall not be entitled to the compensatory allowances 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:

Provided that in the case of a Government servant dismissed or removed from service, who is deemed to have been placed or to continue to be under suspension from the date of such dismissal or removal and who fails to produce such a certificate for any period or periods during which he is deemed to be placed or to continue to be under suspension, he shall be entitled to the subsistence allowance and other allowances equal to the amount by which his earnings during such period or periods, as the case may be, fall short of the amount of subsistence allowance and other allowances that would otherwise be admissible to him; where the subsistence and other

allowances admissible to him are equal to or less than the amount earned by him, nothing in this proviso shall apply to him."

As per the said Rule, a Government servant under suspension is entitled to subsistence allowance equal to the leave salary if he had been on leave on half average pay or on half pay and also dearness allowance admissible on such leave salary. Clause (iii) of FR 53 (1) states that dearness allowance will be based on increase or decrease of the subsistence allowance admissible under the respective clauses. The Rule does not specifically provide for increase or grant of increments during the period of suspension. Consequently, the petitioner during the period of suspension would be entitled to subsistence allowance equal to the leave salary which he would have drawn, if he had been on leave on half average pay or on half-pay, in addition to dearness allowance, if admissible on such leave salary payable. The proviso to the Rule stipulates that if the period of suspension exceeds three months, subsistence allowance can be increased or decreased, as the case may be. In the present case, we are not concerned with the proviso.

10. A disciplinary enquiry can result in exoneration or imposition of a minor or major penalty including dismissal or removal from service. Conviction in criminal prosecution also has its consequences. Dependent upon the final verdict, the authorities on the conclusion of the departmental proceedings or prosecution decide whether or not the period of suspension is

to be counted as period spent on duty. Generally, if the employee is fully exonerated, the suspension period can be counted as period spent in service and in other cases, the period of suspension may not or may partly be counted as service. In any case, the authority concerned is required to pass an order, whether or not the suspension period is to be counted as service. This position is clearly and categorically laid down in Rule 54-B of the FRSR, and in Sub-Rule (6), in particular. Rule 54-B reads as under:-

“54-B. (1) When a Government servant who has been suspended is reinstated or would have been so reinstated but for his retirement on superannuation while under suspension, the authority competent to order reinstatement shall consider and make a specific order—

(a) regarding the pay and allowances to be paid to the Government servant for the period of suspension ending with reinstatement or the date of his retirement on superannuation as the case may be; and

(b) whether or not the said period shall be treated as a period spent on duty.

(2) Notwithstanding anything contained in rule 53, where a Government servant under suspension dies before the disciplinary or court proceedings instituted against him are concluded, the period between the date of suspension and the date of death shall be treated as duty for all purposes and his family shall be paid the full pay and allowances for that period to which he would have been entitled had he not been suspended, subject to adjustment in respect of subsistence allowance already paid.

(3) Where the authority competent to order reinstatement is of the opinion that the suspension

was wholly unjustified, the Government servant shall, subject to the provisions of sub-rule (8), to be paid the full pay and allowances to which he would have been entitled, had he not been suspended:

Provided that where such authority is of the opinion that the termination of the proceedings instituted against the Government servant had been delayed due to reasons directly attributable to the Government servant, it may, after giving him an opportunity to make his representation within sixty days from the date on which the communication in this regard is served on him and after considering the representation, if any, submitted by him, direct, for reasons to be recorded in writing that the Government servant shall be paid for the period of such delay only such amount (not being the whole) of such pay and allowances as it may determine.

(4) In a case falling under sub-rule (3) the period of suspension shall be treated as a period spent on duty for all purposes.

(5) In cases other than those falling under sub-rules (2) and (3), the Government servant shall subject to the provisions of sub-rules (8) and (9), be paid such amount (not being the whole) of the pay and allowances to which he would have been entitled had he not been suspended, as the competent authority may determine, after giving notice to the Government servant of the quantum proposed and after considering the representation, if any, submitted by him in that connection within such period (which in no case shall exceed sixty days from the date on which the notice has been served) as may be specified in the notice.

(6) Where suspension is revoked pending finalisation of the disciplinary or court proceedings, any order passed under sub-rule (1) before the conclusion of the proceedings against the Government servant, shall be reviewed on its own motion after the conclusion of the

proceedings by the authority mentioned in sub-rule (1), who shall make an order according to the provisions of sub-rule (3) or sub-rule (5), as the case may be.

(7) In a case falling under sub-rule (5) the period of suspension shall not be treated as a period spent on duty unless the competent authority specifically directs that it shall be so treated for any specified purpose:

Provided that if the Government servant desires, such authority may order that the period of suspension shall be converted into leave of any kind due and admissible to the Government servant.

NOTE—The order of the competent authority under the preceding proviso shall be absolute and no higher sanction shall be necessary for the grant of—

(a) Extraordinary leave in excess of three months in the case of temporary Government servant; and

(b) Leave of any kind in excess of five years in the case of permanent Government servant.

(8) The payment of allowances under sub-rule (2), sub-rule (3) or sub-rule (5) shall be subject to all other conditions under which such allowances are admissible.

(9) The amount determined under the proviso to sub-rule (3) or under sub-rule (5) shall not be less than the subsistence allowance and other allowances admissible under rule 53.”

(emphasis supplied)

Sub-rule (6) stipulates that when a suspension order is revoked pending finalisation of the disciplinary or court proceedings, the authority may pass an order under sub-rule (1), notwithstanding the fact that sub-rule

(1) applies to a case wherein government servant who was suspended is reinstated or would have been reinstated but for his retirement including the premature retirement while under suspension. Sub-rule (6) does not mandate that the authorities must necessarily pass an order when the suspension is revoked pending finalisation of disciplinary or court proceedings. It is an enabling provision which would come into play when an order under Sub-Rule (1) was passed, though the disciplinary or court proceedings had not culminated. It postulates that on finalisation of the disciplinary or court proceedings when an order under sub-rule (1) had been passed, the authority would review the position and accordingly make an order under sub-rule (3) or sub-rule (5). An order under sub-rule (3) is passed directing full pay and allowances, when the suspension was wholly unjustified. This is subject to the proviso. Sub-rule (5) applies to cases not covered by sub-rule (3) and in such cases, the employee is entitled to the amount not being the whole of the pay and allowances which would be payable to the employee for the suspension period.

11. The Supreme Court in *State of Punjab Vs. Jaswant Singh Kanwar*, (2014) 13 SCC 622, has observed that the dictionary meaning of suspension would mean to debar usually for a time, from any privilege, the execution of an office or from the enjoyment of an income. By reason of suspension, the powers, functions, and privileges remain in abeyance, though one remains to

be subject to the same disciplinary rules and penalties and to the same authorities. The effect thereof is that this period is not treated as period spent on duty, unless it is so specifically directed to the contrary. Referring to the concept of increment in service law jurisprudence, reference was made to ***State Bank of India Vs. Central Government Labour Court***, (1972) 3 SCC 595 to elucidate that the word increment refers to an increase or addition on the fixed scale; it is a regular increase in salary on such scale. Increment, when it is in the timescale of pay, the employee advances from the lower point of scale to the higher by periodic addition. Increment is an incidence of an employment. An employee gets an increment by working for full year and drawing full salary. As during the period of suspension, the employee does not work, he is not entitled to increments, for period is not spent on duty. It is not as if the employee, who has been suspended would never be entitled to increments even if he is fully or partly exonerated.

12. At this stage, it may be relevant to also examine judgment of the Supreme Court in ***Union of India Vs. R.K. Chopra***, (2010) 2 SCC 763. In this case issue arose whether an employee, who was suspended, would be entitled to benefit of Central Civil Services (Revised Pay) Rules, 1997, which came into force with effect from 1st January, 1996. Reference was made to Rule 53(1)(ii)(a) of the FRSR which stipulates that where period of suspension exceeds three months, the authority is competent to vary the

subsistence allowance fixed at the first stage @ 50%, subject to some restrictions. Referring to the Government of India's GOMs No. F-2(36)-Ests/-III/58 dated 27th August, 1958, it was held that a government servant under suspension might be given an option to elect the revised scales of pay introduced in respect of the post held by him immediately prior to suspension when the revised scale of pay takes effect from a date prior to suspension. Accordingly, subsistence allowance would be calculated. In case where revised scale of pay takes effect from a date falling in the suspension period, and where a government servant under suspension retains the lien on the substantive post, he can be allowed to exercise similar option. Benefit of option, pertinently, would practically accrue to him in respect of period of suspension only and only after his reinstatement dependent on the fact whether the period of suspension is treated as duty or not. We are, in this case, not concerned with fixation of pay-scale pursuant to the Sixth Pay Commission or Central Civil Services (Revised Pay) Rules, 2008, but the dictum elucidates that grant of increments during the suspension period depends upon whether or not the period of suspension is treated as period spent on duty.

13. The Supreme Court in the ***R.K. Chopra*** (supra) had referred to Rule 5 and 6 of Central Civil Services (Revised Pay) Rules, 1997 and in specific to the second proviso to Rule 6 under which a government servant under

suspension can exercise option within three months from the date of his return to duty if it was later than the prescribed date. Note (iii) to Rule 7 was also referred to and stipulates that the government servant under suspension shall continue to draw subsistence allowance based on existing scale of pay and his pay on the revised scale would be subject to final order pending disciplinary proceedings. The said decision in no way contradicts or is in conflict with the subsequent decision of the Supreme Court in *Jaswant Singh Kanwar* (supra).

14. In view of the aforesaid discussion, we are of the opinion that the impugned order of the Tribunal directing that the respondent would be entitled to increments during the period of suspension cannot be sustained. No such direction could have been issued at that stage nor can it be issued at the present stage. Only after the criminal prosecutions have concluded and the issue whether the period of suspension is to be counted as on duty has been decided, would the question of entitlement to increments for the period of suspension arise.

15. The writ petition is accordingly allowed and the impugned order, to the extent that it directs the grant of increments for the period of suspension, is set aside. We however clarify that in case increments have been given, the same shall not be recovered. Adjustments towards increments wrongly paid may be made in the future when retirement or other benefits are paid.

However, the petitioners would be entitled to re-compute the present pension in accordance with our findings. In the facts of the case, there will be no order as to costs.

(SANJIV KHANNA)
JUDGE

(SUNITA GUPTA)
JUDGE

DECEMBER 8th, 2016
VKR