

CASE NO.:
Appeal (civil) 587 of 2005

PETITIONER:
State Government of M.P. & Ors.

RESPONDENT:
Shankarlal

DATE OF JUDGMENT: 13/12/2007

BENCH:
S.B. Sinha & Harjit Singh Bedi

JUDGMENT:
J U D G M E N T

S.B. Sinha, J.

1. Respondent was appointed as a Lower Division Clerk in the Public Works Department on 25.9.1971. He was promoted as Upper Division Clerk on 1.1.1979.

2. A departmental proceeding was initiated against him. He was placed under suspension by an order dated 4.9.1982. In the said order of suspension, it was clearly stipulated that subsistence allowance would be paid to him in terms of Rule 53 of the Fundamental Rules. On or about 19.6.1982, he was transferred from Katni to Barhi. He did not join at Barhi after the order of suspension was passed. It appears that a communication was issued to him on 5.10.1983 asking him to collect the subsistence allowance stating :

\023You are suspended by the Superintending Engineer PWD (B&R) Jabalpur Circle, Jabalpur vide order No.1164/E-11-19 of 74 dated 4.9.82 and suspension order was sent to you, but you have refused to take it.

(2) Charge sheet was issued by SEJC vide No.2067/E-11-19 of 74 dated 16.10.82, and sent through peon and 2 sub-Engineer of this Division, but you have refused to take it.

(3) Executive Engineer, PWD (E/M) Dn. Jabalpur Enquiry officer of your D.E. case have served the notice for facing the DE and attending their office, but you have refused to take it.

Please arrange to take the above letters from their officer and produced to the undersigned, so that further action, for sanction of suspension allowance and other dues, can be taken by this officer.

Please also explain for your not joining in Barhi Sub Division with Head Quarters at Barhi after suspension & why your absence from Barhi should not be considered as willful absence from Head quarters and action taken accordingly.\024

3. For a few days, namely, on 2.11.1983, 22.11.1983, 9.12.1983 and 20.1.1984, he took part in the departmental proceedings. On those days, some witnesses on behalf of the department were examined and cross-examined. But on 24.2.1984, he absented himself. A telegram was sent to him asking him to submit his list of witnesses and defence on 12.3.1984. He did not comply therewith. He also did not take part in the departmental

proceedings on 29.3.1984. Another chance was given to him to appear before the enquiry officer on 19.4.1984 but even on the said date he was not present. He although was present on 5.5.1984, but did not take part in the hearing in the said proceeding stating that he had filed an appeal before this Court.

We may place on record that neither any number has been put in the said purported S.L.P. nor the same was registered, although according to the respondent, who had appeared in person before us, the said SLP was still pending.

4. On subsequent dates, he absented himself and, thus, did not take part in the enquiry proceedings. Out of 18 dates fixed for hearing, the respondent was present only on five days. In the aforementioned situation, an ex parte departmental proceeding was held wherein he was found guilty of the charges levelled against him. We may also place on record that he collected his subsistence allowance for the period 4.9.1982 to 20.9.1982 in January 1985 and thereafter payment till September 1984 was made in February 1987. His services, however, were terminated by an order dated 28.5.1985. The amount of subsistence allowance of the respondent was raised from 50% to 75% on 14.6.1985.

5. He preferred an appeal thereagainst which was dismissed by the Chief Engineer being the appellate authority on 15.11.1999.

6. An original application was filed by him before the State Administrative Tribunal wherein, inter alia, a question in regard to non-payment of subsistence allowance was raised. The Tribunal in its order opined :

\023Therefore, the applicant himself is responsible for delayed payment of the subsistence allowance, not the respondents.\024

7. Other contentions raised by him before the Tribunal were also not accepted. The Tribunal held that the conclusion of the enquiry officer being based on evidence produced in the departmental enquiry, no case has been made out for interference with the order of the Disciplinary Authority. The original application was, therefore, dismissed.

8. On a writ petition preferred by the appellant thereagainst before the High Court of judicature at Madhya Pradesh at Jabalpur which was marked as Writ Petition No.1497 of 2002, a Division Bench of the High Court, however, held that non-payment of subsistence allowance amounted to violation of principles of natural justice, stating :

\023The Tribunal dismissed the application on the ground that the Tribunal or Court are not the appellate forum to review the punishment. However, this fact cannot be marginalized and blinked away because it goes to the root of the matter and it has nexus with the principles of natural justice, that unless and until subsistence allowance is paid to the delinquent employee in proper time, how he could take proper steps in defending his case in the departmental enquiry. In the present case, the period during which the subsistence allowance was not paid was quite long which is 4.9.1982 to 13.11.1984.

On the basis of the aforesaid premised reasons, we set aside the order passed by the Tribunal as well as the order terminating the services of the petitioner passed by the authority. The petitioner is hereby directed to be reinstated. However, looking to the entire facts and surrounding circumstances, we do not think it proper to award any back wages.\024

9. Ms. Vibha Datta Makhija, learned counsel appearing on behalf of the State, in support of this appeal would submit that the respondent having not

shown any prejudice in regard to non-payment of the subsistence allowance, the High Court committed a serious error in passing the impugned judgment.

10. Respondent who appeared in person, on the other hand, contended that non-payment of subsistence allowance violates the right to life of a person as contained in Article 21 of the Constitution of India and in that view of the matter, it was obligatory on the part of the appellant herein to pay the said allowance.

11. Rule 53 of the Madhya Pradesh Fundamental Rules provides that subsistence allowance should be paid to an employee who has been placed under suspension. Payment of inadequate quantum of subsistence allowance has been adversely commented by this Court [See O.P. Gupta v. Union of India & Ors. [AIR 1987 SC 2257]].

12. It is, thus, not in dispute that all facilities for receipt of payment of subsistence allowance must be given to the delinquent officer.

13. An almost identical question in regard to payment of subsistence allowance albeit in a different fact situation came up before this Court in Jagdamba Prasad Shukla v. State of U.P. & Ors. [(2000) 7 SCC 90] wherein it was opined :

\0236. It is evident from the record that the High Court is not right in observing that the ground sought to be urged was not taken in the claim petition or in the writ petition. In fact, the High Court in the latter part of the judgment observes that :

\023for the first time, the petitioner has taken the ground in this writ petition that he could not attend the departmental proceedings due to financial crunch as he was not paid his subsistence allowance\024.

A perusal of the record shows that the contention urged before the High Court and again before us, was also raised before the U.P. Public Service Tribunal and even earlier before the authorities. The U.P. Public Service Tribunal considered it and on the facts of the case, the Tribunal held that :

\023Therefore, those rulings where person was unable to attend the enquiry for non-payment of subsistence allowance, resulting in inquiry being vitiated will not be applicable.\024

Apart from it, in reply dated 22-1-1979 sent to the show-cause notice, the appellant specifically stated that he has not been paid his pay and suspension allowance which cannot be withheld and as such how could he be expected to reach Gorakhpur or elsewhere due to shortage of funds. He further stated that :

\023the applicant has requested a number of times for drawing his pay and suspension allowance, but the same could not be drawn and sent to the applicant which was a serious handicap to appear anywhere even if he so preferred during illness and even against the recommendations of his medical attendant\024.

The request of the appellant for payment of subsistence allowance is also contained in his letter dated 31-3-1978 sent to the Superintendent of Police, Railways, Gorakhpur Section, Gorakhpur. The said letter also contains the address of the

appellant. The address of the appellant is in fact contained on various communications sent by him to the respondents. It is curious that the respondents could serve all other communications including the show-cause notice to the appellant but insofar as the payment of subsistence allowance is concerned, the plea taken is that the appellant did not intimate his address and, therefore, the amount could not be sent. Thus, it is evident that despite repeated requests, the subsistence allowance was not paid to the appellant from the date of suspension till removal. It is also evident that the appellant had expressed difficulty in reaching the place of inquiry due to shortage of funds.

8. The payment of subsistence allowance, in accordance with the Rules, to an employee under suspension is not a bounty. It is a right. An employee is entitled to be paid the subsistence allowance. No justifiable ground has been made out for non-payment of the subsistence allowance all through the period of suspension i.e. from suspension till removal. One of the reasons for not appearing in inquiry as intimated to the authorities was the financial crunch on account of non-payment of subsistence allowance and the other was the illness of the appellant. The appellant in reply to the show-cause notice stated that even if he was to appear in an inquiry against medical advice, he was unable to appear for want of funds on account of non-payment of subsistence allowance. It is a clear case of breach of principles of natural justice on account of the denial of reasonable opportunity to the appellant to defend himself in the departmental enquiry. Thus, the departmental enquiry and the consequent order of removal from service are quashed.\024

14. We may, however, notice that in *Indra Bhanu Gaur v. Committee, Management of M.M. Degree College & Ors.* [(2004) 1 SCC 281], a Bench of this Court opined that when an opportunity had been granted to the delinquent officer to take the subsistence allowance, it must be shown that because of non-payment thereof, he was not in a position to participate in the proceedings or that any other prejudice in effectively defending the proceedings was caused to him.

15. Yet again, in *U.P. State Textile Corpn. Ltd. v. P.C. Chaturvedi*, (2005) 8 SCC 211, it was held :

\023Rule 41 provides that the subsistence allowance is payable only when the employee, if required, presents himself every day at the place of work. Obviously, for establishing that the employee had presented himself at the place of work, the authorities had clearly stipulated a condition that the attendance register was to be signed. No explanation was offered by Respondent 1 employee as to why he did not sign the register. It cannot be lightly brushed aside as technical and/or inconsequential. As admittedly, Respondent 1 employee had not signed the attendance register even though specifically required in the order of suspension, the High Court was not justified in coming to a conclusion that the non-signing was not consequential or a bona fide lapse. It is also to be noted that at various points of time the employer informed Respondent 1 employee about

the consequences of his not signing the attendance register as stipulated in the order of suspension.\024

16. The High Court, in our opinion, committed a serious error in holding that the question of prejudice is irrelevant in so far as it misread and misinterpreted Jagdamba Prasad Shukla (supra). No law in absolute terms in this connection was laid down therein. The relief was granted to the appellant having regard to the fact situation obtaining therein. It was found as of fact that no subsistence allowance, had been given. It was not established that communication in relation to subsistence allowance was, in fact, served upon the appellant therein and despite repeated requests, subsistence allowance was not paid. The fact that the Court therein opined that no justifiable ground has been made for non-payment of the subsistence allowance all through the period of suspension till removal, may, itself be a ground for arriving at the conclusion that the delinquent officer was suffering from financial crunch on account thereof as also his illness.

17. The High Court, therefore, in our opinion, was required to arrive at a correct finding of fact so as to enable it to pose unto itself the right question for arriving at a right decision.

18. Respondent, indisputably, has been found guilty of commission of misconduct. He, however, rightly or wrongly carried an impression that the writ petition filed by him before this Court presumably by sending a letter to the Chief Justice has been entertained. But, evidently, neither no such letter was received nor the same had been entertained by this Court.

A finding of fact has been arrived at by the Tribunal that the respondent himself was to thank himself for non-receipt of subsistence allowance. It was held that the appellant had taken all possible steps for disbursement of subsistence allowance.

19. We, therefore, are of the opinion that in the peculiar facts and circumstances of the case, interest of justice shall be subserved if the impugned judgment is set aside and the matter is remitted to the High Court for consideration thereof afresh. The High Court may look into the records of the case so as to enable it to arrive at a decision whether non-payment of subsistence allowance caused any prejudice to the respondent in the event it intends to interfere with the finding of fact arrived at by the Tribunal that the respondent himself was responsible therefor.

20. However, we direct that in the peculiar facts and circumstances of this case, the State should pay a sum of Rs.50,000/- (Rupees fifty thousand only) to the respondent by way of litigation costs. The State shall also place before the High Court all relevant records. We would request the High Court to consider the desirability of disposing of the matter expeditiously.

21. The appeal is allowed to the aforesaid extent and with the aforesaid directions and observations.