

R.P. Kapur

Vs

Union of India

Civil Appeal No. 4323 of 1999

(CJI Dr. A. S. Anand, M. Jagannadha Rao, N. Santosh Hegde JJ)

09.08.1999

JUDGMENT

M. Jagannadha Rao, J. –

1. Leave granted.

2. This is an appeal by the appellant (party-in-person) against the judgment of the Central Administrative Tribunal, Chandigarh Bench, in O.A. No. 423/HR/94 dated 11.10.1996. At the time of the admission of the Special Leave Petition on 17.2.1998, limited notice had been issued restricting the dispute to the question whether *pension* and retiral benefits *are to be computed on the basis of revised scales of pay*. That order reads as follows:

"The grievance of the petitioner appears to be that though pension payment order has been made in his favour but the pension has not been calculated at the revised pay scales. It is submitted that none of the retiral benefits have been calculated at the revised scales. Issue notice to the respondents limited to the said question".

3. At the outset, we may state that we are concerned in this case with compulsory retirement of a government servant as a matter of punishment after a regular disciplinary inquiry. We are not here concerned with a case where a public servant is retired compulsorily in public interest.

4. The facts of the case, relevant to the dispute, are as follows: The appellant joined service on 19.11.1971 in the Indian Railway Service of Signal Engineers (Class II). On the ground of certain misconduct, he was suspended from service on 21.1.1982, pending a disciplinary inquiry. At the conclusion of the inquiry, he was compulsorily retired under an order dated 17.11.1992, after due consultation with the Union Public Service Commission. The material part of that order which became effective from the date of its service, namely, 25.11.1992, reads as follows:-

"The President has, therefore, decided to impose on Sri R.P. Kapur, a penalty of compulsory retirement from service with the condition that while the payment during the entire period of suspension from 21.1.1982 to the date of service of this order, will be restricted to the subsistence allowance drawn, this period may be allowed to count as qualifying service for pension but for no other purpose."

5. On 28.5.1993, an order was passed by the Railways (P.52 of the paper book) that "since the appellant was paid only subsistence allowance during the period of suspension upto the date of compulsory retirement, the relevant period of 10 months for calculation of average emoluments for

pension would be the one relating to 10 months period preceding 21.1.1982", i.e. the date on which he had been initially placed under suspension. In other words, instead of computing the pension on the basis of the average emoluments i.e. subsistence allowance drawn in the 10 months before 25.11.1992, the date of compulsory retirement, it was proposed to compute the pension on the basis of the average emoluments, namely the pay drawn during the 10 months before the order of suspension dated 21.1.1982. The result was that the appellant became disentitled for computation on the basis of 75% of the pay as revised w.e.f. 1.1.1986.

6. On the basis of the above order dated 28.5.1993, the impugned order dated 25.6.1993 (see P. 39-40 of the paper book), was passed by the respondents taking the 10 months 'pay' before suspension 21.1.1982 at Rs. 1250/- p.m. They arrived at a monthly average of Rs. 1618.22 and computed the pension at Rs. 518, deducted Rs. 171/- being 1/3 of the pension commuted, and together with other inputs arrived at a figure of Rs. 1178/- p.m. w.e.f. 25.11.1992. Family pension and other retiral benefits were also computed on that basis. It appears from the counter filed on 8.3.1999 by the respondents, that pursuant to certain orders in O.A. 265 of 1994 dated 4.7.1996 of the Central Administrative Tribunal, Chandigarh Bench, the above order was slightly modified by arriving at Rs. 1668.22 as the monthly average and pension was fixed at Rs. 529 and brought on par w.e.f. 1.1.1986 at Rs. 1192/- p.m. plus variable Dearness allowance. These figures were based on the average emoluments ten months prior to 21.1.1982 and not the average of the subsistence allowance paid during 10 months before 25.11.1992.

7. The appellant has placed on record the orders of the Chief Personnel Officer, N.E. Railway (at P.42 of the paper book) dated 4/5.10.1988 to show that after 1.1.1986, initially his pay was computed in the revised scale of Rs. 2650/- p.m. w.e.f. 1.1.1986 and on that basis his subsistence allowance at the rate of 75% of the pay was fixed as above under sub-rule (ii) of Rule 2043 (FR 53) R-II. That order reads as follows:

"In terms of Central Administrative Tribunal, Guwahati's Judgment in case NO.GC 171/87, the pay of Shri R.P. Kapur, (ASTE, under suspension) in the revised scale of Rs. 2200-4000/- (RSRP) is fixed @Rs. 2650/- with effect from 1.1.1986.

This has been certified by the FA & CAO/EGA/Maligeon vide his endorsement No. Nil dated 3.10.1989.

Since Shri R.P. Kapur, is under suspension, subsistence allowance at the rate of 75% of the pay fixed as above may be drawn/adjusted accordingly in terms of sub-rule (ii) of Rule 2043(FR 53) R-II.

Sd/-(Illegible)

For Chief Personnel Officer

N.F. Railway

No. 202E/2/60(O) Loose

Dated 4/5.10.1988"

(It may here be noted that while according to the appellant, after 1.1.1986, the pay was re-fixed at Rs. 2650/- p.m., the counter affidavit of the respondents in the Tribunal put the re-fixation after

1.1.1986 at Rs. 3300/- p.m.).

8. The appellant, therefore, contends that when the subsistence allowance is 75% of the average of 10 months pay i.e. average of Rs. 2650/- p.m. for 10 months (or Rs. 3300/- as stated in the counter) - being the amount per month paid in the last 10 months before the compulsory retirement on 25.11.1992, - the respondents have wrongly computed the pension and all other retiral benefits illegally on the basis of Rs. 1250/- p.m. the pay during the 10 months preceding the order of suspension dated 21.1.1982.

9. We shall now refer to the response of the respondents in their initial counter affidavit filed before the Tribunal which, on its face, appears to be self contradictory. It is stated there (P.47 of the paper book) that the Railway Board in consultation with the Department of Pension and Pensioners' Welfare have taken the view that "since the petitioner was paid only subsistence allowance during the period of suspension, the relevant period of 10 months for calculation of average emoluments for the pension should be the one relating to 10 months period preceding 21.1.1982, i.e. the date on which the petitioner had been kept under suspension". The above contention in the counter is obviously based on the order dated 28.5.1993 referred to earlier. It is then stated in the counter rather curiously that even if the average emoluments are fixed as per the pay revision w.e.f. 1.1.1986, the pension will not increase. This peculiar logic in the counter is worth quoting:

"It is pertinent to mention here that even though the pension was calculated on the basis of pre-revised scale as on 1.1.1986, the pension of the petitioner has been fixed at Rs. 1178.00 which is equivalent to the revised pay scale as on 1.1.1986 plus normal relief as admissible from time to time to the pensioners. Therefore, it is implied that the petitioner has been paid his due pension equivalent to the revised pay scale as admissible in such case. If his revised pay of Rs. 3200/- were taken into consideration for the purpose of calculation of pension, he would be getting the same pension i.e. Rs. 1178.00. Therefore, the prayer of the pensioner has got no merit and deserves to be dismissed."

10. It is not clear, mathematically how the pension computed on the pay drawn as per the pre-revised scale (Rs. 1178 or Rs. 1192 p.m. as the case may be), can be the same even if it computed on the basis of the pay revised w.e.f. 1.1.1986 i.e. Rs. 2650 (or Rs. 3300 p/m.).

11. It was stated in another para (para 4, 11) of the same counter filed in the Tribunal that "even though the pay of the petitioner was fixed in revised scale of pay Rs. 3000-4500, he did not draw the pay because of the fact that he was placed under suspension w.e.f. 21.1.1982 and he was placed under suspension w.e.f. 21.1.1982 and he was only the subsistence allowance during this period from 21.1.1982 to 25.11.1992 and not 'pay' as stated by the petitioner". It was further stated (para 4.12) ".....the calculation of pension, gratuity and commutation was correctly done and there is no anomaly in calculation taking into account the pay of the petitioner immediately before his suspension w.e.f. 21.1.1982". What the respondent meant was that inasmuch as the appellant did not draw "full pay" as revised from 1.1.1986 but only "subsistence allowance" on such revised pay, he could not claim any computation to be made on the basis of the subsistence allowance between 1981 to 1992. The reason was that pension was to be based on full pay. Full pay was drawn only before the suspension in 1982.

12. The appellant filed a rejoinder before the Tribunal and submitted that the above method of computation was not correct.

13. *The O.A. was dismissed by the Tribunal on 11.10.1996 holding that the contention of the respondents was correct and that the appellant's contention, if accepted would amount to treating the period of suspension as on duty. It was stated in that order of the Tribunal that the dismissal of the O.A. would, however, be subject to the result of O,A, 267/HR/94 where the order of compulsory retirement was under challenge. A review petition filed by the appellant was dismissed on 17.12.1996 holding that the appellant's "contention that the period of suspension from 21.1.1982 to 25.11.1992 should be treated as period spent on duty" could not be accepted in view of the terms of the order of compulsory retirement.*

14. *Aggrieved by the judgment of the Tribunal dated 11.10.1996, this appeal has been filed. Before us, the appellant has raised the same contentions as he raised before the Tribunal.*

15. *A counter has been filed by the respondents in this Court on 15.10.1998 contending that in the circumstances of the case, the appellant is to be treated as one under suspension till 25.11.1992, the date of compulsory retirement. The period under suspension "may count for any specific purpose e.g. qualifying service/leave etc. provided the competent authority passes a specific order to that affect." The President has passed a specific order that the period in question may count as qualifying order that the period in question may count as qualifying service for the purpose of pension and not for any other purpose. "The special dispensation was made by the Disciplinary Authority only to help the petitioner for spending 10 years under suspension". It is further stated that "under Rule 502 of Railway Manual of Pension Rules, 1950, average emoluments should be determine with reference to emoluments drawn by a government servant during the last 10 months of his service". the said rule, it is said, has laid down that "if during the last 10 months of his service a government servant had been under suspension, the period whereof does not count as service, the aforesaid period of suspension should be disregarded in the calculation of the average emoluments and equal period before the 10 months shall be included". * Then it is stated:*

"The petitioner had been under suspension for more than 10 years before

** We may here point out that Rule 502 of the 1950 Rules has been examined by us from the Manual. It does not contain any such provision as quoted above. The provisions quoted are obviously from Rule 50 of the Railway Services (Pension) Rules, 1993 which replaced filed on 9.3.1999 the respondents have relied upon and set out only Rule 50 of the 1993 Rules. His compulsory retirement and, therefore, even an equal period of 10 months preceding the 10 months of his retirement would fall within the suspension period during which he had drawn only subsistence allowance. Thus, if the whole period of the suspension period is ignored the relevant emoluments will be one relating to the 10 months period preceding 21.2.1982 from which he was placed under suspension".*

In other words, it is accepted in the counter that the "suspension period is ignored". Then it is further stated that (see P.92 of the paper book) there is a distinction between 'subsistence allowance' and 'pay' and that pension can be only on 'pay' and that hence one has to go back to the period 10 months before 21.1.1982, the date of suspension. Then comes an important plea that for the peculiar contingency arising in the case of the appellant, there is no provision in the Rules which permits the computation of pension on subsistence allowance, i.e. even though such subsistence allowance has been computed at 75% of the pay as revised w.e.f. 1.1.1986. That para in the counter reads as follows:

"Under the existing rules, there is no provision to take the average of the subsistence allowance for calculating the average emoluments for purposes of pension. Since the petitioner did not draw regular pay and allowance in the revised scales of pay w.e.f. 1.1.1986 to 25.11.1992, there is no scope to calculate his average emoluments for the purpose of pension and other pensionary dues as per the revised pay scales".

16. After the appellant filed his rejoinder, this Court directed the respondents to produce the relevant Rules. Thereafter, a further additional counter was filed on 9.3.1999. Reference was made there to Rule 50 of the Railway (Pension) Rules, 1993. That Rule is set out in the counter as under:

"Rule 50 - Average Emoluments: Average emoluments shall be determined with reference to the emoluments drawn by a railway servant during the last ten months of his service.

NOTE 1 :- If during the last ten months of his service a railway servant had been absent from the duty on leave of which leave salary is payable or having been suspended had been reinstated without forfeiture of service, the emoluments which he would have drawn, had he not been absent from duty or suspended, shall be taken into account for determining the average emoluments.

Provided that any increase in pay (other than the increment referred to in Note 3) which is not actually drawn shall not form part of his emoluments.

NOTE 2:- If, during the last ten months of his service, a railway servant had been absent from duty on extraordinary leave, or had been under suspension the period whereof does not count as service, the aforesaid period of leave or suspension shall be disregarded in the calculation of the average emoluments and equal period before the ten months shall be included". (This rule corresponds to FR 34)".

17. It is stated in the counter-affidavit that "as per rule, if an employee is awarded a major penalty and the suspension period is treated as wholly justified, in that case, such employee is not entitled for any benefit of service and the period of suspension cannot be treated as 'on duty'". It is stated that the President, who is the Disciplinary Authority, has passed a specific order that while the payment during the entire period of suspension will be restricted to 'subsistence allowance only', the said period may be allowed to be counted as qualifying service for the purpose of pension and not for any other purpose. Hence, the petitioner is not entitled to get any other benefit for the suspended period, i.e. 21.1.1982 to 25.11.1992. On the above reasoning, it is contended that the "petitioner is not entitled for pension on the revised pay-scale in the light of the aforesaid rules".

18. These are the relevant orders and the relevant contentions on both sides.

19. We have now to decide whether the above contentions raised in the various counter-affidavits are correct.

20. We shall first proceed to analyse Rule 50 of the Railway Services (Pension) Rules, 1993. The said Rule speaks of 'average emoluments drawn' by a railway servant during the last ten months of his service. Note 1 below the said rule, it will be seen, deals with a case of 'reinstatement' and hence Note 1 cannot obviously apply. But it is necessary to explain what it means. It states that if the person suspended is reinstated without forfeiture of service, the emoluments which he "would have drawn" shall be taken into account.

21. There is a proviso to Note 1. It states that increase in pay which is *'not actually drawn'* shall not form part of his emoluments. Considerable reliance has been placed on this proviso by the respondents to contend that the appellant has not drawn the full revised pay w.e.f. 1.1.1986 but he has drawn only subsistence allowance. In our view, this proviso cannot apply because Note 1 itself, as seen above, does not apply. However, what the proviso means is that increase in pay not actually drawn i.e. which is only notionally fixed but without a right for payment - as in *E. Gopalakrishna v. Union of India (1995 Supple (4) SCC 205)* - cannot go into the computation.

22. We then come to Note 2 on which greater reliance has been placed in the counter affidavits. If one reads the Note 2 carefully, it is clear that in cases where during the last ten months of one's service, the person has been under suspension, - *the period whereof does not count as service*, - the said period of suspension is to be *disregarded* while computing pension.

23. Reading it carefully, it will be seen that only if the suspension period is *not* to count as service, the said period is to be disregarded. In our opinion, the words *'the period whereof does not count as service'* are important and have to be given effect to. On the other hand, if the suspension period is liable to be reckoned, then obviously the said period cannot be disregarded. In our view, the respondents have obviously ignored the said word *'not'*, and clearly misinterpreted the said Note II below Rule 50. In the case of the appellant, - in terms of the very language of the order of compulsory retirement passed by the President of India, the period of suspension is to count towards "qualifying service". If the President, as the Disciplinary Authority, has directed that the period of suspension shall count as qualifying service - it is, in our opinion, wholly impermissible for the Railways to *omit* the said period from consideration on the specious ground that before 25.11.1992 appellant has drawn only *subsistence allowance* and not *pay*. The very purpose of the order of the President cannot thus be allowed to be defeated.

24. We may also point out that under Rule 37 of the Pension Rules 1993, it is stated that where "a railway servant is kept under suspension pending inquiry into his conduct, the period of such suspension *shall count* as qualifying service *only* where on conclusion of such inquiry, he has been fully exonerated or the suspension is held to be wholly unjustified and *in other cases*, the period of such suspension shall not count *unless the authority competent to pass orders under the rule governing such cases expressly declares that it shall count* to such extent as that authority may declare.....". In the present case, there is an express direction by the President to count the service, within this Rule. Therefore, once the suspension period is directed to be counted for computing the qualifying service, it is the *emolument* drawn at *the end of the period just before retirement* that become relevant and not the *'pay'* drawn before the commencement of suspension, - which in this case goes to a period ten years before 1992. Further, it will be noticed that the appellant has put in less than 20 years, by the date of his suspension on 21.1.1982 he having been recruited in 1971. From 1971, the service upto 21.1.1982 will be less than 20 years, and if we accept the respondent's contention no pension can in fact at all be paid. It is not the respondents' contention that no pension need be paid. This is again one more reason as to why the contention of the respondent is to be rejected.

25. We shall next refer to the other contention that the appellant has not drawn "emoluments" which can amount to *'pay'* during suspension and that he has only drawn *'subsistence allowance'* and that cannot be described as *'pay'*. It is the respondent's contention that unless *'emoluments'* are drawn the *'average emoluments'* cannot be computed. The said contention, in our opinion, is based upon a misapprehension that *'subsistence allowance'* does not come within the definition *'emoluments'*. The respondents in this context have failed to notice Rule 49 which immediately precedes Rule 50. As

we shall presently show, a proper interpretation of Rule 49 read with Rule 1303 of the Railway Establishment Code (Part II) will lead to the conclusion that 'suspension allowance' also comes within the definition of 'emoluments'.

Rule 49 defines 'Emoluments' as follows:-

"Rule 49: Emoluments:- The expression (a) 'emoluments' for the purpose of calculating various retirement and death benefits, means the *basic pay* as defined in clause (i) of Rule 1303 of the Code (i.e.) the Railway Establishment Manual (Vol.2), we shall refer to the said rule 1303, (which corresponds to F.R.9(21)(a)). That Rule reads as follows:

"Rule 1303: Pay: Pay means the *amount* drawn monthly by a government servant as:-

- (i) the pay, other than special pay.....
- (ii) overseas pay, special pay and personal pay; and
- (iii) any other emoluments which may be specifically classified as pay by the resident.

Average pay - Average Pay means the *average monthly pay earned* during the 12 complete months immediately preceding the month in which the *event occurs* which necessitate the calculation of average pay".

27. Rule 49 refers to 'basic pay' and Rule 1303 refers to 'amount drawn'. In our view, a combined reading of Rule 49(1) and Rule 1303 above referred to shows that if full basic pay is 'emoluments', that being the monthly amount drawn, then the 75% of the full basic pay will also be 'emoluments' in the case of a person under suspension, it being the amount drawn month by month by the government servant. Thus the first condition is satisfied. The other requirement of the definition of 'emoluments' for purpose of pension is that the amount is to be computed on the basis of emoluments drawn during the 10 months before retirement. This condition cannot be disregarded by the respondents. Thus both ingredients of the definition of 'emoluments' are satisfied. Further, it will be noticed that Rule 49(2) specifically requires that the scales as revised w.e.f. 1.1.1986 are to be taken into account as per the Railway Services (Revised Pay) Rules, 1986. This sub-rule cannot be allowed to be disregarded by the respondents.

28. In view of the above rule position, the contentions raised in the counter cannot be accepted.

29. The Tribunal, in our opinion, is wrong in thinking that if the subsistence allowance before 1992 is adopted, it will amount to treating period of suspension as on 'duty'. We may point out that the petitioner is not asking that his pension is to be fixed on the basis of the *full salary* payable in the 10 months before 25.11.1992. The appellant's plea is that the pension is to be fixed on the basis of the *subsistence allowance* fixed and drawn by him in the 10 months preceding 25.11.1992. That has been fixed on the basis of the scales as revised w.e.f. 1.1.1986. This plea, in our opinion, is certainly permissible under the Rules. On the other hand, if we have to go back to the emoluments drawn before suspension i.e. average during 10 months before 1982 - then that will amount to going by the pre-1982 emoluments while the rule requires that the emoluments during 10 months *before retirement* are to be taken into account.

30. For all the reasons given above, we are of the view that the appellant is entitled to have his pension fixed on the basis of the revised subsistence allowance fixed and drawn by him as per the order of the Chief Personnel Officer dated 4/5.10.1988, as per the pay revision w.e.f. 1.1.1986 as per has been fixed at Rs. 2650/- p.m. w.e.f. 1.1.1986 as per the order filed by the appellant or if it has been fixed at Rs. 3300/- p.m. as admitted by the respondents in the counter filed before the Administrative Tribunal. We, therefore, declare and direct as follows. If the revised pay is indeed Rs. 2650/- p.m. and his subsistence allowance is 75% thereof, the appellant will be entitled to the 75% of Rs. 2650/- to be treated as the 'emoluments' for the previous 10 months before 25.11.1992 till which date he has been in service (even if he was under suspension). Average emoluments, for purposes of pension have to be fixed on that basis. If the re-fixation of pay is Rs. 3300/- as stated in the respondents' counter in the Tribunal, the average emoluments have to be worked out on the basis of 75% of Rs. 3300/- during 10 months before 25.11.1992. If on such fixation, the appellant is entitled to other additions like DA etc. and which are periodically revised, the same shall also be computed w.e.f. 25.11.1992.

31. The pension and family pension shall, therefore, be re-computed on the above basis and paid to the appellant w.e.f. 25.11.1992. The other retiral benefits will also be re-fixed on the above basis w.e.f. 25.11.1992 and paid to him. The computation of the family pension shall also be done on that basis. On account of the long delay and denial of pension and retiral benefits on a wrong interpretation of the Rules, we deem it fit to award 12% interest on all the arrears payable to him on the above basis in respect of pension and all benefits. Arrears have to be computed with effect from the date of retirement on 25.11.1992. The appeal is allowed as stated above but there will be no order as to costs.