

(2008) 12 CAL CK 0039

In the Calcutta High Court

Case No : A.S.T. No. 2593 of 2008, C.A.N. No. 9584 of 2008

Birbhum District Primary School Council and Ant.

APPELLANT

Vs

Md. Mokhtar Hossain and Others

RESPONDENT

Date of Decision : 03-12-2008

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2009) 2 SLR 266

Hon'ble Judges : Surinder Singh Nijjar, C.J.; Sanjib Banerjee, J

Bench : Division Bench

Advocate : Subir Sanyal, Sumita Sen, Ratul Biswas, for the Appellant; Kamalesh Bhattacharyya, for the Respondent

Judgement

Sanjib Banerjee, J.

The Judgment of the Court was delivered by:

1. A clause in the applicable rules relating to suspension of a primary school teacher falls for consideration in this appeal. The appellants are aggrieved by the order allowing the writ petition without calling for any affidavits and insist that the matter is of some significance on a point of principle.

2. Following a criminal complaint against him, the writ petitioner - a head teacher at the Kubra Primary School under the Birbhum District Primary School Council - was arrested and produced before the sub-divisional judicial magistrate in Rampurhat on August 6, 2002. He remained in detention thereafter and was enlarged on bail on November 11, 2002. On November 1, 2002 the chairman of the District Primary School Council issued a letter of suspension citing the petitioner's detention in custody for a period exceeding 48 hours and the chairman's authority under a notification of February 5, 1977 to issue the order of suspension. The order of suspension continued despite a representation of January 6, 2006 made by the writ petitioner for withdrawal thereof. The writ petition was filed in or about March, 2007 seeking a mandamus for rescinding

the suspension notice and ancillary writs and directions. The learned Single Judge held that the petitioner could not continue to remain suspended after he was enlarged on bail as the order of suspension was to come to an end immediately upon the release of the petitioner. The notice of suspension was quashed and the reasons given in the impugned order are as follows:

This Court had considered the aforesaid issue repeatedly and specifically held that suspension ends on the release of the teacher concerned from custody. It is well settled that the "deemed suspension" will come to an end when the concerned teacher will be released from detention by the competent criminal court and mere pendency of investigation on a criminal charge cannot be a sufficient ground for keeping a teacher under suspension. In the case of Basudev Malik Vs. State of W.B. and Others, Justice Bhattacharya specifically held that upon release of the teacher from detention by the competent criminal court, the "deemed suspension" will come to an end. The relevant portion from the aforesaid judgment is quoted hereunder:

"The moment he will be released from detention by the competent criminal Court the "deemed suspension" will come to an end and the petitioner should be permitted to join his duty subject to the final decision in the criminal case."

The identical view was also taken by this Hon"ble Court in the following decisions:

Chhabi Chakraborty Vs. State of West Bengal and Others, and

(ii) 2006 (2) CLJ (Cal), 456 (Malay Kumar Laha v. Visva Bharati).

The appellants argue that the learned Single Judge did not consider the matter in the context of the applicable rules. Counsel for the District Primary School Council says that the Basudev Malik judgment that the learned Single Judge relied on was rendered on a different set of rules; that the Chhabi Chakraborty judgment is at variance with a Supreme Court pronouncement; and, that the Malay Kumar Laha verdict was given by a learned Single Judge by merely relying on His Lordship's earlier decision in the Chhabi Chakraborty case. Counsel submits that the rules relevant in the present context are substantially the same as the rules that fell for consideration of the Supreme Court in the judgment reported at Union of India (UOI) Vs. Rajiv Kumar, . It is urged that there was no settled position of law, on the construction of the applicable rules, that the learned Single Judge could rely on to quash the order of suspension without calling for any affidavit.

4. Upon this appeal being received, the operation of the impugned order was stayed on November 19, 2008 and the stay continues till disposal of the appeal.

5. The writ petitioner is governed by The West Bengal Primary Education (Conduct of Service of Teachers of Primary Schools) Rules, 2001. The provision in the said Rules relating to suspension is found in rule 7:

7. Suspension - (1) A Primary School Council may place a teacher under

suspension -

(a) where an inquiry under sub-rule (1) of rule 9 of these rules against him is contemplated by the Primary School Council or such an inquiry is pending; or

(b) where a case of any criminal offence involving moral turpitude against the teacher is under investigation or trial.

(2) Where a teacher is detained in custody for a period of exceeding 48 hours on a criminal charge or otherwise, he shall be deemed to have been suspended by an order of the appointing authority with effect from the date of his detention and shall remain under suspension until further orders. A teacher who is undergoing a sentence of imprisonment shall also be dealt with in the same manner, pending a decision as to the disciplinary action to be taken against the teacher.

(3) Every order of suspension under sub-rule (1) shall be communicated to the Director of School Education, Government of West Bengal, and the Board.

(4) A teacher under suspension or deemed to have been suspended shall be entitled to the following payments:-

(a) During the first three months of suspension, a monthly subsistence allowance equal to the amount of pay which he would have drawn if he had been on half-pay leave.

Provided that where the period of suspension exceeds three months, the appointing authority shall be competent to increase the amount of subsistence allowance for the remaining period of suspension by such amount, not exceeding fifty percent of the subsistence allowance admissible during the first three months of suspension, if in the opinion of the appointing authority, the period of suspension has been prolonged for reasons to be recorded in writing.

(b) Dearness, medical and other allowances, admissible from time to time on the basis of the subsistence allowance fixed by the competent authority.

(5) No payment under sub-rule (4) shall be made unless the teacher furnishes a certificate to the effect that he is not engaged in any other employment, business, profession or vocation.

6. It is the admitted position that as at the date of the issuance of the suspension notice of November 1, 2002, the notification cited in such notice had stood repealed and, to such extent, it is undeniable that the notice was bad. However, that does not alter the position. Upon the said Rules of 2001 coming into effect in July 2001, a primary school teacher is deemed to have been suspended by an order of the appointing authority with effect from the date of his detention in the event he is detained in custody for a period exceeding 48 hours on a criminal charge or otherwise. Rule 7(2) of the said Rules of 2001 provides that such primary teacher "shall remain under suspension until further orders. " Irrespective of whether a notice of suspension was issued, the legal

fiction in the relevant rule would imply that the writ petitioner remained under suspension from the date of his detention, August 6, 2002.

7. The appellants contend that a serious charge outside the scope of his official duty had been brought against the writ petitioner and that a representation had been received from the local villagers that they were disinclined to send their girl children to the school if the writ petitioner continued as a teacher thereat. But it is unnecessary to enter into such matters of fact, particularly as no affidavit was used before the trial court and the nature of the charge does not appear from the material that was available before the learned Single Judge. If a matter of principle is to be decided, the element of prejudice has to be kept at bay lest it tinge the decision. It is for such reason that the appellant's repeated assertion that the alleged offence involved moral turpitude is not considered relevant for the present purpose. It would have been pertinent if the notice had been issued under rule 7(1)(b) of the said Rules, but the present discussion is in the context of an automatic suspension under sub-rule (2).

8. There is more than a casual distinction between sub-rule (1) and sub-rule (2) of rule 7 of the said Rules. Sub-rule (1) contemplates the issuance of a notice upon either precondition contemplated in clauses (a) and (b) thereof being complied with and necessarily entails an application of mind. The operation of sub-rule (2) is automatic and it kicks in with retrospective effect upon a primary school teacher being detained in custody for a period exceeding 48 hours on a criminal charge or otherwise. The suspension comes into effect automatically upon the expiry of the period of 48 hours in detention and dates back to the date of the teacher's detention. *Stricto sensu*, an order of suspension issued under sub-rule (1) dissolves upon the various ending points indicated in that sub-rule, while the deemed order of suspension under sub-rule (2) may continue indefinitely. Though this may be far too literal a construction of the relevant aspect of sub-rule (2), yet it is plain to see and, in an extreme case, may also hold good.

9. In the Basudev Malik case rules 28(9)(viiia) and 28(8b) of the Management Rules relating to secondary school teachers were considered. The judgment records that the relevant secondary school teacher was suspended in terms of rule 28(9)(viiia) which gave the relevant authority the power "to suspend a teacher or an employee where such suspension is in the interest of the Institution, pending drawal of proceedings against the person concerned ..." The learned Single Judge held that in view of such rule (which is not quoted in the judgment) a secondary school had no authority to suspend its teacher or employee merely because a criminal case had been instituted against such teacher or employee. The discussion in this regard is found at paragraph 6 of the report:

6. After hearing the learned Advocates for the parties and after going through the provisions contained in Management Rule 28(9)(viiia), I find that the Managing Committee of a school has right to suspend a teacher or an employee

where such suspension is in the interest of the institution pending drawal of proceedings against the person concerned within 90 days from the date of suspension. In this case, petitioner was arrested for an alleged offence committed beyond the scope of his duty as an assistant teacher and such offence is neither directed against the institution nor the property of the institution.

It is true that if in the long run petitioner is found guilty and is consequently convicted, the school authority is at liberty to take appropriate disciplinary action against the petitioner. But, so long the criminal proceeding is not concluded and the petitioner is not found guilty, there is no scope of initiating any disciplinary proceeding at the instance of the school. Thus, the school authority has no right to even suspend the petitioner merely because a criminal case has been initiated against the petitioner.

10. The learned Single Judge thereafter proceeded to appreciate the deeming provision in the then newly incorporated sub-rule (8b) of Rule 28 of the Management Rules and concluded as follows at paragraph 7 of the report:

7. However, after incorporation of sub-rule (8b) of Rule 28 of the Management Rule the moment an approved teacher or an employee of the school is arrested in connection with a criminal case and consequently detained in custody beyond 48 hours, he should be deemed to be under suspension during the period of detention and according to the said newly incorporated sub-rule (8b) in such a case the school authority is not even required to pass any formal order of suspension that being "deemed suspension" and the school has no further role to play in the matter. The moment he will be released from detention by the competent criminal Court the "deemed suspension" will come to an end and the petitioner should be permitted to join his duty subject to the final decision in the criminal case.

11. Rule 28(8b) of the Management Rules relating to Secondary Schools, the relevant sub-rule in that case, in its material part reads as follows:

In the case of teaching and non-teaching staff of an institution detained in custody for a period exceeding 48 hours under any law providing for preventive detention or as a result of a proceeding either on a criminal charge or otherwise, such staff shall be deemed to have been suspended by an order of the appointing authority, with effect from the date of detention and shall remain under suspension until further orders.

12. Sub-rule (8b), again not set out in the judgment, does not indicate that the secondary teacher should be deemed to be under suspension during the period of detention. Paragraph 7 of the Basudev Malik judgment proceeds on the basis that the period of suspension under sub-rule (8b) is co-terminus with the period of actual detention of the secondary teacher. With respect, it does not appear so from the sub-rule. What does appear is that the starting point of suspension coincides with the date of detention and, as in the provision relevant to the instant case, the suspension comes into effect automatically upon the period of

48 hours and a bit expiring from the beginning of the detention and by legal fiction operates retrospectively from the date of detention. Such suspension that is brought about by the deeming provision continues under sub-rule (8b), again as in the provision relevant to the instant case, until further orders. In other words, the deemed order of suspension remains effective until an express order to the contrary is made.

13. In the judgment reported at Union of India (UOI) Vs. Rajiv Kumar, , the Supreme Court construed Rule 10 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965. Clause (b) of sub-rule (2) of Rule 10 of such Rules provides that a government servant "shall be deemed to have been placed under suspension by an order of appointing authority with effect from the date of his detention, if he is detained in custody, whether on a criminal charge or otherwise, for a period exceeding forty-eight hours ..." Sub rule (5)(a) stipulates that an order of suspension "made or deemed to have been made under this Rule shall continue to remain in force until it is modified or revoked by the authority competent to do so." In the light of such provisions, the Supreme Court held as follows at paragraphs 14 and 15 of the report:

14. Rule 10(2) is a deemed provision and creates a legal fiction. A bare reading of the provision shows that an actual order is not required to be passed. That is deemed to have been passed by operation of the legal fiction. It has as much efficacy, force and operation as an order otherwise specifically passed under other provisions. It does not speak of any period of its effectiveness. Rules 10(3) and 10(4) operate conceptually in different situations and need specific provisions separately on account of interposition of an order of a court of law or an order passed by the appellate or reviewing authority and the natural consequences inevitably flowing from such orders. Great emphasis is laid on the expression "until further orders" in the said sub-rules to emphasise that such a prescription is missing in sub-rule (2). Therefore, it is urged that the order is effective for the period of detention alone. The plea is clearly without any substance because of sub-rules (5)(a) and (5)(c) of Rule 10. The said provisions refer to an order of suspension made or deemed to have been made. Obviously, the only order which is even initially deemed to have been made under Rule 10 is one contemplated under sub-rule (2). The said provision under Rule 10(5)(a) makes it crystal clear that the order continues to remain in force until it is modified or revoked by an authority competent to do so while Rule 10(5)(c) empowers the competent authority to modify or revoke also. No exception is made relating to an order under Rules 10(2) and 10(5)(a). On the contrary, it specifically encompasses an order under Rule 10(2). If the order deemed to have been made under Rule 10(2) is to lose effectiveness automatically after the period of detention envisaged comes to an end, there would be no scope for the same being modified as contended by the respondents and there was no need to make such provisions as are engrafted in Rules 10(5)(a) and (c) and instead an equally deeming provision to bring an end to the duration of the deemed order would by itself suffice for the purpose.

15. Thus, it is clear that the order of suspension does not lose its efficacy and is not automatically terminated the moment the detention comes to an end and the person is set at large. It could be modified and revoked by another order as envisaged under Rule 10(5)(c) and until that order is made, the same continues by the operation of Rule 10(5)(a) and the employee has no right to be reinstated in service. This position was also highlighted in *Balvantray Ratilal Patel Vs. The State of Maharashtra*, . Indication of the expression "pending further order" in the order of suspension was the basis for the aforesaid view.

14. The Supreme Court applied the usual principles of construction to consider the meaning of the relevant provision and concluded at paragraph 26 of the report as follows:

26. The inevitable conclusion therefore is that the order in terms of Rule 10(2) is not restricted in its point of duration or efficacy to the period of actual detention only. It continues to be operative unless modified or revoked under sub-rule (5) (c), as provided under sub-rule (5)(a).

15. The Chhabi Chakraborty decision noticed the Supreme Court judgment in *Rajiv Kumar* and the rules that fell for consideration before the Supreme Court. The learned Single Judge, however, concluded at paragraph 7 of the report that Rule 7(2) of the 2001 Rules, which is relevant in the present case, "deals with deemed suspension while the teacher is under custody for a period exceeding 48 hours on a criminal charge." The learned Judge was of the view that the suspension that comes into operation by the legal fiction of the deeming provision in the sub-rule has to end upon the period of detention expiring and found that Rule 7(2) of the 2001 Rules was not in pari materia with the relevant provisions of Rule 10 of the central rules that had been considered in the *Rajiv Kumar* case. The Chhabi Chakraborty judgment thereafter concludes,

15. Normally, an employee is suspended to keep him away from the place of his work so that he cannot influence the proceeding which is contemplated or which is continuing. A criminal case is initiated on a charge which is in no way connected with the working sphere of the employee. The employee got involved in the criminal case, detained in custody for more than 48 hours and he is suspended with retrospective effect for unlimited period and he is given subsistence allowance that is minimum food to exist in this world. Natural justice comes forward and shocks the conscience. An employee if involved in a criminal case for any reason whatsoever will be suspended and that too with retrospective effect and the effectiveness of the suspension or period of suspension or the date of withdrawal of suspension, nobody knows. If that is not the violation of natural justice what more it can be?

16. Considering the facts and circumstances of the case, I am of the view that such type of deemed suspension and order on it as provided in Rule 7(2) of the Primary Education Rule is illegal.

16. In the most recent judgment reported at 2006(2) Cal LJ 456 (*Malay Kumar*

Laha v. Visva Bharati & Ors.), Rule 48 of the Visva Bharati Service Rules came to be considered where there was no deeming provision as in the present case. The ratio of the judgment is found at paragraph 11 of the report:

11. In the rule, pendency of criminal trial has been described but this pendency of criminal trial must be relating to his service or relating to his service area or zone, otherwise if it is a case under Sections 420/409, this does not affect his service area and the incumbent employee need not have to be kept away from his working place that apart in so many cases the Hon"ble Apex Court has observed that an employee cannot be kept under suspension for an unlimited period. Either the proceeding is to be initiated or suspension is to be withdrawn. This is also covered by the decision of this Court reported in Chhabi Chakraborty Vs. State of West Bengal and Others, .

17. The substance of the relevant provision in the Rajiv Kumar case is akin, if not identical, to Rule 7(2) of the 2001 Rules. The suspension that comes into effect by the legal fiction of the deeming provision under such sub-rule continues unabated till a further order in that regard is made. That further order is an order to be made by the appointing authority and not any order that may be passed in connection with the criminal proceedings or the order of detention. The appointing authority may choose not to issue any further order, which would imply that the order of suspension would continue; or the appointing authority may modify the order of suspension; or altogether revoke the same. The appointing authority can take any of the three courses of action and the rule recognises the same. The inaction or action on the part of the appointing authority may, however, fall for scrutiny or judicial review.

18. The Basudev Malik case, the Chhabi Chakraborty judgment and the Malay Kumar Laha decision to the extent it is based on the Chhabi Chakraborty judgment are founded on the premise that a deemed order of suspension, in such circumstances, ceases to be operative upon the detention ceasing. The clause "until further orders" governed the deeming suspension provision in the Basudev Malik and Chhabi Chakraborty matters; it also operates in the present case. The relevant clause in either the Management Rules or in the 2001 Rules cannot admit of a construction that the suspension that sets in under the deeming provision remains valid only during the currency of the detention. The expression "where a teacher is detained" in the opening words of sub-rule (2) may or may not have been construed to imply that the period of suspension would be limited to the duration of detention if the expression "until further orders" did not appear at the tail of the same sentence. But upon the provision asserting that the teacher shall remain under suspension until further orders, the deemed order of suspension has to be undone by a conscious act or it continues till so done.

19. No further authority, if any was called for at all, is necessary in the context than the Rajiv Kumar pronouncement of the Supreme Court.

20. In the construction of a provision, a statutory rule no less, the usual principles of interpretation would apply. Such principles of construction require that the grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further. Words of a statute may be modified or varied where their import is doubtful or obscure. But it is impermissible to depart from the ordinary meaning of the precise words used merely because the reader may perceive an absurdity or manifest injustice from an adherence to their literal meaning.

21. The plain words of sub-rule 7(2) of the 2001 Rules can only be understood to continue the suspension that began by virtue of the deeming provision till a further order in that regard is made. To infer that the sub-rule discontinues the suspension on cessation of detention would be to plant words therein and imply *casus omissus* when there is no case of strong necessity to presume the inadvertence in the drafting of the sub-rule. A concern for the manner in which such provision may be relied upon, or misused, should not be a consideration in construing the plain words of the sub-rule or prompt a strained construction thereof.

22. In the most absurd situation, an order of suspension that had come into effect under the deeming provision of Rule 7(2) of the said 2001 Rules may not be expressly terminated even though the proceedings relating to which the detention of more than 48 hours occurred may have been dropped. The conduct of the appointing authority in then failing to revoke the suspension in such a situation would be called into question in appropriate proceedings and is likely to be frowned upon and the suspension undone. But the fact that Rule 7(2) of the 2001 Rules leaves open a possibility that an order of suspension that started by virtue of the deeming provision could be allowed to linger indefinitely by mere inaction on the part of the appointing authority, is not a relevant consideration in how the provision may be construed.

23. There can be no guidelines laid down in a straightjacket as to how an appointing authority should deal with the suspension of a primary teacher where the suspension commenced by virtue of the deeming provision in Rule 7(2) of the 2001 Rules. The conduct of the appointing authority would be justifiable and open to question in proceedings under Article 226 of the Constitution. It could well be that in a given case the prolonged suspension on account of sheer inaction on the part of the appointing authority may be unjustified. The period of suspension should ordinarily not be unnecessarily prolonged but it could also be that plausible reasons exist for the prolonged suspension and the appointing authority may be able to justify its opinion that the suspension needs to be continued. Merely because a suspension that commenced under the legal fiction in Rule 7(2) of the 2001 Rules continues for a long period would not invalidate the suspension or lead to any conclusion that the duration of the suspension

stipulated in that rule is till the release of the primary teacher following the detention. The fact that the provision is prone to misuse will not have a telling impact on the purport of the provision or in the matter of construction thereof.

24. In the present case, the learned Single Judge relied on the Basudev Malik, Chhabi Chakraborty and Malay Kumar Laha judgments to hold that the writ petitioner could not be kept under suspension after he was enlarged on bail as the suspension came to an end immediately upon the release of the writ petitioner from detention. The relevant rule does not appear to have been appropriately construed in the Basudev Malik, Chhabi Chakraborty and Malay Kumar Laha judgments and the judgments in all three cases are contrary to the law laid down by the Supreme Court in the Rajiv Kumar matter.

25. The judgment and order impugned are set aside. The writ petition is disposed of by directing the chairman of the appellant council to consider the writ petitioner's written representation of January 6, 2006 and dispose of the same by a speaking order within a period of four weeks from date. The appeal and application are disposed of accordingly. There will be no order as to costs.

26. Urgent certified photostat copies of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

Surinder Singh Nijjar, C.J.

27. I agree.