

(2010) 09 GAU CK 0005
In the Gauhati High Court
Case No : Writ Petition (C) No. 18 of 2010

Dulal Chandra Baidya

APPELLANT

Vs

Tripura State Electricity Corporation Ltd. and Others

RESPONDENT

Date of Decision : 10-09-2010

Acts Referred:

Central Civil Services (Classification, Control and Appeal) Rules, 1965 — Rule 10(2), 19(1)
Constitution of India, 1950 — Article 21
Penal Code, 1860 (IPC) — Section 120B, 379, 409, 420, 468

Citation : (2011) 3 GLR 258 : (2011) 1 GLT 729

Hon'ble Judges : U.B. Saha, J

Bench : Single Bench

Advocate : S. Talapatra and B. Banerjee, for the Appellant; N. Majumdar and S. Chakraborty, for the Respondent

Final Decision : Allowed

Judgement

U.B. Saha, J.—In this writ petition, the Petitioner Sri Dulal Ch. Baidya, a Junior Engineer of the Power Department, Govt. of Tripura while on deputation in Tripura State Electricity Corporation Ltd., Respondent No. 1 herein, as Manager was suspended under Sub-rule (2) of Rule 10 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 (for short, "Rules 1965") vide Office Order No. F. CMD/19/16/2006/322 dated 03.08.2006 (Annexure-2 to the writ petition) issued by the Chairman-cum-Managing Director, Respondent No. 2 herein, as he was detained in custody on 27.07.2006 for a period exceeding 48 hours and in this writ petition he prays for directing the Respondent Nos. 1 and 2 to revoke and set aside the aforesaid office order and also to allow him to resume his duties as Manager (Electrical) and further to make payment of arrear pay and allowances, increment and other pecuniary benefits w.e.f. 27.07.2006.

2. Heard Mr. S. Talapatra, learned senior counsel assisted by Mr. B. Banerjee, learned Counsel for the Petitioner and Mr. N. Majumdar, learned Counsel for the Respondent Nos. 1 and 2 as well as Mr. S. Chakraborty, learned Addl. GA for the

State.

3. Keeping in mind the relief sought for and as agreed to by the learned Counsel for the parties, the instant writ petition is taken up for final disposal at the admission stage.

4. The Petitioner was initially appointed as a Junior Engineer in V(B) of the Tripura Power Engineering Service on 12.09.1997 and while he was working in the Power Department, Govt. of Tripura his service was placed on deputation along with others under the Respondent No. 1 in the year 2004. While the Petitioner was serving as Manager (Electrical) and was posted in the Office of the Senior Manager, Amarpur Electrical Sub-Division, he was implicated in a criminal case being Birganj PS Case No. 22/2006 u/s 379 IPC read with Section 136 of the Electricity Act. In connection with the aforesaid PS Case the Petitioner was arrested and he had to remain in custody for a period exceeding 48 hours. On that ground he was placed under suspension with effect from 02.07.2006 in view of the provisions of Sub-rule (2) of Rule 10 of Rules 1965 vide office order dated 03.08.2006 as stated supra with a condition that the said suspension would remain in force until further orders. After investigation the police submitted charge sheet against the Petitioner and after trial he was convicted u/s 136 of the Electricity Act by the Special Judge, South Tripura, Udaipur in Spl. No. 02.02006 corresponding to Birganj PS Case No. 22/2006 and was sentenced to suffer RI for two years and to pay a fine of Rs. 1,000/- vide judgment and order dated 24.05.2008.

5. The Petitioner being dis-satisfied with the aforesaid judgment and order filed an appeal before this Court and the said appeal was registered as Crl. Appeal 53/2008. Upon hearing the parties on merit this Court vide its judgment and order dated 01.04.2009 set aside the judgment and order of conviction and sentence and acquitted the Petitioner from the charges levelled against him. On acquittal, the Petitioner on 07.04.2009 made a representation to the Respondent No. 2 (Annexure-5 to the writ petition) for payment of his pay and allowances with effect from 27.07.2006. He also furnished a copy of the aforesaid judgment and order of this Court.

6. Though the aforesaid representation was received by the authority on 08.04.2009 but the Respondent Nos. 1 and 2 did not take any action what so ever and also did not make any communication to the Petitioner. The Petitioner also stated in his petition that the last communication which he received from the Respondent No. 2 is the order of suspension (Annexure-2 to the writ petition) and thereafter he had been receiving subsistence allowance till April, 2008 and thereafter the authority did not provide any pecuniary benefit to him and not only that the Respondent No. 2 has also stopped payment of subsistence allowances to him without issuance of any show cause notice as well as communication. It is also averred in the writ petition that since the Petitioner has been acquitted from the charges levelled against him in the criminal case he is entitled to resume his duties and the order of suspension is liable to be set aside

and/or revoked and the Respondents should be directed to pay him all the arrear pay and allowances with effect from 27.07.2006, i.e. the date on which he was arrested in connection with the aforesaid police case including the increment and other pecuniary benefits.

7. As the Respondent Corporation and the Managing Director i.e. Respondent Nos. 1 and 2 respectively, failed to discharge their duties including the revocation of the order of suspension, the Petitioner has filed the instant writ petition.

8. Respondent Nos. 1 and 2 by way of filing counter-affidavit admitted the allegation regarding non-payment of subsistence allowances but clarified the reasons for such non-payment, inter alia, that the Petitioner did not submit the declaration/statement till the filing of the counter-affidavit as required under Rule 53(2) of the Fundamental Rules regarding his stay in the Head Quarters and certificate regarding his non-engagement in any other work/business except the work under the Respondents. In the counter-affidavit, the Respondent Nos. 1 and 2 categorically stated that they are ready to provide/give the Petitioner the subsistence allowances and any other benefit if he is entitled to as per rules subject to submission of declaration of statement under Sub-rule (2) of Rule 53 of the Fundamental Rules.

9. Further case of the Respondents in their counter-affidavit is that though this Court on 01.04.2009 vide its judgment and order passed in Crl. Appeal No. 53/2008 set aside the judgment and order of conviction and sentence passed by the learned Special Judge but there is strong evidence against the Petitioner and therefore, the Respondent No. 2 initiated a proposal to the Power Department, Government of Tripura as per Rule 19(1) of Rules 1965 for further course of action as the Petitioner was initially appointed by the Power Department, Govt. of Tripura and on the basis of Government decision his service was placed under the Respondent No. 1 on deputation.

10. Though the State of Tripura being a party Respondent in the writ petition entered appearance through the learned Addl.GA, but did not file any counter-affidavit despite time allowed by this Court again and again for filing of the same.

11. Mr. Talapatra while urging for revocation of the suspension order would contend that the Petitioner was suspended not for any particular misconduct but for detention in custody for more than a period of 48 hours in connection with a criminal case and being the Petitioner has ultimately been acquitted by this Court from the criminal charges levelled against him, the Respondents have no right to keep him under suspension after his acquittal. He again contended that till the filing of the instant writ petition the Respondent-Corporation did not even propose the lending department for initiating a departmental proceeding. Only on 16.02.2010, the Respondent No. 1 through one of its Deputy General Manager requested the Officer-in-Charge Birganj Police Station to provide the copy of the charge sheet along with the seizure list and admittedly till today no departmental proceeding has been initiated against the Petitioner either by his borrowing

department or lending department.

12. He further contended that the instant writ petition is fully covered by the decision of this Court dated 19.08.2010 in WP(C) No. 215/2010 wherein this Court has taken note of Memo dated 19th June, 1998 issued by the State Government wherein it is stated that the total period of suspension both in respect of investigation and disciplinary proceeding should not ordinarily exceed six months and the review of suspension is to be under taken within three months from the date of suspension and if the review could not be done within the aforesaid period then the matter should be reported to the higher authority.

13. He again contended that this Court not only took note of Memo dated 19th June, 1998, but this Court also took note of Memo dated 24th March, 1994 wherein it is stated, inter alia, that as the disciplinary authority is not passing any order in a disciplinary proceeding in time the said disciplinary authority is directed to complete the disciplinary proceeding preferably within six months and in any case it should not exceed nine months. According to him, the Power Department, Govt, of Tripura, i.e. the lending department did not initiate any proceeding against the Petitioner since 2006 to till date and in absence of any disciplinary proceeding the Respondent Corporation has no right to deny the Petitioner from getting subsistence allowance as he is entitled to under Rule 53 of the Fundamental Rules and also taking him back into service revoking the impugned order of suspension. He further contended that as per Rule 53 of the Fundamental Rules, a Government servant under suspension is entitled to subsistence allowance and other allowances from the date of suspension and during the period of suspension the same cannot be denied on any ground except the ground, inter alia, that the suspended employee is unable to furnish a certificate that he is not engaged in any other employment, business, profession or vocation during the period of suspension.

14. Mr. Majumdar while resisting the submission of Mr. Talapatra and supporting the action of the Respondent-Corporation would contend that the Respondent-Corporation never denied subsistence allowance to the Petitioner as he is entitled to, in accordance with law, but the same was not paid to him due to non-furnishing of the declaration as required under Rule 53 (2) of the Fundamental Rules. He further contended that mere acquittal in a criminal case does not prohibit the employer to proceed with a departmental proceeding against the employee concerned for his misconduct and for which the Respondent No. 2 has already taken steps. He further submits that unless the proposed departmental proceeding is completed the Petitioner is not entitled to resume his duties as a Manager (Electrical) under the Respondent No. 1 and also get the arrear pay and allowances as sought for.

15. Mr. Chakraborty, learned Addl. GA for the State while adopting the contentions made in the affidavit of the Respondent Nos. 1 and 2 would contend that till now there is no proposal from the borrowing department/Corporation, Respondent No. 1, for initiating any departmental proceeding against the

petitioner. He also contended that the memoranda dated 19.06.1998 and 24.03.1994 are not mandatory in nature but are directory in nature and in the Rules, 1965, nowhere it is stated that the disciplinary proceeding has to be completed within a particular period, However, he fairly submits that as the order of suspension was issued about four years back and there is no specific order issued stopping the subsistence allowances of the Petitioner it was not proper on the part of the Respondent Nos. 1 and 2 to deprive the Petitioner from getting the subsistence allowance as he is entitled to under Rule 53 subject to he fulfills the parameter as mentioned in Sub-rule (2) of Rule 53 of the Fundamental Rules.

16. Having heard the learned Counsel for the parties and on going through the records as available before this Court including the decision of this Court in WP(C) 215/2010 as referred to by Mr. Talapatra, this Court feels it is necessary to reproduce the relevant portion of Rule 53 of the Fundamental Rules. Accordingly, the same is reproduced hereinunder:

F.R. 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 any other Government servant-

(a) a subsistence allowance at an amount equal to the leave salary with 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;

(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;

(3) Subsistence Allowance.- (a) Initial grant.-A Government servant under suspension is entitled to subsistence and other allowances from the date and during the period of suspension under the statutory provisions of FR 53.

The subsistence allowance shall not be denied on any ground unless a Government servant is unable to/does not furnish a certificate that he is not engaged in any other employment, business, profession or vocation, during the period of suspension.

17. It appears from the aforesaid provisions of FR 53 that subsistence allowance is provided to an employee under suspension so that he can survive with human dignity and the livelihood of his family members may not be disturbed. In WP(C) 215/2010 this Court has held that suspension itself is not a punishment as the same is done in contemplation of a disciplinary proceeding for misconduct or during the pendency of a criminal case either for its own investigation, inquiry or trial and also when an employee is in detention or in custody in connection with a criminal charge or otherwise for a period exceeding 48 hours. This Court also took note of the decision of the Apex Court in Capt. M. Paul Anthony Vs. Bharat

Gold Mines Ltd. and Another, wherein the Apex Court taking note of the case of O.P. Gupta Vs. Union of India (UOI) and Others, noted that "Suspension notwithstanding, non-payment of subsistence allowance is an inhuman act which has an unpropitious effect on the life of an employee. When the employee is placed under suspension, he is demobilized and the salary is also paid to him at a reduced rate under the nick name of "subsistence allowance", so that the employee may sustain himself." The Apex Court also noted the observation made in O.P. Gupta (supra), inter alia, "the very expression "subsistence allowance" has an undeniable penal significance. The dictionary meaning of the word "subsist" as given in Shorter Oxford English Dictionary, Vol. II at Page 2171 is "to remain alive as on food; to continue to exist", "Subsistence" means - means of supporting life, especially a minimum livelihood."

18. The aforesaid views of this Court get support from the decision of the Apex Court in Darshan Singh v. State of A.P. (1997) 1 GLT 30 wherein it is held that an order of suspension is not an order imposing punishment on a delinquent servant found to be guilty. It is an order made against him before he is found guilty to ensure smooth disposal of the proceeding initiated against him and such proceeding must be expeditiously concluded both in the interest of the public servant and also the Government servant although it is not punishment under the civil services rules yet it should not be lightly passed in a routine manner.

19. On going through Capt. M. Paul Anthony and O.P. Gupta (supra) this Court has no hesitation to hold that Article 21 of the Constitution was enunciated by the framers of the Constitution only to protect the right to life of a citizen and not for surrendering the basic human rights. More so, when a citizen is working either under the Government or in its corporation or in other organization his basic human rights cannot be taken away by the employer when he is either on suspension and/or facing a disciplinary proceeding as the basic human rights are not only protected by the provisions of the Constitution but also by a statutory provision like Rule 53 of the Fundamental Rules.

20. In the instant case, admittedly the Petitioner was acquitted by this Court from the charges levelled against him in the criminal case. Therefore, on the same charge either the employer Corporation or the State Respondent is not in a position to initiate a departmental proceeding but obviously if the authority wants to initiate a disciplinary proceeding for any misconduct that can be done. Upon going through the memorandum dated 19th June, 1998 it appears that the authority which suspended an employee like the Petitioner, is bound to review the order of suspension within three months and the total period of suspension both in respect of investigation and disciplinary proceeding should not ordinarily exceed six months and if the review could not be done within the prescribed period then the matter should be reported to the higher authority.

21. In the instant case, the Respondent Corporation nowhere stated in its affidavit that it has undertaken the review of suspension of the Petitioner within the period of three months or they informed the matter to the higher authority

i.e. the lending authority, Department of Power, Govt. of Tripura. More so, no disciplinary proceeding has been initiated against the Petitioner by this time and the purpose for which the Petitioner was suspended as well as arrested, i.e. the criminal charges, are no longer there. Therefore, according to this Court the prolonged suspension of the Petitioner is not called for either due to administrative exigency or in public interest, rather affects the moral of the employee before his punishment either in criminal proceeding or departmental proceeding. Even if memo dated 19th June, 1998 is not a law but a guideline made by the State then also the said authority is bound to review the order of suspension periodically.

22. The payment of subsistence allowance by the employer to an employee is not a bounty but a right under the statute and denial of such right by the employer is also a violation of right to life of an employee like the Petitioner and on that count itself the action of the authority is not only unreasonable and unfair but also arbitrary. In the case of *Netai Bag and Others Vs. The State of West Bengal and Others*, the Hon"ble Supreme Court has re-affirmed fairness in executive actions in the following words:

17. It has been consistently held by this Court that in a democracy governed by the rule of law, the executive Government or any of its officers cannot be allowed to possess arbitrary powers over the interests of the individual. Every action of the executive Government must be in conformity with reason and should be free from arbitrariness. The Government cannot be equated with an individual in the matter of selection of the recipient for its largesse. Dealing with the limits on the exercise of executive authority in relation to the rule of administrative justice, Mr. Justice Frankfurter in *Vitarelli v. Seaton* 359 US 535 said:

An executive agency must be rigorously held to the standards by which it professes its action to be judged... Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed.... This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword.

23. In the case of *Onkar Lal Bajaj Vs. Union of India (UOI) and Another etc.* etc., , the Apex Court reiterated about the concept of probity in governance in the following lucid words:

36. The role model for governance and decision taken thereof should manifest equity, fair play and justice. The cardinal principle of governance in a civilized society based on rule of law not only has to base on transparency but must create an impression that the decision-making was motivated on the consideration of probity. The Government has to rise above the nexus of vested interests and nepotism and eschew window-dressing. The act of governance has to withstand the test of judiciousness and impartiality and avoid arbitrary or

capricious actions. Therefore, the principle of governance has to be tested on the touchstone of justice, equity and fair play and if the decision is not based on justice, equity and fair play and has taken into consideration other matters of fact, the reasons are not based on values but to achieve popular accolade, that decision cannot be allowed to operate.

24. In *Md. Sahabuddin v. State of Assam and Ors.* (1990) 1 GLR 276, this Court while revoking the order of suspension of the Petitioner of that case, which was issued on 11.06.1986 and continued for more than 3 1/2 years, noted that:

suspension from service is a very serious matter and should be for as minimum period as may only be necessary. A prolonged suspension without any justifiable cause is not only wastage of human resources but also of material resources of the organization which has to pay the subsistence allowance etc. without any return. We find absolutely no reason to continue the suspension of the Petitioner.

25. In *K. Sukhendar Reddy Vs. State of Andhra Pradesh and Another*, wherein the Appellant of that case, a member of the Indian Administrative Service, was placed under suspension by order dated 06.02.1997 passed u/s 3(1) of All India Service (Discipline and Appeal) Rules, 1969 in contemplation of disciplinary proceeding which were proposed to be initiated against him, the Apex Court while considering his case noticed that no disciplinary proceeding under All India Service (Discipline and Appeal) Rules, 1969 were contemplated against him but he was involved in a criminal case under Sections 468/471/409 and 420 read with Section 120B of the IPC and the investigation of the said criminal case has not been completed for about 21/2 years. Considering the aforesaid fact the Apex Court noted:

We do not know how long it will take to complete the investigation. That being so, the officer of the rank of the Appellant against whom it has now come out that the disciplinary proceedings are not contemplated, cannot be kept under suspension for an indefinite period, particularly in a situation where many more senior officers may ultimately be found involved, but the Appellant alone has been placed under suspension.

Though the facts of the aforesaid case are different then the case in hand but the same is helpful to come to a conclusion that an order of suspension should not be allowed to continue for an indefinite period where neither the investigation in criminal proceeding is pending nor a departmental proceeding is initiated. In the instant case, the criminal case in which the Petitioner was initially convicted has reached its finality by an order of this Court and admittedly no disciplinary proceeding has yet been initiated. Therefore, as a Court of justice and equity it would not be proper to allow the said authority to continue the order of suspension for depriving the right to life of an employee like the Petitioner. But however, in exceptional cases where the authority can justify the continuation of suspension is necessary for exigency of administration as well as for public interest in those cases obviously the order of suspension can be continued.

26. In view of the above, this Court is of the opinion that withholding of the subsistence allowance of the Petitioner is nothing but violation of his right to life and on that count also the said order is liable to be interfered with.

27. For the foregoing reasons, the impugned order of suspension dated 03.08.2006 (Annexure-2 to the writ petition) is hereby set aside and the Respondent Corporation is directed to take back the Petitioner in his duty and also pay all his arrears of salary up to date minus the subsistence allowance, if any, that has already been paid to him.

28. With the aforesaid observations and directions, the instant writ petition is disposed of.

No order as to costs.