
(2005) 06 KL CK 0049

In the High Court Of Kerala

Case No : W.A. No's. 21460 and 3018 of 2002

Gopakumar

APPELLANT

Vs

Kerala State Nirmithi Kendra

RESPONDENT

Date of Decision : 29-06-2005

Acts Referred:

Constitution of India, 1950 — Article 14, 21, 226, 309
Industrial Disputes Act, 1947 — Section 33(3)

Citation : (2005) 107 FLR 960 : (2005) 3 KLT 991

Hon'ble Judges : K.A. Abdul Gafoor, J;K. Hema, J

Bench : Division Bench

Advocate : Murali Purushothaman, for the Appellant; M. Pathrose Mathai Saji Varghese, Mariam Mathai and Renu D.P., Government Pleader, for the Respondent

Judgement

K.A. Abdul Gafoor, J.—The first among the two Writ Appeals is by respondents 1 and 2. They will be described as the appellant, in this judgment. The second is by the writ petitioner.

2. The writ petitioner was appointed as Accountant on 17.1.1990. He was promoted, according to him, as Assistant Manager (Accounts) on 22.9.1997. Later he was placed under suspension on 30.4.1999. He was not paid subsistence allowance though an enquiry was proceeded with. He represented for payment of subsistence allowance. That request was declined as per Ext.P7 order relying on KESNIK Disciplinary Proceedings and Appeal Rules, 2001 Ext.P9. Clause III(e) of the said Rules provides that an employee/volunteer placed under suspension shall not be eligible for any honorarium or other benefits, but in the event of he being fully exonerated, the period of suspension shall be treated as duty for all purposes. Accordingly the petitioner approached this Court impugning Ext.P7 denial of subsistence allowance and the provision in Ext.P9 as mentioned above which provides that an employee/volunteer under suspension shall not be paid subsistence allowance.

3. It was contended before the learned Single Judge that when the petitioner was

placed under suspension on 30.4.1999, the said Exhibit P9 Rules had not come into force. It was enforced with effect from 30.3.2001. Until then there was no Rule depriving an employee from getting subsistence allowance. It was further contended that the said provision in Exhibit P9 Rules enabling deprivation of subsistence allowance which is to be provided for sustenance of an employee was opposed to the fundamental rights of the petitioner guaranteed under Article 21 of the Constitution of India and that it is too unfair and unethic and therefore, militate against his fundamental rights guaranteed under Article 14 of the Constitution of India. This contention was resisted by the employer, the appellants in W.A.No. 2146 of 2002 urging that the petitioner was not really an employee, but was only engaged as a volunteer at his own instance to perform certain works in the accounts section of the appellant which is a Society registered under the Travancore-Cochin Literary, Scientific and Charitable Societies Act, of course, owned by the Government of Kerala. When he had volunteered to do some work and when he was so engaged as a volunteer, there arises no employer-employee relationship between them. When there is no such relationship, there arises no liability to pay subsistence allowance. He was not an employee to be eligible for subsistence allowance. It is further submitted that even in the case of volunteers, it was specifically stipulated in Exhibit P9 Rules that pending disciplinary action they will not be entitled for any type of allowance or benefits. Therefore, he did not have an entitlement for any remuneration during the period of suspension. So there is nothing illegal in Ext.P7 communication denying him subsistence allowance and the in Rules in Exhibit P9 which disables an employee placed under suspension from getting subsistence allowance. It is further submitted that unlike in Civil Services, volunteers/employees in the service of the appellant are not disabled from seeking any other avocation during the period of suspension. So he could have even during suspension opted for other avocation to find subsistence for him and his family. So he was not entitled for subsistence allowance on that count as well. It is further submitted that he had never been placed under suspension. He was only kept away from duty. That also shows that there was no employer-employee relationship between them and therefore no entitlement for payment of subsistence allowance.

4. The learned Single Judge appreciated these contentions and considering the decision of the Apex Court reported in State of Maharashtra Vs. Chandrabhan Tale, came to the finding that until Exhibit P9 Rules were enforced with effect from 30.3.2001, there was no provision governing the emoluments payable during the period of suspension and therefore the petitioner was entitled for the salary and that from the date of enforcement of the said Rules, as there was no restriction fastened on him not to seek any other avocation, he was not entitled to claim any subsistence allowance. It was also found that he, being in the position, at the time of suspension, of Assistant Manager (Accounts), was beyond the fold of the Payment of Subsistence Allowance Act, 1972.

5. The employer is in appeal in so far as the impugned judgment directs payment

of subsistence allowance equal to the full salary as eligible to the petitioner from the date of suspension until the enforcement of Exhibit P9 Rules, and the petitioner is in appeal in so far as subsistence allowance is denied from the date of enforcement of Ext.P9 Rules and in so far as his challenge against Clause II I(e) of the KESNIK Disciplinary Proceedings and Appeal Rules, 2001 which deprives an employee under suspension from getting any honorarium or any other benefits was repelled.

6. The contentions urged by either side before the learned Single Judge are reiterated before us. The decisions reported in R.P. Kapur Vs. Union of India (UOI) and Another, , State of Maharashtra Vs. Chandrabhan Tale, , Fakirbhai Fulabhai Solanki Vs. Presiding Officer and Another, , Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. and Another, and Ram Lakshan v. Presiding Officer ((2000) 10 SCC 201) are also relied on by the employee.

7. The much agitated question was with regard to the existence of employer-employee relationship, as the writ petitioner was termed only as a volunteer and not a servant or a workman or either as a person employed. Of course, the initial order of engagement is not produced before us. But it is seen from Ext.P10 that he was given a lift to a higher position by the appellant with effect from 22.9.1997 after about 9 years of his engagement. It is further seen from Ext.P11 dated 24.6.1995 that he was subjected to a transfer from Thiruvananthapuram to Ernakulam. It is also seen from Ext.P12 dated 11.12.1995 that he had been assigned certain specified work as mentioned therein which reads as follows:

"Maintenance of subsidiary Accounts and allied registers, preparation of bills and vouchers in respect of production centre and all projects attached to Regional Nirmithi Kendra viz., Barton Hill site, CESS, Titanium and any other new projects as and when attached to the Kendra, submission of monthly expenditure statements to each projects, maintenance of respective files etc."

It is also seen from Exhibit P1 that he has been described as an Accountant. From Ext.P2, it is also seen that disciplinary action was being initiated against him on account of a gross misconduct. Ext.P9 Rules which is equally applicable to "employees/ volunteers" define the said concept as "a person who is engaged for work under the KESNIK" Volunteers are thus engaged for work under the appellant. The same Rules are applicable for employees as also volunteers, who are bracketed each other in Ext.P9 Rules. So both are treated alike. It is also revealed that they are given remuneration and they are given lift in their placement and the writ petitioner was even promoted from his position as Accountant to a position of Assistant Manager (Accounts). These are sufficient strong indications for the existence of an employer-employee relationship between the appellants on the one hand and the writ petitioner on the other hand. Added to these, the petitioner has a long continuous service for more than a decade right from 17.1.1990. Thus, we have no hesitation to find that there was employer-employee relationship between the appellant and the writ petitioner.

8. When there is such employer-employee relationship and the petitioner is the employee of the appellant, necessarily even in the absence of Rules, the employer will have a right to place the employee under suspension pending disciplinary action. It is an incidence of the employment itself.

9. It has been held by the Apex Court in the R.P. Kapur's case (supra) that:

"...If there is no express term in the contract relating to suspension and payment during such suspension or if there is no statutory provision in any law or rule, the employee is entitled to his full remuneration for the period of his interim suspension; on the other hand if there is a term in this respect in the contract or there is a provision in the statute or the rules framed thereunder providing for the scale of payment during suspension, the payment would be in accordance therewith. These general principles in our opinion apply with equal force in a case where the government is the employer and a public servant is the employee with"

Thus the general principles enunciated by the Supreme Court as mentioned above is applicable to every situation where there is employer-employee relationship, because the Supreme Court has emphasized that:

"...On general principles therefore the Government, like any other employer, would have a right to suspend a public servant in one of two ways...."

This position was again reiterated by the Apex Court in the decision reported in Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. and Another, and in Ram Lakhan's case ((2000)10 SCC 201). Therefore, the learned Single Judge was well justified in directing payment of full salary from the date of suspension of the employee until the date of promulgation of Exhibit P9 Rules. Admittedly, Exhibit P9 Rules were not in force at the time of suspension.

10. The next question to be considered is whether the provision in the said Rules as mentioned above making employees/volunteer under suspension ineligible for payment of subsistence allowance is ultra vires to the Constitution. It has been held in the decision reported in Fakirbhai Fulabhai Solanki Vs. Presiding Officer and Another, , though arising from a proceedings u/s 33(3) of the Industrial Disputes Act that:

"...Denial of payment of at least a small amount by way of subsistence allowance would amount to gross unfairness."

Anything grossly unfair is arbitrary as well and therefore offends Article 14 of the Constitution of India. It has also been held in the decision reported in State of Maharashtra Vs. Chandrabhan Tale, that a provision for payment of subsistence allowance at the rate of Re. 1 was unfair, unconstitutional, meaningless and illusory and was consequently struck down by the Supreme Court. In the said decision the Supreme Court held that:

"20. The learned Judges of the Division Bench have found in the judgment under

appeal that the object and purpose of the main Rule 151 is to provide for subsistence allowance pending suspension of the civil servant and that the subsistence allowance mentioned in the main Rule and the second proviso means a bare minimum which can reasonably be provided for a civil servant who is kept under suspension and without work and therefore not entitled to full wages. If the civil servant under suspension, pending a departmental enquiry or a criminal trial started against him, is entitled to subsistence allowance at the normal rate which is a bare minimum required for the maintenance of the civil servant and his family, he should undoubtedly get it even pending his appeal filed against his conviction by the trial Court, and his right to get the normal subsistence allowance pending consideration of his appeal against his conviction should not depend upon the chance of his being released on bail and not being lodged in prison on conviction by the trial Court. Whether he is lodged in prison or released on bail on his conviction pending consideration of his appeal, his family requires the bare minimum by way of subsistence allowance. Subsistence allowance provided for in the second proviso at the nominal rate of Re. 1 per month is illusory and meaningless. The contention of the appellant that even the nominal sum of Re.1 per month is subsistence allowance for a civil servant under suspension is as unreasonable as the contention of the appellant that what should be the subsistence allowance for a civil servant under suspension is for the authority empowered to frame rules under Article 309 of the Constitution to consider and that the civil servant who has entered service is bound by the second proviso. The sum of Re.1 per month can never sustain a civil servant for even a day much less for a month."

11. The learned Single Judge came to the conclusion that as there was no restriction so far as the employee is concerned to engage himself in any other trade or business, the principle laid down in this decision will not apply to the facts of the case. We are unable to accept this, as such a position cannot be the outcome of the said decision, especially in the light of the later decision reported in Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. and Another, wherein it has been held 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 demobilised and the salary is also paid to him at a reduced rate under the nickname of "subsistence allowance", so that the employee may sustain himself."

It was further held that:

"...The act of non-payment of subsistence allowance can be likened to slow-poisoning as the employee, if not permitted to sustain himself on account of non-payment of subsistence allowance, would gradually starve himself to death."

12. In other words denial of subsistence allowance amounts to deprivation of right to live guaranteed under Article 21 of the Constitution of India. That there

may be a chance for the employee to seek other avocation during the period of suspension in the absence of any restriction contained in the Service Rules governing the parties is no answer to deny the subsistence allowance. It may vary from situations to situation, depending upon the age of the employee, his health, and his job and as to whether any other employer will keep him in employment during the period in which yet another employer had kept him out of duty due to an alleged misconduct. Therefore, it is totally unfair and arbitrary for an establishment like the appellant in W.A.No. 2146 of 2002 to deny subsistence allowance and thus deprive the right to live guaranteed under Article 21 of the Constitution of India, prescribing a rule to the effect that an employee placed under suspension shall not be eligible for any honorarium or other benefits.

13. It is equally arbitrary as well, it being an unfair provision. We have hence no hesitation to strike down the said provision in Exhibit P9 as it militate against Article 14 of the Constitution of India.

14. Even the petitioner does not have a case that he being an Assistant Manager (Accounts) is governed by the Payment of Subsistence Allowance Act. Even if there is such contention, it cannot be pursued further as Assistant Manager will not come within the definition of "employee" as contained in Chapter 2(a) of the said Act.

15. Consequently there is no provision in the service rules of the appellant regulating payment of subsistence allowance. When there is thus no service rule providing the rate of allowance to be paid during the period of suspension, necessarily, the petitioner will again be entitled to the full wages that he was drawing until appropriate rules are framed in that regard because he continues to be an employee based on the same conditions of service, prevailing before such suspension.

16. There is a further contention from the employer disputing the entitlement of the petitioner to receive subsistence allowance that he was protracting the enquiry proceedings. That contention is belied by Ext. P4 letter of the enquiry officer whereunder he had withdrawn from the enquiry because of the non corporation of the employer. The employer had been continuously absent. But the employee was present all the while. Even after formal lodging of the charges, there was inaction on the part of the employer. Because of this non co-operation, he stopped the enquiry. This shows that the protracting attitude was not from the petitioner, but from the appellant. That is not therefore a ground to deny subsistence allowance.

In the result, W.A.No. 2146 of 2002 fails and W.A.No. 3018 of 2002 is allowed. The amount payable to the petitioner which had fallen in arrears as on today shall be paid within three months from the date of receipt of a copy of this judgment.