

(1985) 01 GUJ CK 0012
In the Gujarat High Court

Jaydev Shrichand Damani

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 24-01-1985

Acts Referred:

Bombay Civil Services Rules, 1959 — Rule 15, 151(1), 151(1)(ii)(b)
Penal Code, 1860 (IPC) — Section 34, 409, 465, 467, 477A
Prevention of Corruption Act, 1988 — Section 5(2)

Citation : (1985) 2 GLR 749

Hon'ble Judges : S.A. Shah, J

Bench : Single Bench

Judgement

S.A. Shah, J.—The short question that arose for consideration in Court and who has been suspended is entitled to normal subsistence allowance or Re. 1/- per month, as provided in the second proviso to Sub-clause (b) of Clause (ii) of Sub-rule (1) of Rule 151 of the Bombay Civil Services Rules, 1959 (hereinafter referred to as "the Rules").

2. The petitioner was working as Assistant Office Superintendent in the office of Machhan Nala Project division, Divada Colony, at the time of his suspension.

3. The petitioner and one Daljibhai Suthar, Deputy engineer in charge of Radhanpur Sub-Division (Roads and Buildings), Public Works Department, were tried by the learned Sessions Judge in Special Case No. 5 of 1977 for the offences punishable under Sections 409, 477-A, 467, 465 and 471 read with Section 34 of the Indian Penal Code and Section 5(2) of the Prevention of Corruption Act. The charge against them was of misappropriation of Government money to the extent of Rs. 6,616-90 paise. After the trial they were acquitted. Against the said order of acquittal, the State of Gujarat filed Criminal Appeal No. 525 of 1979 before this Court, and this Court, by its judgment and order dated 27/31st August and 3rd September 1981, set aside the order of acquittal of the petitioner and convicted him for the offences punishable under sections 409, 467 and 477-A of the Indian Penal Code and Section 5(2) of the Prevention of

Corruption Act and sentenced him to undergo terms of imprisonment and also to pay fine.

4. On receipt of the information regarding conviction of the petitioner, the Executive Engineer, Kadana Project Division, Divada Colony, by his order dated 11-1-1982 (Annexure "B") suspended the services of the petitioner with effect from 12-1-1982. In second para of the said order, it is stated that the petitioner will be entitled for the first six months subsistence allowance at the rate of half the salary in the manner stated therein. Thereafter by another order dated 10-2-1982 (Annexure "C") para 2 of the previous order was cancelled, and an order was passed that the petitioner will get only Re. 1/- as subsistence allowance per month during the period of his suspension in accordance with Rule 151(1)(ii)(b) of the Rules. The said amended order was to come into effect from the date of the suspension of the petitioner.

5. It is the contention of the petitioner that the Supreme Court by its decision in State of Maharashtra Vs. Chandrabhan Tale, , has declared the second proviso to Rule 151(1)(ii)(b) of the Rules (as applicable to Maharashtra) as void as it offends Articles 14, 16, 21 and also 311(2) of the Constitution of India. This proviso provides for payment of subsistence allowance at the rate of Re. 1/- per month to a Government servant, who is convicted by a competent Court and sentenced to imprisonment, and whose appeal against the conviction and sentence is pending. Relying upon the said observations of the Supreme Court, the petitioner has stated that Re. 1/- per month as a subsistence allowance can be characterised as ludicrous. It is mockery to say that Re. 1/- per month will be enough for bare subsistence of the petitioner.

6. The petitioner has further quoted Government Resolution dated 5-12-1983 (Annexure "D") whereby Government has accepted that proviso to Rule 151(1)(ii)(b) of the Rules as held by the Supreme Court as void as it offends Articles 14, 16 and 21 of the Constitution of India, and therefore, modified the said proviso and directed that subsistence allowance at normal rate shall be granted in such cases also, instead of Re. 1/- per month, as provided in the existing proviso. However, the petitioner is aggrieved by the Circular (Annexure "E") which is also issued on the same day, i.e. 5-12-1983, by which it is clarified that the orders cited in the Preamble, i.e. previous resolution, shall come into effect from the date of issue of those orders, i.e. 5-12-1983 and not retrospectively, and accordingly, arrears for the period prior to 5-12-1983 shall not be payable. The petitioner, therefore, made an application (Annexure "F") on 19-4-1984 to the Under Secretary, Irrigation Department, Gandhinagar, but no reply was received and, therefore, he has filed this petition, contending inter alia that in view of the decision of the Supreme Court in case of State of Maharashtra v. Chandrabhan (supra) he is entitled to normal subsistence allowance from the date of his suspension.

7. Rule 151 of the Rules makes provision for allowance for payment to the Government servants under suspension. Sub-rule (1)(i) is in respect of Military Officers, with which we are not concerned. Sub-rule (1)(ii) relates to other

Government servants, and Sub-clause (a) provides that a subsistence allowance at an amount equal to the leave salary which 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 based on such leave salary provided that where the period of suspension exceeds six months, the authority which made or is deemed to have made the order of suspension shall be competent to vary the amount of subsistence allowance for any period subsequent to the period of the first six months as provided therein.

8. Sub-clause (b) of Clause (ii) of Sub-rule (1) of Rule 151 of the Rules is in respect of compensatory allowance, with which we are not concerned. The first proviso to that Sub-clause (b) is in respect of compensatory allowance, and the second proviso which was under challenge before the Supreme Court in the aforesaid decision reads:

Provided also that when a Government servant is convicted by a competent Court and sentenced to imprisonment the subsistence allowance shall be reduced to a nominal amount of Re. 1/- per month with effect from the date of such conviction and shall continue to draw the same till the date of his removal or dismissal or reinstatement by the competent authority, unless he was acquitted by the appellate Court in the meanwhile, in which case he will draw the subsistence allowance at the normal rate, retrospectively with effect from the date of the conviction which is so set aside by the appellate Court, but if such acquittal of a Government servant was on technical grounds such as the want of the previous sanction of competent authority for prosecution or the like and is followed by fresh prosecution, the drawal of subsistence allowance shall be regulated on the basis of the nature of the final result of the prosecution.

It is well settled that an employer has a right to suspend his employee, keeping the contract of service alive in the sense that he may not take work from him. But in such a case necessary consequence is that the employer is under contractual obligation to pay the wages to the employee because the contract of service is kept alive. It is only in the case where either the contract of service or the statutory provisions permits the employer not to pay the subsistence allowance, the employer can keep the contract of service alive and refrain from making payment. An order of suspension of a Government servant does not put an end to his service under the Government. He continues to be a member of the service in spite of the order of suspension.

9. If we look to the order of suspension (Annexure "B") itself, the authority has directed that the petitioner is restrained from accepting the private service or doing any business, and if he does so, it would amount to misconduct. The petitioner's Headquarters is also fixed at Divada Colony and is required to take permission before leaving the Headquarters. Now, since the statutory rules provide for payment of subsistence allowance to a Government servant under suspension so that he can keep his body and soul together, and the said subsistence allowance is equivalent to half the leave salary, the impugned

proviso debars a Government servant of such subsistence allowance in case he is convicted and sentenced to imprisonment. It is difficult to appreciate the rationale behind the said proviso inasmuch as, a Government servant is restrained from accepting a private job or doing any business for his maintenance, and by the impugned proviso he is refrained from being paid any amount towards his subsistence. No doubt, there is difference between a Government servant who is convicted and the one who is not convicted. However, even if we accept the difference so far as classification is concerned it is not possible to understand as to how a Government servant will maintain himself during the period of suspension when he has been restrained from accepting any private employment or from doing any business, and directed to remain at the Headquarters, thereby keeping his service and discipline intact and denied even the bare minimum of subsistence allowance? There is, therefore, no rationale to differentiate between the two categories of Government servants. Even though an employee may be deprived of the salary by framing statutory rules, such rules have still to face the challenge of arbitrariness, if in the guise of providing subsistence allowance the Government pays a token amount of Re. 1/- towards the subsistence to its servants under suspension. Such a difference has no nexus with the subsistence of such employees.

10. The Supreme Court in its aforesaid decision has also considered its previous decision in *Madhav Hayawadanrao Hoskot Vs. State of Maharashtra*, , and thereafter in para 23 it has been observed:

Any departmental inquiry made without payment of subsistence allowance contrary to the provision for its payment, is violative of Article 311(2) of the Constitution as has been held by this Court in the above decision. Similarly, any criminal trial of a civil servant under suspension without payment of the normal subsistence allowance payable to him under the rule would be violative of that article. Payment of subsistence allowance at the normal rate pending the appeal filed against the conviction of a civil servant under suspension is a step that makes the right of appeal fruitful and it is, therefore, obligatory. Reduction of the normal subsistence allowance to the nominal sum of Re. 1/- per month on conviction of a civil servant under suspension in a criminal case pending his appeal filed against that conviction, whether the civil servant is on bail or has been lodged in prison or conviction pending consideration of his appeal, is an action which stultifies the right of appeal and is consequently unfair and unconstitutional. Just as it would be impossible for a civil servant under suspension who has no other means of subsistence to defend himself effectively in the trial Court without the normal subsistence allowance - there is nothing on record in these cases to show that the civil servants concerned in these cases have any other means of subsistence - it would be impossible for such civil servant under suspension to prosecute his appeal against his conviction fruitfully without payment of the normal subsistence allowance pending his appeal.... In these circumstances, I held that the second proviso is unreasonable and void and that a civil servant under suspension is entitled to the normal subsistence

allowance even after his conviction and by trial Court pending consideration of his appeal filed against his conviction until the appeal is disposed of finally one way or the other, whether he is on bail or lodged in prison on conviction by the trial Court.

11. The aforesaid observations squarely apply to the facts and circumstances of the present case. It is true that the proviso under consideration before the Supreme Court was similar to the first part of the impugned proviso. There is some amendment in Rule 151(1)(ii)(b) of the Rules so far as it applies to the State of Gujarat, which provided that if the appeal is allowed, the concerned Government will be entitled to the normal subsistence allowance from the date of his conviction. In other words, he will be restored to the original position. But so far as the main part is concerned, there is no amendment and, therefore, the second proviso is also void and cannot deprive the petitioner of his right to the normal subsistence allowance. Government has also accepted this position by its resolution, referred to above.

12. If the impugned second proviso is invalid on account of the judgment of the Supreme Court, referred to above as accepted by the Government resolution, why a Government servant should not be entitled to normal subsistence allowance prior to the date of the resolution is not explained by filing an affidavit. The aforesaid decision of the Supreme Court is squarely applicable, and in view of that the second proviso is declared to be invalid, and when such a declaration is made, the statutory provision should be treated as void from the date when it was incorporated. The statutory provision, in my opinion, is not rendered void by the decision, but the same was found to be void from its inception, and the judgment merely declared the voidness of the provision. I am, therefore, of the opinion that the Circular of Government that the petitioner is not entitled to subsistence allowance at the normal rate from the date when he was placed under suspension is arbitrary and illegal. At the request of Mr. Divetia, it is clarified that this judgment will not restrain the Government from taking further action against the petitioner in the departmental inquiry.

13. In the result, the petition is allowed. Government is directed to make payment the subsistence allowance from the date when the petitioner was suspended till date within three months from the date of the receipt of the writ of this Court. The Circular (Annexure "E") is hereby quashed and set aside. Rule is made absolute with costs.