

(1997) 04 SIK CK 0001
In the Sikkim High Court
Case No : Writ Petition No. 17 of 1996

Martin Fonning

APPELLANT

Vs

Managing Director, SBS

RESPONDENT

Date of Decision : 04-04-1997

Acts Referred:

Citation : (1997) 04 SIK CK 0001

Hon'ble Judges : Malay Sengupta, Acting C.J.

Bench : Single Bench

Advocate : O.P. Bhandari, for the Appellant; S.P. Wangdi and A.J. Sharma, for the Respondent

Judgement

Malay Sengupta, Acting C.J.

1. This is a petition filed under Article 226 of the Constitution of India by an employee of the State Bank of Sikkim.
2. The petitioner was appointed as a Clerk in the State Bank of Sikkim on July 17, 1977. He was placed under suspension on September 24, 1986 and was reinstated in the same service on May 11, 1995. During this period a criminal case was started against the petitioner on November 22, 1986. The said case ended in a charge-sheet dated May 31, 1991. The petitioner made several appeals to different authorities of the bank and also to the Chief Minister of the State. After long last, Government decided to withdraw the aforesaid case and the criminal proceeding was dropped as withdrawn on November 11, 1993.
3. Though the order of suspension was revoked and the petitioner was reinstated in his service it was noted that the order of reinstatement was "Subject to the condition that he shall not claim any of his past forfeited remuneration". The petitioner joined his service on April 24, 1995 pursuant to the aforesaid order of reinstatement dated May 11, 1995. Sometime after joining the service as above, the petitioner filed a representation to the Bank on May 29, 1995 claiming his full pay and allowances including the increments accrued during the period of:

suspension. Since he did not get any favourable action or reply he filed the instant writ petition on May 29, 1996, just after a year from the date of his representation. Demand justice notice was sent on behalf of the petitioner on May 11, 1996.

4. In this writ petition the petitioner prays for a writ in the nature of mandamus ensuring petitioner's right over his salary etc. during the period of his suspension and also to get other ancillary service benefits.

5. The writ is being contested by the State Bank of Sikkim who oppose the prayer made by the petitioner. It has been stated that the petitioner was suspended for various reasons which included serious dereliction of duty. It has also been stated that the petitioner involved himself in some unauthorised and illegal land transaction and, therefore, a criminal case was started against him. On investigation prima facie case was established and a charge-sheet under Sections 380/ 420/ 466/ 468/ 471, I.P.C. was submitted against him. The petitioner was in hardship because of the order of suspension and approached all available authorities to exonerate him from the hardship. Because of his persuasion of considering his hardship, the Government decided to withdraw the case pending against the petitioner and the State Bank decided to revoke the order of suspension over the petitioner and to reinstate him in employment. The petitioner agreed to the condition that he would not be getting any arrear of pay, etc. The respondent Bank has also contended that the writ petition does not lie at all as the petitioner has approached the Court without availing himself of the scope of alternative remedy in the form of Appeal, before the Bank authorities.

6. In this writ petition we are to see if the petitioner is entitled to get any benefit for the period during which he remained under suspension. We are also to see if the writ petition is not maintainable as having been filed prematurely.

7. The petitioner has cited huge number of decisions most of which do not have much relevance with the fact of this case. Decisions reported in *Brahma Chandra Gupta Vs. Union of India (UOI)*, and *Maharaja Sayajirao University of Baroda and Others Vs. R.S. Thakar*, as have been referred to on behalf of the petitioner do not help the petitioner in any manner. In *Brahma Chandra's* case the petitioner was acquitted after full trial and he was awarded full pay and allowances for the period from the date of his suspension till the date of his reinstatement. In the *University* case the service of the incumbent was terminated because of long unauthorised absence. He filed a writ petition for getting reinstated in the service and also for arrears of pay. He passed through different fates before a Single Bench of the concerned High Court and also before a Division Bench thereafter. The Division Bench ordered for reinstatement and passed an order for payment of back wages. This decision was confirmed by the Supreme Court mainly on the ground that the termination itself was not legal. Thus we see that the fact of this case also differs from the fact of the present writ petition.

8. On the other hand we may refer to the decision reported in *Punjab State Vs.*

Suledear Wazir Chand Chopra, where it has been held in paragraphs 6 and 7 "A suspension suspends the contract of service and a servant is not entitled to claim wages for the period of suspension as a matter of right". Almost same was the view expressed in *Municipal Committee Buldana v. Dattatray Sadashiv Karve*, reported in AIR 1946 Nag 347 which reads "If however, there is a power of suspension and a servant is suspended by his master in exercise of the power, the fate of the order of suspension is to suspend the contract of service as a whole and the servant can neither insist on working nor claim his pay during the period of suspension". Such are the views expressed by the Court on the matters of suspension. But the attitude towards payment of wages and other benefits for the suspended period is getting changed and the views of the Courts are slightly liberal, but there cannot be any blanket directive and it is an administrative decision which the executive branch is the authority to take.

9. Before we go for other legal aspects we may note a few of the relevant features available from the record. The petitioner was suspended by Office Order dated September 24, 1986 with immediate effect. The reason behind the order of suspension was that the petitioner acted irresponsibly while he was posted at Pakyong Branch and such acts of irresponsibilities were noticed during an inspection of that particular branch. The criminal case which was started against the petitioner was initiated not by the Bank but by the Revenue Officer of the government on an altogether different ground and during the period when the petitioner was under suspension. The petitioner went on approaching different authorities during the period of his suspension. He also made representation to the Chief Minister of the State. In a representation submitted before the Chief Minister of Sikkim in September, 1993 he pleaded for compassion and prayed for withdrawal of the criminal case. Possibly this representation softened the attitude of the Government and in October, 1993 the learned Public Prosecutor was advised by the Government to withdraw the criminal proceeding against the petitioner. The learned Trial Court accepted the prayer and the petitioner was released from the case. Quite sometime after, the Bank reviewed the case of the petitioner and decided not to proceed further and to revoke the order of suspension. There was possibly a negotiation with the petitioner in this respect and the petitioner conceded in writing to the proposal of the Bank that he would be reinstated on condition that he would not get any further amount towards his pay and allowance during the period of suspension.

10. It should be noted that the Bank acted very callously in dealing with the case. It is obvious that some gross violation of duties were noticed during the inspection of the branch on May 22, 1986 and pursuant to that the petitioner was placed under suspension with effect from September 24, 1986. But till the date of reinstatement of the petitioner to his service, the Bank did not care to start any departmental proceeding. The period is around ten years which is too long for such purpose.

11. The petitioner collected good number of pages from the files of the State

Bank of Sikkim and annexed the same to his writ petition. In Sikkim, we have noticed that there are people like the petitioner who find access to all departmental files and who can merrily take out copies of such documents, routine or confidential, and make those public. It is useless to comment harsh on such situation which has become a part of the culture of such people. The custodian of such files and documents are not hauled up by the authorities for such laches and are left scot free.

12. Anyway, from such documents we find that the Bank dealt with the matter of suspension or its revocation in such a manner as if the suspension was on account of the criminal case. But we have already noted that when the initial suspension order was passed, the criminal case was nowhere within vicinity. Again by Officer Order No.761 dated May 11, 1995, the Bank revoked the order of suspension dated September 24, 1986. The copy of this order was communicated to different persons and officials under Memo No. 1929-33 dated May13, 1995. Surprisingly there is another order bearing the same number and the same date, noting that the petitioner was reinstated/appointed subject to the condition that he should not claim any of his past forfeited remuneration in view of the suspension caused by his private activities. One is to make research as to how two orders could be issued under one number. Moreover, the suspension order was not passed on account of any private activities. It was obviously done because of dereliction of official duties. Another very glaring feature is noticed in the joining report submitted by the petitioner on May 13, 1995. In the said letter we find that the petitioner joined his service in the forenoon of April 24, 1995 pursuant to the order of revocation of suspension which was passed on May 11, 1995. How someone can join his duties during the period of his suspension? The above circumstances and features speak a volume about the casual attitude and approach of the administration of the State Bank of Sikkim.

13. We may come back to the legal position. We have already mentioned the views expressed in Brahma Chandra 's case regarding entitlement of salary etc. on reinstatement after acquittal. On the same context we may refer to a Supreme Court decision in Depot Manager A. P. State Transport v. V. Venkateswarulu reported in AIR1994 SCW 4411 where it has been held "The High Court was, however, not justified in holding that on acquittal and reinstatement an employee becomes--without any further scrutiny--entitled to the payment of full salary for the period during which he remained under suspension". In the said decision the Hon"ble Court dealt with some provisions of the Transport Employees Regulation, 1967 which is almost akin to Rule 97 of the Sikkim Government Service Rules, 1974 which is applicable in the instant case. We may recollect the background of the withdrawal of the case. The petitioner was successful in convincing the Government in general and the Chief Minister in particular about the hardship he was facing with and to get the Government yield towards his prayer for withdrawal of the prosecution. Thus it is not a case of acquittal after trial. It is very difficult to find out a precedent with fact identical to the present one but we may refer to a decision of the Central Administrative

Tribunal, Allahabad reported in 1993 (2) ALJ 161 (Devi Din v. Union of India) where the acquittal was on account of compromise or in other words where the order of acquittal was passed by the Court without entering into the merit of the case. It was held by the Administrative Tribunal in that case that where the Court did not have any liberty to adjudicate the matter and to arrive at a conclusion to exonerate the accused from the charges, the Government have a right to decide as to how the question of payment for the period during which the accused petitioner was under suspension. One can draw analogy between Devi Din's case and the case of the petitioner in this respect.

14. We may refer to the order sheet of the Bank's file where in the note dated December 20, 1994 of the D. G. M. (A) we find that the petitioner called on his office on December 19, 1994 and agreed to the proposal that he would not get full pay and allowances for the period spent by him under suspension. The petitioner also "submitted his consenting application" that day. This fact has not been controverted by the petitioner even when specific queries were made by this Court on this point during hearing of the writ petition. On this background it would be relevant to refer to the case of Ram Saran Das v. State of Haryana reported in 1982 (1) SLR 27 where it has been categorically observed that the petitioner giving an undertaking to the effect that he would not claim arrears of pay beyond the subsistence allowance on his reinstatement, cannot claim any such arrears after his reinstatement.

15. There is another aspect which needs our attention. The Bank in the Order of Reinstatement dated May 11, 1995 made it clear that any claim for the past forfeited remuneration during the period of suspension would not be entertained. But they have not spelt out how they treated this period of service. Since suspension order is not an order of termination, normally on revocation of order of suspension, the continuity of the service does not break, Even if no remuneration for the period under suspension is paid, there must be notional fixation of pay on revocation of the order of suspension. It is also to be spelt out as to the seniority position of the incumbent after revocation of the order of suspension. All these are missing in the order of revocation or in the order of reinstatement or in any part of the note sheets of the file which have been annexed to the writ petition. We may note the views expressed by the Supreme Court in a decision reported in Lt. Governor of Delhi and others Vs. Const. Dharampal and others, . In this case, dealing with a question of reinstatement of an employee whose service was terminated, the Court observed that the authorities while dealing with the question of determining arrear salary and allowances for the period of termination must take into account the period between termination and reinstatement for the purposes of seniority, promotion and retiral benefits. The aforesaid case is more grave than the instant case. In the aforesaid case the employee was terminated from service, but in our case it is a case of an employee placed under suspension.

16. Therefore, the authorities should have spelt out how the period under

suspension would be dealt with for the purposes of seniority, promotion, continuity of service and retiral benefits. The employer (Bank) has the authority to consider if it would agree to the prayer for payment of full salary etc. for the period of suspension. But it should be made clear that the revocation of order of suspension can never mean a fresh appointment. The respondents appear to be under confusion when in the Order dated May 11, 1994 they noted it as "Reinstates/Appoints".

17. We should now come down to a very pertinent point raised on behalf of the respondents. It has been argued that when the petitioner was denied of pay and allowances during the period of suspension and also of the right to get increments in pay, he should have, in the event of any grievance, come with an appeal before the competent authority under Rule 10 of the Sikkim Government Servants (Discipline and Appeal) Rules, 1974. It has been argued that the petitioner without availing himself of this alternative remedy under Rule 10 has come direct with the writ petition, and such a writ petition is not admissible. It has again been contended that the petitioner has forfeited his right to such an appeal as it was not preferred within three months from the date of the order appealed against. The Rule of the Sikkim Government is as such. Moreover, we may refer to the decision of a Full Bench of the Supreme Court reported in A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhwani and Another, where it has been held "If a petitioner has disabled himself from availing himself of the statutory remedy by his own fault in not doing so within the prescribed time, he cannot certainly be permitted to urge that as ground for the Courts dealing with the petition under Article 226 to exercise its discretion in his favour". Thus the position of law is very clear. But in the instant case the petitioner cannot be thrown out altogether. It appears that immediately on receipt of the order of revocation dated May 11, 1995 and immediately after resuming his duties, the petitioner sent a representation on May 29, 1995 to the Managing Director making claims over arrear pay, increment etc. We do not find anything j on record or in the form of argument that this representation was given due consideration and was disposed of.

18-19. To be fair we may ask the respondents to treat this representation as an appeal under Rule 10 of the Sikkim Government Establishment (Discipline and Appeal) Rules, 1974 and take decision on the following points:

- (i) If full pay and allowances for the period under suspension would be paid to the incumbent.
- (ii) If the petitioner would get regular increments in his pay during this period.
- (iii) If not, whether on reinstatement the initial pay would be fixed notionally taking into consideration increments which the petitioner would have earned had he not been placed under suspension.
- (iv) If the seniority of the petitioner would be protected.

(v) If the period under suspension would be counted towards all service and retiral benefits.

20. While taking the above matters into consideration and while arriving at the appropriate decision, the respondents should keep in mind the observations made in the body of this judgment and the views expressed by different Courts in the decisions referred to in the body of this judgment.

21. With these observations we dispose of the writ petition without any orders as to costs.