

(1999) 12 GUJ CK 0024

In the Gujarat High Court

Case No : Special Civil Application No. 3708 of 1998

Minaxi Zaverbhai Jethva

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 15-12-1999

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Gujarat Civil Services (Discipline and Appeal) Rules, 1971 — Rule 5(5), 5.2

Penal Code, 1860 (IPC) — Section 34, 406, 411, 420

Citation : (1999) 12 GUJ CK 0024

Hon'ble Judges : M.R. Calla, J

Bench : Single Bench

Advocate : D.M. Thakkar, for Thakkar Assoc, for the Appellant; V.B. Gharania, Id.AGP for H.C. Patel, Id.Addl.GP, for the Respondent

Final Decision : Allowed

Judgement

M.R. Calla, J.—The petitioner has been working as a Nurse since 1992 in the Community Health Centre at Rajula, District Amreli. She was then transferred to Bahucharaji, District Mehsana. The petitioner is a widow and while she was working at Rajula, she was living with one Shri Jitendrabhai Vallabhbbhai Makwana as a friend on the basis of a friendship agreement. On 29th October 1996, the said person, namely, Shri Jitendrabhai Vallabhbbhai Makwana lodged a complaint in the Court of Judicial Magistrate, First Class, Rajula, being Complaint No.56 of 1996 under Sections 420, 406, 34 and 114 of the Indian Penal Code alleging against the petitioner that the petitioner had retained the ornaments and other articles belonging to the said person even after they started living separately while the petitioner's case is that these ornaments and other articles belong to the petitioner herself having been purchased out of her own money. A copy of this complaint No.56 of 1996 pending in the Court of Judicial Magistrate, First Class, Rajula has been annexed as Annexure.A with the petition. Pursuant to the aforesaid complaint, the petitioner was arrested by the police on 18th September 1997 and was produced before the Magistrate on the next day, and on 20th

September 1997, she was released on bail. On 6th October 1997, she was again taken on remand at 7.45 p.m. and was released on 8th October 1997 at 5.30 p.m. On 19th March 1998, the chargesheet was filed in the Court and thereafter on 13th April 1998, an order was passed by the respondent no.2 placing the petitioner under suspension. A reading of this suspension order dated 13th April 1998 shows that the authority which placed the petitioner under suspension took notice of the fact that at Rajula Police Station, a criminal case for the offence under Sections 420/406 of the Indian Penal Code had been filed and she was brought to the police station from Bahucharaji on 18th September 1997 at 12.15 O'clock and was produced before the Magistrate at 10.30 O'clock on 19th September 1997 and on 20th September 1997, she was taken to hospital and thereafter released; again from 6th October 1997 to 8th October 1997, she was taken on remand and thus she had remained in custody for a period of more than 48 hours and therefore, it was a case of deemed suspension under Rule 5.2(a) of the Gujarat State Civil Services (Discipline and Appeal) Rules, 1971 and therefore, having remained in custody for the offence as aforesaid dated 18th September 1997, she was placed under suspension with the headquarters at Bahucharaji and that she would get 50% of the pay as subsistence allowance etc.

2. Against this suspension order dated 13th April 1998, the present petition was filed before this Court by the petitioner on 4th May 1998. On 5th May 1998, the notice returnable for 25th June 1998 was issued. An affidavit-in-reply dated 19th November 1999 has been filed by the respondent no.2 wherein it has been stated in para 3 by Shri H.G. Pandya, Administrative Officer and Additional Director of the Medical Services at Gandhinagar, working under the Commissionerate of Health Department that,

"I say and submit that the Department has no concern with the complaint No.56/96 lodged against the petitioner. However, I say that the petitioner was arrested on 18-9-97 at 12.15 and was released on 20-9-97 at 13.30, that is after completion of 48 hours. I say that the petitioner has been suspended due to completion of 48 hours in police custody. Therefore the suspension order is legal and not bad in law nor against the provisions of law or violative of Articles 14 and 16 of the Constitution of India."

3. Thereafter, when the matter came up before the Court on 6th December 1999, Rule was issued and the matter was directed to be listed for hearing for today, i.e. 15th December 1999 and while doing so, it was also observed in the order dated 6th December 1999 itself in presence of learned Counsel for the respondents that, in the meanwhile, the concerned authorities shall also consider the background of the facts under which the suspension order was issued and would also examine the question as to whether this suspension of the petitioner was required to be continued any further. However, today, when the matter was taken up, learned Asstt. Govt. Pleader has submitted that no decision has been taken by the respondents and the Court may pass appropriate orders.

4. I have heard learned Counsel for the petitioner and learned Counsel for the

respondents. In the opinion of this Court, this case is an illustrious and glaring but dismal example of the suspension being continued without application of mind and it appears that the facts and circumstances out of which the cases arise for suspension or for the purpose of continuation of such suspension for a long time are not at all considered and the suspended employees' grievance is not considered in the correct perspective even when the matters are filed in the Court and despite the opportunities are given to the respondents to consider as to whether the continuation of such suspension order was any more warranted or not. Such a practice of passing the suspension orders and allowing the suspension orders to continue indefinitely causes prejudice to the employees and avoidable loss to the Government as well, which can only be deprecated. While on one hand it puts the employee to suffer the agony and trauma of suspension, on the other hand, it also places heavy financial burden on the State Exchequer out of the public money to be paid to the suspended employee as the subsistence allowance without taking any work from him/her just for no reason or justification whatsoever.

5. Here is a case in which the present petitioner, a widow lady, who had been working as a Nurse and who was living with the person named hereinabove had developed some difference with him and therefore, declined to continue to live with him and as has been stated in the body of the complaint itself, she declined to marry him and aggrieved from the petitioner's denial to marry him, he filed the criminal complaint under Sections 420, 406, 34 etc. before the Court and stated therein that certain articles including the furniture etc. had been retained by her. It is on the basis of this complaint, purely of private dispute, of course alleging offences under Sections 420 and 406 of I.P.C. was entertained by the Court and on that basis, the police subjected the petitioner to arrest and for that arrest if she had remained in custody for a period of more than 48 hours, even if it is held that she had to be placed under suspension by operation of the Rule itself, the suspension order could be said to be in accordance with the Rule on the day when it was passed, i.e. 13th April 1998, although it does not stand to reason that why the order of suspension was passed on 13th April 1998 when the period of custody of 48 hours relates back to September 1997 and the purpose could be served at this stage in April 1998 even by passing an order that for the period or the days for which she remained in custody shall be treated as deemed suspension. In any case, even if the suspension order dated 13th April 1998 is taken to be proper order, there cannot be any justification for continuance of this suspension order. Even this position is not disputed that there are Government Circulars in the nature of executive instructions to the effect that the cases of suspension of the Government employees are to be reviewed periodically. It appears that no such periodical review has taken place and even if it is assumed that it may have taken place, it appears that no further orders have been passed and throughout there has been a total inaction and lack of application of mind.

6. On the face of it, it is a case in which there is no misconduct whatsoever

committed by the petitioner in relation to the employment and the author of the affidavit-in-reply dated 19th November 1999 has correctly stated in para 2 that, "the Department has no concern with the complaint No.56/96 lodged against the petitioner". This Court is therefore simply bemoaned that the officers themselves find that the criminal case has nothing to do with the Department and yet, the suspension has been allowed to continue for a period of one year and eight months by now. The respondents would have been well advised to cease the suspension at least when the notices of this petition were served upon them when they themselves found that the criminal case has nothing to do with the Department. True it is that the Rules do provide that a Government servant can be placed under suspension during the pendency of the criminal case, but after all, that only arms the Government with the power to place the employee under suspension in case a criminal case is pending. However, that does not mean that for pendency of any or every criminal case the employee must be placed under suspension and continued as such indefinitely. This power is to be exercised after due and active application of mind to the facts and circumstances of each case. The concerned Government functionaries exercising the powers under the Discipline and Appeal Rules have to apply their mind and consider as to whether the criminal case involves any serious offence against the society, public at large or State, any moral turpitude or any element of misconduct in relation to the employment and then decide as to whether it is necessary to place the Government servant under suspension. So far as the present case is concerned, the question was only of petitioner's remaining in custody for a period of more than 48 hours in relation to a case filed against her for refusing to carry on relations with a person and retaining the articles which were given to her by such person when they were living friendly, may be on her promise to enter and maintain relations at par with marital relations. Therefore, it was certainly a case in which the suspension should have been ceased to be operative at a subsequent stage within a reasonable time and in fact the petitioner should have been treated under suspension only for the period for which she was not available on duty on account of her detention as aforesaid in judicial custody for more than 48 hours.

7. The copy of the complaint in Criminal Case No.56 of 1996 as has been filed with this petition as Annexure.A shows in para 4 that the allegations against the present petitioner levelled by the complainant Shri Jitendrabhai Vallabhbbhai Makwana were that the petitioner had entered into a "Maitri Karar" and that he had been off and on going to her house and they had even gone together out of station; in case he did not go to her, she used to call him on phone and that she had asked him for certain articles and therefore, the articles of necessary use had been given by him and kept in her house. In the complaint, the details of such 36 items have been given. In substance, the allegation is that the articles or cash as were given under the belief that "Maitri Karar" shall be honoured were retained and thus a fraud was played upon him by the petitioner and her mother who are Mochi by caste.

8. Rule 5(2)(a), and 5(5)(a) and (c) of the Gujarat Civil Services (Discipline & Appeal) Rules, 1971 relating to suspension, which are relevant for the purpose of present case, are reproduced as under:-

"5. Suspension:-

(1)

(a)

(b)

(2) A Government servant shall be deemed to have been placed under suspension by an order of appointing authority-

(a) 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.

(3)

(4)

(5)(a) 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.

(b)

(c) An order of suspension made or deemed to have been made under this rule may at any time be modified or revoked by the authority which made or is deemed to have made it or by any authority to which that authority is subordinate."

According to this rule a Government servant shall be deemed to have been placed under suspension 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. Therefore, in the facts of this case, the appointing authority had passed the suspension order on 13.4.98. However, this provision is not the end of the matter. It has been further provided in Rule 5(5)(a) 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. Not only that it has been further provided in Rule 5(5)(c) that an order of suspension made or deemed to have been made under this rule may at any time be modified or revoked by the authority which made or is deemed to have made it or by any authority to which that authority is subordinate. It is, therefore, clear that Rule making authority has taken care to lay down suitable provisions for modification or revocation of such suspension orders. It appears that after passing the suspension order dt.13.4.98, the authorities charged with the duties to consider as to whether such suspension order was required to be modified or revoked, have not at all addressed

themselves to these provisions and have not considered as to whether any order was required to be passed so as to modify or revoke the aforesaid order. Had the provisions in rule 5(5)(a) and (c) would have been taken note of, the concerned authorities themselves would have come to a conclusion that this suspension order was not required to be continued any more, because it was certainly a case in which the complaint had been filed by a private party for a dispute interse with regard to certain articles, to which reference has been made in the complaint. It was certainly a matter for consideration as to whether the conduct, for which the criminal case had been filed against the present petitioner, had any nexus or relevance with her employment as such. Whether she wanted to continue to live with the so called friend or not was absolutely her private affair and when the petitioner's case is that these items had been purchased out of her own income, it was certainly a highly disputed question as to whether it was a case which warranted her suspension. The whole basis of the complaint filed against her is that she had entered into a "Maitri Karar" with the author of the complaint Shri Jitendrabhai Valabhbhai Makwana and that the petitioner had declined to marry him and that she had enticed these articles from him on the basis of the "Maitri Karar" and assured that she will marry him. It is the case of the author of the complaint himself that he himself is a married person having three children. Therefore, it is clear that in such cases of deemed suspension, the concerned authorities have to take into consideration the entirety of facts as to whether the suspension was required to be continued in this case. It is not the case of the respondents that any charge-sheet has been served upon the petitioner or that she has committed any misconduct or violation of any Conduct Rules. Therefore, even if the suspension order was passed as a deemed suspension on account of remaining in custody for more than forty-eight hours, such suspension cannot be made a fate accompli for all times to come and with regrets no less than surprise this Court finds that even after the service of the notice by this Court, the respondents did not consider as to whether any order is required to be passed for the purpose of modification or revocation of the suspension order as such. Thus the whole purpose of the wholesome provisions, as contained in Rule 5(5) (a) and (c), have been defeated in the facts of the present case. Respondents have simply rest contended by filing the reply that although the Department is not concerned with complaint No.56/96 lodged against the petitioner, it is a case of deemed suspension and, therefore, suspension order is not bad in law. This Court finds that such a suspension order, even if it was required to be passed on the day on which it was passed, the same had to be considered for modification or revocation at the earliest possible opportunity. For the purpose of placing and continuing a Government servant under suspension, it has to be considered that the reason for continuance of suspension must be germane to the discharge of duties, must have relevance to the nature of employment and it has to ascertain as to whether the ingredients, on the basis on which the offences are alleged against a Government servant, have any nexus or anything to do with the misconduct in relation to employment and as to prima facie what is the extent and gravity of criminal liability as per the allegations.

9. In the case of A.C.Barot vs. District Superintendent of Police, reported in 1990 (1) G.L.H. 545, it was considered by the Court that, "may be that some incident might have taken place of abusing or causing hurt but that was all in the private capacity of the petitioner as a person and not either in the discharge of his duty or in abuse of the power as a police officer." The Court noticed that in that case there was total absence of any allegation that the petitioner abused his power or misconducted himself as a Police Officer. It has been laid down that before the exercise of power of suspension the competent authority has to consider various aspects, viz., gravity of alleged misconduct, seriousness of the offence, availability of the evidence, prima facie case of dismissal, removal or compulsory retirement and continuance in service likely to hamper the inquiry or investigation or likelihood of interference with the witnesses or tampering with the evidence or that the continuance of such public servant would afford an opportunity to indulge in similar misconduct or offence again. It has been further observed in the aforesaid case that if the acts of misconduct or misbehavior or the alleged offences are not as stated above, any other irregularity or misconduct should not be the ground for the suspension of the public servant. It is evident that not only specific criteria is laid down for exercising the power of suspension but even the mandatory instructions are issued not to resort to the suspension in case of other irregularity or misconduct and before exercising or resorting to the power of suspension, the above criteria are required to be satisfied. The whole idea is that the suspension orders have to be passed and the suspension has to be continued after due and active application of mind with an objective approach to the facts of each case and it is not as if that the duty of the concerned authority is over after passing the suspension order and the employee is left to continue under suspension indefinitely. The cases of suspension cannot be taken so lightly and such matters cannot be left totally uncared for as if nothing more was required to be done after placing the employee under suspension or after saying that it is a case of deemed suspension. Be that as it may, this Court finds that even if the order dt.13.4.98 was valid at the point of time when it was passed, because it was a case of deemed suspension permissible under the Rules, continuance thereof is wholly unwarranted and the inaction to consider the case for modification or revocation of the suspension order shows a total lack of application of mind. The continuance of the petitioner under suspension on the basis of the order dt.13.4.98 is, therefore, found to be illegal.

10. The result is that this Special Civil Application succeeds. Whereas this petition was filed by the petitioner on 4.5.98 before this Court, the petitioner's continuance under suspension under the order dt.13.4.98 is held to be illegal from the date the petition was filed before this Court. The respondents are directed to issue appropriate orders reinstating the petitioner from suspension with effect from 4.5.98 i.e. the date on which the petition was filed with all consequential benefits but it is left open for the respondents to pass appropriate orders with regard to the period from 13.4.98 to 4.5.98 in accordance with the Rules. Direction with regard to the petitioner's reinstatement, as has been given

hereinabove, shall be complied with at the earliest possible opportunity but in no case later than 31.12.99. This Special Civil Application is hereby allowed and the rule is made absolute to the above extent. No order as to costs.

11. Before parting with the order, this Court inquired from the learned counsel for the petitioner Mr.D.M.Thakkar as to what is the stage of the Criminal Case No.56/96 and Mr. Thakkar has given out that no effective proceedings have been held and no evidence has been recorded after the framing of the charge. Whereas the matter is pending before the Court of Judicial Magistrate, First Class, Rajula, this Court does not find it proper to make any observations with regard to the merits but looking to the contents of the complaint, this Court feels that the question certainly requires serious examination as to whether taking cognizance of the offence in the facts of this case was at all required? On the basis of such allegations as are contained in the complaint if cognizance is taken, would it not be a case of total abuse of process of the Court and as to whether on the basis of the allegations that are levelled in the complaint was it a case worth taking cognizance for the offences punishable under Sections 406, 420, 34 and 114 of the I.P.C. and as to whether all the allegations, as are levelled in the complaint, even if are taken to be true on the face value, do they constitute the ingredients for offences under Sections 406, 420, 34 and 114 of I.P.C.? Merely because a widow lady had entered into some "Maitri Karar" which is void ab-initio and had assured a person to get married and subsequently backed out and declined to marry him or refused to continue to live with him or refused to keep any relations with him and it is alleged that had such assurances not been given, the person would not have passed on the items and articles as are stated in the body of the complaint and that thereby she obtained something from such person and has retained the same, can it be said that she had entailed any criminal liability for the offences as alleged against her? It is also a question to be considered as to whether it is a case of simple civil wrong at the most or would entail any criminal liability? I, therefore, find it to be a fit case to take note of S. 397 of Cr.P.C. so as to call for and examine the records of these proceedings pending before the Judicial Magistrate, First Class, Rajula for examining the correctness, legality and propriety of these proceedings and the orders passed therein for suo motu exercise of revisional powers of this court under S. 397 of Cr.P.C.

For Registry:

The Registry is, therefore, directed to place a copy of this order along with the copy of the complaint No.56/96 (Annexure.A) and place before this Bench or before the Bench hearing Criminal Revisions as may be directed and permitted by the Honourable Chief Justice for taking further appropriate action in exercise of the powers under relevant provisions of Cr.P.C.