

(2004) 10 GUJ CK 0022

In the Gujarat High Court

Case No : Special Civil Application No. 18193 of 2003

Ramanbhai Parshottambhai Harijan

APPELLANT

Vs

District Development Officer

RESPONDENT

Date of Decision : 21-10-2004

Acts Referred:

Bombay Civil Services Rules, 1959 — Rule 151, 151(1), 152, 152(2), 153
Constitution of India, 1950 — Article 226, 227
Gujarat Panchayat Service (Discipline and Appeal) Rules, 1964 — Rule 11, 12, 151, 152, 5(4)

Citation : (2005) 104 FLR 1089

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

Bench : Single Bench

Advocate : Rajesh K. Shah, for the Appellant; H.S. Munshaw, for Respondent Nos. 1-3 and Mita S. Panchal, AGP, for the Respondent

Final Decision : Allowed

Judgement

M.S. Shah, J.—The petitioner was appointed as a Talati-cum-Mantri in the year 1971. In 1988, the petitioner was suspended on the ground that the petitioner had committed misappropriation of a sum of Rs. 2175/-. A criminal case was filed against the petitioner and the petitioner was charge sheeted in Criminal Case No. 622 of 1989. However, by judgment dated 23.4.1992, the petitioner was acquitted. While the petitioner came to be reinstated in service in view of the aforesaid order of acquittal, the Deputy District Development Officer, Surat i.e. the disciplinary authority held departmental inquiry and passed order dated 3.3.1993 under Rule 5(4) of the Gujarat Panchayat (Disciplinary & Appeal) Rules, 1964 imposing the penalty of stoppage of two increments with future effect. The Deputy District Development Officer also passed order dated 30.6.1993 regularizing the period of suspension from 12.5.1988 to 7.4.1993 as period of leave under Rule 152 of the BCSR. Thereafter, the Taluka Development Officer, Valsad passed consequential order dated 29.6.1995 (Annexure "B") regularizing the period of suspension as leave without pay between 27.3.1989 to 7.4.1993

after adjusting the period from 12.5.1988 to 26.3.1989 against leave with pay and leave with half pay. The Taluka Development Officer by the same order also directed recovery of the amounts paid to the petitioner as subsistence allowance during the period of suspension from 27.3.1989 to 7.4.1993. It is the said order dated 29.6.1995 (Annexure "B") which came to be challenged before the District Development Officer, Surat who dismissed the appeal on 22.1.1998 (Annexure "C"). The petitioner carried the matter in further appeal being Appeal No. 197 of 1999 before the Gujarat Civil Services Tribunal. The Tribunal also dismissed the appeal by judgment dated 25.8.2003 (Annexure "D") which is challenged in this petition, purporting to be one under Articles 226 and 227 of the Constitution, but which is in substance a petition under Article 227 of the Constitution.

2. Rule 151(1) of the BCSR provides that a Government servant under suspension is entitled to 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; with a proviso that where the period of suspension exceeds six months the authority may vary the amount of subsistence allowance by increasing it upto 50% of the subsistence allowance admissible during the period of the first six months. The instructions below Rule 151 specifically provide that subsistence allowance shall not be paid unless the Government servant furnishes a certificate that he did not accept any private employment or engage himself in trade or business during the period in question and in case of doubt, the authority may get such certificate verified and in case the certificate is found to be a false one that itself would amount to an act of misconduct and made an additional charge against him.

Rule 152 of the BCSR reads as under :-

"152.(1) When a Government servant who has been dismissed, removed or suspended is reinstated, the authority competent to order the reinstatement shall consider and make a specific order :-

(a) regarding the pay and allowances to be paid to the Government servant for the period of his absence from duty; and

(b) whether or not the said period shall be treated as a period spent on duty.

(2) Where the authority mentioned in sub-rule (1) is of opinion that the Government servant has been fully exonerated or in the case of suspension that it was wholly unjustified the government servant shall be given the full pay and allowances to which he would have been entitled had he not been dismissed, removed or suspended, as the case may be.

(3) In other case, the Government servant shall be given such proportion of such pay and allowances as such competent authority may prescribe :

Provided that the payment of allowances under clause (2) or (3) shall be subject to all other conditions under which such allowances are admissible.

(4) In a case falling under clause (2) the period of absence from duty shall be treated as a period spent on duty for all purposes.

(5) In case falling under clause (2) the period of absence from duty shall not be treated as a period spent on duty unless such competent authority specifically directs that it shall be so treated for any specified purposes.

The instructions to the said Rule provide that pay and/or allowances under this Rule shall be withheld for any period during which the Government servant has accepted private employment or engaged in trade or business.

Note 2 below Rule 152 reads as under :-

"Note 2.- Under this rule the authority competent to order the reinstatement can convert a period of absence from duty from the date of suspension, dismissal or removal, as the case may be, till the date of reinstatement into one of leave admissible under the rule. The period of such absence cannot, however, be converted into leave without pay, except in accordance with the conditions in Rule 752. Subsistence allowance paid under this rule should be adjusted or received from the Government when the period of suspension is converted into leave with or without pay.

The conversion of only a part of the period of suspension as leave is not permissible; if a competent authority decides to convert a period spent under suspension into one of leave, the entire period of suspension has to be converted into leave admissible under the rule.

Rule 153 of the BCSR reads as under :-

"153. Leave may not be granted to a Government servant under suspension."

Rules 11 and 12 of the Gujarat Panchayats Service (Discipline and Appeal) Rules, 1964 which were applicable at the relevant time read as under :-

"11. Subsistence allowance during suspension. A member of the panchayat service who is placed under suspension shall during the period of such suspension be paid subsistence allowance according to the relevant rules applicable to him.

12. Reinstatement.- When a member of the Panchayat Service who has been dismissed, removed or suspended from service is reinstated, the authority passing the order of reinstatement shall make an order as to :-

(a) the pay and allowances which shall be paid to him for the period of his suspension; and

(b) whether or not the said period shall be treated as a period spent on duty:

in accordance with the relevant rules applicable to him."

The learned counsel for the parties do not dispute that the relevant Rules

applicable to the petitioner are Rules 151 to 153 of the Bombay Civil Services Rules, 1959.

3. The short question arising for consideration in this petition is whether the disciplinary authority has the power to recover the amount/s of subsistence paid to an employee during the period of suspension under Rule 151 BCSR, while passing orders for regularizing the period of suspension under Rule 152 BCSR.

4. In *O.P. Gupta Vs. Union of India (UOI) and Others*, the Apex Court has laid down the following principles regarding payment of subsistence allowance :-

"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. The real effect of suspension as explained by this Court in *Khem Chand Vs. The Union of India (UOI) and Others*, is that he continues to be a member of the Government service but is not permitted to work and further during the period of suspension he is paid only some allowance - generally called subsistence allowance - which is normally less than the salary instead of the pay and allowances he would have been entitled to if he had not been suspended."

Similarly, in *Jagdamba Prasad Shukla Vs. State of U.P. and Others*, the Apex Court reiterated the above principles in the following terms :-

"The payment of subsistence allowance, in accordance with the Rules, to an employee under suspension is not a bounty. It is a right. An employee is entitled to be paid the subsistence allowance."

In the aforesaid decision, the Apex Court has even held that where an employee facing inquiry viz. departmental inquiry is not paid subsistence allowance and, therefore, unable to appear in inquiry, the departmental inquiry itself and the consequent order of penalty would be vitiated and liable to be quashed.

5. In view of the aforesaid decisions, it is clear that when an employee is paid subsistence allowance during pendency of a departmental inquiry or prosecution, the employee is entitled to get subsistence allowance in accordance with the relevant Rules and is entitled to get the same as a matter of right in order to remain alive as on food or to continue to exist. "Subsistence" means allowance for supporting life or minimum livelihood because the suspended employee is not permitted to work and he is not paid salary and allowances which he would have been entitled to, had he not been suspended.

6. Ultimately if and when the suspended employee is reinstated, the disciplinary authority is required to consider whether the period of suspension should be treated as the period spent on duty or be treated as suspension as such by way of penalty or the period may be regularized. What are the different orders that the disciplinary authority may pass under Rule 152.

6.1 If the suspended employee is exonerated in the departmental inquiry, the

period of suspension will be treated as spent on duty. In that case under sub-rule (2) of Rule 152 upon reinstatement the employee is entitled to get the arrears of full salary and allowances after adjusting the amount of subsistence allowance against such arrears of salary, obviously because the employee is not to be paid twice over.

6.2 In case where the disciplinary authority is of the view that the suspension was justified and is required to be treated as suspension by way of penalty, such order of penalty can be passed under the relevant discipline and appeal rules, after giving the employee an opportunity of being heard. When the suspension initially imposed as a preventive measure during pendency of the departmental inquiry or prosecution is converted into a penal measure after hearing the employee, there would be no question of paying any amount over and above the subsistence allowance already paid to the employee during the period of suspension. Of course, the employee would be treated as continuing in service without any break.

6.3 In case the disciplinary authority finds that the suspended employee is not fully exonerated and, therefore, the period of suspension is not to be spent as on duty nor is it a case where the misconduct proved is not so serious as to warrant treating the period as suspension by way of penalty, the disciplinary authority regularizes the period of suspension as full pay leave or half pay leave or when there is not sufficient leave to the credit of the employee, the balance period after adjusting the leave lying in the leave account of the employee the disciplinary authority would treat it as leave without pay.

7. The reasoning of the disciplinary authority is that for the period which is regularized as leave without pay, the employee was not entitled to be paid any salary and, therefore, the subsistence allowance must be refunded to the Government. The petitioner's reply is that subsistence allowance was paid to him in order to subsist and, therefore, not liable to be refunded.

8. Subsistence amount is not paid as salary for services rendered, because suspension is the unilateral act of the employer to prevent the employee from rendering services. authority does not treat the period of suspension as the period spent on duty or suspension by way of penalty, although the contact of employment subsists. Since such employee continues to be the employee of the employer (who has suspended him), the suspended employee cannot take up any other job or occupation and, therefore, the employer has to provide for subsistence allowance to the suspended employee so that he can maintain himself and his family in short to subsist. Subsistence allowance is, therefore, not to be refunded by the employee even if he is found guilty of the charges levelled against him in the departmental inquiry or even if he is convicted in the criminal case during the pendency of which he was suspended. The Gujarat Civil Services Tribunal does not at all appear to have considered this settled legal principle at all. The judgment of the Tribunal on this issue, therefore, suffers from an error of law apparent on the face of the record and deserves to be set

aside.

9. In view of the above discussion, the petition is allowed. The impugned judgment dated 25.8.2003 (Annexure "D") of the Gujarat Civil Services Tribunal in Appeal No. 197 of 1999 is hereby quashed and set aside. So also the order dated 30.6.1993 (Annexure "B") of the Deputy District Development Officer, Surat and the order dated 22.1.1998 (Annexure "C") of the District Development Officer, Surat are also quashed and set aside.

Rule is made absolute accordingly.