

(1998) 07 BOM CK 0038

In the Bombay High Court

Case No : Writ Petition No. 3823 of 1996

Shri Basweshwar M. Mamdapure and another

APPELLANT

Vs

The Primary Education Board and others

RESPONDENT

Date of Decision : 15-07-1998

Acts Referred:

Bombay Civil Services Rules, 1959 — Rule 151

Constitution of India, 1950 — Article 14, 21, 311(2)

Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 — Rule 34(2)

Penal Code, 1860 (IPC) — Section 34, 384

Citation : (1998) 4 ALLMR 19 : (1998) 4 BomCR 181 : (1998) 3 MhLj 198

Hon'ble Judges : S. Radhakrishnan, J; A.V. Savant, J

Bench : Division Bench

Advocate : Nitin Dalvi, for the Appellant; Sachin Shetye, A.G.P., for the Respondent

Judgement

S. Radhakrishnan, J.—Heard the learned Counsel Shri Dalvi for the petitioners and learned A.G.P. Shri Shetye for the respondents.

2. By this petition, the petitioners are challenging the constitutional validity of second proviso to Rule 34(2) of Maharashtra Employees of Private Schools (Conditions of Services) Rules, 1981 which provides that when an employee is convicted by a competent Court and sentenced to imprisonment, the subsistence allowance shall be reduced to a nominal amount of rupee one per month with effect from the date of such conviction and he shall continue to draw the same till the date of his removal or reinstatement by the competent authority.

3. The brief facts of the petition are that petitioner No. 1 was a Head Master in a school known as Santoshi Mata Primary School at Solapur. Petitioner No. 2 was a teacher working in the same school. It appears that both the petitioners had obtained blank resignation letters from various teachers and used them for the purpose of extortion. Ultimately, a criminal case was filed against both the petitioners for offences u/s 384 read with section 34 of I.P.C. The said criminal

case was registered as Regular Criminal Case No. 38 of 1989 before the Judicial Magistrate, First Class, Court No. 4 at Solapur. Ultimately, the said Judicial Magistrate convicted both the petitioners for the aforesaid offence u/s 384 read with section 34 of I.P.C. and both were sentenced to undergo one year's simple imprisonment for the same and also they were directed to pay a sum of Rs. 1,000/- each by way of fine or in default to undergo further simple imprisonment of 3 months.

4. Against the aforesaid conviction by the Judicial Magistrate, First Class, the petitioners had preferred, in the Sessions Court at Solapur, Criminal Appeal No. 24 of 1994. Finally the Sessions Judge by his judgment dated 13th September, 1995 had upheld the aforesaid conviction and sentence imposed by the Judicial Magistrate, First Class, Solapur. The petitioners were immediately taken into the custody after the said appeal was decided against them on 13th September, 1995. Immediately thereafter on 14th September, 1995, the petitioners had moved this Court by way of Criminal Revision Application No. 192 of 1995 challenging the aforesaid conviction and sentence. This Court by its order dated 14th September, 1995 had admitted the said criminal revision application and the petitioners were ordered to be released on bail on each of them furnishing the security bond of Rs. 5,000/- with two sureties for the like amount to the satisfaction of the trial Court. This Court also in the meanwhile had suspended the execution of the petitioners' sentence as well as the impugned order of conviction i.e. to say on 14th September, 1995, this Court had stayed imposition of sentence as well as conviction imposed on both the petitioners.

5. Thereafter the administrator of the aforesaid Solapur Municipal Primary School had issued an order on 2nd January, 1996 whereby both the petitioners' subsistence allowance was reduced to Re. 1/- per month as per the provisions of Rule 34(2) of the M.E.P.S. Rules, 1981 with effect from 13th September, 1995, being the date on which the Sessions Court had dismissed the appeal.

6. The petitioners have now filed this petition basically, challenging the aforesaid order dated 2nd January, 1996 whereby the subsistence allowance of the petitioners has now been reduced to Re. 1/- per month as per the provisions of the Rule 34(2) of M.E.P.S. Rules, 1981.

7. The learned Counsel for the petitioners Shri Dalvi strongly contends that the relevant proviso to Rule 34(2) of M.E.P.S. Rules, 1981 is ultra vires, and violative of Articles 14 and 21 of the Constitution of India. The said second proviso to Rule 34(2) of M.E.P.S. Rules, 1981 reads as under :

"Provided further that, when an employee is convicted by a competent Court and sentenced to imprisonment, the subsistence allowance shall be reduced to a nominal amount of rupee one per month with effect from the date of such conviction and he shall continue to draw the same till the date of his removal or reinstatement by the competent authority."

The Learned Counsel for the petitioner submits that a delinquent employee who

faces a criminal proceedings will be unable to defend himself effectively with the subsistence allowance of Re. 1/- per month. He also contended that reduction of subsistence allowance to Re. 1/- per month is a mockery and the same will lead to total starvation of the petitioners. The learned Counsel also contended that the said Rule is constitutionally invalid inasmuch as the same has no rational nexus with the object of suspending an employee pending the disciplinary action. Therefore, the learned Counsel contends that the said Rule is violative of Article 14 inasmuch as it has no rational with the object sought to be achieved and the same is also unreasonable and hence violative of Article 14. In this behalf the learned Counsel for the petitioners Shri Dalvi brought to our notice a judgment of the Apex Court in State of Maharashtra Vs. Chandrabhan Tale, . In this case, a similar rule being Rule No. 151 of Bombay Civil Services Rules, 1959 was challenged as ultra vires. In the said rule, the second proviso thereto read as under :

"Provided also that when the Government servant is convicted by a competent authority 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 he 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 Appellate Court."

The Apex Court after considering all the aspects and referring to certain judgments has categorically held as under

"Any departmental enquiry 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. Therefore, Baban's contention in the writ petition that the subsistence allowance

is required to support the civil servant and his family not only during the trial of the criminal case started against him but also during the pendency of the appeal filed in the High Court or this Court against his conviction is correct. If any provision in any rule framed under Article 309 of the Constitution is illusory or unreasonable, it is certainly open to the civil servant concerned to seek the aid of the Court for declaring that provision to be void. In these circumstances, I hold 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 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."

Accordingly the Apex Court struck down the second proviso to Rule 151 of the Bombay Civil Services Rules, 1959 as unreasonable and void and held that the civil servant under suspension is entitled to normal subsistence allowance even after his conviction by the 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.

8. A bare perusal of the aforesaid Second Proviso to Rule 151 of the Bombay Civil Services Rules, 1959 as well as Second Proviso to Rule 34(2) of M.E.P.S. Rules, 1981 as quoted hereinabove, makes it clear that they are *pan materia* same inasmuch as both rules contemplate that as soon as the employee is convicted by the competent Court and sentenced to imprisonment, subsistence allowance shall be reduced to a nominal amount of Re. 1/- per month with effect from the date of such conviction and that he shall draw the same till the date of his removal, dismissal or reinstatement by the competent Court.

9. The learned Asstt. Govt. Pleader Shri Shetye brought to our notice a circular issued by the Govt. of Maharashtra, Finance Department being Circular No. DRS-1083/CR-1555/SER-8 dated 27th July, 1984. The said Govt. Resolution makes it clear that after the aforesaid judgment of the Apex Court in the case of State of Maharashtra Vs. Chandrabhan Tale, the Govt. of Maharashtra had decided that the Govt. servant who continued under suspension even after conviction by the trial Court pending consideration of the appeal filed against such conviction, the normal subsistence allowance as admissible should be paid to him irrespective of the fact that during such suspension whether he is released on bail or is lodged in prison on conviction.

10. The learned Assistant Government Pleader fairly concedes that as the Govt. of Maharashtra has already taken a stand to pay the normal subsistence allowance even after the conviction and during pendency of the appeal, as per the aforesaid Govt. Resolution dated 27th July, 1984, even the present Second Proviso to Rule 34(2) of M.E.P.S. Rules, 1981 cannot be sustained.

11. In this context, we may refer to two Apex Court Judgments, on different facets of Article 21 of the Constitution of India. The first one is Francis Coralie Mullin Vs. Administrator, Union Territory of Delhi and Others, , wherein the Apex

Court has observed as under while interpreting Article 21 of the Constitution of India:--

"But the question which arises whether the right to life is limited only to protection of limb or faculty or it does go further and embrace something more. We think that the right to life includes the right to live with human dignity and all that goes along with it namely the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms freely moving about and mixing and coming in contact with fellow human beings."

In the second case in *M/s. Shantistar Builders Vs. Narayan Khimalal Totame and others*, , the Apex Court has held as under :

"Basic needs of man have traditionally been accepted to be three food, clothing and shelter. "The right to life is guaranteed in any civilized society. That would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in. The difference between the need of an animal and a human being for shelter has to be kept in view. For the animal it is the bare protection of the body; for a human being it has to be a suitable accommodation which would allow him to grow in every aspect-physical, mental and intellectual. The Constitution aims at ensuring fuller development of every child. That would be possible only if the child is in a proper home. It is not necessary that every citizen must be ensured of living in a well-built comfortable house but a reasonable home particularly for people in India can even be mud-built thatched house or a mud-built fireproof accommodation."

12. In view of the categorical ruling of the Apex Court on a proviso which is identical to the present proviso to Rule 34(2) of M.E.P.S. Rules, 1981 and the Second Proviso to Rule 151 of the Bombay Civil Services Rules, 1959, and in view of the other two judgments of the Apex Court referred to paragraph 10 hereinabove, we have no hesitation whatsoever in striking down the said Second Proviso to Rule 34(2) which reads as under:

"Provided further that, when an employee is convicted by a competent Court and sentenced to imprisonment, the subsistence allowance shall be reduced to a nominal amount of rupee one per month with effect from the date of such conviction and he shall continue to draw the same till the date of his removal or reinstatement by the competent authority."

The same is unreasonable and clearly violative of Article 14 as well as 21 of the Constitution of India. Obviously the subsistence allowance is the basic monetary relief provided to an employee which cannot be reduced to the level of Re. 1/- which would lead the petitioners to total starvation which is patently contrary to the enhanced concept of personal liberty under Article 21 of the Constitution of India which entitles a right to live with human dignity. The aforesaid Second Proviso to Rule 34(2) is also violative of Article 14 of the Constitution of India as the same is unreasonable and has no rational nexus with the object sought to be

achieved. Accordingly the aforesaid Second Proviso to Rule 34(2) of M.E.P.S. Rules, 1981 is quashed and struck down.

13. Another aspect to be noted in this case is that by an order dated 14th September, 1995 in Cri.Rev.Application No. 192 of 1995, this Court had suspended the sentence as well as conviction of both the petitioners. In the light of the above, a question arises as to whether the administrator of the aforesaid primary school could at all issue the impugned order dated 2nd January, 1996 when there was no subsisting order of conviction by a competent Court and a valid sentence of imprisonment. This issue, of course, has not been specifically raised and pleaded in the petition, as such we are expressing no opinion with regard to the above and leave this issue open.

14. We do hereby direct respondent No. 1 to pay the normal subsistence allowance to the petitioners as provided in M.E.P.S. Rules. 1981 within three months. The impugned order dated 2nd January, 1996 is also quashed and set aside.

15. Rule is accordingly made absolute as stated hereinabove, however, with no order as to costs.

16. Issuance of certified copy expedited.

17. Rule made absolute accordingly.