
(2008) 12 CAL CK 0026
In the Calcutta High Court
Case No : F.M.A. No. 668 of 2007

Sri Prabhasankar Bardhan

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 05-12-2008

Acts Referred:

Asansol Municipal Corporation Act, 1990 — Section 22

Citation : 113 CWN 42

Hon'ble Judges : Tapan Mukherjee, J;Pranab Kumar Chattopadhyay, J

Bench : Division Bench

Advocate : Kishore Dutta and Mr. Sandipan Banerjee, for the Appellant;
Hiranmoy Bhattacharyya, for the Respondent

Final Decision : Allowed

Judgement

Pranab Kumar Chattopadhyay, J.—The present appeal has been preferred at the instance of the writ petitioner who has been suffering an order of suspension for the last 14 years. The appellant herein has questioned the justification and legality of the continuance of the order of suspension for an indefinite period and that too, without reviewing the same from time to time by the competent authority. The appellant is also aggrieved for non-enhancement of the subsistence allowance during the long 14 years of suspension.

2. The appellant herein was placed under suspension by the Vice-chairman of the then Burnpur Notified Area Authority in terms of the order dated 1st February, 1994 in view of lodging of FIR against the said appellant with the local police station on the charge of embezzlement of funds. The said Burnpur Notified Area Authority was subsequently merged with the Asansol Municipal Corporation in the year 1994.

3. The appellant herein being aggrieved by the continuance of the aforesaid order of suspension for an indefinite period made representation before the respondent Asansol Municipal Corporation for revocation of the aforesaid order of

suspension and to reinstate him in service with immediate effect and also to pay the entire arrear salaries. The aforesaid representation made by the appellant to the Mayor, Asansol Municipal Corporation on 31st December, 2005 was rejected by the said Mayor by the order dated 31st January, 2006.

4. The appellant filed the writ petition challenging the aforesaid decision of the Mayor, Asansol Municipal Corporation before this Hon'ble Court which was ultimately dismissed by the learned single Judge by the judgment and order under appeal dated 28th April, 2006. Assailing the said judgment of the learned single Judge, instant appeal has been preferred by the appellant/writ petitioner.

5. It has been specifically urged on behalf of the appellant that the order of suspension issued to the appellant cannot continue for an indefinite period. Mr. Kishore Dutta, learned counsel of the appellant submits that the order of suspension was issued to the appellant as far back on 1st February, 1994 and the competent authority of the Asansol Municipal Corporation neither reviewed the question of continuing the order of suspension in respect of the appellant nor even reviewed the quantum of subsistence allowance initially sanctioned to the said appellant.

6. However, a criminal case was initiated against the appellant in view of lodging of the FIR by the Vice-chairman of the then Burnpur Notified Area Authority on 1st February, 1994 and the same is still pending for final adjudication before the competent criminal Court. In any event, no departmental proceeding has yet been initiated against the appellant herein.

7. In the aforesaid circumstances, it is to be considered whether the order of suspension issued to the appellant should have been revoked as requested by the appellant or the same should continue for an indefinite period.

8. It has also been urged on behalf of the appellant that the respondent authorities never reviewed the quantum of subsistence allowance payable to the appellant and the said appellant is receiving the same subsistence allowance since the issuance of the order of suspension in the month of February, 1994. The learned counsel of the appellant further submits that the respondent authorities should have reviewed the quantum of subsistence allowance payable to the appellant herein from time to time.

9. There is no dispute that the appellant herein has been receiving subsistence allowance at the rate of 50% of the last pay drawn by him and there was no enhancement of the said subsistence allowance during the last 14 years i.e. from the issuance of the order of suspension to the appellant in the year 1994 till today.

10. Mr. Kishore Dutta, learned counsel representing the appellant submits that no one can be kept under suspension for an indefinite period and that too, without initiating any departmental proceeding. Mr. Dutta referred to and relied on a decision of this Hon'ble Court in the case of Akhilendu Ghosh v. State of West

Bengal & Ors., reported in 2001 (3) CHN 688 (Paragraph 13). Mr. Dutta further submits that in the absence of any rule and/or regulation with regard to the payment during the period of suspension, an employee is entitled to full salary during the said period of suspension. Mr. Dutta referred to and relied on a decision of the Hon''ble Supreme Court in the case of Balvantray Ratilal Patel Vs. The State of Maharashtra, .

11. Mr. Hiranmoy Bhattacharyya, learned counsel representing the respondent-Asansol Municipal Corporation authorities submits that the appointing authority has the power to suspend an employee pending a departmental enquiry or a criminal proceeding. Mr. Bhattacharyya further submits that in the present case, respondent-Asansol Municipal Corporation being the appointing authority of the appellant/writ petitioner has the power, authority and jurisdiction to suspend its employee namely, the appellant/writ petitioner during pendency of the criminal proceedings. Mr. Bhattacharyya also submits that the Mayor-in-council is authorised to exercise executive power of the Corporation u/s 22 of the Asansol Municipal Corporation Act, 1990 (hereinafter referred to as the "said Act"). According to Mr. Bhattacharyya, the Mayor-in-council of the respondent Corporation in exercise of its executive power u/s 22 of the said Act passed the following resolution in connection with the terms and conditions of service of its employees:

"Resolved unanimously that until rules of AMC is formulated the guidance of WBSR be followed."

12. Mr. Bhattacharyya further submits that the aforesaid resolution is an administrative order and not a regulation framed in exercise of the power conferred u/s 260 of the said Act and, therefore, the same is not required to be published in the Official Gazette in terms of section 260(3) of the said Act. Mr. Bhattacharyya referred to and relied on the following decisions of the Hon''ble Supreme Court in support of his aforesaid arguments:

- 1) V.T. Khanzode and Others Vs. Reserve Bank of India and Another, (Paragraphs 18, 19, 20 & 21)
- 2) The Meghalaya State Electricity Board and Another Vs. Shri Jagadindra Arjun, (Paragraph 9)
- 3) Sohan Singh Sodhi Vs. Punjab State Electricity Board, Patiala, (Paragraph 11)

13. Mr. Bhattacharyya also submits that the delegation of power by the Corporation in terms of the provisions of section 28 of the said Act in favour of the Mayor-in-council is not required in the instant case as the Mayor-in-council has issued only the administrative order/instructions pending framing of the regulation u/s 260 of the said Act by the Asansol Municipal Corporation. Mr. Bhattacharyya also referred to an extract of the minutes of the proceedings of the meeting of the Asansol Municipal Corporation held on 28th June, 1994 and submitted that the Corporation passed a resolution delegating its powers and

functions to the Mayor--in-council u/s 28(1) of the said Act in relation to all policy decisions regarding administration.

14. We are, however not very much impressed by the arguments advanced by the learned counsel of the respondent-Asansol Municipal Corporation.

15. The Corporation is empowered u/s 18 of the said Act to frame regulations relating to the terms and conditions of service of its officers and employees. The said section 18 of the said Act is quoted hereunder:

"Section 18. Terms and conditions of service of officers and employees. - The Corporation may, by regulation, provide for the terms and conditions of service including discipline, control and conduct of officers and other employees constituting the establishment of the Corporation."

16. The "Corporation" and "its constitution" have been defined in sections 4 and 5 of the said Act, which are also quoted hereunder:

"Section 4. The Corporation.-(1) With effect from such date as the State Government may, by notification, appoint, there shall be a Corporation charged with the Municipal Government of Asansol to be known as the Asansol Municipal Corporation.

(2) The Corporation shall be a body corporate with perpetual succession and a common seal, and may by its name sue and be sued.

(3) Subject to the provisions of this Act, the Corporation shall be entitled to acquire, hold and dispose of any property.

Section 5 Constitution of the Corporation. -

(1) The Corporation shall consist of the following members, namely:

a) not more than fifty and not less than thirty-five elected Councillors as may be determined by the State Government, and

b) such persons having special knowledge or experience in municipal administration as the State Government may nominate from time to time:

Provided that such persons shall not have the right to vote in the meetings of the Corporation.

(2) The Councillors referred in clause (a) of sub-section (1) shall be elected by the constituencies, each constituency electing one Councillor, and for this purpose, each ward shall constitute a constituency."

17. The Mayor-in-council is a Municipal authority in terms of section 3(b) of the said Act. The Mayor-in-council can exercise only such powers as are delegated by the Corporation u/s 28 of the Asansol Municipal Corporation Act, 1990.

18. In view of the specific provision of section 18 of the Asansol Municipal Corporation Act, the Corporation is empowered to pass regulation relating to the

terms and d) conditions of service including discipline, control and conduct of its officers and other employees. The aforesaid specific power vested in the Corporation u/s 18 of the said Act, if not specifically delegated u/s 28(1) of the said Act, the Mayor-in-council cannot exercise the power u/s 22 of the said Act. The Mayor-in-council, however, did not frame any regulation in the instant case on behalf of the Corporation.

19. The delegation of power given to the Mayor-in-council in connection with all policy decisions regarding administration cannot include the specific power of the Corporation to frame regulation in relation to the terms and conditions of service including discipline, control and conduct of its officers and other employees in terms of section 18 of the Asansol Municipal Corporation Act, 1990.

20. In any event, as argued by Mr. Bhattacharyya, learned counsel of the respondent-Asansol Municipal Corporation, the Mayor-in-council has issued administrative instructions in the instant case in exercise of its executive power vested u/s 22 of the said Act and did not pass any regulation in connection with the terms and conditions of service including discipline, control and conduct of its officers and other employees on behalf of the Corporation.

21. So, we are to examine whether the Mayor-in-council in exercise of the executive power of the Corporation u/s 22 of the said Act is entitled to issue any administrative instruction in relation to the terms and conditions of service including discipline, control and conduct of the officers and other employees of the Corporation under the executive power.

22. Section 22 of the said Act clearly provides that the executive power of the Corporation shall be exercised by the Mayor-in-council subject to the provisions of the Act and the rules and regulations made thereunder. The Corporation is empowered to frame regulations prescribing the terms and conditions of service including discipline, control and conduct of its officers and other employees in terms of section 18 of the said Act. When there are no rules or regulations pertaining to the conditions of service including discipline, control and conduct of the officers and other employees of the Corporation, then, pending framing of rules and regulations appropriate administrative order can be issued by the Corporation in this regard by exercising its power of the employer, or the said power can be delegated to the Mayor-in-council u/s 28(1) of the Asansol Municipal Corporation Act, 1990. The Mayor-in-council of the Asansol Municipal Corporation could not issue any administrative order in relation to the terms and conditions of service including discipline, control and conduct of the officers and other employees of the Asansol Municipal Corporation when such power of the Corporation was not expressly delegated to the Mayor-in-council u/s 28(1) of the Asansol Municipal Corporation Act. In the absence of specific delegation of power, Mayor-in-council in the guise of exercising executive power on behalf of the Corporation cannot provide for the terms and conditions of service including discipline, control and conduct of the officers and other employees of the Corporation.

23. In the aforesaid circumstances, the provisions of the West Bengal Service Rules cannot be followed in respect of the employees of the corporation pursuant to the resolution adopted by the Mayor-in-council in its meeting held on 13th July, 1994.

24. The appellant herein is undisputedly suffering due to his prolonged suspension from service for the last 14 years due to the pendency of the criminal case. It has not been alleged before us that the appellant herein is responsible for the pendency of the aforesaid criminal case for an absurdly long period of 14 years. We have every doubt that the criminal trials have not been proceeded with diligently although the appellant is still suffering immense hardship due the aforesaid suspension from service.

25. It is most unfortunate that the appellant herein has been receiving only 50% of his salary during last 14 years in view of the aforesaid order of suspension issued by the respondent authorities. We do not understand how the interest of the Corporation would be better served by keeping the appellant under suspension for such a long period specially when no disciplinary proceeding has been initiated by the respondent authorities. We are unable to agree with the learned counsel of the respondent Municipal Corporation that the appellant herein should remain under suspension till the criminal case is finally disposed of specially when long 14 years have already passed.

26. Under similar circumstances, Justice G. N. Ray (as His Lordship then was) while speaking for a Division Bench of this Hon'ble Court in the case of Chairman and Managing Director, Punjab National Bank & Ors. v. Dilip Kumar De, reported in 1988 (1) SLR 171 observed:

"10.....It is really unfortunate that the criminal trials are pending for such a long time and the respondent Sri De has been compelled to defend the criminal trials at distance stations like Jodhpur and Patna from Calcutta for all these years while suffering an order of suspension. It also appears to us that the Government circulars referred to hereinbefore clearly point out that pendency of the criminal trial by itself will not imply that an employee of the Bank against whom criminal case has been instituted and charge-sheet has been given should remain in suspension until the criminal trial is finally concluded....."

27. Even if the order of suspension issued against the appellant might have been a proper and reasonable order at its inception but indefinite prolongation of the same cannot be approved specially when the respondent authorities did not initiate the disciplinary proceedings. The learned counsel representing the respondent Corporation also did not submit before us that the respondent Corporation would like to initiate disciplinary proceedings against the appellant herein in near future.

28. From the submissions of the learned counsel of the respondent Corporation we do not see any ray of hope regarding early disposal of the aforesaid pending

criminal case initiated against the appellant.

29. For the aforementioned reasons, we are of the opinion that it is a fit case where the order of suspension should be quashed only on the ground that the same cannot remain operative for an indefinite period. Accordingly, we quash the impugned order of suspension issued against the appellant.

30. The appellant herein has also claimed full remuneration for the period of suspension on the ground that there is no statute or rule under which the same can be denied.

31. In the case of Balvantray Ratilal Patel Vs. The State of Maharashtra, Hon''ble Supreme Court observed:

"3.....It is equally well settled that an order of interim suspension can be passed against the employee while an inquiry is pending into his conduct even though there is no such term in the contract of appointment or in the rules, but in such a case the employee would be entitled to his remuneration for the period of suspension if there is no statute or rule under which it could be withheld. In this connection, it is important to notice the distinction between suspending the contract of service of an officer and suspending an officer from performing the duties of his office on the basis that the contract is subsisting. The suspension in the latter sense is always an implied term in every contract of service. When an officer is suspended in this sense it means that the Government merely issues a direction to the officer that so long as the contract is subsisting and till the time the officer is legally dismissed he must not do anything in the discharge of the duties of his office. In other words, the employer is regarded as issuing an order to the employee which, because the contract is subsisting, the employee must obey.

4. The general principle therefore is that an employer can suspend an employee pending an inquiry into his misconduct and the only question that can arise in such suspension will relate to payment during the period of such suspension. If there is no express term relating to payment during such suspension or if there is no statutory provision in any enactment or rule the employee is entitled to his full remuneration for the period of his interim suspension....."

32. Since we have already held that the West Bengal Service Rules cannot be made applicable in respect of the employees of the Asansol Municipal Corporation on the basis of the resolution passed by the Mayor-in-council on 13th July, 1994, there is no provision in the Asansol Municipal Corporation Act, 1990 or the rules and/or regulations framed thereunder relating to payment to an employee during the period of suspension. Therefore, following the aforesaid decision of the Hon''ble Supreme Court in the case of Balvantrai Ratilal Patel (supra), the appellant herein will be entitled to full remuneration during the period of suspension.

33. Mr. Bhattacharyya, learned counsel representing the respondent Corporation

referred to and relied on a decision of the Hon"ble Supreme Court in the case of V.T. Khanzode and Others Vs. Reserve Bank of India and Another, . In Paragraph 23 of the aforesaid decision, Hon"ble Apex Court held:

"23..... It is true that this by itself is not conclusive because, failure to mention the source of power cannot invalidate the exercise of power, if the power is possessed by the authority which exercises it"

34. In the present case, the Mayor-in-council did not possess the power to issue any order prescribing the terms and conditions of service including discipline, control and conduct of the officers and other employees of the Corporation. Therefore, the aforesaid decision cannot be of any help to the learned counsel of the respondent Corporation.

35. Mr. Bhattacharyya also cited another decision of the Hon"ble Supreme Court in the case of The Meghalaya State Electricity Board and Another Vs. Shri Jagadindra Arjun, . In the aforesaid decision, Supreme Court specifically held as follows:

"11.....Hence, if there are no rules or regulations pertaining to service conditions of its employees, the same could be prescribed by administrative order and such power of the employer which is a statutory corporation would be implied."

36. In this case, administrative order was admittedly issued by the Mayor-in-council and not by the employer, namely the Asansol Municipal Corporation, a statutory Corporation. The aforesaid decision, therefore, cannot be of any assistance to Mr. Bhattacharyya.

37. The decision of the Hon"ble Supreme Court in the case of Sohan Singh Sodhi Vs. Punjab State Electricity Board, Patiala, cited by Mr. Bhattacharyya also cannot be of any assistance to the respondent Corporation since in the aforesaid decision, Supreme Court only affirmed its earlier decision in the case of Meghalays State Electricity Board (supra).

38. Since we have quashed the order of suspension, the respondent Corporation is directed to allow the appellant to join the duties immediately.

39. As we have already held that the appellant would be entitled to full salary during the period of suspension, the respondent Corporation is directed to disburse the same to the appellant from the date of the order of suspension after adjusting the amount already paid to the said appellant towards subsistence allowance in the meantime.

40. Needless to mention that the respondent Corporation should make payment of the aforesaid arrear dues to the appellant at an early date but positively within a period of four weeks from the date of communication of this order.

41. With the aforesaid observations and directions, this appeal stands allowed and the judgment and order under appeal passed by the learned single Judge are

set aside.

In the facts and circumstances of the present case, there will be no order as to costs.

Let urgent xerox certified copy of this judgment, if applied for, be given to the learned advocates of the parties on completion of usual undertaking.

Tapan Mukherjee, J.

42. I agree.