
(2006) 11 BOM CK 0027

In the Bombay High Court

Case No : Writ Petition No. 2775 of 1992

Vatsala Premchand Sarmal

APPELLANT

Vs

Raghunath Damodar Krachale and Another

RESPONDENT

Date of Decision : 29-11-2006

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 33(3)
Maharashtra Civil Services (Joining Time, Foreign Service and Payment during
Suspension, Dismissal and Removal) Rules, 1981 — Rule 68(1), 69(4)

Citation : (2007) 4 BomCR 375 : (2007) 1 MhLj 705

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : A.D. Shetty and Shobhana Gopal, instructed by Sanjay Udeshi and Co, for the Appellant; N.M. Ganguli, for the Respondent

Final Decision : Allowed

Judgement

D.Y. Chandrachud, J.—The first respondent joined the services of the Hazarimal Somani College of Commerce and Economics as a Senior Clerk in the Accounts Department in the month of April, 1971. In 1976, he was discharging the duties of an Accountant. On 2nd October, 1981, a charge-sheet was issued to the first respondent. The articles of charge were thus:

(i) During 1976-1977 the first respondent had allegedly collected a sum of Rs. 4785/- from 383 students of the Junior College by charging fees for preparatory classes which were not shown in the accounts of the College;

(ii) During 1978-79 when the first respondent was in charge of accounts both for the Degree and Junior College one Professor Verghese was appointed as a lecturer upto 31st March, 1979 after which date, the aforesaid teacher did not attend the College. The first respondent had allegedly drawn the salary of the aforesaid teacher in the pay-sheets between April and August, 1979 which was credited to the account of the teacher;

(iii) During the period from April, 1979 to January, 1980, the first respondent had allegedly made payment to temporary employees in respect of days on which they had not worked in the College;

(iv) During February and March, 1977, the first respondent allegedly made payments to certain Lecturers once for extra lectures and thereafter once again. The first respondent had allegedly, in collusion with the Registrar withdrawn an amount of Rs. 9286 for payments to the aforesaid persons;

(v) During 1976-77, bearer cheques were allegedly drawn in the names of the aforesaid teachers enabling the withdrawal of an amount of Rs. 9286/- in cash, though the practice of the College was to issue only crossed cheques and credit the account of the concerned teacher;

(vi) During 1979-80, the first respondent had a cash balance of Rs. 8820/- of the Degree College and Rs. 225/- of the Junior College including fees collected from the students. Instead of depositing the amount, the first respondent misappropriated it;

(vii) The first respondent failed to regularly maintain the cash books and ledgers of the Degree College and the Junior College for the period from April, 1980 to December, 1980. As a result, there was a delay in completion of audit work and since the papers for the grant-in-aid could not be submitted in time, the Colleges did not get grant-in-aid of Rs. 3,55,133/-;

(viii) The first respondent did not obtain stamped receipts from the teaching and non-teaching staff for salaries paid between 1976-1977 and 1979-1980.

2. The first respondent filed a reply to the charge-sheet on 31st October, 1981 and denied the charges.

3. In contemplation of disciplinary proceedings, the first respondent was suspended from service on 27th February, 1981. The enquiry commenced on 26th October, 1982. The first respondent participated in the enquiry initially. After 11 sittings of the enquiry were completed the first respondent remained absent. On 6th May, 1983, the Enquiry Officer submitted his report holding the first respondent guilty of all the charges. On 28th October, 1983, a notice to show cause was issued to the first respondent upon the report of the Enquiry Officer. No reply was filed by the first respondent. In the meantime, the first respondent had filed a Writ Petition before this Court seeking the payment of his subsistence allowance. On 28th November, 1983, Hon"ble Mrs. Justice Sujata Manohar (as the learned Judge then was) while disposing of the petition, recorded the statement of the petitioner herein that the first respondent shall be paid subsistence allowance as per the rules from November, 1983, on his submitting every month a certificate as required by Rule 69(4) of the Maharashtra Civil Services (Joining Time, Foreign Service, Removal) Rules, 1981. In respect of the arrears, a dispute was pending before the Labour Court which was directed to be disposed of expeditiously.

4. On 9th December, 1983, the first respondent came to be dismissed from service. An appeal was filed before the College Tribunal by the first respondent under the provisions of the Bombay University Act, 1974. The Tribunal by its Judgment and Order dated 11th September, 1992 came to the conclusion that charges (ii), (vi) and (vii) were established. The Tribunal held that the charges which were established were serious in nature and even though it had come to the conclusion that the other charges had not been proved, the punishment inflicted upon the first respondent would have been sustained. The Tribunal found that the first respondent had obstructed the disciplinary enquiry. All the objections urged on behalf of the first respondent in regard to the fairness of the enquiry were overruled. However, the Tribunal held that the enquiry was vitiated only on the ground that the first respondent was not paid his subsistence allowance during the pendency of the disciplinary proceedings. On this ground alone, the Tribunal held that the order of dismissal was null and void and directed that the first respondent be re-instated in service with backwages from the date of his suspension.

5. In assailing the correctness of the order passed by the Tribunal, Counsel appearing on behalf of the petitioner submits that:

(i) The first respondent had neither pleaded nor proved any prejudice to his participation in the disciplinary proceedings, consequent upon the non-payment of the subsistence allowance;

(ii) The Supreme Court has held in *Indra Bhanu Gaur v. Committee, Management of M.M. Degree College 2003 (99) FLR 1940* and in *U.P. State Textile Corporation Ltd. Vs. P.C. Chaturvedi and Others*, that non-payment of subsistence allowance would not ipso facto invalidate a disciplinary proceeding unless the employee substantiates that the non-payment was either deliberate or to spite him and unless prejudice is shown and established;

(iii) Before the Tribunal the pleading of the first respondent in fact was that he had not participated in the disciplinary proceedings after he initially appeared at a few sittings, on the ground of the "vindictive attitude shown by the representative of the College in collusion with the Enquiry Officer". Hence, no prejudice on account of the non-payment of subsistence allowance was established;

(iv) The case of the management was that the first respondent was employed by the Bombay Labour Union. Before the Tribunal the management sought the issuance of a witness summons to the union for the production of its record which was opposed by the first respondent; and

(v) Apart from there being no prejudice to the first respondent as a result of the non-payment of subsistence allowance, the Tribunal recorded that it was the first respondent who had adopted an obstructive attitude in the disciplinary proceeding.

6. On the other hand, on behalf of the first respondent, Counsel supported the order of the Tribunal and urged that:

(i) No interference of this Court under Article 226 of the Constitution is warranted, since the decision of the Tribunal was consistent with the law as it then stood on the date of the decision. In any case a mere wrong decision is not a ground for the exercise of the writ jurisdiction under Article 226 as held by the Supreme Court in AIR 1984 SC 38;

(ii) In the judgment of the Supreme Court in Indra Bhanu's case (supra) the earlier Judgment in Fakirbhai Fulabhai Solanki v. Presiding Officer (1986) L.I.C. 879 has not been considered;

(iii) The denial of subsistence allowance is itself a matter of prejudice and no further prejudice is required to be shown or established; and

(iv) Though the first respondent had submitted certificates required under Rule 69(4) of the Maharashtra Civil Services Rules, 1981, no subsistence allowance was paid by the management.

7. At the outset, before dealing with the rival submissions, it would be important to note that the Tribunal has held that the findings of misconduct in respect of charges (ii), (vi) and (vii) stand established. The Tribunal has also held that the charges which were established were of a serious nature and, except for its finding that the enquiry was vitiated on the ground of non-payment of subsistence allowance, it would not have interfered with the penalty of dismissal. The first respondent has not filed any proceedings before this Court to challenge the Judgment of the Tribunal insofar as it came to the conclusion that the finding of misconduct has been proved. The basic issue however, that falls for determination is whether the disciplinary enquiry was vitiated purely and solely on account of the fact - now admitted before the Court - that the subsistence allowance that was due and payable to the first respondent was not paid. After a learned Single Judge of this Court passed an order on 28th November, 1983, the management paid the subsistence allowance to the first respondent but shortly thereafter, he was dismissed from service with effect from 9th December, 1983. Prior thereto, by a letter dated 11th December, 1981, the management had informed the first respondent that in breach of the service rules he had accepted employment elsewhere. The first respondent was therefore, required to report to the College every day and to sign the attendance register. There is a considerable degree of correspondence between the management and the first respondent. According to the management, the first respondent was required by Rule 69(4) of the Maharashtra Civil Services Rules, 1981 to furnish a certificate before payment was made every month to the effect that the employee had not accepted any private employment or engaged in trade or business during the period in question. Rule 69(4) reads thus:

Rule 69(4) - No payment under Rule 68(1) shall be made unless the Government servant furnishes a certificate to the following effect before payment is made

every month:

I certify that I did not accept any private employment or engage myself in trade or business during the period in question.

If the authority has any reasons to doubt this certificate; it may ask the Police Authorities to verify the certificate and if the Government servant is found to have given a false certificate that should be construed as an act of misconduct and made an additional charge against him. In the case of Gazetted Officers under suspension, they should furnish the certificate themselves to the Treasury Officer/Audit Officer, who should see that the certificate is furnished before the claim for payment is admitted. In case of doubt regarding the certificate, the case should be referred to the Head of Department, who will ask the Police Authorities to verify the same.

8. From the record of the case, it appears that the first respondent had from time to time furnished certificates for a consolidated period and on some occasion for a shorter period as required. However, there is no dispute about the fact that subsistence allowance was not paid until an order was passed by this Court on 28th November, 1983. Thereafter, as already noted above, the amount was paid prospectively.

9. The Tribunal has relied upon the judgment of the Supreme Court in *Fakirbhai Fulabhai Solanki v. Presiding Officer* (1986) L.I.C. 879 and held that the non-payment of subsistence allowance vitiated the disciplinary proceedings. *Fakirbhai's* case involved a protected workman as defined in Sub-section (3) of Section 33 of the Industrial Disputes Act, 1947 against whom a finding of misconduct was arrived at in a disciplinary proceeding. The workman was in receipt of his salary and allowances till the end of the disciplinary enquiry. However, from 13th August, 1979, the workman was suspended from service pending the disposal of the application before the Tribunal after he had been found guilty at the domestic enquiry but without any wages or allowances. The workman was not paid any subsistence allowance till 5th August, 1985 when the Tribunal passed its order granting permission to the management to dismiss the workman. In paragraph 4 of the Judgment of the Supreme Court, the Court noted the submission of the workman that since he was denied the subsistence allowance, it was not possible for him to defend himself effectively before the Tribunal in the proceeding relating to the permission prayed for by the management u/s 33(3) of the Act and therefore, the permission granted by the Tribunal was vitiated. The workman relied on the judgment in *State of Maharashtra Vs. Chandrabhan Tale*, where the Supreme Court held that the provisions of the Bombay Civil Services Rules, 1959 under which a nominal sum of Re. 1/- per month was payable from the date of conviction was unreasonable and void. The Supreme Court had held that a civil servant under suspension is entitled to normal subsistence allowance even after his conviction by the trial Court pending the disposal of his Appeal. In *Fakirbhai's* case, a Bench of two Learned Judges of the Supreme Court held that when an application was made u/

s 33 to the Tribunal for the grant of approval, the workman was entitled to defend himself and to oppose the application for the grant of approval. The proceedings before the Tribunal were likely to take a long period of time and in that case were pending for 6 years. In order to defend himself, the workman had to incur expenses in connection with the proceedings before the Tribunal. The Supreme Court held that the workman should have been paid some amount by way of subsistence allowance during the pendency of the proceedings before the Tribunal to maintain himself and his family and to meet the expenses of the litigation. If no amount was paid, the Court held, there would be a denial of an opportunity before the Tribunal. The Supreme Court had noted that no material was placed by the employer to show that the workman had sufficient means for defending himself before the Tribunal.

10. The issue as to whether the non-payment of subsistence allowance would vitiate disciplinary proceedings was thereafter considered by a Bench of two learned Judges of the Supreme Court in Capt. M. Paul Anthony v. Bharat Gold Mines Ltd. (1999) LLJ 1094. That was a case where as a result of the non-payment of the subsistence allowance, it was urged on behalf of the appellant-workman that he could not undertake a journey from his hometown in Kerala to Kolar Gold Fields in Karnataka where the departmental proceedings were being held. The Supreme Court noted that though the question as to whether the appellant was unable to travel to the place where the enquiry had been held on account of non-payment of subsistence allowance, may not have been raised earlier, it was not suggested by the respondent that the petitioner had any other source of income. The adjournment sought by the workman on account of his illness which was duly supported by a medical certificate was also refused resulting in the proceedings being proceeded with ex parte. The Supreme Court observed as follows:

33. Since in the instant case the appellant was not provided any subsistence allowance during the period of suspension and the adjournment prayed for by him on account of his illness, duly supported by medical certificates, was refused resulting in ex parte proceedings against him, we are of the opinion that the appellant has been punished in total violation of the principles of natural justice and he was literally not afforded any opportunity of hearing. Moreover, as pleaded by the appellant before the High Court as also before us that on account of his penury occasioned by non-payment of Subsistence Allowance, he could not undertake a journey to attend the disciplinary proceedings, the findings recorded by the Inquiry Officer at such proceedings, which were held ex parte, stand vitiated.

11. The next Judgment to which it would be necessary refer is the Judgment of a Bench of two learned Judges of the Supreme Court in Indra Bhanu Gaur v. Committee, Management of M.M. Degree College. The services of a Principal came to be terminated on a finding of misconduct by an Enquiry Committee. Before the Supreme Court one of the submissions was that the order of dismissal

was vitiated since no subsistence allowance was paid during the pendency of the enquiry. Dealing with the submission, the Supreme Court held thus:

We find that there was total lack of co-operation from the appellant as the factual background highlighted above would go to show. Ample opportunity was granted to the appellant to place his case. He did not choose to do so. It is only a person who was ready and willing to avail of opportunity given can make a grievance about denial of any opportunity and not a person like the appellant who despite repeated opportunities given and indulgence shown exhibited defiance and total indifference in extending co-operation. Therefore, on that score the appellant cannot have any grievance. So far as the effect of not paying the subsistence allowance is concerned, before the authorities no stand was taken that because of non-payment of subsistence allowance, he was not in a position to participate in the proceedings, or that any other prejudice in effectively defending the proceedings was caused to him. The appellant could not plead or substantiate also that the non-payment was either deliberate or to spite him and not due to his own fault. It is ultimately a question of prejudice. Unless prejudice is shown and established, mere non-payment of subsistence allowance cannot ipso facto be a ground to vitiate the proceedings in every case. It has to be specifically pleaded and established as to in what way the affected employee is handicapped because of non-receipt of subsistence allowance. Unless that is done, it cannot be held as absolute proposal in law that non-payment of subsistence allowance amounts to denial of opportunity and vitiates departmental proceedings.

12. The Judgment in Indra Bhanu Gaur's case was followed in the Judgment of the Supreme Court in U.P. State Textile Corporation Ltd. Vs. P.C. Chaturvedi and Others, . Dealing with the consequences of non-payment of subsistence allowance, the Supreme Court held thus:

So far as the effect of not paying the subsistence allowance is concerned, before the authorities no stand was taken by respondent 1 employee that because of non-payment of subsistence allowance, he was not in a position to participate in the proceedings, or that any other prejudice in effectively defending the proceedings was caused to him. He did not plead or substantiate also that the non-payment was either deliberate or to spite him. It is ultimately a question of prejudice. Unless prejudice is shown and established, mere non-payment of subsistence allowance cannot ipso facto be a ground to vitiate the proceedings in every case. It has to be specifically pleaded and established as to in what way the affected employee is handicapped because of non-receipt of subsistence allowance. Unless that is done, it cannot be held as an absolute position in law that non-payment of subsistence allowance amounts to denial of opportunity and vitiates departmental proceedings.

13. Counsel appearing on behalf of the first respondent submitted that the subsequent Judgments in Indra Bhanu Gaur (supra) and U.P. State Textile Corporation (supra) have not considered the earlier view in Fakirbhai's case. The submission, in my view, would not carry the case of the first respondent any

further, because a careful reading of all the Judgments of the Supreme Court which have been adverted to hereinabove would demonstrate a common thread of reasoning. Fakirbhai 's case arose out of an application for approval to the dismissal of a workman, found guilty of misconduct, u/s 33(3) of the Industrial Disputes Act, 1947. The submission before the Supreme Court was, as a matter of fact that the denial of subsistence allowance during the pendency of the proceedings before the Tribunal resulted in a situation where the workman was unable to defend himself effectively. That submission was accepted by the Supreme Court. In Capt. M. Paul Anthony's case, the workman had been unable to travel from his hometown in Kerala to Kolar Gold Fields in Karnataka where the disciplinary enquiry was convened on account of his ill health and financial difficulties. Both in Fakirbhai's case as well as in Capt. M. Paul Anthony's case, the Supreme Court noted that no material had been placed before the Court to show that the workman had sufficient means to defend himself. In fact, in Paul Anthony's case, the Supreme Court noted that it was not suggested by the respondent that the appellant had any other source of income. Whether the nonpayment of the subsistence allowance will result in a disciplinary proceeding being vitiated cannot therefore be answered in the abstract. The law is that non-payment of subsistence allowance would result in the invalidation of the proceedings where as a result of the omission of the management the employee is unable to defend himself in the enquiry. Capt. M. Paul Anthony's case, belongs to the category of cases where prejudice was established because the employee was unable to travel the distance between his hometown and the place where the disciplinary enquiry was convened on account of non-payment of subsistence allowance. The subsequent Judgment in Indra Bhanu Gaur's case (supra) therefore does not lay down a proposition which is different from what was laid down in the Judgments of the Supreme Court in the earlier Cases. The subsequent decision emphasised that in order to enable the Court to hold that the non-payment of subsistence allowance vitiated disciplinary proceedings, it is first and foremost necessary for the workman to set up the plea that as a result he was either not in a position to participate in a proceeding or to effectively defend them. Prejudice either in the form of not being enable to participate in the disciplinary proceedings or of some other nature has to be specifically pleaded and established. The decision in the Indra Bhanu Gaur's case therefore laid down that there is no absolute proposition in law that the non-payment of subsistence allowance amounts to a deprivation of an opportunity so as to vitiate the disciplinary proceedings. The Judgment in U.P. State Textile Corporation has followed the same line of reasoning.

14. In the present case, cognizance was taken by the Tribunal of the obstructive attitude that was adopted by the first respondent during the disciplinary proceedings. In paragraph 24 of its Judgment, the Tribunal held as follows:

24. The various applications which I have indicated above show that the appellant raised various objections on many occasions before the Inquiry Officer. In the first place he objected to the Venue of Inquiry. I cannot understand how a

delinquent can raise such an objection. I have already dealt with this aspect. In my opinion this objection is a flimsy one. The appellant also objected to the appearance of Mr. Netare. I have pointed out in this connection that he had no reason to raise any such objection. The appellant wanted the Inquiry to be held in Marathi. The Inquiry Officer obliged him by conducting the proceedings in Marathi as well as in English. Strangely enough the appellant had objections for this procedure also when he had no reason to do so. Though he claimed to be not well versed in English, he alleged that the translation of the Marathi evidence made by the Inquiry Officer in English was wrong. Without any reason the appellant did not attend the Inquiry Proceedings from 13-1-1983. He did not care to inform the Inquiry Officer as to why he was not attending the Inquiry. In the meanwhile he wrote applications after applications to various officials for changing the Inquiry Officer.

15. Again, in paragraph 41 of the Judgment, the Tribunal held thus:

41. I have dealt with the attitude of the appellant because on many grounds it is alleged that the inquiry is vitiated and hence question of prejudice to the appellant becomes important. While considering the question of prejudice it is necessary to consider whether the behaviour of the appellant justifies the inference of prejudice. If delinquent is bent upon obstructing the Inquiry the question of prejudice is to be viewed in the light of his behaviour. From the beginning the appellant did not want the inquiry to be conducted at the place where it was being conducted. He also did not want Mr. Netare to present the case for the Management. He wanted that Inquiry Officer should be some one other than Mr. Vaze. Even though the correspondence made by him shows that he understands English properly he insisted upon inquiry being conducted in Marathi. The Inquiry Officer obliged him but even then he boycotted the Inquiry on some pretext or the other. Before boycotting the inquiry he did not have the courtesy to inform the Inquiry Officer that from a particular date he would remain absent. Even though by letter he was asked to remain present he did not even have the courtesy to point out that he had decided to boycott the Inquiry.

16. Finally, it would be material to note that in the concluding part of the Judgment, the Tribunal was constrained to observe that the first respondent herein "had tried to obstruct the enquiry at every stage. "

17. The Pleadings of the first respondent before the Tribunal would assume significance particularly having regard to observations in the recent Judgments of the Supreme Court. In paragraph 10 of the memo of appeal before the Tribunal, the first respondent averred as follows:

10. The appellant says that he attended for inquiry for about 11 sittings, but due to the vindictive and criminal attitude adopted by the representative of the respondent College, Shri V.K. Netare, in collusion with the Inquiry Officer Shri V.R. Vaze, as described in the paragraphs mentioned below, it become virtually impossible for the appellant to attend further inquiry proceedings.

18. The case of the first respondent therefore was not to the effect that the non-payment of the subsistence allowance had prejudiced him in the conduct of the defence in the disciplinary enquiry. The first respondent in fact participated in the enquiry, attended 11 sittings and moved several applications before the Tribunal to which a reference has been made in the Judgment of the Tribunal. The conduct of the first respondent was recorded both by the Enquiry Officer and by the Tribunal as obstructive of the disciplinary proceedings. It would also be necessary to note that in grounds (9) and (10) of the memo of Appeal, the enquiry proceedings were challenged on the ground of non-payment of subsistence allowance. However, the first respondent did not establish any prejudice before the Tribunal on account of the non-payment of the subsistence allowance for the period prior to November, 1983 nor was there any pleading in support thereof.

19. At this stage, it would also be material to note that it was the case of the Management that the first respondent was employed with the Bombay Labour Union. The Management had addressed a communication on 31st October, 1981. Before the Tribunal, the Management moved an application for the issuance of a witness summons to the Secretary of the Bombay Labour Union for the production of the cashbook from 1981-1982, the ledger for the years 1981-1983 and the names of the persons employed by the Union. The first respondent opposed the application. The Tribunal by its order dated 20th August, 1986 postponed the decision on the application until after the evidence of the first respondent was over. The Court has been informed that ultimately no further steps were taken thereon.

20. Having regard to all these facts and circumstances, it is impossible to subscribe to the view of the Tribunal that the disciplinary enquiry would stand vitiated as a result of non-payment of the subsistence allowance to the first respondent. No such plea of prejudice was taken before the Tribunal and even before this Court, no such submission has been urged. In these circumstances, the order of the Tribunal insofar as it held that the enquiry was vitiated only on the ground of non-payment of subsistence allowance will have to be quashed and set aside.

21. The charges against the first respondent were serious in nature. The Tribunal has held that those charges, that is charges 2, 6 and 7 which have been held to be proved are serious enough to sustain the punishment of dismissal. That part of the finding has not been challenged before this Court by the first respondent. There could be no dispute about the principle of the law that in the exercise of the jurisdiction of the Court under Article 226 of the Constitution of India, the Court would not re-appreciate evidence or substitute the view of the Tribunal for a view which appears to the Court be more reasonable in the case. The finding of the Tribunal to the effect that the enquiry stood vitiated is ex-facie an error apparent on the face of the record. The finding is not consistent with the law laid down by the Supreme Court. A case for interference under Article 226 is

therefore clearly made out. The interference of the Court is also necessary in order to preserve the sanctity of the disciplinary proceeding. The case involves a serious act of misconduct.

22. In the circumstances, the petition will have to be allowed and is accordingly allowed. The Judgment and Order of the Tribunal dated 11th September, 1992 allowing the Appeal filed by the first respondent is quashed and set aside.

23. Rule is accordingly made absolute in terms of prayer Clause (a).

24. In the circumstances of the case, there shall be no order as to costs.