

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION No. 2057 of 1993****For Approval and Signature:****HONOURABLE MR.JUSTICE AKIL KURESHI**

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1 Whether Reporters of Local Papers may be allowed
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy
of the judgment ?

Whether this case involves a substantial question
of law as to the interpretation of the
4 constitution of India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the civil judge
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KESHARISINH CHHAGANSINH RAOL - Petitioner(s)

Versus

STATE OF GUJARAT & 3 - Respondent(s)

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Appearance :

MR BIPIN P JASANI for Petitioner(s) : 1,
MS REETA CHANDARANA, AGP for Respondent(s) : 1, 4,
NOTICE SERVED for Respondent(s) : 2,
MRS SN PAHWA FOR MR PM THAKKAR for Respondent(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI**Date : 28/02/2006****ORAL JUDGMENT**

1.In the present petition, the petitioner has challenged
the action of the respondents in not revoking the order
of suspension dated 20th February 1981 as also the

action of the respondents in not fixing his pay under the revised pay-scale with effect from 1.1.86 and granting him higher pay-scale with effect from 1.6.87. It is the case of the petitioner that he is entitled to receive all post retiral benefits on the basis of the revised pay-scale.

2.Short facts leading to the present petition are that the petitioner was an employee of Mansa Nagar Panchayat. The petitioner was engaged as Octroi Clerk with effect from 5.5.1954. He was placed under suspension from 20.2.81. The petitioner was placed under suspension on account of certain criminal cases filed against him. It is the allegation against the petitioner that he had misappropriated a large amount of money belonging to Mansa Nagar Panchayat.

3.While under suspension, the petitioner crossed the age of superannuation on 16.6.93. He was, therefore, made to retire with effect from 30th June 1993.

4.It is the case of the petitioner that his continued suspension indefinitely by the respondents is illegal and unlawful and that the respondents did not review the suspension order periodically and that in any case, after his superannuation, the master and servant relationship having come to an end, there is no

question of any further action against the petitioner. It is, therefore, the case of the petitioner that the respondents should have regularised the period of suspension and granted all post retiral benefits and also should have released salary for the period during which he was kept under suspension.

4.1 It is also the grievance of the petitioner that the respondents did not revise the pay of the petitioner despite introduction of new pay-scale with effect from 1.1.86 and did not grant the benefit of higher pay scale as per the Government policy. It is therefore the case of the petitioner that the petitioner should at least receive his subsistence allowance and other benefits, such as provisional pension and gratuity on the basis of pay fixation according to 4th Pay Commission recommendations.

5. Learned advocate Shri Jesani for the petitioner submitted that the respondents erred in keeping the petitioner under suspension for indefinitely long period and that the petitioner having been permitted to retire with effect from 30th June 1993, the respondents cannot any longer withhold the benefits payable to the petitioner. Reliance was placed on a decision of the

learned single Judge of this Court in the case of C.M.Sharma v. Sectary, Water Resources Department, 1992 (2) GLH 289 wherein the learned single Judge was pleased to hold that the employee therein having been permitted to retire, there was no possibility of any further departmental action against him. The learned single Judge, had therefore, directed releasing of salary for the suspension period and other retiral benefits in favour of the employee.

5.1 Learned advocate Shri Jesani further submitted that in any case, the pay of the petitioner should have been fixed as per the 4th Pay Commission Recommendations with effect from 1.1.86 and the subsistence allowance for the period subsequent to such pay fixation should have been on the basis of correct pay fixation. The petitioner should also be paid provisional pension according to his correct pay fixation and he should also be paid gratuity accordingly.

6. Learned advocate Mrs. Pahwa appearing for the Nagarpalika submitted that the petitioner had misappropriated a large amount of money belonging to the Nagarpalika for which several complaints have been filed against the petitioner. Such criminal cases are pending before the criminal courts. The petitioner

himself has obtained stay against further proceedings. The petitioner, therefore cannot complain about delay in disposal of the cases. She further contended that until such time all these criminal cases are concluded, the suspension period of the petitioner cannot be regularised. She submitted that till the petitioner is acquitted in all the criminal cases, his pension cannot be finalised. With respect to the correction of pay fixation of the petitioner in tune with 4th Pay Commission Recommendations, she submitted that the Panchayat had made recommendations to the Government, however, the State Government turned down such a request.

7.Learned AGP Ms.Chandarana for the State Government supported the stand of the Panchayat.

8.With respect to the question of the period of suspension one thing can be seen that the petitioner was placed under suspension on account of his involvement in criminal cases. Admittedly such criminal cases have not yet concluded. The petitioner, therefore, continues to face criminal cases involving serious charges of misappropriation of large funds of the employer. The proceedings of the criminal cases have been stayed at the instance of the petitioner.

9. Rule 4-A of the Gujarat Panchayat Service (Discipline & Appeal) Rules 1964 (which was prevailing at the relevant time) provides for suspension of a Government servant. Sub-rule (1) of rule 4-A which is relevant in the present case reads as follows:

"5. Suspension. (1) The appointing authority, or any authority to which it is subordinate or the disciplinary authority in that behalf may place a member of Panchayat Service under suspension -

(a) Where a disciplinary proceeding against him is contemplated or is pending, or

(b) Where a case against him in respect of any criminal offence involving moral turpitude is under investigation, inquiry or trial:

Provided that where the order of suspension is made by an authority subordinate to or lower in rank than the appointing authority, such authority shall forthwith report to the appointing authority the circumstances in which the order was made."

It can thus be seen that the Competent Authority has power to place a member of Panchayat service under suspension against whom case in respect of any criminal offence involving moral turpitude is under investigation, inquiry or trial. It can also be seen that as per sub-rule (5) of rule 4-A the order of suspension made or deemed to have been made under the said rule would continue to remain in force until it is modified or

revoked by the authority competent to do so.

10. Rule 151 of the Bombay Civil Services Rules (BCSR for short) provides, inter alia, that a Government servant under suspension is entitled to receive 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 or on half pay and in addition dearness allowance based on such leave salary. Proviso to sub-rule (1) of rule 151 of BCSR, inter alia, provides for increase of the subsistence allowance by further not exceeding 50 per cent on certain conditions. Rule 152 of the BCSR, inter alia, provides that where the competent authority is of the opinion that the Government servant has been fully exonerated or that his suspension 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.

11. Rule 189-A of the BCSR, inter alia, provides that the Governor reserves the right of withholding or withdrawing a pension or any part thereof, whether permanently or for a specified period and the right of

ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government if in a departmental or judicial proceeding, the pensioner is found guilty of grave misconduct or negligence during the period of his service, including services rendered upon re-employment after retirement.

Proviso to rule 189-A, inter alia, provides that such departmental proceeding, if instituted while the Government servant was in service whether before his retirement or during his re-employment shall after the final retirement of the Government servant be deemed to be a proceeding under this rule and shall be continued and concluded by the authority by which it was commenced in the same manner as if the Government servant had continued in service.

Explanation to rule 189-A provides, inter alia, that a judicial proceeding shall be deemed to be instituted (i) in the case of a criminal proceeding on the date on which the complaint or report of the police officer on which the Magistrate takes cognizance, is made, and (ii) in case of a Civil proceeding on the date or presentation of the plaint in the court.

12. Rule 189-A of BCSR reads as follows:

"189-A. The Governor reserves the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government if in a departmental or judicial proceeding, the pensioner is found guilty of grave misconduct or negligence during the period of his service, including services rendered upon re-employment after retirement:

Provided that --

(a) such departmental proceeding, if instituted while the Government servant was in service whether before his retirement or during his re-employment shall after the final retirement of the Government servant be deemed to be a proceeding under this rule and shall be continued and concluded by the authority by which it was commenced in the same manner as if the Government servant had continued in service:

(b) such departmental proceeding if not instituted while the Government servant was in service, whether before his retirement or during his re-employment -

(i) shall not be instituted save with the sanction of the Governor;

(ii) shall not be in respect of any event which took place more than 4 years before such institution; and

(iii) shall be concluded by such authority and in such place as the Governor may direct and in accordance with the procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relations to the Government servant during his service.

(d) the Gujarat Public Service Commission shall be consulted before final orders are passed.

Explanation : - For the purpose of this rule-

(a) a departmental proceeding shall be deemed to be instituted on the date on which the statement of charges is issued to the Government servant or pensioner, or if the Government servant has been placed under suspension from an earlier date, on such date; and

(b) a judicial proceeding shall be deemed to be instituted --

(i) in the case of a criminal proceeding on the date on which the complaint or report of the police officer on which the Magistrate takes cognizance, is made, and

(ii) in the case of a Civil proceeding, on the date or presentation of the plaint in the court.

From the above rule position, it can be seen that against a Government servant, even after his retirement, power is available with the Governor to withhold or withdraw his pension or any part thereof if in a departmental or judicial proceeding, the pensioner is found guilty of grave misconduct or negligence during the period of his service. For the purpose of rule 189-A, judicial proceeding shall be deemed to be instituted in case of a criminal proceeding on the date on which the complaint or report of the police officer on which the Magistrate takes cognizance is made.

13. In the present case, it is not in dispute that before the petitioner reached the age of superannuation,

complaint or report of the police officer on which the Magistrate takes cognizance was made. In fact, charge-sheet was filed against the petitioner in several criminal proceedings. Thus, admittedly, judicial proceeding was truly and properly instituted against the petitioner when he crossed the age of superannuation. The Authorities, therefore, have power to withhold or withdraw his pension or any part thereof permanently or for a specified period, and/or order recovery of the loss caused to the department on account of his grave misconduct or negligence being so established in such proceedings.

13.1 The suspension period of the petitioner can be regulated only after conclusion of such proceedings. That is also the essence of rule 152 of BCSR where sub-rule (2) thereof provides that in case of suspension, if it is found by the Competent Authority that the same was wholly unjustified, the employee shall be given full pay and allowance to which he would have been entitled had he not been placed under suspension. Such a conclusion, obviously, can be reached only after the conclusion of the criminal cases pending against the petitioner.

13.2 The fact that the petitioner himself is

responsible for prolonging the criminal trial is also one of the factors to be reckoned. It is, therefore, not possible to accept the contention of the learned advocate for the petitioner that upon his superannuation, the master-servant relationship having been terminated, there is no further possibility of any adverse action against the petitioner and the employer must release his full retiral benefits and also regularise the period of suspension and release the deficient pay and allowances. Rule 189-A of the BCSR would run counter to any such submission.

14. In the case of C.M.Sharma v. Secretary, Water Resources Department (supra), the learned single Judge was not considering the effect of the Bombay Civil Services Rules and in particular rule 189-A thereof since the parties therein were governed by the provisions contained in Gujarat Water Resources Development Corporation Employees (Control & Appeal) Rules, 1984. It was also a case wherein the authorities had exercised the power of suspending the employee who was kept under detention for a period exceeding 48 hours upon a private complaint and apparently the allegations made therein had nothing to do with discharge of his duties. It was in that

background that the learned single Judge came to the conclusion that after 9 long years it was not possible for the employer to continue the employee under suspension and upon his superannuation, permitted by the employer, to withhold the regularization of the suspension period. The facts of the present case are vitally different. The allegations made against the petitioner in the criminal complaint have direct relation to the discharge of his official duties. In fact, the charges against the petitioner were that he had misappropriated large funds belonging to the employer for which he is facing criminal prosecution. The petitioner himself is responsible for stay of the further proceedings in the criminal cases. The employer had not resorted to the provision for deeming suspension on account of detention in police custody for more than 48 hours, but the petitioner was placed under suspension pursuant to a conscious decision on account of his involvement in criminal cases wherein the charges were of moral turpitude. Under no circumstances in the present case the petitioner can seek regularisation of his suspension period unless and until the criminal cases are over. Nor can he seek finalisation of his pension.

15.The petitioner, however, cannot be denied the benefit of pay fixation pursuant to the 4th Pay Commission recommendations. No provision has been pointed out by the respondents to withhold such pay fixation. In any case, this issue had been considered by a Division Bench of this Court in the case of State of Gujarat v. D.C.Chauhan, 1998 (1) GLH 427 wherein the following observations were made by this Court:

"5. It was argued before the learned single Judge as well as before us that a Government servant under suspension is entitled to subsistence allowance on the pay scale at the relevant time when he was placed under suspension. The Rule does not say so. In our opinion, the learned single Judge was right in observing that from the language of the Rule no such interpretation is possible. The learned single Judge has also rightly relied upon an order passed in Special Civil Application No.6043 of 1991, wherein such benefit was granted. We do not see any infirmity in the order passed by the learned single Judge. The Letters Patent Appeal deserves to be dismissed and is, accordingly, dismissed."

16.In the result, while turning down the prayer of the petitioner for regularization of suspension period, his prayer for pay fixation on the basis of 4th Pay Commission Recommendations with effect from 1.1.86 is accepted. The respondents shall recalculate his entitlement of subsistence allowance, provisional pension and gratuity payable on that basis and release

the unpaid amount expeditiously and preferably within a period of three months from the date of receipt of a copy of this order.

17.The petitioner has claimed higher pay fixation upon stagnation. Such pay fixation is always subject to satisfactory service record which the petitioner cannot claim. Such a request of the petitioner cannot be accepted until the criminal cases are concluded and the same is therefore tuned down.

18.Subject to the above observations and directions, the petition is disposed of. Rule is made partially absolute with no order as to costs.

Direct service.

(Akil Kureshi, J.)

(vjn)