

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 12.01.2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAJA

W.P.No.8314 of 2015 and
M.P.No.1/2015

K.Boopathi

...Petitioner

Versus

District Elementary Educational Officer,
Namakkal, Namakkal District.

... Respondent

Prayer: Writ petition is filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, calling for the records pertaining to the order passed by the respondent in his Proceedings R.C.No.4021/A4/2012 dated 24.7.2012 and the order in his Proceedings Na.Ka.No.2036/A4/2012 dated 14.10.2014 and quash the same and direct the respondent to confer all the consequential benefits.

For Petitioner : Mr.C.Selvaraj,
Senior Counsel
for M/s.C.S.Associates

For Respondent : Mrs.P.Rajalakshmi,
Additional Government Pleader

O R D E R

Questioning the correctness of the impugned order of suspension passed by the respondent in his Proceedings R.C.No.4021/A4/2012 dated 24.7.2012 against the petitioner and the consequential order, rejecting to revoke the order of suspension dated 14.10.2014, the present Writ Petition has been filed.

2. Learned Senior Counsel for the petitioner submitted that the petitioner joined as Secondary Grade Teacher on 4.10.1996 and thereafter, promoted as Elementary School Headmaster on 24.6.2006. While he has been working as Headmaster of Elementary School at Panchayat Union Elementary School, Pallapalayam, Kailarmalai Panchayat Union, Namakkal District, he was placed under suspension on 24.7.2012 based on a complaint given against him stating that while disbursing the scholarship amount to the children of uncleaned labour, he has misappropriated the funds allotted for the year 2011-2012. He further submitted that the respondent has also filed a Criminal Complaint against the petitioner on the file of Jedarpalayam Police Station for the offence under Sections 409 and 420 of IPC. Subsequently, he was served with a Charge Memo dated 30.7.2012 alleging the similar charge for which the petitioner

has submitted his detailed explanation on 14.8.2012. However, the Disciplinary Authority, disagreeing with his explanation, appointed an Enquiry Officer and the Enquiry Officer after conducting the enquiry, submitted his report on 13.6.2014 for which the petitioner was asked to submit his explanation by proceedings dated 9.7.2014. Accordingly, the petitioner has submitted his explanation on 24.7.2014. But, till date, the respondent neither come forward to revoke the suspension nor to pass final order on the disciplinary proceedings. Therefore, the petitioner has submitted a representation dated 6.1.2014 to the respondent requesting to revoke the order of suspension. But the same was rejected on the ground that criminal case is pending against him by order dated 14.10.2014. The learned Senior Counsel for the petitioner also submitted that though the petitioner knows very well that during the pendency of the criminal case, departmental enquiry cannot be proceeded with, without raising any objection, he has co-operated with the same and he has also submitted his detailed explanation for the Enquiry Officer's Report dated 13.6.2014. Therefore, considering the same, at least, the respondent should come forward to revoke the suspension order. But, without resorting to either of this course, the respondent is keeping the petitioner under suspension which is against the ratio laid down by the Hon'ble Supreme Court of India in a decision reported in 2015 [7] SCC 291 [Ajay Kumar Choudhary V. Union of India through its Secretary and another].

3. A detailed counter has been filed by the respondent. Reiterating the averments stated in the counter affidavit, the learned Additional Government Pleader submitted that the petitioner was placed under suspension on 24.7.2012 based on the complaint given against him that while disbursing the scholarship amount to the children of uncleaned labour, he has misappropriated the funds. Hence, a case was registered in Cr.No.286/12 on the file of Jedarpalayam Police Station for the offences under Sections 409 and 420 of IPC and there was also departmental enquiry initiated against the petitioner by issuing a charge memo on 30.7.2012 for which he has given his explanation and finally, an Enquiry Officer was appointed and he has also submitted his report. She further stated that in view of the pendency of the criminal case, the respondent has not come forward to revoke the suspension order. Therefore, no interference is called for, it is pleaded.

4. In the present case, it is not in dispute that the petitioner was placed under suspension on 24.07.2012, while he has been working as Headmaster of Elementary School at Panchayat Union Elementary School, Pallapalayam, Kailarmalai Panchayat Union, Namakkal District for the allegation that he is alleged to have misappropriated the scholarship amount paid to the Children of Uncleaned Labour and the respondent has been paying the Subsistence Allowance at the rate of 50%. Further, although the respondent has proceeded both departmentally and criminally by filing a Criminal Case in Cr.No.286/12 on the file of Jedarpalayam Police Station for the offences under Sections 409

and 420 of IPC, it is not known why the counter affidavit has not disclosed the status of the criminal case. While doing so, when the respondent has proceeded departmentally by issuing a charge memo on 30.7.2012 and after receiving his explanation dated 14.8.2012, the Disciplinary Authority disagreeing with the same, appointed the Enquiry Officer who also on completion of his enquiry submitted his report. In spite of the submission of the Enquiry Officer's Report and further explanation given by the petitioner to the Enquiry Officer's Report on 24.7.2014, it is not known why the respondent has not come forward to pass any final orders, as a result, the petitioner has acquired the right of full subsistence allowance at the rate of 100% of his salary.

5. In an identical situation, the Apex Court in a decision reported in 2015 [7] SCC 291 [Ajay Kumar Choudhary V. Union of India through its Secretary and another] has considered the issue relating to prolonged suspension and held that the currency of suspension order should not extend beyond three months and within this period, if the memorandum of charge sheet is not served on the delinquent/accused, a reasoned order must be passed for extension of suspension. In this regard, it is relevant to extract paragraphs 11 to 16 of the said decision hereunder:

'11. The legal expectation of expedition and diligence being present at every stage of a criminal trial and a fortiori in departmental inquiries has been emphasised by this Court on numerous occasions. The Constitution Bench in Abdul Rehman Antulay v. R.S. Nayak, (1992) 1 SCC 225, underscored that this right to speedy trial is implicit in Article 21 of the Constitution and is also reflected in Section 309 of the Cr.P.C., 1973; that it encompasses all stages, viz., investigation, inquiry, trial, appeal, revision and re-trial; that the burden lies on the prosecution to justify and explain the delay; that the Court must engage in a balancing test to determine whether this right had been denied in the particular case before it. Keeping these factors in mind the CAT had in the case in hand directed that the Appellant's suspension would not be extended beyond 90 days from 19.3.2013. The High Court had set aside this direction, viewing it as a substitution of a judicial determination to the authority possessing that power, i.e., the Government. This conclusion of the High Court cannot be sustained in view of the following pronouncement of the Constitution Bench in Antulay:

86. In view of the above discussion, the following propositions emerge, meant to serve as guidelines. We must forewarn that these propositions are not exhaustive. It is difficult to foresee all situations. Nor is it possible to lay down any hard and fast rules. These propositions are:

(1) Fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily. Right to speedy trial is the right of the accused. The fact that a speedy trial is also in public interest or that it serves the social interest also, does not make it any the less the right of the accused. It is in the interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible in the circumstances.

(2) Right to speedy trial flowing from Article 21 encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and re-trial. That is how, this Court has understood this right and there is no reason to take a restricted view.

(3) The concerns underlying the right to speedy trial from the point of view of the accused are:

(a) the period of remand and pre-conviction detention should be as short as possible. In other words, the accused should not be subjected to unnecessary or unduly long incarceration prior to his conviction;

(b) the worry, anxiety, expense and disturbance to his vocation and peace, resulting from an unduly prolonged investigation, inquiry or trial should be minimal; and

(c) undue delay may well result in impairment of the ability of the accused to defend himself, whether on account of death, disappearance or non-availability of witnesses or otherwise.

(4) At the same time, one cannot ignore the fact that it is usually the accused who is interested in delaying the proceedings. As is often pointed out, "delay is a known defence tactic".

Since the burden of proving the guilt of the accused lies upon the prosecution, delay ordinarily prejudices the prosecution. Non-availability of witnesses, disappearance of evidence by lapse of time really work against the interest of the prosecution. Of course, there may be cases where the prosecution, for whatever reason, also delays the proceedings. Therefore, in every case, where the right to speedy trial is alleged to have been infringed, the first question to be put and answered is – who is responsible for the delay? Proceedings taken by either party in good faith, to vindicate their rights and interest, as perceived by them, cannot be treated as delaying tactics nor can the time taken in pursuing such proceedings be counted towards delay. It goes without saying that frivolous proceedings or proceedings taken merely for delaying the day of reckoning cannot be treated as proceedings taken in good faith. The mere fact that an application/petition is admitted and an order of stay granted by a superior court is by itself no proof that the proceeding is not frivolous. Very often these stays are obtained on ex parte representation.

(5) While determining whether undue delay has occurred (resulting in violation of Right to Speedy Trial) one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the workload of the court concerned, prevailing local conditions and so on – what is called, the systemic delays. It is true that it is the obligation of the State to ensure a speedy trial and State includes judiciary as well, but a realistic and practical approach should be adopted in such matters instead of a pedantic one.

(6) Each and every delay does not necessarily prejudice the accused. Some delays may indeed work to his advantage. As has been observed by Powell, J. in *Barke* 33 L Ed 2d 101 "it cannot be said how long a delay is too long in a system where justice is supposed to be swift but deliberate". The same idea has been stated by White, J. in *U.S. v. Ewell* 15 L Ed 2d 627 in the following words:

'... the Sixth Amendment right to a speedy trial is necessarily relative, is consistent with delays, and has orderly expedition, rather than mere speed, as its essential ingredients; and whether delay in completing a prosecution amounts to an unconstitutional deprivation of rights depends upon all the circumstances.'

However, inordinately long delay may be taken as presumptive proof of prejudice. In this context, the fact of incarceration of accused will also be a relevant fact. The prosecution should not be allowed to become a persecution. But when does the prosecution become persecution, again depends upon the facts of a given case.

(7) We cannot recognize or give effect to, what is called the 'demand' rule. An accused cannot try himself; he is tried by the court at the behest of the prosecution. Hence, an accused's plea of denial of speedy trial cannot be defeated by saying that the accused did at no time demand a speedy trial. If in a given case, he did make such a demand and yet he was not tried speedily, it would be a plus point in his favour, but the mere non-asking for a speedy trial cannot be put against the accused. Even in USA, the relevance of demand rule has been substantially watered down in *Barker* 33 L Ed 2d 101 and other succeeding cases.

(8) Ultimately, the court has to balance and weigh the several relevant factors – 'balancing test' or 'balancing process' – and determine in each case whether the right to speedy trial has been denied in a given case.

(9) Ordinarily speaking, where the court comes to the conclusion that right to speedy trial of an accused has been infringed the charges or the conviction, as the case may be, shall be quashed. But this is not the

only course open. The nature of the offence and other circumstances in a given case may be such that quashing of proceedings may not be in the interest of justice. In such a case, it is open to the court to make such other appropriate order – including an order to conclude the trial within a fixed time where the trial is not concluded or reducing the sentence where the trial has concluded – as may be deemed just and equitable in the circumstances of the case.

(10) It is neither advisable nor practicable to fix any time-limit for trial of offences. Any such rule is bound to be qualified one. Such rule cannot also be evolved merely to shift the burden of proving justification on to the shoulders of the prosecution. In every case of complaint of denial of right to speedy trial, it is primarily for the prosecution to justify and explain the delay. At the same time, it is the duty of the court to weigh all the circumstances of a given case before pronouncing upon the complaint. The Supreme Court of USA too has repeatedly refused to fix any such outer time-limit in spite of the Sixth Amendment. Nor do we think that not fixing any such outer limit ineffectuates the guarantee of right to speedy trial.

(11) An objection based on denial of right to speedy trial and for relief on that account, should first be addressed to the High Court. Even if the High Court entertains such a plea, ordinarily it should not stay the proceedings, except in a case of grave and exceptional nature. Such proceedings in High Court must, however, be disposed of on a priority basis.

12. State of Punjab v. Chaman Lal Goyal, (1995) 2 SCC 570 deserves mention, inter alia, because action was initiated on 25.3.1992 and a Memorandum of Charges was issued on 9.7.1992 in relation to an incident which had occurred on 1.1.1987. In the factual matrix obtaining in that case, this Court reserved and set aside the High Court decision to quash the Inquiry because of delay, but directed that the concerned officer should be immediately considered for promotion without taking the pendency of the Inquiry into perspective.

13. It will be useful to recall that prior to 1973 an accused could be detained for continuous and consecutive periods of 15 days, albeit, after judicial scrutiny and supervision. The Cr.P.C. of 1973 contains a new proviso which has the effect of circumscribing the power of the Magistrate to authorise detention of an accused person beyond period of 90 days where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and beyond a period of 60 days where the investigation relates to any other offence. Drawing support from the observations contained of the Division Bench in Raghubir Singh v. State of Bihar, (1986) 4 SCC 481, and more so of the

Constitution Bench in *Antulay*, we are spurred to extrapolate the quintessence of the proviso of Section 167(2) of the Cr.P.C. 1973 to moderate Suspension Orders in cases of departmental/disciplinary inquiries also. It seems to us that if Parliament considered it necessary that a person be released from incarceration after the expiry of 90 days even though accused of commission of the most heinous crimes, a fortiori suspension should not be continued after the expiry of the similar period especially when a Memorandum of Charges/Charge-sheet has not been served on the suspended person. It is true that the proviso to Section 167(2) Cr.P.C. postulates personal freedom, but respect and preservation of human dignity as well as the right to a speedy trial should also be placed on the same pedestal.

14. We, therefore, direct that the currency of a Suspension Order should not extend beyond three months if within this period the Memorandum of Charges/Chargesheet is not served on the delinquent officer/employee; if the Memorandum of Charges/Charge-sheet is served a reasoned order must be passed for the extension of the suspension. As in the case in hand, the Government is free to transfer the concerned person to any Department in any of its offices within or outside the State so as to sever any local or personal contact that he may have and which he may misuse for obstructing the investigation against him. The Government may also prohibit him from contacting any person, or handling records and documents till the stage of his having to prepare his defence. We think this will adequately safeguard the universally recognized principle of human dignity and the right to a speedy trial and shall also preserve the interest of the Government in the prosecution. We recognize that previous Constitution Benches have been reluctant to quash proceedings on the grounds of delay, and to set time limits to their duration. However, the imposition of a limit on the period of suspension has not been discussed in prior case law, and would not be contrary to the interests of justice. Furthermore, the direction of the Central Vigilance Commission that pending a criminal investigation departmental proceedings are to be held in abeyance stands superseded in view of the stand adopted by us.

15. So far as the facts of the present case are concerned, the Appellant has now been served with a Charge-sheet, and, therefore, these directions may not be relevant to him any longer. However, if the Appellant is so advised he may challenge his continued suspension in any manner known to law, and this action of the Respondents will be subject to judicial review.

16. The Appeal is disposed of in the above terms and we desist from imposing costs.''

6. A perusal of the above dictum clearly shows that prolonged suspension is neither permissible in law nor justifiable. As highlighted above, when the petitioner was placed under suspension from 24.07.2012 and he is not even paid with the full subsistence allowance at the rate of 100% of his salary as per the provision, this Court, instead of directing the respondent to pay him the full salary, deems it fit to set aside the impugned order of suspension. Accordingly, the impugned order of suspension passed by the respondent dated 24.7.2012 against the petitioner is set aside and the respondent is directed to reinstate the petitioner in service, within a period of two weeks from the date of receipt of a copy of this Order.

7. With the above observation and direction, the Writ Petition stands allowed. No costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-

Assistant Registrar(CS-IV)

//True Copy//

Sub Assistant Registrar

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To

District Elementary Educational Officer,
Namakkal, Namakkal District.

+ 1 cc to M/s. C.S. Associates, Advocate Sr.2846

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