

26 10.5.2022
Sc Ct. no.4

**FMA 311 OF 2022
(MAT 194 OF 2022)
with
I.A. No. CAN 1 OF 2022**

Sri Goutam Bhattacharjee

Vs.

The State of West Bengal & Ors.

Mr. Sarwar Jahan
Mr. Sanjib Seth.

.... For the Appellant

Mr. Biswabrata Basu Mallick

.... For the DPSC,
Hooghly

Admittedly the appellant was arrested in connection with Baranagar Police Station Case No. 50 of 2021 registered on 31st January, 2021 under Sections 306, 506 and 34 of the Indian Penal Code and was later on released on bail on 24th March, 2021 by the learned Additional District and Sessions Judge, Barrackpore in CRM No. 187 of 2021.

Rule 7 of the West Bengal Primary Education (Conduct of Service of Teachers of Primary Schools) Rules, 2001 provides for a deemed suspension in the event a teacher detained in custody for a period of exceeding of 48 hours on a criminal charge or otherwise.

It would be relevant to quote Rule 7 which runs thus:-

Suspension.-(1) A primary School Council may place a teacher under suspension-

- (a) where an inquiry under sub-rule (1) of rule 9 of these rules against him is contemplated by the Primary School Council or such an inquiry is pending; or
- (b) where a case of any criminal offence involving moral turpitude against the teacher is under investigation or trial.

Where a teacher is detained in custody for a period of exceeding 48 hours on a criminal charge or otherwise, he shall be deemed to have been suspended by an order of the appointing authority with effect from the date of his detention and shall remain under suspension until further orders. A teacher who is undergoing a sentence of imprisonment shall also be dealt with in the same manner, pending a decision as to the disciplinary action to be taken against the teacher.

Every order of suspension under sub-rule (1) shall be communicated to the Director of School Education, Government of West Bengal, and the Board.

A teacher under suspension or deemed to have been suspended shall be entitled to the following payments:-

- (a) During the first three months of suspension, a monthly subsistence allowance equal to the amount of pay which he would have drawn if he had been on half-pay leave.
- (b) Provided that where the period of suspension exceeds three months, the appointing authority shall be competent to increase the amount of subsistence allowance for the remaining period of suspension by such amount, not exceeding fifty percent of the subsistence allowance admissible during the first three months of suspension, if in the opinion of the appointing authority, the period of suspension has been prolonged for reasons to be recorded in writing.
- (c) Dearness, medical and other allowances, admissible from time to time on the basis of the subsistence allowance fixed by the competent authority.

No payment under sub-rule (4) shall be made unless the teacher furnishes a certificate to the effect that

he is not engaged in any other employment, business, profession or vocation.”

It is apparent from the aforesaid provision contained in the above quoted Rule that a teacher shall be deemed to have been suspended by an order of the appointing authority with effect from the date of his detention under the criminal charge or otherwise until further orders. The writ petition was taken out not only challenging the order of deemed suspension but for further direction upon the authorities to consider whether the order of deemed suspension is liable to continue eternally.

The learned Advocate for the appellant emphasizes on the provision of Rule 7 of the aforesaid Rules to contend that even in case of a deemed suspension, the authority must issue a notice of suspension which is conspicuously absent in the instant case. The aforesaid point is not tenable in view of the judgment of ***Birbhum District Primary School Council & Anr. vs. Md. Mokhtar Hossain & Ors.*** reported in ***(2009)1 CHN 476***. The identical issue was raised and it has been held that the language imported in the aforesaid Rule does not warrant any further order to be issued by the appointing authority because of the legal fiction of the provision in the following :-

“17. The substance of the relevant provision in the Rajiv Kumar case is akin, if not identical, to Rule 7(2) of the 2001 Rules. The suspension that comes into effect by the legal fiction of the deeming provision under such sub-rule continues unabated till a further order in that regard is made. That further order is an order to be made by the appointing authority and not any order that may be passed in connection with the criminal proceedings or the order of detention. The appointing authority may choose not to issue any further order, which would imply that the order of suspension would continue, or the appointing authority may modify the order of suspension; or altogether revoke the same. The appointing authority can take any of the three courses of action and the rule recognises the same. The inaction or action on the part of the appointing authority may, however, fall for scrutiny or judicial review.”

However, the question which further arises in the instant matter because of the expression “until further order” used in the aforesaid Rule implies the deemed suspension not to continue for all time to come. The Division Bench in the above noted decision took note of the earlier decision of the Hon’ble Supreme Court rendered in the case of **Union of India vs. Rajiv Kumar** reported in **AIR 2003 SC 2917** wherein it is said that the authorities should not construe the aforesaid provision being perennial in nature as it would destroy the very concept of the deemed suspension and of the expression

“until further order”. It is further held that the provision relating to deemed suspension creates a legal fiction for only issue of any specific order of suspension but the expression “until further order” should not be construed in the sense that the authorities would not take any further decision and permit the deemed suspension to continue until disposal of the criminal proceeding. It would relevant to quote of Paragraphs 13 and 14 which runs as follows:-

“13. In the judgment reported at AIR 2003 SC 2917 (Union of India v. Rajiv Kumar), the Supreme Court construed Rule 10 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965. Clause (b) of sub-rule (2) of Rule 10 of such Rules provides that a Government servant “shall be deemed to have been placed under suspension by an order of appointing authority with effect from the date of his detention, if he is detained in custody, whether on a criminal charge or otherwise, for a period exceeding forty-eight hours...” Sub-rule (5) (a) stipulates that an order of suspension “made or deemed to have been made under this Rule shall continue to remain in force until it is modified or revoked by the authority competent to do so.” In the light of such provisions, the Supreme Court held as follows at paragraphs 14 and 15 of the report;

14. Rule 10(2) is a deemed provision and creates a legal fiction. A bare reading of the provision shows that an actual order is not required to be passed. That is deemed to have been passed by operation of the legal fiction. It has as much efficacy, force and operation as an order otherwise specifically passed under other provisions. It does not speak of any period of its effectiveness. Rules 10(3) and 10(4) operate conceptually in different situations and need specific provisions separately on account of interposition of an order of a Court of Law or an order passed by the appellate or reviewing authority and the natural consequences inevitably flowing from such orders. Great emphasis is laid on the expression “until further orders” in the said sub-rules to emphasise that such a prescription is missing in sub-rule (2). Therefore, it is urged that the order is effective for the period of detention alone. The plea is clearly without any substance because of sub-rules 5(a) and 5(c) of Rule 10. The said provisions refer to an order of suspension made or deemed to have been made. Obviously, the only order which is even initially deemed to have been made under Rule 10 is one contemplated under sub-rule (2). The said provision Under Rule 10(5) (a) makes it crystal clear that the order continues to remain in force until it is modified or revoked by an authority competent to do so while Rule 10 (5)(c) empowers the competent authority to modify or revoke also. No exception is made relating to an order under Rules 10(2) and 16(5)(a). On the contrary, it specifically encompasses an order under Rule 10(2). If the order deemed to have been made

Under Rule 10(2) is to lose effectiveness automatically after the period of detention envisaged comes to an end, there would be no scope for the same being modified as contended by the respondents and there was no need to make such provisions as are engrafted in Rules 10(5)(a) and (c) and instead an equally deeming provision to bring an end to the duration of the deemed order would by itself suffice for the purpose.”

*15. Thus, it is clear that the order of suspension does not lose its efficacy and is not automatically terminated the moment the detention comes to an end and the person is set at large. It could be modified and revoked by another order as envisaged Under Rule 10(5)(c) and until that order is made, the same continues by the operation of Rule 10(5)(a) and the employee has no right to be reinstated in service. This position was also highlighted in the *Balbantrai Ratilal Patel v. State of Maharashtra*, AIR 1968 SC 800. Indication of the expression “pending further order” in the order of suspension was the basis for the aforesaid view.”*

The Supreme Court applied the general principles of construction to consider the meaning of the relevant provision and concluded at paragraph 26 of the report as follows:

“26. The inevitable conclusion therefore is that the order in terms of Rule 10(2) is not restricted in its point of duration or efficacy to the period of actual detention only. It continues to be

operative unless modified or revoked under sub-rule (5)(c), as provided under sub-rule (5)(a).”

It is axiomatic to record that though the order of suspension shall be deemed to take effect from the date of the detention of the teacher but the expression “until further order“ implies the authorities to review or evaluate the same to arrive at the decision whether such order of suspension is liable to continue or to be modified. Such observation can be visualised from the observations of the said Division Bench made in Paragraph 28 thereof which reads thus:-

“28. There can be no guidelines laid down in a strait-jacket as to how an appointing authority should deal with the suspension of a primary teacher where the suspension commenced by virtue of the deeming provision in Rule 7(2) of the 2001 Rules. The conduct of the appointing authority would be justiciable and open to question in proceedings under Article 226 of the Constitution. It could well be that in a given case the prolonged suspension on account of sheer inaction on the part of the appointing authority may be unjustified. The period of suspension should ordinarily not be unnecessarily prolonged but it could also be that plausible reasons exist for the prolonged suspension and the appointing authority may be able to justify its opinion that the suspension needs to be continued. Merely because a suspension that commenced under the legal

fiction in Rule 7(2) of the 2001 Rules continues for a long period would not invalidate the suspension or lead to any conclusion that the duration of the suspension stipulated in that rule is till the release of the primary teacher following the detention. The fact that the provision is prone to misuse will not have a telling impact on the purport of the provision or in the matter of construction thereof.”

In view of the law expounded by the Division Bench in the case of Birbhum District Primary School Council, the order of the Single Judge cannot be sustained and is hereby set aside. The appellant is directed to make a representation before the appropriate authority for reconsideration and or revisitation on the continuance of the deemed suspension within 2 weeks from date. If such application is made within the time indicated hereinabove, the concerned authority shall decide the same within 3 weeks therefrom and communicate the decision to the appellant within fortnight thereafter.

With these observations, the appeal being MAT 194 of 2022 and the connected application being CAN 1 of 2022 are disposed of.

(Rabindranath Samanta, J.)

(Harish Tandon, J.)