

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI**

ORIGINAL APPLICATION NO.227 OF 2020

DISTRICT : SOLAPUR

Shri Dharma Gopichand Pawar.)
Age : 56 Yrs., Senior Auditor (now under)
suspension), Office of Assistant Director,)
Local Fund Accounts Audit, Zilla Parishad)
Compound, Solapur and residing at)
Flat No.201, Laxmideep Complex,)
Bijapur Road, Jule Solapur.)...**Applicant**

Versus

The Joint Director.)
Local Funds Accounts and Audit, Pune)
Division, having office at Lekhakosh)
Bhavan, Campus of District Collector,)
Pune - 411 001.)...**Respondent**

Mr. A.V. Bandiwadekar, Advocate for Applicant.

Mr. A.J. Chougule, Presenting Officer for Respondent.

CORAM : SHRI A.P. KURHEKAR, MEMBER-J

DATE : 08.09.2020

JUDGMENT

1. The Applicant has challenged the suspension order dated 04.11.2019 whereby he was suspended invoking Rule 4(2)(a) of Maharashtra Civil Services (Discipline & Appeal) Rules, 1979 (hereinafter

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referred to as 'Rules of 1979' for brevity) invoking jurisdiction of this Tribunal under Section 19 of the Administrative Tribunals Act, 1985.

2. Shortly stated facts giving rise to this O.A. are as under :-

The Applicant was serving as Senior Auditor in the office of Assistant Director, Local Fund Accounts Audit, Solapur. He was promoted to the post of Senior Auditor by order dated 29th December, 2003 by Chief Auditor, Local Funds Accounts Audit (nomenclature was subsequently changed to 'Director, Local Fund Accounts Audit'). As such, the appointing authority of the Applicant is Director, Local Fund Accounts Audit/Chief Auditor, Local Fund Accounts Audit. On 31.10.2019, the Applicant was arrested by Anti-Corruption Bureau while accepting bribe from one Mr. Maschindranath G. Mhaske for not raising audit objections in the audit of Construction Division, Z.P. Sub-Division, Pandharpur. He was detained in Police custody for more than 48 hours for the offence under Section 7 read with Section 12 of Prevention of Corruption Act, 1988. Consequent to it, the Respondent - Joint Director, Local Fund Accounts Audit, Pune Division exercising powers under Rule 4(2)(a) of 'Rules of 1979' suspended the Applicant by order dated 04.11.2019 as deemed suspension. Since then, he is under suspension. He made representations to revoke the suspension and reinstatement in service, but in vain. The Applicant, therefore, filed the present O.A. challenging the suspension order dated 04.11.2019 *inter-alia* contending that the Respondent - Joint Director, Local Fund Accounts Audit is not his appointing authority, and therefore, the suspension is illegal and secondly, prolong suspension for more than 90 days is unsustainable in law in view of the decision of Hon'ble Supreme Court in **(2015) 7 SCC 291 (Ajay Kumar Choudhary Vs. Union of India & Anr.)**

3. Shri A.V. Bandiwadekar, learned Advocate for the Applicant sought to assail the impugned suspension order mainly on the ground that in terms of Rule 4(2)(a) of 'Rules of 1979', the appointing authority is only competent for deemed suspension, but suspension order being passed by

Joint Director, Local Fund Accounts Audit is without jurisdiction and on that ground alone, the suspension order deserves to be quashed. In alternative submission, he submits that prolong suspension of more than 90 days without passing any further order of revocation/continuation of suspension is illegal in terms of decision of Hon'ble Supreme Court in **Ajay Kumar Choudhary's** case (cited supra). He has further pointed out that till date, though the period of more than 10 months is over, neither charge-sheet is filed in Criminal Case nor any departmental proceedings are initiated by the Department. On this line of submission, he submits that the impugned suspension order is unsustainable in law and Applicant be reinstated on the said post. In this behalf, he heavily relied on the decision of Hon'ble High Court, Bench at Aurangabad in Writ Petition No.5402/2018 (Dr. Sanjay Kadam and Ors. Vs. State of Maharashtra) decided on 20th March, 2020 wherein it is held that once the statutory rules have been made, the executive power could be exercised only to fill-in the gaps, but the instructions in terms of G.R. cannot and should not supplant the law and it would only supplement the law.

4. Per contra, Shri A.J. Chougule, learned Presenting Officer in reference to contentions raised in reply retorted that even if the Applicant's appointing authority was Chief Auditor, Local Fund Accounts Audit, later Government by G.R. dated 02.03.2009 declared the Respondent 'Joint Director, Local Fund Accounts Audit' as appointing authority, and therefore, the suspension order issued by the Joint Director cannot be faulted with. He fairly concedes that till date, neither charge-sheet is filed in Criminal Case nor D.E. is instituted against the Applicant. As regard review of suspension order, he submits that the Applicant has not completed one year under suspension and after one year, the matter will be placed before the competent authority for taking decision of review of suspension in terms of G.R. dated 24.10.2011 which *inter-alia* provides for placing the matter before the Committee where suspension is on account of registration of crime under the Prevention of

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Corruption Act or Indian Penal Code and no charge-sheet is filed in Criminal Case.

5. In view of the submissions advanced at the Bar, the question posed for consideration is whether the impugned suspension order passed by Joint Director, Local Fund Accounts Audit is legal and sustainable in law.

6. At this juncture, it would be apposite to refer Rule 4 of 'Rules of 1979' invoked by the Respondent to suspend the Applicant, which is as follows :-

"4. Suspension :

- (1) The appointing authority or any authority to which the appointing authority is subordinate or the disciplinary authority or any other authority empowered in the behalf by the Governor by general or special order may place a Government servant under suspension-
 - (a) where a disciplinary proceeding against him is contemplated or in pending, or
 - (b) where in the opinion of the authority aforesaid, he has engaged himself in activities prejudicial to the interest of the security of the State, or
 - (c) where a case against him in respect of any criminal offence is under investigation, inquiry or trial:

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

- (2) A Government servant shall be deemed to have been placed under suspension by an order of appointing authority-
 - (a) with effect from the date of his detention, if he is detained in police or judicial custody, whether on a criminal charge or otherwise, for a period exceeding forty-eight hours;
 - (b) With effect from the date of his conviction, if, in the event of a conviction for an offence, he is sentenced to a term of imprisonment exceeding forty-eight hours and is not forthwith dismissed or removed or compulsorily retired consequent to such conviction."

(3)
.....

(4)

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7. Thus, there is clear distinction in situation where the Government servant is suspended invoking Rule 4(1) and Rule 4(2) of 'Rules of 1979'. Under Rule 4(1), the Government servant can be suspended by appointing authority or any authority, the appointing authority empowered in this behalf by the Governor by general or special order. As per proviso to Rule 4(1) where order of suspension is made by an authority lower than appointing authority, such authority is under statutory obligation to forthwith report to the appointing authority the circumstances in which the order was made. Whereas, material to note that as per Rule 4(2) of 'Rules of 1979' in case of deem suspension on account of detention in police custody or judicial custody for a period exceeding 48 hours or in case of conviction and sentenced to a term of imprisonment exceeding 48 hours, the power vests only with the appointing authority. Thus, there is no provision for delegation of powers to subordinate authority for suspension under Rule 4(2) of 'Rules of 1979', and the appointing authority is the only competent authority for such suspension of the Applicant.

8. In view of above, the next material question comes whether by virtue of G.R. dated 2nd March, 2009 (Page Nos.51 to 53 of Paper Book), the Joint Director, Local Fund Accounts Audit can be termed competent authority for suspension of the Applicant.

9. True, by G.R. dated 2nd March, 2009, the Joint Director has declared as appointing authority for the post of Senior Auditor amongst others. In this behalf Clause 6(b) of G.R. dated 2nd March, 2009 issued by Finance Department is relevant, which is as follows :-

“स्थानीक निधी लेखा गट-क सेवांतर्गत वरीष्ठ लेखापरीक्षक, कनिष्ठ लेखापरीक्षक व लेखापरीक्षा लिपीक या पदांसाठी प्रादेशीक सहमुख्य लेखा परीक्षक/उपमुख्य लेखा परीक्षक (वरीष्ठ) हे नियुक्ती प्राधिकारी असतील.”

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10. There is no denying that the Applicant was promoted in the cadre of Senior Auditor by appointing authority viz. Chief Auditor, Local Fund Accounts Audit by order dated 29th December, 2003. As such, in 2003, the appointing authority of the Applicant was admittedly the Chief Auditor, Local Fund Accounts Audit. However, by G.R. dated 2nd March, 2009, the Joint Director, Local Fund Accounts Audit is declared appointing authority for the post of Senior Auditor amongst others. Material to note that this G.R. was issued to implement Service Recruitment Rules of employees of Local Fund Accounts Audit office. It does not speak about delegation of power of appointing authority under Rule 4(2) of 'Rules of 1979'. There is absolutely no reference in G.R. dated 2nd March, 2009 that powers are delegated to the Respondent for exercising powers under Rule 4(2) of 'Rules of 1979'. This also one of the material aspects to be borne in mind while deciding the competency of Respondent to suspend the Applicant on the basis of G.R. dated 2nd March, 2009.

11. Apart, next material question would be whether such powers can be delegated for exercising powers under Rule 4(2) of 'Rules of 1979' by issuance of G.R. In this behalf, the learned Advocate for the Applicant emphasized that there could be no such delegation of powers contrary to statutory rules by executive instructions in the nature of G.R. He relied on the decision in **Writ Petition No.5402 of 2018** (cited supra). In that matter, the Medical Officers serving in the cadre of Maharashtra had challenged the G.D. dated 13th May, 2015, 13th June, 2015 and 3rd September, 2015 increasing the age of superannuation of District Health Officer, Civil Surgeon and Superior Officers working in Public Health Department from 58 years to 60 years on the ground of non-availability of Medical Officers. The Hon'ble High Court held that in terms of Rule 10 of Maharashtra Civil Services (Pension) Rules, 1982 (hereinafter referred to as 'Pension Rules of 1982' for brevity), once the age of superannuation of Government servant other than Class IV servant is fixed as 58 years, there could be no such extension from 58 years to 60 years by way of

G.R, it being contrary to 'Pension Rules of 1982'. The Hon'ble High Court referred the decision of Hon'ble Supreme Court in **AIR 1967 SC 1753 (G.J. Fernandez Vs. State of Mysore and Ors.)**, which is as under :-

"Learned counsel for the appellant is unable to point out any statute under which these instructions in the code were framed. He also admits that they are administrative instructions by government to its servants relating to the public works department. But this contention is that they are rules issued under Article 162 of the Constitution. Now Article 162 provides that "executive power of a state shall extend to the matters with respect to which the legislature of the State has power to make laws". This Article in our opinion merely indicates the scope of the executive power of the State, it does not confer any power on the State Government to issue rules thereunder. As a matter of fact wherever the Constitution envisages issue of rules it has so provided in specific terms. We may for example refer to Art, 209 the proviso to which lays down in specific terms that the President or the Governor of a State may make rules regulating the recruitment and the conditions of service of persons appointed to services and posts under the Union or the State. We are therefore of opinion that Art. 162 does not confer any power on the State Government to frame rules and it only indicates the scope of the executive power of the State. Of course, under such executive power, the State can give administrative instructions to its servants how to act in certain circumstances; but that will not make such instructions statutory rules which are justifiable in certain circumstances. In order that such executive instructions have the force of statutory rules it must be shown that they have been issued either under the authority conferred on the State Government by some statute or under some provision of the Constitution providing therefore."

12. The Hon'ble High Court then in Para Nos.46, 49 and 51 held as under :-

"46. From the judgments referred above, it is clear that Article 162 of the Constitution of India does not confer any power on the State Government to frame rules and it only indicates the scope of the executive powers of the State. Under such executive powers, the State can give administrative instructions to its servants, as how to act in certain circumstances; but that will not make such instructions statutory rules which are justifiable in certain circumstances.

49. The judgments referred to above further make it clear that once statutory rules have been made, the executive power could be exercised only to fill in the gaps but the instructions cannot and should not supplant the law, but would only supplement the law.

51. It is well settled law that what cannot be done directly cannot be done indirectly. When any alteration is to be brought about legislation, the

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same purpose cannot be achieved by taking recourse to Government Resolutions or Executive instructions which do not have the force of law."

13. Accordingly, the Hon'ble High Court quashed the G.Rs. dated 13th May, 2015, 13th June, 2015 and 3rd September, 2015 being arbitrary and contrary to Rules.

14. Apart, reference can be made to the decision of Hon'ble Supreme Court in **Civil Appeal No.7254/2003 (Rajasthan State Industrial Development Corporation Vs. Subhash Sindhi Cooperative Housing Society, Jaipur and Ors.) decided on 12th February, 2013**, wherein in Para No.19, it has been reiterated as under :-

"19. Executive instructions which have no statutory force, cannot override the law. Therefore, any notice, circular, guidelines, etc. which run contrary to statutory laws cannot be enforced (Vide: B.N. Nagarajan & Ors., etc. v. State of Mysore and Ors. etc., AIR 1966 SC 1942; Sant Ram Sharma v. State of Rajasthan & Ors., AIR 1967 SC 1910; Secretary, State of Karnataka & Ors. V. Umadevi & Ors., AIR 2006 SC 1806; and Mahadeo Bhau Khilare (Mane) & Ors. V. State of Maharashtra & Ors., (2007) 5 SCC 524)."

15. Thus, in view of aforesaid dictum, it is no more in *res-integra* that executive instructions by issuance of resolutions have not statutory force and it cannot override express provisions of law / rules. In the present case, the Applicant's appointing authority in terms of appointment order dated 29th December, 2003 is Chief Auditor, Local Fund Accounts Audit and this being the position, he was the only competent authority for deem suspension of the Applicant in terms of Rule 4(2)(a) of 'Rules of 1979'. As stated above, there is no provision in Rule 4(2) about delegation of powers to subordinate authority alike Rule 4(1) of 'Rules of 1979'. Therefore, the Respondent cannot function as appointing authority with retrospective effect so as to exercise the powers under Rule 4(2) of 'Rules of 1979' by virtue of G.R. dated 2nd March, 2009, it being without force of law. Such delegation of power cannot be done in absence of appropriate amendment to the Rules of 1979' and there could be no such delegation of power by issuance of G.R.

16. In this view of the matter, there is no escape from the conclusion that the Respondent is not competent authority to exercise the powers of deem suspension and the suspension order being issued without jurisdiction and competency is liable to be quashed.

17. Apart, in view of the decision of Hon'ble Supreme Court in **Ajay Kumar Chaudhary's** case, the suspension beyond 90 days is not permissible. Para No.21 of the Judgment is here material, which is as follows :-

“21. We, therefore, direct that the currency of a suspension order should not extend beyond three months if within this period the memorandum of charges/charge-sheet 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 person concerned 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 prepared 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 the 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.”
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18. Material to note that the Central Government through Ministry of Personnel, Public Grievances and Pension had issued Office Memorandum dated 23rd August, 2016 for compliance of directions issued by Hon'ble Supreme Court in **Ajay Kumar Choudhary's** case. Para No.2 of the Office Memorandum is relevant, which is as under :-

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“2. In compliance of the above judgment, it has been declared that where a Government servant is placed under suspension, the order of suspension should not extend beyond three months, if within this period the charge-sheet is not served to the charged officer. As such, it should be ensured that the charge-sheet is issued before expiry of 90 days from the date of suspension. As the suspension will lapse in case this time line is not adhered to, a close watch needs to be kept at all levels to ensure that charge-sheets are issued in time.”

19. Indeed, the Government of Maharashtra had also issued G.R. dated 09.07.2016 consequent to the decision in **Ajay Kumar Choudhary's** case acknowledging that where charge-sheet is not issued within three months, the suspension cannot be continued and further issued directions that the competent authority should ensure that charge-sheet is invariably issued within 90 days from the date of suspension.

20. Now, turning to the facts of the present case, admittedly, till date neither charge-sheet is filed in Criminal Case nor D.E. is initiated against the Applicant though the period of more than 10 months is over. No efforts were made to take review of suspension after expiry of 90 days period. This being the position, the prolonged suspension without placing the matter before the Committee for review is not sustainable in law. Where no review is taken despite the lapse of 90 days period, normally, directions would have been issued by this Tribunal to place the matter before the Review Committee for appropriate decision in accordance to law. However, in the present matter, the issue of competency of Respondent No.2 goes to the root of the matter and the impugned suspension order itself being found without jurisdiction or authority, the same is liable to be quashed and Applicant is liable to be reinstated in service.

21. In-so-far as reinstatement is concerned, I am not in agreement with the submission advanced by the learned Advocate for the Applicant that he should be reposted on same post. The suspension of the Applicant being quashed on technical issue, having regard to the

registration of crime against the Applicant under the provisions of Prevention of Corruption Act, 1988, liberty is granted to the Respondents to reinstate the Applicant on any other suitable post. Indeed, the G.R. dated 14.10.2011 also provides for reinstatement of the employee on non-executive post where suspension is revoked by the Government in view of recommendation of the Committee.

22. The totality of aforesaid discussion leads me to sum-up that the impugned suspension order is unsustainable in law and liable to be quashed. Hence, the following order.

ORDER

- (A) The Original Application is allowed.
- (B) The suspension order dated 04.11.2019 is quashed and set aside.
- (C) The Applicant be reinstated in service with liberty to Respondents to post him on any suitable post, as deem fit within two weeks from today.
- (D) No order as to costs.

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(A.P. KURHEKAR)
Member-J

Mumbai
Date : 08.09.2020
Dictation taken by :
S.K. Wamanse.