IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL MUMBAI

ORIGINAL APPLICATION NO.256 OF 2017

DISTRICT : MUMBAI

Shri Rajendra Kisanrao Shirsath.)
Aged : 48 Yrs., Occu.: State Excise)
Inspector, M/s. Associated Blender's)
Pvt.Ltd. Pune and R/o. 2401, Signja)
Ocean, Next to D'smat, Sector -10A,)
Airoli, Navi Mumbai – 8.)**...Applicant**

Versus

The State of Maharashtra.)
Through Principal Secretary (Excise),)
Home Department, Mantralaya,)
Mumbai - 400 032.)**...Respondent**

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

Ms. N.G. Gohad, Presenting Officer for Respondent.

P.C. : R.B. MALIK (MEMBER-JUDICIAL)

DATE : 10.08.2017

JUDGMENT

1. The Applicant, a State Excise Inspector hereby questions the order dated 16.2.2017 whereby he was placed under suspension after an offence was registered against him by the State Anti-Corruption Bureau (ACB) vide Cr.No.310/2016 dated 2.9.2016 at Police Station Rabale. The allegations against him were relating to, he having been found in possession of the assets disproportionate to his known source of income. The penal provisions invoked against him were Section 109 of the Indian Penal Code (IPC) read with Section 13(1)(e) read with Section 13(2) of the Prevention of Corruption Act, 1988.

2. The order herein impugned is at Exh. 'A' (Page 26 of the Paper Book (PB)). It is mentioned therein that, by an order dated 2.3.2015, the Applicant was placed under suspension in connection with some other offence. By an order dated 2.7.2016, that order of suspension was revoked and he was reinstated at his present posting at Pune. He did not, however, report for duty there as per the communication of 21.10.2016 by the Excise Commissioner. At this stage, it may be noted that, according to the Applicant, in the ultimate analysis, he

joined duties there at Pune and apparently, because of that, he wants that matter to be closed now. Returning to the impugned order, the Government in Home Department have referred to the offence above referred to, having been registered against the Applicant. That offence was registered on 2.9.2016. The impugned order is dated 16.2.2017. That offence was under investigation, and therefore, under Rule 4(1) of the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979 (D & A Rules), he came to be suspended with immediate effect with certain terms and conditions which are not necessary to be examined herein. It is this particular order which is under challenge in this OA.

3. I have perused the record and proceedings and heard Mr. A.V. Bandiwadekar, the learned Advocate for the Applicant and Ms. N.G. Gohad, the learned Presenting Officer (PO) for the Respondents. The only Respondent to this OA is the State in Home Department (Excise).

4. Earlier in the year 2015, the Applicant faced a criminal charge against him relating to the allegations that fall within the purview of Section 354 of the IPC. There were allegations that the Applicant attempted to hush up that matter by holding out allurement by way of money to

the complainant lady whose name I am not going to place on record at least here although unfortunately, she has been identified in the Affidavits. The Police Custody in that matter was declined by the Court of competent jurisdiction and to the extent material herefor, he was placed under suspension and then reinstated. In Para 9 of the Affidavit-in-reply (Page 55 of the PB), it is made clear that the Applicant ultimately joined at Pune postreinstatement on 20.2.2017. It is, therefore, clear that the present one is the second suspension in line. Regard being had to the ambit of this OA, it is not necessary for me to discuss anything pertaining to the first matter.

5. It appears that the concerned Officer of the ACB informed the Excise Department about the said offence having been registered against the Applicant. However, there is no record produced in this OA about the matter of disproportionate assets. All that has been mentioned is that the investigation is on. The Applicant relies on a fact situation whereby some time ago, an Officer in the same Department faced a similar situation and even the charge-sheet was laid unlike the present case, but he was not suspended.

6. Even if I proceed on the assumption that, initially the suspension may have been warranted and this I must hasten to add is only an assumption, the issue of crucial significance is whether the said suspension should continue. The Applicant was never arrested in this matter. No departmental enquiry is initiated against him.

7. In Paras 6, 7 and 8 of the Affidavit-in-rejoinder (Page 69 of the PB), the Applicant has given out the reasons as to why the charge of disproportionate assets could not stick against him. The allegations in this Para are met with in the Affidavit-in-sur-rejoinder where it is only mentioned that they related to the Anti-Corruption Bureau.

8. The above discussion, therefore, would make it quite clear that the order of suspension has been made merely because an offence has been registered against the Applicant. There is not even ritualistic suggestion that, if the Applicant was allowed to continue to function, he would in any manner try to interfere with the ongoing investigation. Even otherwise, it does not appear to be so because that investigation is within the control of the ACB and the collection of evidence in that matter must be going on and so I presume it is. Whatever investigation is

required to be done has got nothing to do with the Applicant being on duty or under suspension. It is not even alleged that, he was trying to delay the investigation. Even if such an allegation was made, there are ways and means whereby such an attempt could be checkmated. For that, I do not think, the continued suspension of the Applicant is the remedy.

9. Mr. A.V. Bandiwadekar, the learned Advocate for the Applicant has relied upon a Judgment of this Tribunal which spoke through me in **OA 1096/2016 (Shri Anantkumar S. More Vs. The State of Maharashtra and one another, dated 21.4.2017)**. That was also a matter where a Superintending Engineer and Ex-Officio Deputy Secretary in Mantralaya was placed under suspension and he moved this Tribunal thereagainst. In the course of the discussion in that matter, I relied upon **Cap. Paul Anthony Vs. Bharat Gold Mines Limited : 1999 SCC (L & S) 810** and another Judgment of the Hon'ble Supreme Court in **Ajay Kumar Choudhary Vs. Union of India : (2015) 2 SCC (L & S) 455 = (2015) 7 SCC 291**. I also relied upon a Judgment of the Division Bench of the Hon'ble Bombay High Court in **Madanlal Sharma Vs. The State of Maharashtra and others : 2004 (1) MLJ 581** and **State of Maharashtra and Others Vs. Shivram S.**

Sadawarte : 2001 (3) Mh.L.J. 249 and another Judgment of the Hon'ble Bombay High Court in **Writ Petition No.9660/2014 (The State of Maharashtra Vs. Dr. Subhash D. Mane (DB), dated 1.12.2014)**. I have also relied upon a Judgment of the Hon'ble Supreme Court in **Rajasthan State Industrial Development and Investment Corporation Vs. Subhash Sindhi Co-operative Housing Society Jaipur and Ors. : 2013 AIR SCW 1174** and a Judgment of the Hon'ble High Court of Andhra Pradesh in **P. Rajender Vs. Union of India and another : 2001 (3) SLR 740 (AP)**.

10. There is, however, another Judgment rendered by me a few days after **More's** Judgment in **OA 214/2017 (Shri Jahur Ahmed Tajuddin Pirjade Vs. The State of Maharashtra and 5 Ors., dated 27.04.2017)** wherein More's Judgment was extensively relied upon. There, the Applicant was a Sectional Engineer and he challenged a similar order of suspension in which after an elaborate discussion, directions were given to review the suspension of the Applicant in accordance with the discussion therein within the period of two weeks and conveying the outcome thereof to the said Applicant.

11. In as much as almost all the issues that arise herein have already been extensively discussed by me with the guidance from the various Judgments of the Hon'ble Bombay High Court and the Hon'ble Supreme Court, I do not think, I should be paraphrasing much. It will be for facility and even congruity better if I were to, whenever necessary reproduce passages therefrom. In **Pirjade's** matter, in Para 30, I dealt with an issue as to whether the mere fact that the recourse to the remedy by way of the OA was made within a short span of the order of suspension was itself sufficient to throw the case of the Applicant out of the window. I found that, it was a fact specific issue. It was not as if the Applicant must be necessarily made to suffer mandatorily for some duration of time before he moved this Tribunal. Paras 7 and 8 from More's Judgment came to be reproduced and in Para 8, in fact, the Judgments of the Hon'ble Supreme Court above referred to were quoted. In this context, therefore, it will be proper to reproduce the entire Paras 30 and 31 of **Pirjade's** matter.

> "**30.** I have already indicated above that the time lag between the date of suspension and the filing of this OA has been very short. I have already mentioned as to how the learned CPO wanted this itself to be cited as a ground to throw

this OA out of the window. I have already given indication of my point of view on that. It is a fact specific issue. It cannot be said that other factors remaining constant, the aggrieved must be made to suffer mandatorily for some duration of time. I must repeat that, if there was some material with the Respondents and that too, of the period, the Applicant was posted not at Mhaisal, but his previous posting, then depending upon the determination of its very relevance, then in that event, rather than making self-serving statements and self-drawn inferences, the Respondents should have produced those documents for the perusal of the Tribunal to judge as to whether their view was such as to be called plausible on that anvil and as to whether the said conclusion of the Respondents was immune from judicial or quasi-judicial scrutiny and even interference or at least intervention. That has not been done. There is no doubt that the period of time within which such a course of action must be adopted has got some relevance and to the extent necessary, I may have to discuss that aspect of the matter presently. But one aspect of the matter is very

clear that studied in isolation and left only with that single point, no short work of the Applicant's case could be made just because he moved the Tribunal when it was still early days post his suspension. It also needs to be noted that within four days of the said order, the Applicant made a representation protesting thereagainst and requesting for his reinstatement also making it clear that otherwise, he would have to seek redressal from the Court of law. That representation is Annexure 'A-15' (Pages 58 to 62 of the PB). He has raised clear dispute *inter-alia* about his absence as alleged as well as the other fact components of the case of the Respondents. For example, as far as the leave aspect of the matter is concerned, it could easily have been proved one way or the other, by production of documents. Those documents would be in the custody of the Respondents. Similarly, the other aspects of the matter which I have already summarized above in so far as the allegations are concerned, including for example the misuse or abuse of the political acquaintance or such other aspects, the documents could have been produced and that could only have been done by

the Respondents. I can find no immunity capable of being claimed by the Respondents from the adversity in the form of drawing an adverse inference against them for having failed to produce it before the Tribunal. There is no reason why, a presumption should not be raised, that had those documents existed, they would have been produced and/or further, had they been produced, they would have gone against the Respondents and hence, the non-production. As for principles in **Anandkumar More** (supra), Paras 7 and 8 need to be reproduced.

> "7. In the background of the above delineated factual parameter, this Tribunal is called upon to consider as to whether at this stage, it needs to interference or intervention of this Tribunal with the suspension of the Applicant. There is no doubt that there are jurisdictional limitations. They are too very well known to the recapitulated here and it would be suffice to mention that the principles of law appear to be that a certain leeway is surely there for the employer to take a decision

about the suspension aspect of his employee. This aspect of the matter, however, is and has got to be fact specific. It needs always to be borne in mind that in public services, there are constitutional safe-guards and those safeguards cannot be in actual practice made illusory and with whatever jurisdictional limitations there are on the powers of the judicial forum, but by an artificial exercise of the powers, the circumspection provided for the jurisdiction cannot be allowed to get degenerated into a state of no jurisdiction.

8. Mr. C.T. Chandratre, the learned Advocate for the Applicant in this behalf relied upon **Cap. Paul Anthony Vs. Bharat Gold Mines Limited : 1999 SCC (L & S) 810**. Although Their Lordships in that matter were dealing with the Civil Services Rules applicable to the Central Government employees, but it is very clear that the principles laid down therein are applicable to all such service matters where the issue was just as the present one which arises for

determination. Their Lordships relied upon **O.P. Gupta Vs. Union of India : (1987) 4 SCC 328** in **Paul Anthony** (supra), Their Lordships denounced the tendency of some of the Officers to place their subordinates under suspension even over trivial lapses. The issue of simultaneous continuation of the DE as well as the Criminal Proceeding was also considered by Their Lordships in Paul Anthony (supra). Para 29 of **Paul Anthony** (supra) in fact needs to be fully reproduced wherein a passage from **O.P. Gupta** (supra) has also been quoted.

"29. Exercise of right to suspend an employee may be justified on the facts of a particular case. Instances, however, are not rare where officers have been found to be afflicted by a "suspension syndrome" and the employees have been found to be placed under suspension just for nothing. It is their irritability rather than the employee's trivial lapse which has often resulted in suspension. Suspension notwithstanding, non-payment of subsistence allowance is an

inhuman act which has an unpropitious effect on the life of an employee. When the employee is placed under suspension, he is demobilised and the salary is also paid to him at a reduced rate under the nickname of "subsistence allowance", so that the employee may sustain himself. This Court, in O.P. Gupta Vs. Union of India made the following observations with regard to subsistence allowance: (SCC p.340, para 15).

"An order of suspension of a government servant does not put an end to his service under the Government. He continues to be a member of the service in spite of the order of suspension. The real effect of suspension as explained by this Court in Khem Chand Vs. Union of India is that he continues to be a member of the government service but is not permitted to work and further during the period of suspension he is paid only some allowance- generally called subsistence allowance - which is normally less than the salary instead of the pay and allowances he would

have been entitled to if he had not been suspended. There is no doubt that an order of suspension, unless the departmental enquiry is concluded within a reasonable time, affects a government servant injuriously. The very expression 'subsistence allowance' has an undeniable penal significance. The dictionary meaning of the word 'subsist' as given in shorter Oxford English Dictionary, Vol. II at p.2171 is 'to remain alive as on food; to continue to exist'. 'Subsistence' means- means of supporting life, especially a minimum livelihood."

31. Mrs. Mahajan relied upon in this matter on **Madanlal Sharma Vs. State of Maharashtra and others : 2004 (1) Mh.L.J. 581**. That Judgment was relied upon by me in **Anandkumar More** (supra). Paragraph 10 therefrom reads as under :

"10. I am aware of a Judgment of the Hon'ble Bombay High Court (DB) in **Madanlal Sharma Vs. The State of**

Maharashtra and others, 2004(1) MLJ 581, more particularly Paras 13 and 15 thereof. There Lordships were pleased to hold that indefinite continuation of suspension is not even valid for which there were a number of binding Judgments. It was also observed that it was a settled law by way of several Judgments of the Hon'ble Bombay High Court and the Hon'ble Apex Court that suspension is not to be resorted as a matter of rule. It is to be taken as a last resort, only if the enquiry could not be fairly and satisfactorily completed without the delinquent Officer being kept away from the post."

It is, therefore, clear that on the authority of **Madanlal Sharma** (supra), it can safely be stated as a principle that suspension may not be resorted to, if without suspending the delinquent, the enquiry can be fairly and satisfactorily completed. In this behalf, the above discussion including that in Paragraph 28, above needs to be reread."

12. Another aspect of the matter which is commonly raised herein and there is a reference thereto in the Affidavit-in-reply is that the Applicant has not taken recourse to the departmental appeal which is provided for in the Rules. Relying upon **Shivram Sadawarte** (supra) and **More's** case, it was held which I reiterate here that, that is not a fatal lacuna at all and construing the word, "ordinarily" in Section 20 of the Administrative Tribunals Act, it can quite safely be held that such a move is not at all illegal and in fact, not even irregular apart from the fact that even that aspect of the matter is fact specific. In **More's** matter, in Para 14, I have reproduced passages from **Shivram Sadawarte** and **Dr. Subhash Mane's** case in that behalf. Para 9 from More's Judgment will be most appropriate to be reproduced.

> "**9.** Mr. Chandratre then relied upon a Judgment of this Tribunal presided over by me in **OA 240/2016 (Shri Shivraj R. Rathod Vs. The District Collector, Solapur and 2 others, dated 18.11.2016)**. That was a matter of the suspension of a Circle Officer and even after lapse of a period of 10 months, not only the DE had not gone underway but even the charge-sheet had not been issued. I relied upon a

Judgment of the Hon'ble Supreme Court in **Ajay Kumar Choudhary Vs. Union of India : (2015) 2 SCC (L & S) 455 = (2015) 7 SCC 291**. I noted therein that **Ajay Kumar Choudhary** (supra) was relied upon in **OA 405/2016 (Smt. Preeti H. Wig Vs. Government of Maharashtra and one another, dated 25.10.2016)**. I reproduced the observations in **Ajay Kumar Choudhary** (supra) in Para 11 in that particular Judgment and Para 11 & 12 of **Ajay Kumar Choudhary** (supra) on Pages 297 and 298 of S.C.C. in fact need to be produced.

> "11. Suspension, specially preceding the formulation of charges, is essentially transitory or temporary in nature, and must perforce be of short duration. If it is for an indeterminate period or if its renewal is not based on sound reasoning contemporaneously available on the record, this would render it punitive in nature. Departmental/disciplinary proceedings invariably commence with delay, are plagued with procrastination prior and post the drawing up of the memorandum of

charges, and eventually culminate after even longer delay.

12. Protracted periods of suspension, repeated renewal thereof, have regrettably become the norm and not the exception that they ought to be. The suspension person suffering the derision of his department, has to endure this excruciation even before he is formally charged with some misdemeanor, indiscretion or offence. His torment is his knowledge that if and when charged, it will inexorably take an inordinate time for the inquisition or inquiry to come to its culmination, that is, to determine his innocence or iniquity. Much too often this has now become an accompaniment to retirement. Indubitably, the sophist will nimbly counter that our Constitution does not explicitly gurantee either the right a speedy trial even to the incarcerated, or assume the presumption of innocence to the accused. But we must remember that both these factors are legal grounds norms, are inextricable tenets of Common Law Jurisprudence antedating even the Magna

> Carta of 1215, which assures that – "We will sell to no man, we will not deny or defer to any man either justice or right." In similar vein the Sixth Amendment to the Constitution of the United States of America gurantees that in all criminal prosecution the accused shall enjoy the right to a speedy and public trial."

13. For understanding the principles which must govern all concerned in the matters like the present one, I hereinbelow reproduces Para 9 from More's Judgment in which the Judgment of the Hon'ble Supreme Court in **Ajay Kumar Choudhary** (supra) has been noted for guidance. The principles, therefore, must have become very clear by now.

14. In **Madanlal Sharma's** case (supra), it was held by the Hon'ble Bombay High Court that, suspension should be a last resource and not routine one. Para 31 of **Pirjade's** matter in that connection provides useful insight which I quote.

> "**31.** Mr. Chandratre relied upon a Judgment of the Division Bench of the Hon'ble Andhra

Pradesh High Court in **P. Rajender Vs. Union of India and another : 2001 (3) SLR 740 (AP)**. In Para 8 of that Judgment, the Hon'ble Andhra Pradesh High Court was pleased to observe that, suspension pending investigation enquiry or trial was an interim measure and under the Rules relevant thereto, such an order of suspension was not to be made only because it was lawful to do so. In Para 6 of that Judgment, the provision relevant therein was quoted and it is in essence and substance, the same as Rule 4 of D & A Rules. The Hon'ble High Court was pleased to observe in Para 8 itself that, there must be application of mind of the competent authority and that application of mind was a *sine-qua-non* for making such an order of suspension. Such an order can be made by bearing in mind not only the public interest, but also the relevant facts and attendant circumstances as to how far and to what extent, the public interest may suffer in the absence of the order of suspension. The facts have already been discussed above. It is not necessary for me to express any opinion about the merit of the matter itself, but it can safely be said that whatever else one might say

about it if the Respondents were to claim that it was an open and shut case that might be an exaggerated claim."

15. In Para 35 of **Pirjade's** Judgment, I relied upon the Judgment of the Hon'ble Andhra Pradesh High Court Judgment in **Rajender** (supra). A quotation therefrom will be apt for guidance.

"**31.** Mrs. Mahajan relied upon in this matter on **Madanlal Sharma Vs. State of Maharashtra and others : 2004 (1) Mh.L.J. 581**. That Judgment was relied upon by me in **Anandkumar More** (supra). Paragraph 10 therefrom reads as under :

"10. I am aware of a Judgment of the Hon'ble Bombay High Court (DB) in **Madanlal Sharma Vs. The State of Maharashtra and others, 2004(1) MLJ 581**, more particularly Paras 13 and 15 thereof. There Lordships were pleased to hold that indefinite continuation of suspension is not even valid for which there were a number of binding Judgments. It

was also observed that it was a settled law by way of several Judgments of the Hon'ble Bombay High Court and the Hon'ble Apex Court that suspension is not to be resorted as a matter of rule. It is to be taken as a last resort, only if the enquiry could not be fairly and satisfactorily completed without the delinquent Officer being kept away from the post."

It is, therefore, clear that on the authority of **Madanlal Sharma** (supra), it can safely be stated as a principle that suspension may not be resorted to, if without suspending the delinquent, the enquiry can be fairly and satisfactorily completed. In this behalf, the above discussion including that in Paragraph 28, above needs to be reread.

36. In **Anandkumar More's** Judgment, I had also relied upon **O.P. Gupta's** case decided by the Hon'ble Supreme Court wherein it was held that there was no presumption that the Government always acted in the manner which

was just and fair, and therefore, on mere expression of apprehension, the judicial forum should not mechanically act and uphold the order of suspension."

16. In **Pirjade's** matter, in Para 20, the significance of some material to be placed before the Tribunal to justify the order of suspension was highlighted. I have already mentioned above that, no such material is produced and for all practical purposes, as far as the Respondents are concerned, suspension itself is being cited as justification for the order of suspension.

17. I may now turn to a very significant aspect of the matter in regard to the periodical review of the order of suspension. There is a GR of 2011 which fell for consideration in the two earlier Judgments which have figured herein. That was dated 14th October, 2011. Paras 20 onwards from More's Judgment in fact need to be reproduced.

"**20.** There is a mechanism of review of suspension by a Review Committee. The Respondents have relied upon a G.R. of 14th October, 2011 which deals with the issue of the

review of the case of the suspended employees. It is at Page 39 of the PB. I must remind myself that according to the Respondents, unless a period of one year elapsed, the review of suspension cannot be made. The said G.R. supersedes the G.Rs of 14.12.1995, 14.6.1996, 18.10.2007, 14.3.2008, 28.3.2008, 26.6.2008, 5.12.2008 and 11.10.2011. The Clause 2(a) thereof lays down that those public servants who were accused of having acquired assets beyond their known sources of income or of moral turpitude, bribe, murder, attempt to murder, rape and such serious offences, then in their case, as per the provisions of Section 4(5)(c) of the D & A Rules, an appropriate course of action can be adopted. The said Clause reads as under:

> **"(c)** An order of suspension made or deemed to have been made under this rule may at any time be modified or revoked by the authority which made or is deemed to have made the order or by any authority to which that authority is subordinate.
>
> {Provided that, where a criminal offence is registered against a Government Servant,

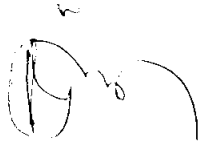
the recommendation of the Suspension Review Committee constituted by the Government in this behalf, shall be obtained by the authority which has made or is deemed to have made the suspension order or by any authority to which that authority is subordinate, before revoking or modifying the order of suspension of such Government servant.}"

21. The composition of the Committee has been set out therein for Group 'A' and Group 'B' employees. For the present purpose, the said Committee would be chaired by Chief Secretary, the members would be – Additional Chief Secretary / Principal Secretary / Salary (Home) as a Member, Additional Chief Secretary / Principal Secretary / Secretary (Service) as a Member Secretary / the Director General (Anti-Corruption) as Member and an invitee Secretary from the concerned Mantralaya Department. In case of the employees facing the serious charges as mentioned above as well as in case of Group 'C' and 'D' employees, the Review Committee would hold meetings once in three months. In case, on those serious allegations, if the offence

was registered and, therefore, suspension followed, then such a meeting would be held after one year of the date of suspension (निलंबनाच्या दिनांकापासून एका वर्षानंतर). Before the matter was submitted to such a Committee, the disciplinary authority would have to take a decision regarding initiation of DE against the concerned employee. There are directions that if it was decided to hold the DE, then the charge-sheet must be served on the concerned delinquent and it should be submitted to the said Committee. In case, it was decided that no DE was necessary to be held, then in such cases, a detailed reasoned report must be submitted before the said Committee. It is further provided that once a matter was placed before the Suspension Committee, if there was some change of circumstances or progress, it would again be placed before the said Committee and in the absence thereof, the matter would be placed after six months of the earlier meeting of the Committee.

22. The Clause 4 thereof provides *inter-alia* that if the criminal offence was registered and the charge-sheet was laid before the Court, if the matter was not decided within two years, it was

competent for the said Committee to recommend the reinstatement and posting of such an employee on a non-executive post. In case, a period of two years had not elapsed, then the recommendation would be made depending upon the seriousness of the crime, its sweep and nature and the maximum punishment that it would attract. The total period of suspension would be taken into consideration. The current status of the charge-sheet before the competent Court and whether it was laid before the Court, the current status of the pending DE and as to whether the delinquent was responsible for causing delay and also the earlier service record of the delinquent and the suspension allowance, etc. would be taken into consideration. In case, he was to be reinstated, care would have to be taken that he was given a posting where he would not come in contact with the general public. Clause 7(a) provides *inter-alia* that, in the event, the DE was initiated, then within a period of three months, a review of suspension should be taken and if the DE continued even after the lapse of six months, then the question of reinstatement could be considered after making



it sure that the delinquent would not interfere with the enquiry.

23. There are two other GRs dated 12th February, 2013 and 31st January, 2015 which exclusively deal with the issue relating to the prosecution under the Prevention of Corruption Act, 1988. Going by the record of this OA such as it is, I find that in this particular matter, the penal provisions invoked are all under the Indian Penal Code (IPC).

24. Mr. C.T. Chandratre, the learned Advocate for the Applicant told me that so far as the 2011 GR with particular reference to Clause 3(3-a), (3-b), (3-e) and 4(a) and Clause 5 of the GR of 30.1.2015 are concerned, they are arbitrary and illegal. Amplifying his submissions, he argued that these Clauses of a GR which was not issued under the proviso to Article 309 of the Constitution, but are governmental instructions only tend to offend and are violative of the Rule 4 of the D & A Rules. However, it may be recalled that I have already mentioned as to the time limit indicated in **Madanlal Sharma's** case (supra). In **Ajay Kumar Choudhary** (supra) also, there

are directions about the time limit. They are much shorter than the period of one year that the 2011 GR has imposed.

25. It is also a matter of record that a part of the said GR is placed under challenge. The efficacy of the said instrument is nowhere as high as that of an enactment by legislature or any Rule framed under the proviso to Article 309 of the Constitution. Its efficacy, if I might say so is much weaker than those sources mentioned just now. The Applicant has challenged a part thereof. But in all fairness, it must be mentioned that those provisions are the very souls of the said instrument. In this connection, reliance was placed on a Judgment of the Hon'ble Supreme Court in the matter of **The Rajasthan State Industrial Development and Investment Corporation Vs. Subhash Sindhi Co-operative Housing Society Jaipur & Ors. : 2013 AIR SCW 1174 (Para 19)**. The Hon'ble High Court held :

"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."

26. It is, therefore, quite clear that as against the statutory rules framed under the Proviso to the Article 309 of the Constitution of India, the GR dated 14.10.2011 can never prevail. It can never override the Rules (D & A Rules). That is because as between the two, the D & A Rules originate from higher source."

18. In Para 27, I held in More's OA that in the circumstances such as this one, I could simply ignore the said GR in so far as its provisions of periodical review was concerned. Para 27 from More also needs to be reproduced hereinbelow.

"**27.** I have already indicated above as to what the precise challenge to the said GR is all about. The above discussion must have made it clear that in so far as the efficacy and potency of the said GR vis-à-vis the D & A Rules are concerned, if there is an inconsistency between the two, there are two courses of action open. In the first place, there can be a complete challenge to it on various grounds and ask for its invalidation. On the other hand, however, when principles of law as laid down by the Hon'ble Supreme Court are

so clear as they are including in Rajasthan State Industrial Development (supra), then there will be, in my view, no hitch in simply ignoring the instrument of weaker efficacy, which herein is the said GR leaving the formal annulment or invalidation thereof to be undertaken in any other proceeding in future. The simplest of the questions to ask would be as to whether, if the two instruments, one of which has got statutory backing and the other one that does not have it and it is for all practical purposes an instruction, should the Tribunal still prefer latter as to all its elements and ingredients thereby producing a result that an instrument of higher efficacy and potency will have been left languishing and the one with weaker potency would have carry the day. That quite simply cannot be done in my opinion, and therefore, I can quite simply ignore the said GR. Again we can test this conclusion with a hypothetical instance wherein inconsistency was there between a duly enacted law, an instrument which is of weaker efficacy. Will it be open to the judicial forum to prefer such an instrument to the duly enacted law. To my mind, the whole thing is quite clear, and

therefore, I have absolutely no hesitation in ignoring the GR which almost makes it mandatory not to take a review of the suspension for the duration therein mentioned. In my view, at least to the extent of the inconsistency, the said instrument can safely be glossed over. The net result would be that I shall not be bound by the duration of time mentioned in the said GR. Pertinently, as per Para 14(9) in **Shivram Sadawarte's** case (supra) at Page 261 of the MLJ, the review would have to be made every quarterly and that is a must. That is a pronouncement of a Division Bench of a constitutional Court viz. the Hon'ble High Court and that will have to be given preference to any other Government instrument of weaker efficacy."

19. It is held in **O.P. Gupta's** case by the Hon'ble Supreme Court that there was no presumption that the Government always acted in just and fair manner, and therefore, on a mere apprehension, the order of suspension cannot be judicially upheld.

20. The above discussion based on the binding precedents of the Hon'ble Bombay High Court and the

Hon'ble Supreme Court, as discussed in the two earlier Judgments in **More** and **Pirjade** by this Tribunal, I am very clearly of the opinion that the Applicant has been able to make out a case for the grant of relief. The issue is as to what relief should be granted. In my opinion, regard being had to all the circumstances in the set of these facts, it will be necessary to direct the authorities concerned to hold a review of the suspension of the Applicant without insisting on the mandatory period of one year because that is not now in the manner of speaking binding. In that sense, they will have to take a review of the suspension of the Applicant within the stipulated time bearing in mind the principles culled out hereinabove, especially from the Judgments of the Hon'ble Bombay High Court and the Hon'ble Supreme Court. This OA will be decided more or less in the line of **Pirjade's** matter. I am quite sure that the authorities concerned would bear in mind the fact that the principles capable of being culled out from the Judgments of the Hon'ble Supreme Court which are law vide Article 141 of the Constitution and the Judgments of the Hon'ble Bombay High Court which are binding precedents must be applied. As per Rule 4 of the D & A Rules, the authorities have the necessary powers and duties to perform and they shall do it. If permissible

thereby, they can take help and assistance from the ACB as well.

21. The Respondents are directed to review the suspension of the Applicant as indicated hereinabove within a period of four weeks from today and convey the outcome thereof to the Applicant within a period of one week thereafter. The Original Application is allowed in these terms with no order as to costs.

Sd/-

(R.B. Malik)
Member-J
10.08.2017

Mumbai
Date : 10.08.2017
Dictation taken by :
S.K. Wamanse.
D:\SANJAY WAMANSE\JUDGMENTS\2017\8 August, 2017\O.A.256.17.w.8.2017.Suspension.doc