IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL MUMBAI

ORIGINAL APPLICATION NO.1096 OF 2016

DISTRICT : NASHIK

Shri Anandkumar S. More.)
Age : 53, Occu.: Govt. Service,)
(Working as Superintending Engineer &)
Ex-Officio Deputy Secretary, Mantralaya,)
Mumbai) and residing at D-5, Bhargav)
Apartment, Near Akashwani, Gangapur)
Road, Nashik 422 013.)...**Applicant**

Versus

1. The State of Maharashtra.)
Through Principal Secretary,)
Water Resources Department,)
Mantralaya, Mumbai - 400 032.)

2. The Principal Secretary.)
General Administration Department,)
Mantralaya, Mumbai 400 032.)...**Respondents**

Mr. C.T. Chandratre, Advocate for Applicant.

Mrs. A.B. Kololgi, Presenting Officer for Respondents.

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

DATE : 21.04.2017

JUDGMENT

1. This Original Application (OA) calls into question the impugned order placing the Applicant under suspension which order is at Exh. 'A-1' (Page 12 of the Paper Book (PB)) and it pertains to the events that allegedly happened during 31.10.2000 and 20.8.2002 when the Applicant was posted as Executive Engineer at Temghar Project. This order of suspension is dated 3.9.2016 and at that time, the Applicant was working as Superintending Engineer and Ex-Officio Deputy Secretary in Mantralaya, Mumbai.

2. The impugned order mentions *inter-alia* that while working as Executive Engineer during the period mentioned above, the Applicant failed to maintain the quality of work with the result, the dam started leaking. An offence has also been registered against the Applicant in Police Station, Paund in Pune District invoking Sections 406, 409, 467, 468, 471, 420 and 120(b) of the Indian Penal Code (IPC). That offence came to be registered on 18.8.2016 against as many as 33 officials and private individuals taken together. The charge-sheet has not been laid in the Court and it is common ground that at the most

investigation into the said offence is going on. The instances of the allegedly sub-standard work have been mentioned in the complaint which came to be treated as FIR under the provisions of Section 154 of the Code of Criminal Procedure, 1973 (CR.P.C. hereinafter). The allegations against the Applicant appear to be of slack supervision but in any case, as of now, the offence registered indicates that the State is so minded as to attribute to the Applicant culpability. Thereafter, on 3.9.2016 by way of the impugned order, the Applicant came to be placed under suspension which order is being challenged herein. The Applicant almost immediately by his representation of 19.9.2016 protested against the suspension order which communication was addressed to the Chief Secretary of the State of Maharashtra. The 1st Respondent herein is the State of Maharashtra in Water Resources Department and the 2nd Respondent is the State of Maharashtra in General Administration Department. The impugned order of suspension is made by the 1st Respondent.

3. I have perused the record and proceedings and heard Mr. C.T. Chandratre, the learned Advocate for the Applicant and Mrs. A.B. Kololgi, the learned Presenting Officer (PO) for the Respondents.

4. The sum and substance of the case of the Applicant is that, during 1.11.2000 and 20.8.2002, as already mentioned above, he was posted as Executive Engineer, Temghar Project Division, Pune. That work actually got started way back in March, 1997. The duration fixed for its completion was three years and eight months because the water in Krishna Valley in Maharashtra was to be stored by the year 2000 in accordance with Krishna Water Dispute Tribunal Award. According to the Applicant, a major portion of the work of the Dam had already been completed before he took the charge. When the work was in progress, the Quality Control Wing was constantly inspecting the site and the numbers of quality control tests were being performed. In fact, thereafter from 2002 to 2007, 2007 to 2010, 2010 to 2012 and 2012 to 2015, the Applicant was posted at Nashik, Aurangabad, Jalgaon and then again Nashik respectively. From 2015 onwards, he was functioning as Deputy Secretary in Mantralaya. He was holding the post of Superintending Engineer. According to the Applicant, he was all of a sudden served with the impugned order which is being questioned herein. According to him, this order having been made apparently under Rule 4(1)(a)(c) of the Maharashtra Civil Services (Discipline & Appeal) Rules, 1979 ('D & A Rules' hereinafter) ought not to have been

made against him because he was not to be blamed for whatever may have happened to the Dam after he left that posting way back in 2002 and before he took charge in 2000. According to the Applicant, although there is an appeal provided against the order of suspension, but there is no forum before which such an appeal could be preferred in as much as the appeal lies against the order of punishment while the order of suspension does not amount to punishment. He has relied upon a few Division Bench Judgments of the Hon'ble Bombay High Court and also of the Hon'ble Supreme Court and according to him, he is not at all to blame. As far as the facts are concerned, it is further pleaded by the Applicant that the work of the said Project was stopped from December, 2001 because of a problem relating to the acquisition of forest land and it did not get started soon thereafter. This fact is not disputed even by the Respondents, as shall be pointed out a while later by quoting a Paragraph from their Affidavit-in-reply (Para-infra). According to him, a case is made out for this Tribunal's intervention because the Respondents would obviously rely upon a G.R. dated 14.10.2011 which provides for the review after a period of one year from the date of the registration of the offence. He has challenged this G.R. *inter-alia* on the ground that it runs contrary to the provisions of the Rule 4 of the D & A Rules which are

framed under the proviso appended to Article 309 of the Constitution of India. Broadly on these facts, the Applicant seeks annulment of the order of suspension and a further declaration that Clause 3, 3-a, 3-b and 4-a of the G.R. of 14.10.2011 and Clause 5 of the G.R. of 31.1.2015 need to be struck down as arbitrary and illegal.

5. The Respondents have filed the Affidavit-in-reply of Under Secretary Mr. Sunil G. Gangarkar who is attached to Water Resources Department. He has pleaded that during 31.10.2000 to 20.8.2002, the Applicant was posted as Executive Engineer at Temghar Project Division. He has also not disputed that the work was assigned to the concerned Contractor of 18.3.1997, but he has apparently claimed that, "considerable portion of work of Dam was executed in working season of 2000-2001". But pertinently, he has not amplified this very vital fact component as to just how much portion was "considerable" according to him and this has to be understood in the context of the claim of the Applicant that during his tenure there, not much work was done.

6. The Affidavit-in-reply then mentions that leakage was detected in the Dam from the year 2001-2002 and it went on increasing. Assuming and only assuming it to be

so again, the lack of particularization is significant in the context of the fact, as to whether the leakage (even if it was there) could have been checked when it was still early days or was it that the successors of the Applicant over a huge span of time suffered it and glossed over it in which event, they would be equally guilty. A special investigation team came to be constituted under Mr. Chitale, who made adverse remarks on the quality of work. Thereafter, Temghar Dam Expert Committee under Mr. V.M. Ranade was constituted on 27.8.2014 to examine the cause of leakage and to suggest remedial measures. According to the Affidavit-in-reply, adverse remarks were made on the supervisory staff, but quite pertinently, the above discussed facts would make it very clear that the Applicant was not the only supervising staff. In fact, he was one of the several and that too, when it was still early days in so far as that Dam was concerned. Even, according to the Affidavit-in-reply, the responsibility of the concerned Executive Engineer was to see that the construction was done as per the quality prescribed in the tender and as per the orders of the Government issued from time to time. According to the Affidavit-in-reply, the proposal for departmental enquiry (DE) came to be submitted by Superintending Engineer, Pune Irrigation Project Circle, Pune on 2.11.2015 and the DE got underway on

29.11.2016 by issuance of charge-sheet. The FIR was lodged with the Police on 18.8.2016 and the Applicant was suspended on 3.9.2016. It is pleaded that the recourse to appeal ought to have been but has not been taken by the Applicant and on that ground, the tenability of this OA is disputed. There is a reference to a Notification of 11th October, 2011 issued by the 2nd Respondent whereby Rule 4 of the D & A Rules came to be amended adding sub-clause (c) of sub-rule 5 of proviso that where a Criminal offence was registered against a Government servant, the recommendation of Suspension Review Committee constituted by the Government in that 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 was subordinate before revoking or modifying the order of suspension. This Notification is at Exh. 'R-1' (Page 75 of the PB). The Affidavit-in-reply has repeatedly raised the issue of the serious offence having been registered against the Applicant and the fact that the event of suspension is too recent to be placed before the Review Committee.

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."

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.
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> **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."

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.

11. Now, these are the principles that must govern the matters such as this one and these principles will have to be followed and applied to the present facts.

12. In this background, even before I proceed further into the facts, I need to discuss a point strongly urged on behalf of the Respondents. According to them, an order of suspension is appealable before the competent appellate authority. A conjoint reading of Rules 17 and 18 of the D & A Rules, would clearly show that an order of suspension under Rule 4 of the said Rules is one whereagainst appeal lies. However, Mr. Chandratre contended that under Rule 18, the appeal lies to the Governor or to the Government depending upon the authority making the first order whereby penalties were imposed and the order of suspension is not a penalty, and therefore, although the appeal must have been provided but a forum is not

provided, and therefore, according to him, the failure on his part to have taken recourse to an appeal should not be held against him.

13. Another aspect of the matter is that, as already discussed above, almost soon after the service of the order of suspension, the Applicant made a representation on 19.9.2016 (Exh. 'A-3', Page 35 of the PB) requesting for annulling the order of suspension, and thereafter, he brought the present OA.

14. In my opinion, there is substance in the submission of Mr. Chandratre that the Applicant had no forum to go to, but even if I were to go along with the Respondents and hold and this I must say is an assumption that the remedy of appeal was available, the Applicant had made a representation and that ought to have been decided in good time for the Applicant to do the needful in the matter. The Hon'ble Bombay High Court held in **State of Maharashtra & Ors. Vs. Shivram S. Sadawarte : 2001 (3) Mh.L.J. 249** held as follows in Para 10.

> "**10.** There can be dispute that a Government servant cannot be kept under suspension indefinitely or for an unreasonably long period and

the same is not contemplated under Rule 4 of the Rules as well. A provision is made empowering the Government to review or revoke such an order of suspension in appropriate cases. If the employee approaches the State Government requesting to revoke the suspension order under Rule 4(5) of the Rules and the said request is declined or remains undecided beyond a reasonable period, undoubtedly the delinquent employee has the right to challenge the Government's decision before a competent Court and the Court will have the powers of judicial review of such an order. The scheme of the rules is clear and does not call to be restated time and again. The delinquent's approach can be at any time and the same is required to be considered by the competent authority within a reasonable period."

But most importantly, it needs to be noted that this precise issue came up for consideration before the Division Bench of the Hon'ble Bombay High Court in **Writ Petition No. 9660/2014 (The State of Maharshtra Vs. Dr. Subhash D. Mane (DB), dated 1st December, 2014**. In Para 9 thereof, Their Lordships were pleased to observe as follows :

> "**9.** ..... Section 20(1) of the Administrative Tribunals Act does not place an absolute embargo on the Tribunal to entertain an application if alternative remedy is available. It only states that the Tribunal shall not ordinarily entertain application unless the Tribunal is satisfied that the applicant has availed the alternate remedy. This phraseology itself indicates that in a given case the Tribunal can entertain an application directly without relegating the applicant to the alternate remedy."

15. It is, therefore, very clear that the fact that the Applicant did not take recourse to the appellate remedy would not at all be fatal to entertaining and even deciding this OA.

16. Returning to the facts, it must have become very clear that the Applicant left the post where the alleged incident took place about 13/14 years before the impugned order of suspension. It is not as if, the Applicant was the last holder of that Office. The work went underway in 1997 before the Applicant joined that post and continued even thereafter, till such time as the impugned order of suspension was served on the Applicant. In my opinion,

therefore, it was necessary for the Respondents to adduce material to suggest at least with reasonable certainty that the Applicant had a real role to play in the so called sub-standard construction of the Dam and that of such a nature that the Applicant must be kept out of harms way as it were. There are several others, in fact more than 30, who are accused in that complaint where the charge-sheet is yet to be laid before the Court of competent Criminal jurisdiction. Even if the minute details had not been provided, at least there should have been some material to indicate the involvement of the Applicant. On a mere say so or *ipse-dexie* that the Applicant was guilty of slack supervision, I do not think, the order of suspension could have been made. The cumulative effect of the above discussion is that, although it is within the domain of the administrators to decide about placing the allegedly erring employee under suspension, but this power also is not unbridled and it is not a matter of their sweet will. **Cap. Paul Anthony** (supra) and **O.P. Gupta** (supra) need to be recalled in this behalf.

17. I have already mentioned above that the legal principle deducible from the Judgments already cited above is that the order of suspension cannot be justified only on the basis of existence of a power to place a

Government servant under suspension. There have to be reasons to justify such a course of action being adopted. Now, here in this particular matter, a point repeatedly raised was about the alleged poor quality construction. It is also mentioned that the posting of the Applicant in Mantralaya would provide to him an easy opportunity and occasion to interfere with the pending investigation. Now, again on a mere say so, it cannot be concluded that the Applicant from wherever he would be in Mantralaya or out of it, in case, his suspension was revoked, he would be able to influence the investigation which is being carried out by the independent investigating agency i.e. the Police. There has to be at least some material strong or weak to indicate that this apprehension is justified. The Police is an independent investigating agency. The scope of the investigation is wide. I can presume that in the departmental proceedings, if any, were to go underway as well as the Police investigation, the alleged role will have to be assigned to all including the Applicant. As of now, everything is in the realm of uncertain future, and therefore, the endless suspension is quite simply out of place to be approved.

18. On the facts such as they are, I am very clearly of the view that it can by no stretch of imagination be said

that, in order to serve the administrative exigencies, the suspension of the Applicant is an absolute imperative. It is very clear that the recourse to suspension can never be allowed to assume a colour of punishment all by itself and here, the tenor of the case of the Respondents is quite clear to the effect that the accused was guilty of infraction of his duties about 15 years ago, and therefore, he has to be kept under suspension. May be, after a full fledged DE, he may or may not be held guilty and may be in the prosecution, he may be convicted or acquitted, but all that is as I mentioned above, within the realm of uncertain future. The punishment, conviction and sentence, acquittal and exoneration are all on a distinct pedestal and although in actual practice, the clear line of distinction between them and the suspension as a non-punitive measure may have become blurred because of a completely slanted approach and altitude of the Government, but judicially, it must be borne in mind that the two are distinct. In other words, the employer must be able to justify the suspension *in presenti* of his employee who is yet to face the DE and/or prosecution or both and in that behalf, he should adduce material to precisely show that suspension is necessary and without that, the investigation would suffer. That has to be established as a fact by itself rather than repetition, times out of number about the alleged gravity of the

offence or delinquency. In fact, this OA itself was lodged in this Tribunal on 21.11.2016 and was argued the other day. It is not so far clear as to when precisely the charge-sheet would be laid before the Court and when the DE would go underway. On the facts such as they are, I am very clearly of the opinion that the continued suspension of the Applicant in the present set of circumstances is not at all necessary. If in a particular matter, more than 30 accused are there, then it is too much to believe that the Applicant would be able to influence either the course of investigation into the alleged crime or even the DE, if and when it would start. The Applicant had no access at all to the facts such as they are for close to 15 years, and therefore, on a mere say so of the Respondents, I do not think, I should rush to the conclusion as envisaged by the Respondents.

19. As far as the facts are concerned, I am of the opinion that in so far as complicity of the Applicant in the alleged crime and a genuineness of the apprehension of interfering with investigation, Para 17 of their own Affidavit-in-reply needs to be reproduced which will leave no need or necessity to make any further paraphrasing thereabout.

"**17.** With reference to Para 6.13 (b), I say that the applicant was in charge of Temghar Project Division between the period 31.10.2000 to 20.8.2002. The work was stopped by Forest Department in month of Dec. 2001. The work was not executed till 19.3.2009. However, since the applicant was holding a post of Superintendent Engineer and Deputy Secretary, Major Projects-2, Water Resources Department, Mantralaya, Mumbai, he could have influenced the witnesses or tampered with the evidence. Thus, the applicant had discharged the duties of E.E. on Temghar Project between 31.10.2000 till December, 2001 i.e. for a period almost 13-14 months. It is also true that almost 90% work of Temghar Dam Project was completed prior to Dec. 2001. The SIT headed under the chairmanship of Mr. Madhav Chitale had held in its report that the works of Temghar Project was not upto standard and construction wings on the project work at the relevant time were responsible for substandard work. Accordingly, the expert committee under the chairmanship of Mr. U.M. Ranade Ex-Sec-WRD has also observed that due to the laxity of officers of construction

wing and quality control wing substandard work was done by the contractor. Hence, adverse contentions of applicant in this para are denied."

It is, therefore, very clear that the above referred Paragraph contains the statement of facts which must be the guiding factors rather than the self-drawn, self-serving conclusions of the Respondents, and therefore, the justification of the continuation of the suspension of the Applicant is quite clearly an unacceptable over-reaction. I have little hesitation in rejecting the same.

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.

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.

28. In this matter, however, a regular challenge has been posed to the provisions of the said GR which the Applicant considers offensive, but in my opinion, for the afore-stated reasons, it is not really necessary for me to

make that formal declaration and as I mentioned above, I can safely ignore it in preference to the sources of much higher efficacy and potency.

29. The above discussion would lead me to conclude that the facts herein are such that even as the criminal prosecution which is still to be lodged in the Court and the DE even if it goes underway may proceed. At least in this OA, I express no opinion on the merit thereof, but restricted as I am and conditioned by the scope and ambit of this OA, I am quite clearly of the view that a case for suspension is not made out. I have already discussed as to how it is an instance of over-reaction of the Respondents that the Applicant would be able to influence the enquiry and the prosecution just because he is having his seat in Mantralaya. There has to be strong material to suggest that there is substance in the apprehension expressed by the administrators in so far as the capability or possibility of influencing course of enquiry by a suspended employee is concerned.

30. In Para 15 of **O.P. Gupta** (supra), the Hon'ble Supreme Court was pleased to observe that there was no presumption that the Government always acted in the manner which was just and fair, and therefore, on mere expression of apprehensions, the judicial forum cannot

mechanically uphold an order of suspension. Be it under Rule 4 of the D & A Rules here or for that matter, under any of the sister provisions of any other set of Rules or instruments. Even within the circumscribed jurisdiction, the judicial forum must make sure that the order of suspension is really merited. A whimsical move or a preconceived or may be unfounded notion and sometimes individual predilections may become the foundation for such an order and when it is placed before the judicial forum, it has to closely examine the matter and arrive at a proper conclusion. I need not repeat, but I have already mentioned hereinabove the distinction between exoneration finding of guilt, conviction or acquittal, which may be recalled.

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.

32. In **OA 233/2016 (Shri Satish A. Trimukhe Vs. State of Maharashtra, dated 30.3.2016)** decided by the Hon'ble Chairman, there was a delay of almost two years in taking the decision on suspension. Now, here also, the State cannot claim that their matter is not marred by such a vice. At the most, it could be said that, towards the end, they created a ruse of acting faster but that is hardly a matter of any solace to them.

33. In such matters, the employees generally want to contend that the impugned orders are malafide, and

therefore, the State turns around and tries to point out as to how such an allegation was unfounded inter-alia because malafides cannot be institutional, but they have to attributed to the human agency and unless those human beings were impleaded to answer the charge, the allegations of malafides cannot sustain. In **Dr. Mane** (supra), a Division Bench of the Hon'ble Bombay High Court in Para 12 was pleased to deal with this aspect of the matter and reliance was placed on a Judgment of the Hon'ble Supreme Court in **Kalabharati Advertising Vs. Hemant Vimalnath Narichania & Ors. : AIR 2010 SC 3745**. The said Para 25 may now be reproduced.

> "**25.** The State is under obligation to act fairly without ill will or malice- in fact or in law. "Legal malice" or "malice in law" means something done without lawful without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard to the rights of others. Whether malice is attributed to the State, it can never be a case of personal ill will or spite on the part of the State. It is an act which is taken with an oblique or indirect object. It means exercise of statutory power for purpose foreign to those for which it is

in law intended." It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, which intent is manifested by its injurious acts."

34. Having reproduced from the Judgment of the Hon'ble Apex Court, I do not think, anything more needs to be added. However, as an essential fall-out of the above observations, it becomes clear that the issue of malice, malafide or such other jurisprudential terms have to be studied in context of a particular set of facts presented for consideration. It is always necessary to be proved that there was presence of such elements constituting malafides as probably would be in the realm of either branches of law including the criminal law. In Para 26 above quote, the Hon'ble Supreme Court clearly observed that, passing an order of an unauthorized purpose would itself constitute malice in law. Applying the same principles to the present facts, in my opinion, it should become very clear that, in the set of these facts, the order of suspension was thoroughly unwarranted and in that sense, the Respondents cannot be absolved from being malafide in their conduct and the word, "malafide" must be so construed as mandated by the Hon'ble Apex Court.

35. The learned PO relied upon a Judgment of the Hon'ble Vice-Chairman in **OA 280/2013 (Shri Hiralal R. Jadhav Vs. State of Maharashtra, dated 111.9.2013)**. The facts, principles of law involved therein and the conclusions capable of being drawn were entirely different in that matter.

36. The learned CPO then relied upon **OA 703/2011 (Dr. Ashok K. Bhise Vs. The State of Maharashtra and one another, dated 11th November, 2011)** rendered by the then Hon'ble Vice-Chairman. That was basically a matter which came to be decided by the issue of the absence in view of the failure of the Applicant to take recourse to the appellate remedy. That aspect of the matter is now fully governed by a binding Judgment of the Division Bench of the Hon'ble Bombay High Court.

37. The upshot, therefore, is that the impugned order is susceptible to the judicial interference. The directions will have to be given to convene the Suspension Review Committee within a period stipulated hereby and give directions to act in accordance with the principles hereinabove discussed and most importantly, by taking into consideration the binding precedents of the Hon'ble High Court and the Hon'ble Supreme Court.

38. The order herein impugned is hereby quashed and set aside. The matter stands remitted to the Respondents with a direction that a meeting of the Suspension Review Committee be convened within four weeks from today to consider the case of the Applicant in the manner mandated by the Hon'ble Constitutional Courts discussed hereinabove. An appropriate decision be taken within a period of four weeks and conveyed to the Applicant within one week thereafter. The Original Application is allowed in these terms with no order as to costs.

Sd/-

(R.B. Malik)
Member-J
21.04.2017

Mumbai
Date : 21.04.2017
Dictation taken by :
S.K. Wamanse.
E:\SANJAY WAMANSE\JUDGMENTS\2017\4 April, 2017\O.A.1096.2016.w.4.2017.Suspension.doc