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IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on : 20.08.2015

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W.P.(C) 5100/2014

VINOD KUMAR

..... Petitioner

Through : Sh. Ankur Chhibber, Advocate.

versus

UNION OF INDIA & ORS.

..... Respondents

Through : Ms. Saroj Bidawat, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. The petitioner seeks directions for quashing of letters dated 09.08.2012 and 26.02.2013 which extended the period of his suspension – initially made by order dated 01.06.2011.
2. The brief facts are that the petitioner was serving as an Assistant Commandant and was posted on 14.03.2011 with the 76th Battalion of the Border Security Force (BSF). A First Information Report (FIR) alleging commission of offences punishable under certain provisions of the Indian Penal Code (IPC) were lodged against the third party for selling 5000 litres of kerosene oil. A preliminary inquiry was conducted which resulted in the petitioner being charge-sheeted along with other employees. This led to a Staff Court of Enquiry on various dates in March, April and May 2011. As a

consequence, the petitioner's superior officer recommended that he ought to be placed under suspension. On 01.06.2011, the Director General placed him under suspension for 90 days with immediate effect. During that time, he was attached to the 32rd Battalion and paid Subsistence Allowance in accordance with the Rules. The suspension order did not spell-out its duration. It merely stated that it was operative with "immediate effect". It appears that subsequently on 09.08.2012 and on 26.02.2013, orders to extend the period of suspension were made, based upon review as to whether the period of suspension had to be extended. These reviews – to consider extension of suspension period were actually undertaken by the BSF authorities on 30.09.2011 and 12.12.2011.

3. It is argued on behalf of the petitioner by Sh. Ankur Chhibber, learned counsel that though Rule 40A of the BSF Rules, 1969 (hereafter referred to as "the BSF Rules") did not spell-out the mechanism or mandate periodic review, nevertheless, the BSF was bound to give effect to Rule 10 of the Central Civil Services (Classification, Control and Appeal) Rules, 1972 [hereafter "the CCS Rules"] in view of the latter's statutory nature and character. In terms of the said CCS Rules, particularly, Rule 10(5)(a) read with Rule 10(6) and (7), a review of every suspension order is to be made within the period of 90 days from the date it is issued and no suspension order can remain in force beyond 180 days.

4. Learned counsel relies upon the decision of the Patna High Court in *Prabhanjan Kumar v. The Union of India* CWJC No.4905/2010 (decided on 10.05.2010). It is submitted that the said High Court had dealt with a case under the CRPF Act, 1949 which contains provisions identical to Rule 40A of the BSF Rules and that the said High Court held that the review

provisions under CCS Rules were mandatory. The Patna High Court *inter alia* stated in *Prabhanjan (supra)* as follows:

“The effective date of communication of an order is the date of issue. In the instant case, the order extending the suspension of the petitioner was made and issued on 23rd March, 2010, i.e. much beyond the period of 90 days from 27.11.2009 and thereby the continued suspension of the petitioner after 25.2.2010 is violative of Sub-Rule (6) and (7) of Rule 10 of the Rules.”

5. Learned counsel also relies upon the decision of the Supreme Court in *Union of India v. Dipak Mali* 2010 (2) SCC 222. The Court had then held that if the review of the suspension order is not made within the first mandatory period of 90 days, it ceases to be in force, and observed as follows:

“In this case, what is important is that by operation of sub-rule (6) of Rule 10 of the 1965 Rules, the order of suspension would not survive after the period of 90 days unless it was extended after review. Since admittedly the review had not been conducted within 90 days from the date of suspension, it became invalid after 90 days, since neither was there any review nor extension within the said period of 90 days. Subsequent review and extension, in our view, could not revive the order which had already become invalid after the expiry of 90 days from the date of suspension.”

6. It is urged that irrespective of the respondent's contention with regard to the inapplicability of the CCS Rules, the BSF itself conducted review on 13.09.2011 and subsequently on 12.12.2011. In these circumstances, it is not open for it to say that the order of suspension did not cease to have effect. Learned counsel lastly submitted that the Patna High Court decision lead to a clarification by the Ministry of Home Affairs, Government of India which stated that the review mandated in accordance with the provisions of the

CCS Rules had to be honored and that the maximum period of suspension would not be beyond 180 days.

7. The BSF's contention is that Rule 40A applies to its employees and officers who are not governed by the CCS Rules. It is submitted that Rule 40A of the BSF Rules does not in any way spell-out the mandatory review – unlike Rule 10 of the CCS Rules; it did not likewise stipulate an outer limit for a period of suspension. Learned counsel relied upon the averments in the counter affidavit to say that the petitioner had faced serious charges and that the suspension was necessary. It is submitted that the lack of any provision akin to Rule 10 of the CCS Rules was taken note of in a meeting under the chairmanship of the Secretary in the Ministry of Home Affairs on 29.08.2011. Although the discussion pertained to review of the rules of the Sashastra Seema Bal (SSB), the same decisions were made applicable to other Central Armed Police Force (CAPF). A gist of the suggestions are as follows:

“(i) Since no provision for review of suspension of SSB personnel exists in SSB Rules, 2009, a new sub-rule to Rule 41 of SSB Rules may be introduced by proposing a suitable amendment to meet the principle of natural justice. However, the proposed amendment shall be made in a manner that even if the review could not be done in a time-bound manner it should not lead to automatic revocation of the suspension.

(ii) SSB may simultaneously review all pending cases of suspension in terms of Rule 41(3) of the SSB Rules, 2009.

(iii) All other CAPFs may also consider making similar amendments to their Rules, if it is not already existing, after studying the present provisions in continuation of MHA's UO No.I.45020/1/2011-Pers-II/MHA dated 17.2.2011”

8. It was urged that subsequently, the BSF amended its Rules and introduced Rule 3A which is in *para materia* with Rule 10 of the CCS Rules in that it stipulates a 90-day period within which every suspension order has to be reviewed to see if it requires extension and also caps the outer time limit of every suspension order as 180 days.

Conclusions

9. It is not in dispute that at the relevant time when the petitioner was placed under suspension -on 01.06.2011, Rule 40A(1) of the BSF Rules did not restrict or condition the exercise of power to suspend an employee. In other words, no time periods were stipulated with respect to the mandatory review and maximum time limit – as in the case of Rule 10 of the CCS Rules. Rule 40A(1), as it existed on 01.06.2011 read as follows:

“ 40A. (1) Notwithstanding anything contained in these rules, the appointing authority may, at its discretion, place a person serving under him, under suspension:-

(i) where a disciplinary action under the Act against him is contemplated or is pending; or

(ii) where in the opinion of the authority aforesaid, he has engaged himself in activities prejudicial to the interest or the security of the state; or

(iii) where a case against him in respect of any civil offence is under investigation, inquiry or trial.

[Provided that the Director General may exercise the powers of suspension in respect of officers of the Force upto the rank of Deputy Commandant.

Provided further that the Director General shall report the facts of each case immediately to the Central Government and all such orders of suspension shall become ab-initio void unless confirmed by the Central Government within a period of one month from the date of the said orders, irrespective of the fact

that the suspension is revoked by the said authority within that period.”

10. Rule 10(1) of the CCS Rules stipulates that when *inter alia* a disciplinary proceeding is contemplated against an employee or officer, he can be placed under suspension. Rules 10(6) and 10(7) of the CCS Rules read as follows:

“10. XXXXXX XXXXXX XXXXXX

(6) *An order of suspension made or deemed to have been made under this rule shall be reviewed by the authority competent to modify or revoke the suspension, before expiry of ninety days from the effective date of suspension, on the recommendation of the Review Committee constituted for the purpose and pass orders either extending or revoking the suspension. Subsequent reviews shall be made before expiry of the extended period of suspension. Extension of suspension shall not be for a period exceeding one hundred and eighty days at a time.*

(7) *An order of suspension made or deemed to have been made under sub-rules (1) or (2) of this rule shall not be valid after a period of ninety days unless it is extended after review, for a further period before the expiry of ninety days :*

*Provided that no such review of suspension shall be necessary in the case of deemed suspension under sub-rule (2), if the Government servant continues to be under suspension * (* should be “**detention**” vide GID(24) under Chapter 3) at the time of completion of ninety days of suspension and the ninety days period in such case will count from the date the Government servant detained in custody is released from detention or the date on which the fact of his release from detention is intimated to his appointing authority, whichever is later.”*

11. The BSF Act, 1968 and the BSF Rules, 1969 are a complete code which govern the employees and others subject to its provisions to the extent they provide for any matter(s). On the other hand CCS Rules apply to civil servants and were framed in exercise of powers conferred upon the Central Government under proviso to Article 309 of the Constitution of India. It could possibly have been urged, in the absence of special rules like Rule 40A that in such matters, where specific provisions with regard to any condition did not exist and at the same time, provisions governing terms and conditions of civil servants were made applicable, Rule 10 of the CCS Rules would have been binding. However, the express provision under Rule 40A of the BSF Rules and its structure at the relevant time completely eliminated the application of Rule 10 of the CCS Rules. All matters pertaining to the raising of the BSF, cadre creation, enrolment, recruitment to various posts, regulation of terms and conditions are covered by provisions of the BSF Act and the Rules framed under it. There is no provision – neither did the petitioner allude to any – which make conditions or rules that govern Central Government officers and employees, applicable to the members of the Force. In matters of suspension, Rule 40A covered the field. At the relevant time, there was no provision in Rule 40A which alleged to or referred or incorporated by reference any provision of the CCS Rules much less Rule 10. We also note that Article 309 of the Constitution expressly states that the rule making power of the Central Government or the appropriate legislature under proviso to Article 309 of the Constitution is expressly subordinated to any Act of Parliament or State legislature. This is evident from the text of proviso to Article 309:

"Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act."

(emphasis supplied)

11. In the present case, the BSF Act and Rules govern the field; in the absence of any express incorporation of or reference to the CCS Rules, there was no question of reading in any restriction provided for under Rule 10 of the CCS Rules into Rule 40A. This Court notices that the decision – *Prabhanjan (supra)* cannot be considered an authority on this issue since the Patna High Court did not decide as to whether in the given facts of the case, the express rules governing the concerned force, had accommodated or permitted reference to CCS Rules. The said judgment is, therefore, *sub-silentio* on that aspect. Likewise, the decision in *Mali (supra)* turns on the interpretation and on the correct interpretation of Rules 10(5) and (6) of the CCS Rules, so far as it governs civil servants.

12. This Court is of the opinion that the amendment subsequently made to Rule 40A reinforces its conclusions. The said amendment introduced Rule 40A(3A) with effect from 22.11.2011: when eventually it was notified in the Official Gazette. The said Rule 40A(3A) reads as follows:

“40A XXXXXX XXXXXX XXXXXX

(3A) An order of suspension made or deemed to have been made under this rules shall be reviewed by the authority competent to modify or revoke such order before expiry of ninety days from the effective date of suspension and pass an order either extending or revoking the suspension and any subsequent review shall be made before the expiry of such extended period of suspension:

Provided that no extension of suspension shall be made for a period exceeding one hundred and eighty days as a time.”

13. Thus, the restrictions imposed and introduced by way of amendment through Rule 40A(3A) are similar to what were provided in 2004 in Rule 10 of the CCS Rules. However, for the BSF, these conditions and restrictions became effective from 20.11.2012. In the circumstances, the petitioner's contention that without a mandatory review, the extension of his period of suspension was rendered invalid, is without substance. We are also unpersuaded by the submission that in fact review took place on 30.09.2011 and 12.12.2011 and that such conduct highlights the understanding of the BSF itself that it was bound to conduct the review. It is well-established that a mistaken interpretation of the law or the understanding that an obligation exists under it when in reality there is no such obligation, does not bind the public or statutory authority or create an estoppel which it is obliged to adhere to or follow. Nor is the Court bound to hold the public authority to such a conduct unless it has resulted in an actionable prejudice to a third party. In the present case, the circumstances clearly point to there being no obligation on the part of the BSF to conduct a review in terms of the governing stipulation, i.e. Rule 40A. That it did under mistaken belief, cannot bind it and in any case cannot confer an entitlement upon the petitioner to say that his suspension was rendered illegal.

14. For the above reasons, we find no merit in the petition. It is accordingly dismissed.

**S. RAVINDRA BHAT
(JUDGE)**

**DEEPA SHARMA
(JUDGE)**

AUGUST 20, 2015

