

\$~19.

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Date of Decision: 13.09.2017**

% **W.P.(C) 8134/2017 & C.M. No. 33423/2017**

GOVT. OF NCT OF DELHI

..... Petitioner

Through: Mr. Sanjay Dewan with Ms. Palak
Rohmetra, Adv.

versus

DR. RISHI ANAND

..... Respondent

Through: Ms. Sana Ansari, Adv.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MS. JUSTICE REKHA PALLI

VIPIN SANGHI, J. (ORAL)

Cav. No.815/2017

Since the caveator has put in appearance, the caveat stands discharged.

C.M. No. 33424/2017

Exemption allowed, subject to all just exceptions. The application stands disposed of.

W.P.(C) 8134/2017 & C.M. No. 33423/2017

1. Learned counsel for the respondent/ caveator has appeared. We have heard learned counsels for the parties. With their consent, we proceed to dispose of the petition at this stage itself.

2. The petitioner has preferred the present petition to assail the order dated 29.05.2017 passed by the Central Administrative Tribunal, Principal Bench, New Delhi (CAT/ Tribunal) in O.A. No. 1785/2017. The respondent/ applicant had preferred the said O.A. to assail his continuing suspension which had exceeded 90 days. The tribunal has allowed the O.A. on the very first day of hearing by placing reliance on the decision of the Supreme Court in *Ajay Kumar Choudhary v. Union of India & Anr.*, (2015) 7 SCC 291. Consequently, the continued suspension of the respondent beyond the initial period of 90 days, vide orders dated 27.09.2016 and 07.04.2017 was quashed. The respondent was directed to be reinstated within one week. The Tribunal also directed that the respondent shall be entitled to full salary for the period w.e.f. 10.10.2016. With regard to the earlier period, the determination of the manner of treatment of the suspension period of 90 days was left to be undertaken under FR 54B.

3. The facts, in brief, are that the respondent while working as a Specialist ENT and Medical Officer-in-charge of Satyawadi Raja Harish Chander Hospital, GNCTD was placed under suspension vide order dated 12.07.2016 in contemplation of disciplinary proceedings under Rule 10(1) of the CCS (CCA) Rules, 1965. His suspension was extended by 180 days vide order dated 27.09.2016 with effect from 10.10.2016 to 07.04.2017

pursuant to the recommendations of the review committee. The charge sheet was issued to the respondent on 01.03.2017. Vide yet another order dated 07.04.2017, the suspension was further extended on the recommendation of the review committee for a period of 180 days with effect from 08.04.2017.

4. While the matter stood thus, the respondent preferred the O.A. on or about 12.05.2017. The case of the respondent/ applicant was that in view of the decision of the Supreme Court in **Ajay Kumar Choudhary** (supra), since the charge sheet had not been issued within 90 days of the initial suspension, the continued suspension of the respondent became illegal, and could not have been continued. The respondent also sought to place reliance on the O.M. dated 23.08.2016 issued by the DoPT as a consequence of the aforesaid decision of the Supreme Court in **Ajay Kumar Choudhary** (supra). The relevant part of the said O.M. reads as follows:

“OFFICE MEMORANDUM

Subject: Central Civil Services (Classification, Control and Appeal) Rules, 1965 – instructions regarding timely issue of Charge-sheet – regarding.

The undersigned is directed to refer to DoP&T's O.M. No.11012/17/2013-Estt.A-III dated 3rd July, 2015 on the above mentioned subject and to say that in a recent case, Ajay Kumar Choudhary vs Union of India Civil Appeal No. 1912 of 2015 dated 16/02/2015, the Apex Court has directed as follows:

“14 We, therefore, direct that the currency of a Suspension Order should not extend beyond three months if within this period the Memorandum of

Charges/Chargesheet is not served on the delinquent officer/employee; if the Memorandum of Charges/Charge sheet is served a reasoned order must be passed for the extension of the suspension. As in the case in hand, the Government is free to transfer the concerned person to any Department in any of its offices within or outside the State so as to sever any local or personal contact that he may have and which he may misuse for obstructing the investigation against him. The Government may also prohibit him from contacting any person, or handling records and documents till the stage of his having to prepare his defence..... Furthermore, the direction of the Central Vigilance Commission that pending a criminal investigation departmental proceedings are to be held in abeyance stands superseded in view of the stand adopted by us.”

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

3. *It should also be ensured that disciplinary proceedings are initiated as far as practicable in cases where an investigating agency is seized of the matter or criminal proceedings have been launched. Clarifications in this regard have already been issued vide O.M. No. 11012/6/2007-Estt.A-Ill dated 21.07.2016....”.*

5. Since the petitioner is aggrieved by the aforesaid directions contained

in the impugned order, the petitioner has preferred the present petition.

6. The submission of learned counsel for the petitioner is that, firstly, a suspended employee, whose suspension has been extended beyond the period of 90 days under sub-rule (6) of Rule 10 does not acquire a statutory right to seek revocation of his suspension, even if the charge memo is not issued within the initial period of 90 days. Even if the respondent could have raised a grievance with regard to his continued suspension beyond the initial period of 90 days - on the ground that he had not been issued the charge sheet, the said grievance was not raised by the respondent in a timely manner. The O.A. was filed only after the issuance of charge sheet on 01.03.2017, and extension of the respondent's suspension on 07.04.2017. The said grievance of the respondent did not survive when the O.A. was preferred, as the charge sheet had already been issued to the respondent. Since the inquiry proceedings against the respondent were underway, the petitioner was justified in continuing the suspension of the respondent. The decision in this regard had been taken in accordance with Rule 10(6) of the CCS(CCA) Rules, 1965 by the Review Committee.

7. Learned counsel further submits that the tribunal, in any event, could not have quashed the suspension of the respondent and, at the highest, could have directed the petitioner to pass a speaking order justifying the continued suspension of the respondent. Learned counsel further submits that the Tribunal has not correctly appreciated the ratio of the decision of the Supreme Court in *Ajay Kumar Choudhary* (supra) and erroneously applied the same in the facts of the present case.

8. Learned counsel further submits that the O.M. dated 23.08.2016 has interpreted the decision of the Supreme Court in ***Ajay Kumar Choudhary*** (supra) and observed in para 2 thereof – that the suspension would lapse in case the timeline, namely, issuance of charge sheet within a period of 90 days of suspension, is not adhered to.

9. On the other hand, the submission of learned counsel for the respondent is that in ***Ajay Kumar Choudhary*** (supra), the Supreme Court had held that the currency of suspension should not extend beyond three months if, within that period, the memorandum of charge/ charge sheet is not served on the delinquent employee and, even if a memorandum of charge/ charge sheet is served, a reasoned order must be passed for extension of suspension.

10. We have heard learned counsels for the parties and considered their submissions. We have also perused the decision of the Supreme Court in ***Ajay Kumar Choudhary*** (supra). In ***Ajay Kumar Choudhary*** (supra), the appellant had assailed his suspension even before issuance of the charge sheet. He had been suspended with effect from 30.09.2011 and the Supreme Court observed that the same “*has been extended and continued ever since*”.

11. In the said case, the tribunal had directed that if no charge memo was issued to the appellant Ajay Kumar Choudhary before the expiry of 21.06.2013, then he would be reinstated in service. The said order was assailed by the Union of India before the High Court. The High Court disposed of the petition by issuing a direction to the Central Government to pass appropriate orders “*as to whether it wishes to continue with the*

suspension or not having regard to all the relevant factors, including the report of CBI, if any, it might have received by now. This exercise should be completed as early as possible and within two weeks from today”.

12. The appellant then approached the Supreme Court to assail the said direction of the High Court. The Supreme Court observed in its decision that till arguments were heard on 09.09.2014, neither the charge sheet, nor the memorandum of charge had been served on the appellant. It was represented before the Supreme Court that the charge sheet was expected to be served on the appellant before 12.09.2014. The Supreme Court considered several decisions and, eventually, concluded in para 21 as follows:

“21. We, therefore, direct that the currency of a suspension order should not extend beyond three months if within this period the memorandum of charges/charge-sheet is not served on the delinquent officer/employee; if the memorandum of charges/charge-sheet is served, a reasoned order must be passed for the extension of the suspension. As in the case in hand, the Government is free to transfer the person concerned to any department in any of its offices within or outside the State so as to sever any local or personal contact that he may have and which he may misuse for obstructing the investigation against him. The Government may also prohibit him from contacting any person, or handling records and documents till the stage of his having to prepare his defence. We think this will adequately safeguard the universally recognised principle of human dignity and the right to a speedy trial and shall also preserve the interest of the Government in the prosecution. We recognise that the previous Constitution Benches have been reluctant to quash proceedings on the grounds of delay, and to set time-limits to their duration. However, the imposition of a limit on the period of suspension has not been discussed in

prior case law, and would not be contrary to the interests of justice. Furthermore, the direction of the Central Vigilance Commission that pending a criminal investigation, departmental proceedings are to be held in abeyance stands superseded in view of the stand adopted by us”.

13. It appears that before the Supreme Court rendered its decision on 16.02.2016, the charge sheet had been served on the appellant – though from a reading of the decision it is not clear as to on what date the same was so served. This development was taken note of by the Supreme Court in its decision. In para 22 of the decision, the Supreme Court observed:

*“22. So far as the facts of the present case are concerned, **the appellant has now been served with a charge-sheet, and, therefore, these directions may not be relevant to him any longer.** However, if the appellant is so advised he may challenge his continued suspension in any manner known to law, and this action of the respondents will be subject to judicial review”. (emphasis supplied)*

14. Thus, even though the charge sheet had not been served on the appellant Ajay Kumar Choudhary when he initially assailed his suspension, or even till the hearing of the appeal took place before the Supreme Court on 09.09.2014 (it was only between 09.09.2014 and the date of decision on 16.02.2015 that the charge sheet appears to have been served), the Supreme Court held that since the charge sheet had been served on the appellant, therefore, the directions issued by it would not be relevant to his case. Despite the fact that the appellant Ajay Kumar Choudhary had remained under suspension right from 30.09.2011, the Supreme Court did not set aside the order of suspension since, in the meantime, Ajay Kumar Choudhary had been served with a charge sheet sometime after 09.09.2014, i.e. nearly three

years after his suspension.

15. The O.M. dated 23.08.2016 and even the earlier O.M. dated 03.07.2015 issued by the DoPT (a copy whereof has been tendered in court by counsel for the respondent) evidently have misconstrued the said decision of the Supreme Court, since the facts of the said case and the eventual directions issued in para 22 of the said decision, appear to have escaped attention.

16. There can be no quarrel with the proposition that a government servant who is suspended in contemplation of a disciplinary proceedings or criminal proceedings under Rule 10 of the CCS (CCA) Rules, should not be kept under suspension indefinitely or unnecessarily. It is for this reason that a review of the on-going suspension is required to be undertaken by the government at regular intervals under Rule 10(6) of the CCS (CCA) Rules, which reads as under:

*“10(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.**” (emphasis supplied)*

17. It may not always be possible for the government to serve the charge sheet on the officer concerned within a period of 90 days, or even the extended period, for myriad justifiable reasons. At the same time, there may

be cases where the conduct of the government servant may be such, that it may be undesirable to recall the suspension and put him in position once again, even after sanitising the environment so that he may not interfere in the proposed inquiry. On a reading of *Ajay Kumar Choudhary* (supra), we are of the view that the Supreme Court has not denuded the Government of its authority to continue/ extend the suspension of the government servant – before, or after the service of the charge sheet – if there is sufficient justification for it. The Supreme Court has, while observing that the suspension should not be extended beyond three months – if within this period the memorandum of charges/ charge-sheet is not served on the delinquent officer, has stopped short of observing that if the charge memo/ charge-sheet is not issued within three months of suspension, the suspension of the government servant shall automatically lapse, without any further order being passed by the Government. No such consequence – of the automatic lapsing of suspension at the expiry of three months if the charge memo/ charge-sheet is not issued during that period, has been prescribed. In *Kailash Vs. Nanhku & Others*, AIR 2005 SC 2441, while examining the issue: whether the obligation cast on the defendant to file the written statement to the plaint under Rule (1) of Order 8 CPC within the specified time was directory or mandatory i.e. whether the Court could extend the time for filing of the written statement beyond the period specified in Rule 1 of Order 8, the Supreme Court held that the Court had the power to extend the time for filing of the written statement, since there was no consequence prescribed flowing from non-extension of time. In para 29 of this decision, the Supreme Court observed as follows:

“29. It is also to be noted that though the power of the court under the proviso appended to Rule 1 Order 8 is circumscribed by the words “shall not be later than ninety days” but the consequences flowing from non-extension of time are not specifically provided for though they may be read in by necessary implication. Merely because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form.” (emphasis supplied)

18. The direction issued by the Supreme Court is that the currency of the suspension should not be extended beyond three months, if the charge memorandum/ charge-sheet is not issued within the period of 3 months of suspension. But it does not say that if, as a matter of fact, it is so extended it would be null and void and of no effect. The power of the competent authority to pass orders under Rule 10(6) of the CCS (CCA) Rules extending the suspension has not been extinguished by the Supreme Court. The said power can be exercised if good reasons therefor are forthcoming.

19. The decision of the Supreme Court in *Ajay Kumar Choudhary* (supra) itself shows that there cannot be a hard and fast rule in this regard. If that were so, the Supreme Court would have quashed the suspension of Ajay Kumar Choudhary. However, in view of the fact that the charge memo had been issued to Ajay Kumar Choudhary – though after nearly three years of his initial suspension, the Supreme Court held that the directions issued by it would not be relevant to his case.

20. From a reading of the decision in *Ajay Kumar Choudhary* (supra)

and Rule 10 of the CCS (CCA) Rules, it emerges that the government is obliged to record its reasons for extension of the suspension which, if assailed, would be open to judicial scrutiny – not as in an appeal, but on grounds available in law for judicial review of administrative action.

21. Learned counsel for the respondent has argued that since the charge sheet/ charge memo was not served on the respondent within the initial 90 days of suspension, the suspension of the respondent automatically lapsed. Under Rule 10 of the CCS (CCA) Rules, there is no automatic reinstatement of a suspended government servant upon expiry of 90 days, or the extended period of suspension if, by the date of expiry of such suspension/ extended period of suspension, the charge sheet is not issued. The only circumstance in which the suspension of the government servant lapses automatically is the one contained in sub-rule (7) of Rule 10. The same reads as under:

*“(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 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.” (Emphasis supplied)

22. Thus, it is only if the suspension is not extended after review within the initial period of 90 days (in a case to which sub-rule (2) does not apply),

that the suspension of the government servant would lapse automatically. In all other cases, the suspension would continue unless and until it is modified or revoked by the competent authority though it would not imply that there is no requirement to conduct periodic renewal of the suspension. This is so provided in sub-rule (5)(a) of Rule 10, which reads as follows:

“10 (5)(a) Subject to the provisions contained in sub-rule (7), an order of suspension made or deemed to have been made under this rule shall continue to remain in force until it is modified or revoked by the authority competent to do so.”
(Emphasis supplied)

23. Thus, there is no force in the submission of the respondent that the suspension of the respondent automatically lapsed since the charge sheet was not issued within the initial period of 90 days. Pertinently, the respondents suspension was reviewed and extended by the government within the initial period of 90 days on 27.09.2016. Thus, the suspension of the respondent did not lapse under sub rule (7) of Rule 10 CCS (CCA) Rules.

24. We are of the considered view that in the facts of the present case, the impugned order was certainly not called for, revoking the suspension of the respondent. When the O.A. was preferred, the charge sheet had already been issued to the respondent on 01.03.2017. At the highest, the tribunal could have called upon the petitioner to justify its extension by passing a reasoned order. It was not for the tribunal to step into the shoes of the administration, and to take a decision – which only the administration can take, on the issue whether the suspension of the charged officer should continue, or not. The jurisdiction of the tribunal is confined to examining

the administrative action of the government on the well established objective principles of judicial review and, where it considers necessary, to require the government to perform its statutory obligation to take a decision. In view of the aforesaid, the impugned order cannot be sustained and is, accordingly, set aside.

25. Learned counsel for the respondent submits that the petitioner is not paying any subsistence allowance to the respondent. This position cannot be allowed to continue. The petitioner is directed to pay the subsistence allowance to the respondent under the rules as admissible to him along with arrears. The arrears shall be paid within four weeks from today and the payment of subsistence allowance shall be commenced forthwith.

26. In case the suspension of the respondent is further extended, it shall be in conformity with Rule 10(6) of the CCS (CCA) Rules and reasons therefor shall be communicated to the respondent, and it shall be open to the respondent to assail the same on all available grounds.

27. Dasti.

VIPIN SANGHI, J

REKHA PALLI, J

SEPTEMBER 13, 2017

sr