



Jsn

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO.2501 OF 2019

Kiran Ramesh Waghela ...Petitioner
Vs.
Municipal Corporation of Greater Mumbai ...Respondents
& Ors.

Mr. Bhavesh Parmar, i/b. Devmani Shukla and Vijayprakash
Yadav for the Petitioner.
Mr. Abhishek Khare with Ms. Rupali Adhate for MCGM.

**CORAM: K.K.TATED &
R.I. CHAGLA, JJ.**
DATE : 24TH FEBRUARY, 2021

J U D G M E N T (Per R.I. Chagla, J.)

1. Rule. Rule made returnable forthwith. Heard by consent.

2. This Petition filed under Article 226 of the Constitution of India challenges order dated 23rd April, 2019 (“the impugned order”) issued by the Assistant Commissioner, M/P Ward of the Respondent No.1 (“Respondent - Corporation”) suspending the Petitioner on account of his having violated Rules 3, 8 and 11 of Municipal Corporation of Brihanmumbai Services (Conduct) said Rules, 1999 (for short “the Rules”).

3. The Petitioner had joined the employment of the Respondent – Corporation in or about 1995 with designation of P. T. Mukadam in SWM department. The Petitioner's meritorious service record resulted into his timely promotion to the post of Junior Overseer with the SWM Department. The post was assigned to the Petitioner in the year 2011.

4. In proceedings before the Industrial Tribunal at Mumbai, being Reference (IT) No.81 of 2005, the Industrial Tribunal on 16th April, 2019 issued a witness summons dated 18th April, 2019 pursuant to order dated 16th April, 2019 to the Petitioner directing the Petitioner to remain present before the Industrial Tribunal on 20th April, 2019. This was done by the Industrial Tribunal in exercise of power under Section 11(3) of the Industrial Disputes Act read along with Rule 19 and 20 of the Industrial Disputes (Bombay) Rules, 1957. The Respondent – Corporation was the first party in Reference (IT) No.81 of 2005.

5. Pursuant to the witness summons issued by the Industrial Tribunal, the Petitioner preferred an application on 20th April, 2019 before the Tribunal and sought an

adjournment, which was allowed. Thereafter on 22nd April, 2019, the Petitioner submitted a letter to his immediate superior officer i.e. Respondent No.5 by which letter the Petitioner provided a copy of the Affidavit which the Petitioner intended to submit as his evidence before the Industrial Tribunal in the said Reference. In the letter it was mentioned that the Petitioner should be informed whether Respondent No.5 or the Respondent – Corporation had any objection to the contents of the Affidavit that the Petitioner was intending to submit before the Industrial Tribunal. The said letter dated 22nd April, 2019 was received and acknowledged by the Respondent No.5. However, the same was never replied and remains un-replied till date.

6. The Petitioner had on 23rd April, 2019 submitted his application to the Industrial Tribunal in the said Reference wherein the fact of submission of letter dated 22nd April, 2019 by the Petitioner to the Respondent – Corporation was clearly mentioned. On that day, the Petitioner's Affidavit in lieu of Examination in Chief was taken on record by the Industrial Tribunal in the said Reference through solemn affirmation.

7. The Petitioner has stated that the contents of the Affidavit in lieu of Examination in Chief was identical to the contents of the draft Affidavit that was submitted by the Petitioner to the Respondent – Corporation vide letter dated 22nd April, 2019. It has been mentioned that on 23rd April, 2019, the Industrial Tribunal being busy with other matters, took up the evidence of the Petitioner in the said Reference in the second session post lunch and the process of Examination in Chief and thereafter cross examination conducted by the Advocate of the Respondent Corporation got completed at about 4.15 p.m.

8. The Petitioner was served on 27th April, 2019 with the impugned order which suspended the Petitioner with immediate effect i.e. from 23rd April, 2019 for violation of Rules 3, 8 and 11 of the said Rules.

9. Thereafter, the Petitioner submitted a letter to the Respondent – Corporation on or about 2nd May, 2019 in response to the impugned order.

10. The Petitioner preferred a Complaint being (ULP) No.132 of 2019 on or about 14th May, 2019 before the Industrial Court at Mumbai, seeking various reliefs claiming that the Petitioner falls within the definition and classification of worker. The Respondent Corporation filed their written statement in the said Complaint on 4th June, 2019 for deciding the preliminary issue of jurisdiction of the Industrial Court by claiming that the Petitioner does not fall within the definition and classification of worker.

11. The Petitioner preferred the present Writ Petition on 23rd July, 2019 challenging the impugned order. Since the Respondent – Corporation had raised the issue of jurisdiction before the Industrial Court in the said Complaint, the Petitioner had withdrawn the said Complaint and this has been recorded by this Court in order dated 2nd February, 2021. Prior to the said order, the Petitioner had filed an additional Affidavit dated 6th January, 2021, wherein the Petitioner apologized to this Court for an incorrect statement made by his Advocate on instructions that the Petitioner had already withdrawn the said Complaint being (ULP) No.132 of 2019 before the Industrial Court as recorded in order dated

22nd December, 2020. It has been mentioned in the said Affidavit that the correct factual position is that the application for withdrawal of the said Complaint was preferred by the Petitioner on 14th October, 2020 and finally disposed of vide order dated 4th January, 2021.

12. The Respondent - Corporation have filed the Affidavit of one Smt. Supriya Mohan Tambe, Administrative Officer, SWM Department, M/West Ward in employment with Respondent - Corporation dated 24th November, 2020 in reply to the Petition. In the said Affidavit in Reply it has been stated that the Petitioner without informing or seeking permission from the Respondent - Corporation appeared and gave evidence as witness before the Industrial Tribunal in the said Reference. It has been stated that the Petitioner appeared before the Industrial Tribunal on 23rd April, 2019 i.e. one day after informing the Respondents that the Petitioner was going to appear. This did not accord adequate time to the Respondents to process the application of the Petitioner which was sent by letter dated 22nd April, 2019 or review the draft Affidavit which accompanied the said letter. It has been stated that the Petitioner failed to inform the

Legal Department of the Respondent – Corporation that he was appearing as witness and giving evidence on behalf of Respondent – Corporation in the said Reference. It has further been stated in the said Affidavit in Reply that the impugned order has been served on the Petitioner for breaches committed by the Petitioner of Rules 3, 8 and 11 of the said Rules.

13. It is further stated in the Affidavit in Reply that subsequent to the suspension order dated 23rd April, 2019, the Respondents have paid the Petitioner a suspension allowance of 50% of basic and dearness allowance for the period April, 2019 to July, 2019 amounting to Rs.37,740/-. The Respondents have further paid to the Petitioner a suspension allowance of 75% of basic and dearness allowance for the period July, 2019 to May, 2020 amounting to Rs.2,39,712/-. They have further paid the Petitioner a suspension allowance of 75% of basic and dearness allowance for the month of June, 2020 amounting to Rs.37,183/-. The further payment of suspension allowance to the Petitioner is under process.

14. Learned Advocate Mr. Bhavesh Parmar appearing for the Petitioner has referred to the impugned order of suspension dated 23rd April, 2019 by which the Petitioner has been remained suspended with immediate effect from that date for alleged violation of Rules 3, 8 and 11 of the said Rules. He has drawn reference to Rule 11 of the said Rules, which provides that no Corporation employee shall except with previous sanction of the Competent Authority give evidence in connection with any inquiry conducted by any person, committee or authority. He has specifically drawn reference to Rule 11(3) of the said Rules which provides that nothing in this rule shall apply to evidence given by a Corporation employee at a judicial inquiry. He has submitted that by reading Rule 11(3), it is clear that the employee of the Corporation can give evidence in a judicial inquiry such as inquiry before the Industrial Tribunal. Thus the Petitioner's filing of Affidavit in lieu of Examination in Chief before the Industrial Tribunal did not require previous sanction of the Respondent- Corporation as per Rule 11(3) of the said Rules. He has submitted that the Petitioner has similarly not violated Rules 3 and 8 of the Rules which

respectively provided for the duty of the Corporation employee to maintain integrity, devotion to duty, etc. and Rule 8 which is joining of association by Corporation employees. He has submitted that there has been no violation of the said Rules by the Petitioner, submitting his evidence before the Industrial Tribunal.

15. Learned Counsel for the Petitioner further submitted that in fact the Petitioner had prior to giving evidence before the Industrial Tribunal informed the Respondent No.5 by his letter dated 22nd April, 2019 which annexed a copy of the draft Affidavit that the Petitioner intended to submit as his evidence before the Industrial Tribunal. The Petitioner had expressly requested the Respondent – Corporation through Respondent No.5 that he should be informed of any objection which Respondent – Corporation may have to the contents of the Affidavit that the Petitioner intended to submit before the Industrial Tribunal. However, the Respondent – Corporation despite receiving the said letter dated 22nd April, 2019, never replied to the same.

16. Learned Counsel for the Petitioner has submitted that the Petitioner was being punished by suspension inspite of the Petitioner complying with the directions of the Industrial Tribunal and the witness summons issued to the Petitioner summoning the Petitioner to depose before the Industrial Tribunal on oath for the purpose of stating true and correct facts. He has submitted that the impugned order has been issued in undue haste on 23rd April, 2019 considering the fact that the evidence of the Petitioner was conducted and completed on that very day before the Industrial Tribunal. He has submitted that the Respondent - Corporation were fully aware of the evidence being submitted by the Petitioner on 23rd April, 2019 as well as the witness summons being issued to the Petitioner vide order dated 16th April, 2019 passed by the Industrial Tribunal and despite which the Respondent - Corporation had not challenged the said order.

17. Learned Counsel for the Petitioner has further submitted that the impugned order of suspension dated 23rd April, 2019 remains in operation even today. He has relied upon the decision of the Supreme Court in the case of *Ajay*

Kumar Choudhary Vs. Union of India & Anr.¹. In the said decision it has been held 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. He has submitted that for any extension of the period of suspension beyond three months, a reasoned order must be passed for extension of the suspension. This is provided that the memorandum of charges / charge-sheet is served. In the present case, the Respondent - Corporation has neither filed any memorandum of charges / charge-sheet nor served the same on the Petitioner within the three months of the impugned order of suspension. In fact till today no memorandum of charges / charge sheet has been filed. He has accordingly submitted that since currency of the suspension order goes beyond three months and no memorandum of charges / charge-sheet being served upon the Petitioner, the impugned order of suspension requires to be quashed and set aside.

18. Mr. Abhishek Khare, learned Counsel appearing for the Respondent - Corporation has raised the issue as to the

1 (2015) 7 Supreme Court Cases 291.

maintainability of this Petition on a ground that there is an alternate and efficacious remedy available to the Petitioner under Section 15 of the Administrative Tribunals Act, 1985. He has relied upon Section 15 read with Sections 2P and 2Q of the Administrative Tribunals Act, 1985 which provides that the State Administrative Tribunal has jurisdiction over all service matters concerning a person and relating to the conditions of his service in connection with the affairs of the State. This would include the service of the Petitioner with the Respondent – Corporation. He has accordingly submitted that the present Writ Petition is not maintainable and the Petitioner be directed to move the Administrative Tribunal.

19. Learned Counsel for Respondents – Corporation has submitted that there were good reasons for issuance of the impugned order of suspension on 23rd April, 2019. He has submitted that the Petitioner had failed to provide adequate notice to the Respondents to enable the Respondents to process Petitioner's application for giving evidence before the Industrial Tribunal in said Reference and / or for review of the draft Affidavit which had been sent by the Petitioner and which was to be filed before the Industrial Tribunal. The

application along with the draft Affidavit of evidence had been sent to the Respondent - Corporation only one day prior to the Petitioner giving evidence before the Industrial Tribunal. He has submitted that this was in clear violation of the Rules and in particular Rules 3, 8 and 11 of the said Rules. He has submitted that the Petitioner had prior to giving of evidence before the Industrial Tribunal appeared before the Tribunal without informing or seeking permission from the Respondent - Corporation. He has accordingly submitted that the impugned order was just and proper and in accordance with the Rules.

20. Learned Counsel for the Respondent - Corporation referred to the decision of the Delhi High Court in the case of **Govt. of NCT of Delhi vs. Dr. Rishi Anand**². He has submitted that in the said decision, the Delhi High Court had occasion to consider the decision of the Supreme Court in *Ajay Kumar Choudhary (Supra)*.

21. Paragraph nos. 17, 18 and 19 read thus:-

² W.P. (C) 8134 of 2017 and C.M. No.33423 of 2017 decided on 13th September, 2017.

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 sanitizing 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."

22. The learned Counsel for Respondent – Corporation has submitted that the Delhi High Court has upon considering the decision of the Supreme Court in *Ajay Kumar Choudhary (Supra)* observed that there cannot be a hard and fast rule and there may be a myriad justifiable reasons for the Government not serving the charge sheet on the officer within the period of 90 days or even the extended period. The decision of the Supreme Court does not say that if the charge sheet is not issued within the period of three months of suspension, the extension of suspension would be null and void and of no effect. The power of extending suspension can be exercised if good reasons are forthcoming.

23. The learned Counsel for Respondent – Corporation has accordingly submitted that in the present case there were good reasons for the issuance of the impugned order and extension of suspension of the Petitioner by the Respondent – Corporation. Hence, there is no merit in this Petition which challenges the impugned order and that this Petition be dismissed.

24. We have considered the rival submissions. It is apparent from the said Municipal Corporation of Brihanmumbai Services (Conduct) Rules, 1999 and in particular Rule 11 thereof that where has been evidence given by a Corporation employee in a judicial inquiry, the previous sanction of the Competent Authority is not required. Rule 11 of the said Rules reads as under:-

11. Evidence before committee or any other authority:-

1) Save as provided in sub-rule (3), no Corporation employee shall, except with the previous sanction of the Competent Authority, give evidence in connection with any inquiry conducted by any person, committee or authority.

2) No corporation employee shall, while giving evidence with the sanction of the Competent Authority criticize the policy or any action of the Corporation or of any Government in India.

3) Nothing in this rule shall apply to evidence given by Corporation employee at any-

a) enquiry before an authority appointed by Government or by the Parliament or by any State Legislature or

b) Judicial enquiry, or

c) Departmental Enquiry ordered by the Competent Authority.

25. Thus, the Petitioner being a Corporation employee did not require previous sanction of the Respondent – Corporation for giving evidence in the judicial inquiry i.e. before the Industrial Tribunal. There has been no violation of Rule 11 by the Petitioner. This would be applicable to Rule 3 which is the duty of the Corporation employee to maintain integrity, devotion to duty etc. In the present case the Petitioner has shown integrity and devotion to duty as well as acted in the interest of the Respondent – Corporation by bringing to the notice of the Respondent – Corporation, the fact of the Petitioner intending to submit evidence before the Industrial Tribunal pursuant to the witness summons issued to the Petitioner on 16th April, 2019. The Petitioner has done so by informing his immediate superior officer Respondent No.5 by letter dated 22nd April, 2019 of his intention to submit evidence by way of Affidavit of Evidence in lieu of Examination in Chief before the Industrial Tribunal and by sending the draft Affidavit of Evidence in lieu of Examination in Chief to the Respondent – Corporation by the said letter. The Petitioner had expressly mentioned in the said letter dated 22nd April, 2019 that if the Respondent – Corporation

or the Respondent No.5 to whom the letter had been sent had any objection to the contents of the Affidavit of Evidence which the Petitioner was intending to submit before the Industrial Tribunal in the said Reference, the same should be informed to the Petitioner. In fact, the Respondent No.5 having received and acknowledged the said letter had failed to reply to the said letter and which remains un-replied till date.

26. The impugned order also mentions that the Petitioner has violated Rule 8 of the said Rules. This Rule seems inapplicable in the present case as it is titled joining of association by Corporation employee. It provides that no Corporation employee shall join or continue to be a member of an association the objects or activities of which are prejudicial to the interest of the sovereignty and integrity of India and interest of Corporation or public order or morality. There is no such joining of association by the Petitioner and thus no question of any violation thereof.

27. Thus the impugned order was clearly not warranted in view of the facts of the present case. In fact, the Petitioner

was only complying with orders / directions issued by the Industrial Tribunal in the said Reference. The Tribunal had issued a witness summons to the Petitioner which was duly complied with. The Respondent – Corporation had in fact not challenged the order issuing witness summons for deposing before the Industrial Tribunal. The Respondent – Corporation has in fact decided to issue the impugned order in spite of being in full knowledge of the witness summons issued to the Petitioner as well as the evidence which the Petitioner was giving before the Industrial Tribunal. It appears that the Respondent – Corporation by way of an after thought and that too with utmost haste i.e. on the very same day, the Petitioner had given evidence before the Industrial Tribunal, passed the impugned order of suspension, suspending the Petitioner with immediate effect.

28. It is surprising to note is that after issuance of the impugned order on 23rd April, 2019, there has been no attempt on the part of the Respondent – Corporation to serve a charge-sheet on the Petitioner. The Supreme Court in ***Ajay Kumar Chaudhary (Supra)*** has held that the currency of a suspension order should not extend beyond three months, if

within this period the charge-sheet is not served on the employee and even if the charge-sheet is served, a reasoned order must be passed for extension of the suspension. The Supreme Court in the said decision of *Ajay Kumar Choudhary (Supra)*, in paragraph 21 held thus:-

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/Chargesheet is not served on the delinquent officer/employee; if the Memorandum of Charges/Chargesheet 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. We think this will adequately safeguard the universally recognized principle of human dignity and the right to a speedy trial and shall also preserve the interest of the Government in the prosecution. We recognize that 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.

29. It is accordingly clear from this decision of the Supreme Court that the impugned order which extends beyond three months and during which period no charge sheet has been filed cannot be allowed to remain in operation. The adequate safeguards of the currency of the suspension order not extending beyond three months if charge sheet is not served on the delinquent officer / employee is in aid of the universally recognized principle of human dignity and the right to a speedy trial and also preserve the interest of Government in the prosecution. Thus such imposition of a limit on the period of suspension would not be contrary to the interest of justice.

30. Further the Delhi High Court in ***Govt. of NCT Delhi (Supra)*** has whilst considering the decision of Supreme Court in ***Ajay Kumar Choudhary (Supra)***, has held that any extension beyond the period of three months where no charge sheet has been filed would require a reasoned order for such extension. In the present case admittedly there is no reasoned order issued by the Respondent – Corporation for

extension of the impugned order of suspension and thus the decision of the Delhi High Court cannot come to the aid of the Respondent – Corporation.

31. We do not find any substance in the submission of the Respondent – Corporation that since there is an alternate remedy available to the Petitioner under Administrative Tribunal Act, 1985, this Court ought not to exercise its writ jurisdiction under Article 226 of the Constitution of India. We are of the view that considering that the impugned order of suspension which continues till today i.e. beyond the period of three months and without any memorandum of charges / charge sheet issued during that period, occasions a failure of justice as held by the Supreme Court in *Ajay Kumar Choudhary (Supra)*, this Court will not refuse to entertain the writ.

32. Accordingly, we are of the view that the impugned order of suspension issued to the Petitioner in the present case which has survived since 23rd April, 2019 is contrary to law apart from being unjustified and would require to be quashed and set aside.

33. Hence, the following order is passed:-

- (a) The impugned suspension order dated 23rd April, 2019 issued by Respondent – Corporation is quashed and set aside;
- (b) Writ Petition is accordingly disposed of with cost of Rs.15,000/-
- (c) Cost to be paid by the Respondent – Corporation to the Petitioner within two months from the date of this order.

(R. I. CHAGLA J.)

(K.K. TATED, J.)