
(2021) 06 CAL CK 0058

In the Calcutta High Court

Case No : A.P.O. No. 45 Of 2021, Writ Petition No. 96, 203 Of 2019, IA No: GA/2/2020

Pranab Kumar Adhikary

APPELLANT

Vs

State Of West Bengal & Ors.

RESPONDENT

Date of Decision : 17-06-2021

Acts Referred:

Constitution Of India, 1950 — Article 141
Indian Penal Code, 1860 — Section 304(6), 498A
Prevention Of Corruption Act, 1988 — Section 7, 13(2)
Code Of Criminal Procedure, 1973 — Section 167(2)

Citation : (2021) 06 CAL CK 0058

Hon'ble Judges : Subrata Talukdar, J;Hiranmay Bhattacharyya, J

Bench : Division Bench

Advocate : Pratik Dhar, Sandipan Banerjee

Final Decision : Disposed Of

Judgement

Under challenge in this appeal is the common judgement and order dated 20th December 2019 of the Hon'ble Single Bench or, the Hon'ble First

Bench, finally deciding the two writ petitions filed by the appellant being WP 96 of 2019 (WP-I) and WP 203 of 2019 (WP-II).

The Hon'ble First Bench, inter alia, held that the appellant was charge-sheeted by the Howrah Municipal Corporation (HMC) to face a Departmental

Enquiry (DE) pertaining to possession of assets disproportionate to his known sources of income. The Hon'ble First Bench held that such a charge

under the Prevention of Corruption Act, 1988 (for short the PC Act) pre-supposes an act or omission in relation to his employment and hence the

Howrah Municipal Corporation was wholly and completely justified in commencing departmental proceedings, inter alia, by issuing the charge-sheet in

question.

The Hon'ble Single Bench was also of the view that the judgement and order of a Hon'ble Division Bench of this Court In Re: Amit Biswas Vs. State

of West Bengal and others as reported in 2007 2) LLN 852 does not apply to the facts connected to the appellant, since the criminal charge In Re:

Amit Biswas (supra), arose out of a matrimonial dispute connected to Section 498A of the Indian Penal Code (IPC) whereas, the charge against the appellant is under the PC Act.

Therefore, the Hon'ble Single Bench came to the finding that in view of the distinct nature of the two charges(supra), the HMC was well within its rights as the employer to departmentally proceed against the appellant/ the writ petitioner.

WP-II stood thus dismissed.

In view of the dismissal of WP-II, the Hon'ble Single Bench also dismissed WP-I by directing the HMC to conclude the DE as expeditiously as

possible but, not later than a period of six months from the date of communication of a copy of its order (dated the 20th of December, 2019). While

directing as above, the Hon'ble Single Bench recognized the accepted jurisprudence relating to Service Law that a delinquent (viz. the appellant)

cannot be kept under suspension indefinitely. However, the Hon'ble Single Bench was of the view that since the rationale behind continuing and

concluding the DE against the appellant was sustained by the judgement and order dismissing WP-II, the analogous writ petition challenging the

suspension of the appellant/ the writ petitioner must yield to the requirement of concluding the DE.

The Hon'ble Single Bench took the further view that the prejudice complained of by the appellant/ the writ petitioner arising out of his continuous

suspension from service stood partially ameliorated in view of the raise in his subsistence allowance from fifty to seventy percent by reason of the

West Bengal Municipal Employees' (Classification, Control, Appeal and Conduct) Rules, 2010 (for short the 2010 Rules).

Thus, WP-I stood also dismissed.

Mr. Pratik Dhar, Ld. Senior Counsel appearing for the appellant, argues purely on the point of the legality of continuing the appellant's suspension for

long without initiating a departmental proceeding, for consideration by this

Appellate Bench. The crux of Mr. Dhar's submissions center around the ratio of the Hon'ble Supreme Court's Judgement In Re: Ajay Kumar Choudhary Vs. Union of India and another as reported in 2015 7) SCC 291.

It is submitted by Ld. Senior Counsel that the law qua suspension is now trite that the subsistence of a suspension order shall not extend beyond three

months of the date of its imposition, if, within this period the Memorandum of Charges/ Charge-Sheet (for short MOC/CS) is not served on the

delinquent officer/ employee. However, in the event the MOC/CS has been served within the said period of three months, the suspension can only be

extended by passing a reasoned order.

Ld. Senior Counsel submits that the appellant is facing a criminal proceeding in connection with Anti-Corruption Branch(ACB) Case No. 4 of 2015

dated the 14th of August 2015 registered under Sections 7 and 13(2) of the PC Act 1988 read with the relevant Sections of the Indian Penal Code

(IPC). The criminal trial connected to the said ACB case has been initiated before the Ld. Additional District and Sessions Judge, Bench-II, Bichar

Bhavan, Kolkata. The appellant is on bail.

It is argued that in connection with the said ACB case the appellant was placed under suspension by his Disciplinary Authority (for short DA) vide

order dated 25th of August 2015. The order of suspension, inter alia, states that since the appellant was detained in custody for a period exceeding 48

hours in connection with the said ACB case, under the relevant provisions of the Regulations controlling the service of the appellant, the appellant

stands suspended with effect from the date of his detention pending departmental enquiry. The said order of suspension dated 25th August 2015

further provides that the appellant will be entitled to receive subsistence allowance as per the applicable rules. The said order of suspension also

provides that the Memorandum along with the Articles of Charges connected to the DE will be issued expeditiously.

It is argued that the appellant was served with the MOC/CS after the completion of nearly four years of his suspension. The MOC/CS was issued on

the 3rd of April 2019 by the DA when the appellant was still under suspension on and from the 4th of August 2015. The appellant replied to the

MOC/CS on the 13th of April 2019 and, in the interregnum between the said order of suspension and the issue of the MOC/CS, the appellant filed

repeated representations before the DA seeking revocation of his suspension.

Mr. Dhar submits that it is no more *res integra* that the suspension of the appellant could not have been continued beyond ninety days without issuing a

MOC/CS. In any view of the matter, the DA is required to pass a reasoned order extending the suspension. It is submitted that no reasoned order

extending the suspension of the appellant has been served on his client. Furthermore, the MOC/CS was issued after nearly four years of the order of

suspension. It is therefore argued that the facts made out by the appellant are *pari materia* to the facts as discussed In Re: Ajay Choudhary (*supra*).

Thus, the appellant is entitled to an immediate revocation by Court of his suspension.

It is submitted that therefore the direction of the Hon'ble Single Bench to conclude the departmental proceedings is *ex facie* erroneous since such a

direction violates the ratio laid down In Re : Ajay Choudhary. The principle as enunciated In Re : Ajay Choudhary does not distinguish between

criminal proceedings such as one initiated under Section 498A IPC and another under the PC Act. The ratio of In Re : Ajay Choudhary is intended to

apply across-the-board to all delinquents who are facing criminal proceedings and are also under suspension pending a DE.

The judgement In Re : Ajay Choudhary is intended to apply as the law of the land under Article 141 of the Constitution of India by seeking to

incorporate the principles relating to filing of a Charge-Sheet in a criminal investigation to the conduct of a DE. The Hon'ble Apex Court has carved

out a principle that the period of 90 days as applied to filing of a Charge-Sheet upon registration of a First Information Report (FIR) will equally apply

to filing a MOC/CS in a DE. The eligibility of an accused to claim the privilege of bail upon expiry of the statutorily provided period of 90 days, shall

equally apply to a delinquent facing a DE following his suspension.

It is thus argued that in the event no MOC/CS is issued in furtherance of the DE within the said period of ninety days, the delinquent shall be entitled

to lifting of his suspension order. In Re : Ajay Choudhary has underscored the principle that in the event the suspension is to be continued, the DA

must record reasons for extending it and, in the absence of reasons, the order of suspension is liable to be set aside.

Mr. Dhar therefore submits that the Hon'ble First Bench misapplied itself by

holding that the prejudice, if any, caused to the appellant qua his order of suspension stood partially ameliorated simply by virtue of the raise in the quantum of his subsistence allowance. Such conclusion cannot be supported by legal authority. Ld. Senior Counsel reiterates that the suspension of the appellant is continuing from August 2015 without the DA adducing any reasons for extension of such suspension. It is also a matter of record that the MOC/CS was not filed within the period of ninety days as held In Re : Ajay Choudhary. It is strongly submitted that since the MOC/CS was served on the appellant close to the expiry of nearly four years from his suspension, the suspension cannot be continued and the appellant is entitled to reinstatement in service.

Per contra, Mr. Sandipan Banerjee, Learned Counsel appearing for the HMC, relies heavily on a judgement of the Hon'ble High Court of Uttarakhand in Special Appeal No.576 of 2019, In Re: Naresh Kumar vs. State of Uttarakhand and Others. Mr. Banerjee argues that the Hon'ble High Court at Uttarakhand had, inter alia, correctly held that the principle enunciated In Re: Ajay Choudhary requires to be applied apropos to the facts of every individual case.

It is submitted that In Re: Naresh Kumar, the Hon'ble High Court has attempted to notice the nature and effect of an order of suspension as well as the impact of such order on public interest. It has been held by the Hon'ble High Court that when the power to suspend is not found to be either arbitrary or vindictive, it is for the employer to assess whether during the pendency of the enquiry the concerned delinquent employee shall be entitled to continue in office. It is submitted that the Hon'ble High Court has upheld the salutary principle behind an order of suspension which permits the employer to complete the DE without threat of interference with the evidence by the charged employee.

Learned Counsel for the HMC therefore takes the stand that every order of suspension must be judicially viewed from the angle of keeping the concerned employee out of the range of committing any mischief whatsoever qua the DE.

Such judicial perspective must also take into account the gravity of the charges against the concerned employee. In the facts of this case, Ld. Counsel for the HMC points out that the seizure of cash and other liquid assets in the

nature of fixed deposits etc. from the appellant is huge. The factum of the seizure has not been questioned at all by the appellant except to deny that the seizure had anything to do with the discharge of his service. The appellant has replied to the MOC/CS taking the grounds:- (a) that the seizure had taken place at a private place, viz. his wife's flat; (b) the appellant had other sources of income apart from his service for which he received consideration; and (c) no person other than the complainant and the investigating officers of the ACB were present at the seizure.

Mr. Banerjee submits that having regard to the gravity of the charges flowing from the enormous seizure of liquid assets attracting the charge under the PC Act, it is in public interest that the appellant be kept out of employment pending the end of the DE. Ld. Counsel for HMC takes the point that the order of suspension dated 25th of August 2015 clearly states that the suspension of the appellant takes effect from the date of his detention in connection with the criminal case and, subsists during pendency of the DE. Therefore, as correctly noticed by the Hon'ble Single Bench, the DE being in motion already clearly casts its imprimatur on the order of suspension.

It is submitted that the DE could not be proceeded with in the interregnum since the criminal trial was pending. However, the DA has now proceeded with the DE which the DA is entitled to so proceed with as per law. The findings in the DE can be produced before this Court, if required. It is pointed out that the prayer of the appellant to withdraw the order of suspension alone at this stage without an end to the DE, is not maintainable.

Replying to the submissions advanced by Mr. Banerjee, Mr. Dhar submits that the judgement of the Hon'ble High Court In Re : Naresh Kumar

(supra) violates the time-honoured principles of judicial precedence flowing from Article 141 of the Constitution of India. It is submitted that In Re:

Naresh Kumar may, at the highest, carry a persuasive value but, cannot overrule the law laid down In Re: Ajay Choudhary. The judgement In Re:

Ajay Choudhary uniquely addresses the issue of an imperative lifting of a suspension order upon the expiry of 90 days without a MOC/CS served on the delinquent. The judgement has axiomatically noticed that a suspension can be extended only with a reasoned order. Such a principle has not been laid down in any of the previous decisions of any Constitutional Court in the country. For the first time In Re: Ajay Choudhary, the Hon'ble Supreme

Court has now laid down such law.

In the light of the above discussion, the judgements as reported in 2017 SCC Online MAD 89, 2017 SCC Online J&K 284 and 2017 SCC Online

MAD 32835, relied upon by Mr. Dhar, stand distinguishable from the present facts in as much as the overwhelming effect of Paragraph 22 of In Re:

Ajay Choudhary stands in favour of completing the DE by the employer over and above revoking the suspension.

The judgement reported in 2019 (5) Gauhati Law Reports 744 is also not applicable to the present case since the appellant was served with an order

of suspension to continue until further orders vide Rule 9 of the 1996 Rules. Therefore, the continued suspension of the appellant cannot be said to be

in violation of his service rules. Moreover, the appellant had taken the first step to refute the allegations made against him in the MOC/CS dated the

3rd of April 2019 by filing a reply on the 13th of April, 2019.

Finally, Mr. Dhar has relied upon 2020 SC Bombay 6131. At Paragraph 10 of the citation (supra), the Hon'ble Bombay High Court left the issues,

including the delayed drawing up of a charge-sheet and continuance of the order of suspension, to be decided in a fresh judicial review and, such

arrangement was found to be in consonance with In Re: Ajay Choudhary.

In view of the closure brought to the facts of the present case by permitting the DE to conclude the issues, the above referred decision of the Hon'ble

High Court at Bombay also stands distinguished.

Mr. Banerjee, Ld. Counsel for HMC, further draws the attention of this Court to the judgements reported in 1994 (4) SCC 126, 1996 (3) SCC 157 and

1997 (4) SCC 1 underscoring the principle that qua a Charge of embezzlement of funds, the public interest would be better served if the DE is

concluded without interfering in the order of suspension.

Having heard the parties and considering the materials placed, this Court must now notice that In Re: Ajay Choudhary intended to chalk out a

procedure whereby the rights of a suspended employee to life and to a speedy trial qua a DE have been balanced with the obligations imposed on his

employer. Therefore, the Hon'ble Apex Court, at Paragraph 20 of In Re: Ajay Choudhary (2015) 7 SCC 291, inter alia, held that though extrapolating

the quintessence of the proviso to Section 167(2) CrPC, 1973 to moderate suspension orders in cases of DEs, such extrapolation stand qualified by the

observations at Paragraph 18(8) of the said judgement. Paragraph 18(8) reads as follows:-

18(8) Ultimately, the Court has to balance and weigh the several relevant factors-â??balancing test? or â??balancing process? - and determine in

each case whether the right to speedy trial has been denied in a given case.

And again at Paragraph 18(9), the Hon?ble Apex Court has opined as follows:-

(9) Ordinarily speaking, where the court comes to the conclusion that right to speedy trial of an accused has been infringed, the charges or the

conviction, as the case may be, shall be quashed. But this is not the only course open. The nature of the offence and other circumstances in a given

case may be such that quashing of proceedings may not be in the interest of justice. In such a case, it is open to the court to make such other

appropriate order-including an order to conclude the trial within a fixed time where the trial is not concluded or reducing the sentence where the trial

has concluded-as may be deemed just and equitable in the circumstances of the case.

Accordingly, the definite directions at Paragraph 21 of In Re: Ajay Choudhary follow:-

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.

However, at Paragraph 22 the Hon'ble Apex Court has finally held that 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. It shall be though open to the appellant to challenge his continued suspension in any manner known to law - such challenge being obviously subject to judicial review. Paragraph 22 reads as follows:

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.

In the facts of the present case too, the DE has commenced with the issuance of the MOC/CS on the 3rd of April, 2019. The appellant has taken his first step to participate in the DE by filing his reply on the 13th of April, 2019.

The appellant, as allowed by law vide Paragraph 22 of In Re: Ajay Choudhary (supra), challenged his suspension by filing WP-I. However, such challenge was nearly four years after his suspension on the 14th of August, 2015 with WP-I being filed in February, 2019. Thereafter, the appellant filed WP-II challenging the DE.

Therefore, standing at the present junction of facts, the appellant's case is *pari materia* to the exception carved out at Paragraph 22 of In Re: Ajay Choudhary. Any judicial review of his order of suspension being coterminous with a continuing DE, ought to be in favour of the former yielding to the latter and, such has been finally decided by the Hon'ble Single Bench. This Court is accordingly of the considered view that contrary to arguments advanced by Mr. Dhar, the judgement and order of the Hon'ble Single Bench dated 20th December, 2019 and presently under appeal, does not fall foul of In Re: Ajay Choudhary.

Accordingly, this Court finds the reasoning offered by the judgement and final

order dated 20th December, 2019 of the Hon'ble Single Bench directing the employer to complete the task of enquiring into the charges of accumulation of assets disproportionate to the appellant's known sources of income to be acceptable. This Court also does not find any flaw with the reasoning offered by the Hon'ble Single Bench that a DE emanating from a matrimonial proceeding is distinguishable from one under the PC Act.

At the same time, while agreeing that the test of 'balance?' as laid down at Paragraph 18(8) of In Re: Ajay Choudhary (supra) leans heavily at this point of time in favour of completing the DE rather than lifting the order of suspension, this Court is at variance with the finding arrived at by the Hon'ble Single Bench that with the raise in his subsistence allowance from 50% to 75%, the grievances of the appellant stand partially ameliorated. To the mind of this Court, the effect of such partial amelioration may be more financial than legal and, cannot make out a case for continuing the suspension of the appellant on this reason alone, without a DE in place.

Furthermore, on a complete interpretation of Rule 9 under Chapter IV of the HMC Officers (Other Than Those Appointed by the Mayor-in-Council) and Employees' (Classification, Conduct, Control and Appeal) Regulations, 1996 (for short the 1996 Regulations) and, particularly Rule 9(3) thereof, the suspension of the appellant shall be deemed to remain in force pending the departmental enquiry. Rule 9(3) reads as follows:-

9. (1) The appointing authority or any authority to which it is subordinate may place a Corporation Officer or employee under suspension :-

(a) Where a disciplinary proceeding or departmental enquiry against him is contemplated or is pending, or

(b) Where a case against him in respect of a criminal offence is under investigation or trial.

.....

(3) Corporation employee who is detained in custody for a period exceeding 48 hours under any law preceding for preventive detention or as a result

of a proceeding either on a criminal charge or otherwise, shall be deemed to have been suspended by an order of the appointing authority, w.e.f. the

date of his detention and shall remainder suspension until further orders (emphasis supplied). A Corporation employee who is under going a sentence

of imprisonment of criminal case has been registered by the police against a

Corporation employee under section 304(6) of the Indian Penal Code

regarding dowry death, shall also be dealt with in the same manner, pending a decision in the disciplinary action to be taken against him.

.....

This Court is therefore of the view that the stand taken by Ld. Counsel for HMC deserves to be favourably considered in as much as the order of

suspension issued against the appellant is required to be construed to be subsisting until further orders pending the DE. It needs to be iterated that

while suspending the appellant, the DA took care to notice both the aspects of a deemed suspension following custodial detention arising out of a

criminal charge, as also such suspension being in aid of a DE.

In the backdrop of the above discussion, it needs no clarity that with the suspension permitted to continue until further orders vide Rule 9(3) of the

1996 Rules (supra), there could be no requirement on the part of the DA to pass apropos reasoned orders extending the suspension. To the further

mind of this Court the definite directions at Paragraph 21 of In Re: Ajay Choudhary would cease to apply having regard to the *pari materia* factual

situation referred to at Paragraph 22 of the same judgement arising out of a DE in motion. Therefore, this Court is of the view that having regard to

the admitted fact that the DE has proceeded against the appellant, the balance of convenience now lies in concluding the DE within a stipulated period

as directed by the Hon'ble Single Bench.

In the light of the above discussion, this Court would pluck only a solitary leaf out of In Re: Naresh Kumar for the purpose of underscoring the point

that the gravity of the charges levelled against the appellant of amassing huge assets disproportionate to his known sources of income also persuade

this Court to affirm the judgement and order of the Hon'ble Single Bench dated 20th December 2019 directing a time-bound completion of the DE.

This Court is also *ad idem* with the finding of the Hon'ble Single Bench that it is the prerogative of the employer to enquire into the charges under the

PC Act against the appellant.

Further, this Court strikes down the reasoning of the Hon'ble Single Bench that by reason of the enhanced suspension allowance, the grievances of the

appellant stood partially ameliorated. Such reasoning is not apropos the legal tests to be applied to an order of suspension and therefore, to the above

extent, the findings of the Hon'ble Single Bench are found to be unsustainable.

On a cumulative assessment of all points as discussed above, this Court is not required to compare the precedential correctness of In Re: Naresh

Kumar apropos In Re: Ajay Chaudhury, except to respectfully observe that both revolve in their respective factual orbits.

The respondents/HMC shall now conclude the departmental enquiry as directed by the Hon'ble Single Bench.

A.P.O. No. 45 of 2021 with W.P.O. No. 96 of 2019 with W.P.O. No. 203 of 2019 with IA No: GA/2/2020 (Old No.GA/297/2020) stand accordingly

disposed of.

There will be no order as to costs.

Parties shall be entitled to act on the basis of a server copy of the order placed on the official website of the Court.

Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

I agree.