Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

WRIT PETITION NO. 397 OF 2016

Gulraiz Ahmed Raza

Vs

Federation of Pakistan through Federal Board of Revenue, etc.

PETITIONER BY: Mr. Mushtaq Ahmed Mohal, Advocate.

RESPONDENTS BY: Mr. Saeed Ahmed Zaidi, Advocate.

DATE OF HEARING**:** 29.03.2021.

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BABAR SATTAR, J.- The petitioner is serving as an Auditor (BS-16) in the Federal Board of Revenue, who is aggrieved by order dated 02.11.2015, whereby he has been suspended for the period of three months pursuant to powers under Section 5(1) of the Government Servants (Efficiency and Discipline) Rules, 1973 **("E& D Rules")**.

2. Learned counsel for the petitioner submitted that this is the third round of the petitioner being investigated on the same charges that date back to the year 2005 in relation to a refund in the amount of Rs.17.47 Million to M/s World Magnetic Fashion Private Limited. That the petitioner was reinstated in the service after the first round of suspension on 13.01.2009 and subsequently a second show cause notice was issued and fresh inquiry was ordered by order dated 03.02.2009. That the second charge sheet was issued on 20.04.2012 and an inquiry report exonerating the petitioner was issued on 31.08.2012. Learned

counsel stated that the petitioner was once again suspended on the same allegations through the impugned order for the period of three months, which order was never extended. That pursuant to section 5 of the E&D Rules, suspension could not be continued beyond the period of three months unless a speaking order had been passed, which did not happen in the instant case.

3. Learned counsel for the petitioner stated that charge sheet was issued for the third time along with statement of allegations and even after the passage of almost five years, the inquiry has still not been concluded even though there is no suspension order against the petitioner in field. That the petitioner has not been allowed to rejoin the service and has stayed suspended till date. Learned counsel further stated that the act of continuing suspension is depriving the petitioner of the opportunity to work and is in a breach of his rights guaranteed under Article of 9, 14 and 18 of the Constitution.

4. Learned counsel for the petitioner stated that criminal references No.55 to 57 of 2011 against the petitioner as well as five other accused persons namely i. Dr. Amir Nawaz Hamed, Additional Collector (Customs), Karachi, ii. Sabir Jamal, Deputy Collector (Customs), Karachi, iii. Gari Khan, Senior Auditor, RTO, Karachi, iv. S.M. Ibrahim, Senior Auditor, RTO, Karachi, and v. Nisar Ahmad, Deputy Director, AGPR, Karachi, are pending in the Accountability Court due to which he remains under suspension. And that the other co-accused persons belong to the same service as him and despite criminal proceedings pending against them, just as the petitioner, they are not under suspension and

consequently the petitioner is aggrieved for being subjected to discrimination for the purposes of Article 25 of the Constitution.

5. Learned counsel for the respondent stated that the petitioner has been suspended pursuant to the authority vested in the Federal Government under Article 194 of the Civil Service Regulations which allows it to keep somebody under suspension who has been released on bail with criminal proceedings pending against him. Learned counsel further states that such suspension is given effect under Rule 5 of the E&D Rules and the suspension period is extended every three months, and in the instant case the latest suspension order was given effect in January 2021. Learned counsel further submitted that the petitioner is not aggrieved as he is receiving full salary and is entitled to all service benefits. It is only that the petitioner is not placed on active duty and that there is wisdom behind this policy as officials who are under trial for criminal offences being put on active duty would be embarrassing for the Federal Government as employer.

6. In response to the assertion of the learned counsel for the petitioner that similarly placed government employees also charged in the same NAB reference as the petitioner are on active duty and have not been suspended, learned counsel for the respondent sought some time to furnish a detailed report which was subsequently submitted before this Court. The allegation against the petitioner is detailed in report filed on behalf of respondents as follows:

> "the appellant being the prime accused in NAB Reference 54/07 and 55/07 he cannot be treated at par with other co-accused in the said cases who had comparative lesser role. The NAB References and their proceedings revolve around the fact that the accused petitioner was the real mastermind behind the issuance of bogus refunds aggregating Rs.30.5 Million and that he transferred Sales Tax refunds to his real brother's bank account and that he along with his wife opened an account in MCB Kareem Abad Branch, Karachi where bogus refunds aggregating Rs.33,510,645/- were finally routed. According to the Reference, the accused petitioner was allegedly the Processing Officer and was therefore required to verify the genuineness of the refund claims. The petitioner not only failed to discharge his duty but also misguided his Supervisory Officer."

7. As regard the non extension of suspension order in relation to co-accused who are facing trial with the petitioner, the report of the respondent states the following:

> "The petitioner's contention that other co-accused have not been suspended which is against Article 25 of the of the Constitution of the Pakistan, is misplaced as the roles and gravity of charges against the other co-accused are not the same as the once against the petitioner who had much large and prima facie established in the issuance of bogus refunds."

8. Article 194 of the Civil Service Regulations states the following:

194. A Government servant who has been charged for a criminal offence or debt and is committed to prison shall be considered as under suspension from the date of his arrest. In case such a Govt. servant is not arrested or is released on bail, the competent authority may suspend him, by specific order, if the charge against him is connected with his position as Government servant or is likely to embarrass him in the discharge of his duties or involves moral turpitude. During suspension period the Government servant shall be entitled to the subsistence grant as admissible under F.R-53.

9. Rule 5 of E&D Rules states the following:

5. Inquiry Procedure.-(1) The following procedure shall be observed when a Government servant is proceeded against under these rules:-

(i) In case where a Government servant is accused of subversion, corruption or misconduct, the authorized officer may require him to proceed on leave or, with the approval of the authority suspend him, provided that any continuation of such leave or suspension shall require approval of the authority after every three months. Provided further that where the authority is President or Prime Minister, the Powers of the authority under this clause shall be exercised by the Secretary, Establishment Division.

(ii) The authorized officer shall decide whether in the light of facts of the case or the interests of justice an inquiry should be conducted through an Inquiry Officer or Inquiry Committee. If he so decides, the procedure indicated in rule 6 shall apply.

(iii) If the authorized officer decides that it is not necessary to have an inquiry conducted through an Inquiry Officer or Inquiry Committee, he shall-

(a) by order in writing, inform the accused of the action proposed to be taken in regard to him and the grounds of the action; and

(b) give him a reasonable opportunity of showing cause against that action: Provided that no such opportunity shall be given where the authority is satisfied that in the interest of the security of Pakistan or any part thereof it is not expedient to give such opportunity.

(iv) On receipt of the report of the Inquiry Officer or Inquiry Committee or where no such officer or Committee is appointed, on receipt of the explanation of the accused, if any, the authorized officer shall determine whether the charge has been proved. If it is proposed to impose a minor penalty he shall pass orders accordingly. If it is proposed to impose a major penalty, he shall forward the case to the authority along with the charge and statement of allegations served on the accused, the explanation of the accused, the findings of the Inquiry officer or Inquiry Committee, if appointed, and his own recommendations regarding the penalty to be imposed. The authority shall pass such orders as it may deem proper.

(2) The exercise of powers under clauses (i) and (iv) of sub-rule (1) by the authorized officers in the Pakistan Missions abroad shall, unless already so provided, always be subject to the approval of the authority.

10. The various instructions in the ESTA Code that regulate the authority of the executive to suspend an employee are as follows:

(i) *CHAPTER 8, Part- II, Conduct, Efficiency and Discipline, Serial no. 24.3, Approval of Competent Authority for Extension in Suspension, p. 824, Esta Code, Vol (1) Edition, 2015.*

"Approval of Competent Authority for Extension in Suspension

A reference is invited to the Establishment Division Office Memorandum of even number, dated the 22nd February, 1975, wherein the legal position with regard to suspension, extension of suspension period and reinstatement of the civil servants was explained.

2. It has come to the notice of the Establishment Division that, on the basis of the above instructions, civil servants under suspension are being re-instated on the ground that approval of the authority for their continued suspension was not obtained before the expiry of three months of their suspension or the extended period of suspension.

3. It may be clarified that the intention of the Establishment Division in circulating the legal position contained in the O.M. referred to above was to impress upon the Ministries/Divisions the importance of obtaining the approval of the authority for the continued suspension of a civil servant well in time. As has been stated in para 2 (b) of O.M. referred to above, it is necessary to obtain orders of the authority for the reinstatement of a civil servant who is under suspension.

4. Ministries/Divisions are requested to take necessary steps to obtain the approval of the authority for suspension of a civil servant after every three months well in time before the expiry of the period of suspension. In no case should a government servant under suspension be re-instated without the approval of the authority. [Authority.- Estt. Division's O.M.No.7/2/75-DI, dated 16-3-1976].

(ii) Chapter 8, Part-II, Conduct, Efficiency And Discipline, Serial No. 25.1, Extension in period of Suspension, P.826, Esta Code, Vol (1) Edition, 2015.

"*Extension in Period of Suspension*

It has been observed that, while making a request for extension in the suspension period of a civil servant under suspension on expiry of the current sanction after three months, the Ministries/Divisions do not mention the stage of disciplinary proceedings/inquiry etc. against the accused.

2. It has, therefore, been decided that, *whenever such a request is made by the Ministries/Divisions, the present position of the disciplinary case including the stage of inquiry, if it is in progress, may invariably be stated in the proposals for extension in the period of suspension* of the accused officer. [Authority.- Estt. Division's O.M. No. 2/26/86-D.I., dated 30-8-1987]."

(iii) *CHAPTER 8, Part- II, CONDUCT, EFFICIENCY AND DISCIPLINE, Serial no. 31.2, Speedy Disposal of Disciplinary Cases – Submission of Reports to Establishment Division, p. 853, Esta Code, Vol (1) Edition, 2015.*

"Speedy Disposal of Disciplinary Cases–Submission of Reports to Establishment Division

Inspite of the instructions issued vide Establishment Division's O.M.No.F.32/48-Estt-(SE), dated 21-7-1949, instances have been brought to the notice of government where disciplinary cases have been pending for as long as two years or even more. The question of speedy disposal of disciplinary cases has, therefore, been considered by government again and it has been decided that the following instructions should be strictly observed by the Ministries/ Divisions.

2. As stated in paragraph 2 of the Establishment Division Office Memorandum dated the 21st July, 1949 quoted above, no government servant should be placed under suspension except when it is really necessary. When, after due consideration and care, it is decided to suspend an officer, it should be the primary responsibility of the Head of the Ministry/Division/Department to see that the case against the government servant is disposed of as expeditiously as possible. In order to enable the Head of the Ministry/Division to watch the progress of each case where a government servant has been suspended and issue necessary directions for its speedy disposal, the fortnightly statements as prescribed in paragraph 2 of the Office Memorandum dated the 21st July, 1949, referred to above should, invariably, be submitted to him by the office concerned.

3. Disciplinary proceedings against government servants placed under suspension should be finalized within two months of the date of suspension. If, in any case, it is not possible to finalize (within the time limit of two months), departmental proceedings against a government servant under suspension, the matter should be reported to the Establishment Secretary giving the following details :- (i) Particulars of the case; (ii) Reasons for delay; and (iii) The

period within which the case is expected to be finalized. The Establishment Secretary, after scrutinizing the report, will offer such advice to the Ministry/Division/Department as he may consider necessary with regard to the speedy disposal of the case. If the Establishment Secretary is satisfied in any case that the suspension of the government servant concerned is no longer justified or necessary, he may recommend to the competent authority to cancel the order of suspension. In cases relating to government servants Grade 17 and above, orders of suspension may also be other than cancelled by the Head of the Ministry or other competent authority if he is satisfied, at any time, before the finalization of the disciplinary proceedings against him that the suspension of the government servant concerned is no longer justified or necessary.

4. The quarterly statements as prescribed under Establishment Division Office Memorandum dated the 21st July, 1949 showing particulars of government servants under suspension and the stage of such case should continue to be forwarded to the Establishment Division. [Authority.- Estt. Division's O.M. No. 3/53/58-SE II, dated 17-1-1959]".

(vi) *CHAPTER 8, Part- II, CONDUCT, EFFICIENCY AND DISCIPLINE, Serial no. 33.1, Suspension of a Government Servant Accused of Criminal Offences, p. 869, Esta Code, Vol (1) Edition, 2015.*

"Suspension of a Government Servant Accused of Criminal Offences

In cases where government servants are accused of criminal offences, frequent references are made to the Establishment Division on issues such as: (i) whether, on their committal to prison, they are to be suspended by a specific order or their suspension is automatic; (ii) whether or not on their release on bail after arrest, they can be reinstated in service; (iii) whether their continued suspension requires approval of the authority after every three months.

2. The matter has been considered in the Establishment Division in consultation with the Law Division. It has been held that cases of the above nature are to be dealt with under Article 194 of the Civil Service Regulations which are existing rules and which cannot be over-ridden by administrative instructions contained in Section IV of Appendix-3 of Fundamental Rules and Supplementary Rules Vol. II.

3. In the context of the points mentioned in paragraph 1, the position that emerges from Article 194 of CSR is explained below:-

(a) a government servant committed to prison either for debt or on a criminal charge, should be considered as under suspension from the date of his arrest and until the termination of the proceedings against him, i.e., his suspension is automatic from the date of arrest till termination of proceedings against him ;

(b) a government servant, against whom a criminal charge or proceeding for arrest for debt is pending, should also be placed under suspension by the issue of specific orders to this effect during the periods when he is not actually detained in custody or imprisoned (e.g. whilst released on bail) if the charge made or proceedings taken against him is connected with his position as a government servant or is likely to embarrass him in the discharge of his duties as such or involves moral turpitude ; and

(c) the requirement of obtaining approval of authority for extension of suspension period after every 3 months laid down in Government Servants (Efficiency and Discipline) Rules, 1973 applies to suspensions ordered under these rules. Article 194 does not mention any such requirement.

4. In view of the position stated above, the answers to the queries mentioned in para 1 are as follows in seriatim:-

(i) Suspension, under Article 194 is automatic.

(ii) In the light of what is stated in the preceding paragraph, the competent authority can, in case the

accused official is no longer detained in custody, reinstate him in service unless it likes him to continue to be under suspension on the consideration that the charges against him are connected with his position as a government servant or is likely to embarrass him in the discharge of his duties as such or involve moral turpitude. From the date of reinstatement onwards, the government servant will no doubt be paid full pay. However, adjustment of allowances for the period he remained under suspension will be made as Article 194 envisages after the termination of the proceedings.

(iii) Approval of the competent authority for suspension under Article 194 is not required every 3 months.

5. With reference to (i) and (ii) in the preceding paragraph, the following administrative instructions may also be followed :- (a) a report may be immediately submitted to the "competent authority" whenever a person is committed to prison and is considered to be under suspension under Article 194 CSR in order to ensure that the competent authority remains in touch with the position of the official and his case; the fact of suspension may also be notified under advice to all concerned including the audit authorities in terms of Article 194 CSR; and (b) a report on the progress of the criminal case leading to the suspension of a government servant under Article 194, CSR, as the case may be, be submitted to the authorized officer every three months for his information to ensure that he remains in touch with the position of the official and his case.

6. The O.M. issues with the concurrence of the Ministry of Finance. [Authority.- Estt. Division's O.M.No.4/12/74-DI, dated 10-3-1980].

11. Guidance can also be sought from Rule 7(i) of the Civil Servants Promotion (BPS-18 to BPS-21) Rules, 2019 pursuant to which a pending criminal proceeding can only be a basis to defer a government servant from being considered for promotion for a period of three years from the date on which investigation into

such allegation has been ordered. Rules 7(e) and 7(i) of the Civil Servants Promotion (BPS-18 to BPS-21) Rules, 2019 state the following:

> *7.* ***Conditions for deferment****.—On consideration for promotion in order of seniority, a civil servant shall be recommended for deferment, if—*
>
> *(e) disciplinary or departmental proceedings are pending against the civil servant;*
>
> *Provided that this clause shall not be applicable in cases, where on the date of consideration of the civil servant for promotion, such proceedings are pending for more than a year and the delay has not been caused by any reason attributable to the officer;*
>
> *(i) an inquiry, investigation, case or a reference is pending against any civil servant in Anti-Corruption Establishment, Federal Investigation Agency, National Accountability Bureau or such other organization by whatever name called for:*
>
> *Provided that this clause shall not be applicable in such cases, where on the date of consideration of a civil servant for promotion, such an inquiry, investigation, case or reference is pending against him for more than three years and the delay has not been caused by any reason attributable to the officer;"*

12. The scope of a person's right to life and livelihood has addressed in various judgments as follows:

(i) *The Board of Trustees of The Port of Bombay v. Dilipkumar Raghavendranath Nadkarni and others (AIR 1983 SC 109)*

"Article 21 of the Constitution of India reads as: "No person shall be deprived of his life or personal liberty except according to a procedure established by law".

Justice D.A. Desai of Supreme Court of India observed in the judgment:

The expression 'life' does not merely connote animal existence or a continued drudgery through life. The expression 'life' has a much wider meaning Where therefore the outcome of a departmental enquiry is likely to adversely affect reputation or livelihood of a person, some of the finer graces of human civilization which make life worth living would be jeopardised and the same can be put in jeopardy only by law which inheres fair procedures."

(ii) *Ms. Shehla Zia v. WAPDA (PLD 1994 SC 693).*

"The word "life" has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity legally and constitutionally."

(iii) *National Engineering Services Pakistan [Nespak] (Pvt.) Limited Vs Kamil Khan Mumtaz (2018 SCMR 211)*

"It is now well established that right to life as envisaged by Article 9 of the Constitution includes all those aspects of life which go to make a man's life meaningful, complete and worth living. In the case of Employees of Pakistan Law Commission v. Ministry of Works (1994 SCMR 1548), it has been laid down that Article 9 of the Constitution which guarantees life and liberty according to law, is not to be construed in a restrictive manner. Life has larger concept which include the right of enjoyment of life, maintaining adequate level of living for full enjoyment of freedom and rights."

13. As held in Shehla Zia and followed ever since, the right to life means the right to a meaningful life and not merely the right to exist. Article 9 of the Constitution equally guarantees the right of every citizen to freedom. While principles of policy

listed in Chapter 2 of the Constitution are not justiciable, they do help elucidate the nature of relationship between the citizens and the state envisaged by our Constitution. Article 37(e) counsels the state to "make provision for securing just and humane conditions of work". Article 38 speaks of "ensuring equitable adjustment of rights between employers and employees" and provision of "facilities for work and adequate livelihood with reasonable rest and leisure."

14. The right to meaningful life and liberty and amicable work conditions cannot be disregarded in construing the employment relationship between the state and public sector employees. The mere payment of a salary while an employee stays in a state of suspension is not sufficient to uphold the constitutional promise of life and liberty under Article 9, of dignity under Article 14 and the instruction to provide for just work conditions under Article 37. It is the employment of one physical and mental faculties in meaningful work that brings satisfaction and happiness, the pursuit of which falls within the scope of Article 9 as interpreted in Shehla Zia. Of course the entitlements under Article 9 can be fettered in accordance with law. But any constraint imposed on a fundamental right and entitlement must be done in furtherance of a legitimate state interest in a manner least restrictive and by means proportionate to realize such state purpose. It is in this context that it needs to be determined whether the executive branch of the state has the authority to keep an employee suspended for an indefinite

period merely because criminal charges have been framed against him that remains to be proved after a fair trial.

15. This then brings us to the right to fair trial, which has also been delineated in various judgments. Let us reproduce dicta from two judgments of the august Supreme Court where it has admonished the use of discretion such that it produces injustice and has reiterated that delay in dispensation of justice undermines the guarantee of Article 10A of the Constitution.

(i) *Pir Imran Sajid Vs Managing Director/General Manager (Manager Finance) Telephone Industries of Pakistan (2015 SCMR 1257)*

"11. It hardly needs to be emphasized that the whole edifice of governance of the society has it genesis in the Constitution and laws aimed at to establish an order, inter alia, ensuring the provisions of socio-economic justice, so that the people may have guarantee and sense of being treated in accordance with law that they are not being deprived of their due rights. Provision of Article 4 embodies the concept of equality before law and equal protection of law and save citizens from arbitrary/discriminatory law and actions by the Governmental authorities. Article 5(2) commands that everybody is bound to obey the command of the constitution. Every public functionary is supposed to function in good faith, honestly and within the precincts of its power so that persons concerned should be treated in accordance with law as guaranteed by Article 4 of the Constitution. It would include principles of natural justice, procedural fairness and procedural propriety. The action which is mala fide or colourable is not regarded as action in accordance with law. While discharging official functions, efforts should be made to ensure that no one is prevented from earning his livelihood because of unfair and discriminatory act on their part.

12. It is now well laid down that the object of good governance cannot be achieved by exercising discretionary powers unreasonably or arbitrarily and without application of mind but objective can be achieved by following the rules of justness, fairness, and openness in consonance with the command of the Constitution enshrined in different Articles including Articles 4 and 25. The obligation to act fairly on the part of the administrative authority has been evolved to ensure the rule of law and to prevent failure of the justice.

(ii) *Mrs. Shagufta Shaheen v. State (2019 SCMR 1106)*

The august Supreme Court in this case held that "long delays in deciding matters did not sit well with the right to fair trial and due process guaranteed as a fundamental right under Art. 10A of the Constitution."

16. There is nothing in our Constitution to gainsay that the purpose of rule of law and the justice system is to punish the guilty i.e. those whose crimes have been proved through a fair trial, and not the accused. Our criminal justice system is based on presuming every person to be innocent of any offence that he may be accused of, until proven guilty in accordance with law. Merely because a person has been accused of an offence, his fundamental rights as guaranteed by the Constitution cannot be snatched away. The accusation of an offence and the establishment of the offence after a fair trial in accordance with law are vastly different things. The fundamental rights of a person cannot be suspended in the anticipation that he might be proven guilty after being tried except to such extent as clearly provided for by law. The allegation in itself can have an impairing effect, placing the dignity and integrity of the person under a cloud, and lowering him in the estimation of right

thinking people within the society. It is also in this context that justice delayed is tantamount to justice denied. The complaint and the accused both have a right to swift dispensation of justice.

17. Article 10A prohibits determination of civil rights or imposition of a penalty without due process and a fair trial. Thus, suspension from service that is not the form of punishment, but as a intervening step to enable an inquiry or due process to take its course before determination of liability, cannot be allowed to linger on indefinitely and acquire the form of punishment in its own right. Such punishment would fall foul of Article 10A of our Constitution. Let us reproduce dicta on the issue of suspension:-

(i) *Messrs East-End Exports, Karachi V. The Chief Controller of Imports and Exports, Rawalpindi (PLD 1965 SC 605)*

"suspension may be a punitive suspension or one in aid of an enquiry. An order in the nature of punishment is always required to be preceded by a properly constituted inquiry. The other kind of suspension is designed to facilitate the due prosecution of the enquiry. Such a temporary suspension is deemed to be an implied term in every contract of service. Section 16 of the General Clauses Act also lays down that an authority who has got power to appoint has also the power to suspend. It has therefore been held that if an authority, when holding an enquiry, is satisfied that the charge against the public servant is connected with his position as a Government servant or is likely to embarrass him in the discharge of his duties or involves moral turpitude, he can suspend him pending the enquiry."

(ii) *Muhammad Haroon v. Water and Power Development Authority (PLD 1978 Lahore 1108)*

"order suspending an employee is of a temporary phase and cannot be termed to affect the terms and conditions of his service, therefore it would give no cause of action to the suspended. In the present case the petitioner's suspension from service was not a penalty…"

(iii) *Ghaffar Ali and others v. Provincial Police Officer, Khyber Pakhtunkhwa and others (2014 PLC (C.S) 558)*

"suspension may be punitive or one in aid of an enquiry. Order in the nature of punishment is always required to be proceeded by a properly constituted enquiry. Suspension is designed to facilitate the due prosecution of the enquiry. Temporary suspension is deemed to be an implied term in every contract of service.

Suspension of a government servant during the course of his service simply means that no work is to be taken from him during the period of suspension. Suspension is only a temporary measure, wherein the employees are entitled to their full emoluments."

(vi) *Yousaf Hayat v. Additional Chief Secretary (2018 PLC(C.S) Note 66)*

"Civil servant cannot be suspended for indefinite period exceeding period of 90 days without further extension of suspension."

(vii) *Suo Motu Case No. 18 of 2010 (PLD 2011 SC 927)*

"The object of suspending an officer from duty during the pendency of an inquiry is that he should not be allowed to tamper with documentary and oral evidence likely to be produced in his case. This object, can be achieved in a very short time and if the case is likely to take more time then the easiest way to avoid it is to transfer him to some other department, so that he may not be able to temper with the evidence that may be produced against him.

Undoubtedly under, the Service Rules there is ample power with the Government to suspend a government servant both as a measure of penalty and during the pendency of the departmental enquiry. But all actions

taken under these rules must be based on the principles of natural justice, otherwise there was no need to frame them.

The power of suspension, therefore, must be exercised in a reasonable and fair manner. The moment the effect of the exercise of such power is found to be unfair and unjust, the government servant, will be entitled to challenge it, and courts of law if satisfied that such orders are based on arbitrary exercise of power will not hesitate to set them aside as they will be in clear violation and breach of statutory rules."

18. *Ajay Kumar Choudhry v. Union of India through its Secretary and another (2015) 7 SCC 291* was decided by the Indian Supreme Court and is not a binding precedent. But the opinion in terms of how it conceptualizes the scope of suspension and the deleterious effect of using a tool meant to facilitate due process to thwart such process by employing it as a punishment is useful for our purposes:

"8. Suspension, specially preceding the formulation of charges, is essentially transitory or temporary in nature, and must perforce be of short duration. If it is for an indeterminate period or if its renewal is not based on sound reasoning contemporaneously available on the record, this would render it punitive in nature. Departmental/disciplinary proceedings invariably commence with delay, are plagued with procrastination prior and post the drawing up of the Memorandum of Charges, and eventually culminate after even longer delay.

9. Protracted periods of suspension, repeated renewal thereof, have regrettably become the norm and not the exception that they ought to be. The suspended person suffering the ignominy of insinuations, the scorn of society and the derision of his Department, has to endure this excruciation even before he is formally charged with

some misdemeanour, indiscretion or offence. His torment is his knowledge that if and when charged, it will inexorably take an inordinate time for the inquisition or inquiry to come to its culmination, that is to determine his innocence or iniquity. Much too often this has now become an accompaniment to retirement. Indubitably the sophist will nimbly counter that our Constitution does not explicitly guarantee either the right to a speedy trial even to the incarcerated, or assume the presumption of innocence to the accused. But we must remember that both these factors are legal ground norms, are inextricable tenets of common law jurisprudence, antedating even the Magna Carta of 1215, which assures that - "We will sell to no man, we will not deny or defer to any man either justice or right." In similar vein the Sixth Amendment to the Constitution of the United States of America guarantees that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial. Article 12 of the Universal Declaration of Human Rights, 1948 assures that - "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks". More recently, the European Convention on Human Rights in Article 6(1) promises that "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time...." and in its second sub article that "everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".

10. The Supreme Court of the United States struck down the use of nolle persequi, an indefinite but ominous and omnipresent postponement of civil or criminal prosecution in Klapfer vs. State of North Carolina 386 U.S. 213 (1967). In Kartar Singh vs. State of Punjab (1994) 3 SCC 569 the Constitution Bench of this Court unequivocally construed the right of speedy trial as a fundamental right, and we can do no better the extract these paragraphs from that celebrated decision -

"86. The concept of speedy trial is read into Article 21 as an essential part of the fundamental right to life and liberty guaranteed and preserved under our Constitution. The right to speedy trial begins with the actual restraint imposed by arrest and consequent incarceration and continues at all stages, namely the stage of investigation, inquiry, trial, appeal and revision so that any possible prejudice that may result from impermissible and avoidable delay from the time of the commission of the offence till it consummates into a finality, can be averted. In this context, it may be noted that the constitutional guarantee of speedy trial is properly reflected in Section 309 of the Code of Criminal Procedure.

87. This Court in Hussainara Khatoon (I) v. Home Secretary, State of Bihar while dealing with Article 21 of the Constitution of India has observed thus:

"No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21. The question which would, however, arise is as to what would be the consequence if a person accused of an offence is denied speedy trial and is sought to be deprived of his liberty by imprisonment as a result of a long delayed trial in violation of his fundamental right under Article 21. Would he be entitled to be released unconditionally freed from the charge levelled against him on the ground that trying him after an unduly long period of time and convicting him after such trial would constitute violation of his fundamental right under Article 21."

21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined

> *in Article 21. The question which would, however, arise is as to what would be the consequence if a person accused of an offence is denied speedy trial and is sought to be deprived of his liberty by imprisonment as a result of a long delayed trial in violation of his fundamental right under Article 21. Would he be entitled to be released unconditionally freed from the charge levelled against him on the ground that trying him after an unduly long period of time and convicting him after such trial would constitute violation of his fundamental right under Article 21.*

19. Suspension, when not ordered as a penalty under E&D Rules in accordance with due process, is a temporary device to facilitate due process in conducting an enquiry and serve the ends of justice. Such temporary device cannot be employed to perpetuate injustice by continuing to extend the period of suspension indefinitely thereby transforming it into a penalty itself. Such penalty would be based on assumption of guilt, it would thwart the presumption of innocence that attaches to every person who is the subject of an allegation and would undermine the Article 10A rights guaranteed by the Constitution. This cannot be countenanced in view of Articles 4, 8, 9, 10A and 14 of the Constitution.

20. Rule 5 of the E&D Rules provides for a 90-days suspension, which is extendable subject to approval of the competent authority. But such extension cannot be indefinite as under our constitutional scheme, no arbitrary or unstructured discretion is vested in any authority. The instruction at Serial No. 31.2 of the Esta Code requires disciplinary proceedings against government servants placed under suspension to be finalized

within two months of the date of suspension. It was held in Suo Motu Case No. 18 of 2010 (*PLD 2011 SC 927)* that, *"the object of suspending an officer from duty during the pendency of an inquiry is that he should not be allowed to tamper with documentary and oral evidence likely to be produced in his case."* Given the object and rationale of suspension as a prelude to fair and unimpeded inquiry, it cannot be imagined that more than one extension might be needed after the expiry of a 90-day suspension period to secure the evidence required for purposes of the inquiry, especially in view of the instructions within Esta Code to conclude a disciplinary inquiry expeditiously. Further under Rule 7(e) of the Civil Servants Promotion (BPS-18 to BPS-21) Rules, 2019, pendency of disciplinary proceedings can be a ground for recommending the deferment of a civil servant, but not if the disciplinary proceeding has been pending for more than a year. If an employee can't be deferred from being considered for promotion for over a year on the basis of a pending inquiry, how can he be kept in suspension for more than such period? Even from a public policy perspective how can a government servant continued to be paid salary etc. from public funds and yet not be required to discharge services? In view of the above provisions of law and principles as explained by Courts, it would only be in extra-ordinary circumstances backed by cogent reasons that suspension pending departmental inquiry and disciplinary proceedings would pass constitutional muster if extended beyond a period of one year. Even a single extension of 90-day suspension would fall foul of the law and the Constitution and amount to abuse of discretion vested in the

Federal Government under the E&D Rules and Article 194 of Civil Service Regulations if not backed by valid reasons. Suspension pending disciplinary or criminal proceedings is an aid to fair trial and due process and can't be transformed into a punishment.

21. These principles when applied to the facts of the instant case, make it abundantly clear that the continuing suspension of the petitioner amounts to abuse of authority by the respondents undermining his fundamental rights. The petitioner has been under suspension since 2009 for allegations of corruption rooted in events that transpired in 2005. There was nothing stopping the respondents from concluding his disciplinary proceedings under the E&D Rules within a reasonable time. But such proceedings have been adjourned sine die pending the outcome of a reference against him grinding along in the accountability court. The sum total of the respondent's case was that as the allegations against the petitioner are of a severe nature, he must be kept in his current state of limbo pending the outcome of his trial. The reasoning of the respondents and their nonchalant attitude in keeping the petitioner suspended for almost a decade is flabbergasting.

22. This petition is ***allowed***. The suspension order dated 02.11.2015 impugned in the petition and the subsequent re-suspension orders passed during the pendency of this petition are set-aside for being illegal, in breach of Rule 5 of the E&D Rules and the rights of the petitioner guaranteed under the Constitution. Respondent No.1 is directed to place the petitioner to a post where he discharges services to the state for which he

continues to receive a salary from the public exchequer. There is no obligation in law to keep his disciplinary proceedings pending due to the reference filed against him. It is settled law that disciplinary proceedings are independent of criminal proceedings. And if there is still the apprehension that he can influence the inquiry pending against him, he may be appointed to such post where he wields no such influence. There is no order as to costs.

(BABAR SATTAR)
JUDGE

Announced in the open Court on 22.04.2021.

JUDGE

Saeed.