

Form No. J(2)

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Saugata Bhattacharyya

W.P.A. 6235 of 2007

Basanta Kumar Roy

-vs-

The Kolkata Municipal Corporation & Ors.

For the Petitioner : Mr. Alak Kumar Ghosh,
Mr. Dilip Kumar Chatterjee

For the KMC : Mr. Ranajit Chatterjee,
Ms. Tanusree Dasgupta

Hearing concluded on: 23.11.2023

Judgment on: 23.11.2023

Saugata Bhattacharyya, J.:

The writ petition centers around the disciplinary proceeding initiated against the petitioner who was a C category employee of Kolkata Municipal Corporation (hereinafter referred to as "KMC"). The disciplinary proceeding was culminated into an order of punishment of removal from service vide order dated 31st August, 2005 passed by the Municipal Commissioner.

It has been specifically submitted by Mr. Ghosh, learned advocate representing the petitioner that representation was preferred on 30th October, 2005 after receipt of the final order of punishment dated 31st August, 2005 wherein it has been specifically stipulated that such representation should not be treated as an appeal. However, according to the petitioner the representation dated 30th October, 2005 could not fetch any result which triggered the present writ petition wherein challenge has been thrown to initiation of disciplinary proceeding as well as issuing of order of punishment dated 31st August, 2005 against the petitioner and the order of the Mayor dated 21st September, 2006.

While assailing the initiation of disciplinary proceeding against the petitioner it has been argued on behalf of the petitioner that the charge sheet was issued by the Joint Municipal Commissioner who initially acted as Disciplinary Authority but subsequently the final order of punishment was issued by the Municipal Commissioner but in terms of Section 18 and Section 21 of the Kolkata Municipal Commission Act, 1980 (hereinafter referred to as the "said Act of 1980") neither Joint Municipal

Commissioner nor Municipal Commissioner is authorised to act as Disciplinary Authority.

In addition thereto the report of the Enquiry Officer has also been questioned on the score that the same is devoid of reasons. It has also been alleged that the order of Municipal Commissioner imposing punishment of removal from service is perverse and the said punishment is disproportionate to the findings of the Enquiry Officer. Lastly it has been argued that in terms of Section 21(5) of the said Act of 1980 for imposing punishment of removal from service prior consultation with the Municipal Service Commission is necessary but in the present case the decision relating to imposing punishment upon the petitioner has been subsequently ratified by the Municipal Service Commissioner which offends the provisions as contained under Section 21(5).

In addition thereto attention of this Court has been drawn to Circular dated 1st February, 2002 issued by the then Municipal Commissioner which is at page 32 of the affidavit-in-opposition used on behalf of the KMC. The said Circular dated 1st February, 2002 provided power of Appellate Authority in favour of Mayor in the event

Municipal Commissioner passes order as Disciplinary Authority in respect of B, C and D category post in unavoidable circumstances. In reference to this Circular dated 1st February, 2002 reliance has been placed on one unreported judgement of a coordinate Bench dated 15th June, 2015 on the writ petition being WPA 1358 of 2000 **(Smt. Kusum Roy & Ors.-vs The Calcutta Municipal Corporation & Ors.)** and it has been contended that the said Circular dated 1st February, 2002 whereby appellate power has been conferred upon the Mayor of KMC has been found to be inappropriate by the coordinate Bench in view of the relevant provisions as contained in the KMC Act of 1980. Emphasis has been laid while arguing the matter on behalf of the petitioner on the authority of Municipal Commissioner/Joint Municipal Commissioner to act as Disciplinary Authority while initiating proceeding against the petitioner since the same has not been contemplated under Section 21 of the said Act of 1980. According to the petitioner if the said Circular dated 1st February, 2002 could pass the test of judicial scrutiny in that event the KMC might have some case in the present situation but in view of the unreported judgment dated 15th June, 2015

passed by the coordinate Bench in **Kusum Roy (supra)** neither Mayor can act as Appellate Authority nor Municipal Commissioner/Joint Municipal Commissioner can act as Disciplinary Authority.

Having found the specific point taken on behalf of the petitioner relating to the authority of Municipal Commissioner/Joint Municipal Commissioner to act as Disciplinary Authority and Mayor to act as Appellate Authority in the backdrop of the decision in **Kusum Roy (supra)** this Court has posed query to Mr. Chatterjee, learned advocate representing the KMC that how Municipal Commissioner/Joint Municipal Commissioner acted as Disciplinary Authority and wherefrom Mayor derived power to act as Appellate Authority and opportunity has been granted to the learned advocate representing the Corporation to address this rudimentary issue first in order to substantiate the punishment order passed against the petitioner dated 31st August, 2005.

Mr. Chatterjee appearing for KMC has strenuously argued that in the event authority which is higher than the appointing authority passes order upon culmination of disciplinary proceeding the same act does not offend

principle of natural justice therefore there is no flaw in imposing punishment of removal from service against the petitioner by issuing impugned order dated 31st August, 2005 at the instance of Municipal Commissioner. In support of such contention Mr. Chatterjee has relied upon following judgments:

- i) (1997) 3 SCC 371 (Balbir Chand -vs- Food Corporation of India Ltd. & Ors.);**
- ii) (2006) 4 SCC 348 (A Sudhakar -vs- Postmaster General, Hyderabad & Anr.);**
- iii) (2007) 10 SCC 662 (Goa Shipyard Ltd. -vs- Babu Thomas);**
- iv) (2013) 10 SCC 39 (Uttar Pradesh Power Corporation Ltd. -vs- Virendra Lal (Dead) through LRS.);**
- v) Reliance has also been placed upon a judgment of the **Division Bench of Madras High Court dated 17th March, 2021** in the case of **The Executive Director -vs- P. R. Shantharam);****
- vi) (2007) 4 CHN 789 (West Bengal Council of Higher Secondary Education & Ors. -vs- Shyamanand Jha & Ors.).**

According to KMC since Municipal Commissioner/Joint Municipal Commissioner being the higher authority passed order of punishment on conclusion of disciplinary proceeding and a representation was made on 30th October, 2005 to the Mayor and the Mayor while acting as an Appellate Authority confirmed the punishment order vide order dated 21st September, 2006 the right of preferring appeal as contemplated under Section 21(4) is not denied and there is no violation of principle of natural justice.

It has been argued that it is well settled that the authority lower in rank than that of appointing authority is not authorised to act as Disciplinary Authority but the authority which is higher in rank than the appointing authority is entitled to pass order of punishment and in the present case since representation has been preferred on 30th October, 2005 which needs to be treated as an appeal; therefore the order of the Disciplinary Authority and the order of the Mayor ought not to be interfered with on the count that petitioner has been denied opportunity to

prefer appeal before the Appellate Authority in terms of the relevant statutory provisions.

Having considered the submissions made on behalf of the respective parties this Court finds it apposite to quote Section 18 and Section 21 of the said Act of 1980 and the same are as follows:

“18. Appointing authorities—Subject to the other provisions of this Act, the appointing authority in respect of the posts of officers and employees constituting the establishment of the Corporation shall be—

(a) in the case of category A posts, the Municipal Commissioner,

(b) in the case of category B posts, a Joint Municipal Commissioner, and

(c) in the case of category C posts and category D posts, such officer or officers of the Corporation as the Municipal Commissioner may, with the prior approval of the Mayor-in-Council, designate in this behalf.”

“21. Control, discipline and conduct of officers and employees—(1) Unless there is anything to the contrary, the whole time of an officer or employee of the Corporation shall be at the disposal of the Corporation and he may be employed by the Corporation in such manner as it thinks fit. Such officer or employee may also be transferred from one post to another carrying an identical scale of pay.

(2) The Corporation may, by regulation, provide for the discipline, control and conduct of officers and

employees constituting the establishment of the Corporation.

[(3) Any officer or employee of the Corporation as may be determined by regulation, may be censured, fined, penalized by withholding of increment or promotion temporarily or permanently, penalized by recovery from his pay of the whole or part of any pecuniary loss caused by him to the Corporation, reduced to a lower stage in the time-scale of pay for a specified period, reduced to a lower time-scale of pay, grade, post or service, or penalized by compulsory retirement or removal or dismissal from service for any breach of departmental rules or of discipline or for negligence of duties or for other misconduct, by the authority by whom such officer or employee has been appointed.]

[(3A) The Commissioner or the appointing authority may pass an order of suspension pending departmental proceedings or prior to the initiation of any departmental proceedings against any employee of the Corporation.

(3B) (i) An employee of the Corporation who is detained in custody for a period exceeding 48 hours on a criminal charge may be suspended by an order of the appointing authority with effect from the date of his detention and such employee shall remain under suspension until an order withdrawing the order of suspension is made by the appointing authority.

(ii) An employee of the Corporation who is undergoing a sentence or imprisonment upon conviction on a criminal charge, shall be suspended by the

appointing authority pending disciplinary proceeding against him.]

(4). An appeal against an order under sub-section (3) shall be---

(a) to the Corporation where the appointing authority is the Mayor-in-Council

(b) to the Mayor in the case of an officer or employee holding a category A post.

(c) to the Municipal Commissioner in the case of an officer or employee holding a category B post; and

(d) to a Joint Municipal Commissioner in the case of an officer or employee holding a category C post or a category D post.

(5) No officer or employee of the Corporation appointed on the recommendation of the Municipal Service Commission [or the Public Service Commission, as the case may be,] shall be reduced in rank, removed or dismissed except after consultation with such Commission.”

It is indisputable that petitioner was holding C category post therefore in terms of Section 18(c) the Officer or Officers of the Corporation as the Municipal Commissioner may, with the prior approval of the Mayor in council, designate regarding appointment of C and D category post, is the appointing authority.

Section 21 postulates control, discipline and conduct of Officers and employees and Sub-Section 3 of

Section 21 specifically empowers the authority to impose punishment order upon the employee who has appointed the said employee. Section 21(4) deals with the power of the Appellate Authority and who can act as an Appellate Authority in consideration of gradation of employees of KMC. In terms of Section 21(4)(d) Joint Municipal Commissioner is the Appellate Authority in case of an officer or employee holding category C post or category D post. Therefore on conjoint reading of Section 18 and Section 21 it transpires since petitioner was holding the post of C category, the officer defined under Section 18(c) is the appointing authority who can act as disciplinary authority and Joint Municipal Commissioner is the Appellate Authority.

Now question crops up for consideration whether Joint Municipal Commissioner can issue charge sheet against the petitioner and Municipal Commissioner can impose punishment by issuing order dated 31st August, 2005 as it has been found here. The issue needs to be determined in the backdrop of the decision of a coordinate Bench in **Kusum Roy (supra)**; this Court also finds it

appropriate to quote relevant portion of the judgment delivered in **Kusum Roy (supra)** below:

“The Municipal Commissioner claiming to be the disciplinary authority has passed the impugned Order dated February 24, 2000. This action of the authorities is questioned on the ground of lack of jurisdiction. Section 18 of the Kolkata Municipal Corporation Act, 1980 specifies the appointing authorities of the different categories of the officers and employees and Section 21 thereof deals with the control discipline and conduct of the officers and employees of the Kolkata Municipal Corporation. The writ petitioner in the present case is considered as a category ‘B’ employee. In terms of Section of Section 18(b) of the Act of 1980 the appointing authority in respect of the original writ petitioner as a category ‘B’ employee is the Joint Municipal Commissioner. Section 21(3) of the Act of 1980 allows the Corporation authorities to award punishment for any breach of departmental rules or discipline or for negligence of duties or for other misconduct. Under Section 21(3) such punishment has to be awarded by the authority by whom such officer or employee has been appointed. In terms of Section 21(3) of the Act of 1980 the disciplinary authority of the original writ petitioner is, therefore, the Joint Municipal Commissioner. Section 21(4) of the Act of 1980 allows an appeal against an order passed under sub-section (3) of section 21 to lie before the Municipal Commissioner in the case of an officer or employee holding a category ‘B’ post. The

Appellate authority in terms of Section 21(4) for the original writ petitioner is the Municipal Commissioner.

In the present case the Municipal Commissioner has acted as the disciplinary authority. The Municipal Commissioner is not the disciplinary authority for the original writ petitioner in terms of Section 21(3) of the Act of 1980. This conduct of the authorities is sought to be justified on three counts. Firstly, it is contended on behalf of the Corporation authorities that, by virtue of the Circular dated February 1, 2002 the original writ petitioner has not been denied an appellate authority as such Circular has provided that an appeal from an order passed by the Municipal Commissioner in the disciplinary proceedings could be made to the Mayor-in-Council. Secondly, the Municipal Commissioner being higher in rank than the Joint Municipal Commissioner could have discharged all functions that Joint Municipal Commissioner have. Thirdly, due to the time constraint of the Order dated December 20, 1999 and since a Joint Municipal Commissioner was not available with the Corporation authorities, the Municipal Commissioner had considered the representation and passed his reasoned order awarding punishment.

The Circular dated February 1, 2002 is subsequent to the passing off the order impugned. The Circular does not speak of any retrospective effect being given thereto. On the date when the order impugned was passed, the Circular was not in effect. In any event, the Circular is contrary to the Sections 18 and 21 of the Act of 1980. A Circular cannot be issued to confer jurisdiction on authorities which the Act does not confer

jurisdiction upon. The Circular dated February 1, 2002 has been issued by the Municipal Commissioner of the Kolkata Municipal Corporation. The Act of 1980 does not authorize the Municipal Commissioner of the Kolkata Municipal Corporation to issue such a Circular. The Circular dated February 1, 2002 is beyond the provisions of the Act of 1980. The Circular therefore is not valid.

The Circular is also not attracted in the present case as it has been issued subsequent to the order impugned. Therefore, the Circular dated February 1, 2002 does assist (sic) the Corporation authorities in justifying the Municipal Commissioner in passing the order impugned. The Municipal Commissioner is not the disciplinary authority in terms of Section 18 and 21 of the Act of 1980. Moreover, an appellate authority available to the writ petition was sought to be denied by the Corporation authorities when the Municipal Commissioner had acted as the disciplinary authority. The contention that an appeal could be made to be Mayor-in-Council is without any basis. The Act of 1980 does not postulate that an appeal could be made to the Mayor-in-Council from an order passed under Section 21(3) of the Act of 1980. The impugned order is in violation of Sections 18 and 21 of the Act of 1980 and cannot be sustained. For the same reasons the three grounds of justification are not accepted.

(emphasis supplied)

A specific query has been made to the learned advocate representing the KMC whether the judgment

dated 15th June, 2015 passed in **Kusum Roy (supra)** has been appealed against or not. From the submission made on behalf of the KMC it appears that no appeal has been preferred against the said judgment dated 15th June, 2015.

On analysing chronology of facts it appears that the Mayor attempted to act as Appellate Authority while passing order dated 21st September, 2006 but in view of the judgment delivered in **Kusum Roy (supra)** on the strength of the Circular dated 1st February, 2002 the Mayor is not authorised to act as Appellate Authority.

It needs to be taken into consideration that representation dated 30th October, 2005 was not an appeal since it was specifically stated in the said representation under the heading "Subject" that "Representation not being an appeal".

Drawing inspiration from the judgment of the coordinate Bench in **Kusum Roy (supra)** it can safely be concluded that since the petitioner was holding C category post neither Municipal Commissioner/Joint Municipal Commissioner nor the Mayor were authorised to act as Disciplinary Authority and Appellate Authority respectively.

It is trite law that right to prefer appeal is a substantive right; in absence of specific provision as contained in the statute Mayor cannot usurp the power of the Appellate Authority and pass order dated 21st September, 2006 confirming the order passed by the Municipal Commissioner who was also not authorised to act as Disciplinary Authority in absence of specific appeal provisions which grants opportunity to the petitioner to prefer appeal/second appeal/revision before the Mayor. On scrutiny of the relevant statute it does not appear that apart from Section 21(4) any appeal provision exists which grants leave to the petitioner herein holding C category post to prefer appeal against the order of the Municipal Commissioner dated 31st August, 2005.

Mr. Chatterje appearing for KMC has relied upon aforementioned judgments in order to demonstrate before this Court that higher authority in the hierarchy is authorised to pass order of punishment but on perusal of those judgments it appears that the Apex Court permitted the higher authority to act as Disciplinary Authority and to pass order of punishment taking into consideration scope

of preferring appeal/second appeal/revision against the order of punishment before the higher authority.

In **P.R. Santharam** (supra) the Division Bench refused to interfere with the decision of the reviewing authority since the writ petitioner exercised right to prefer appeal and the same was decided by the higher authority. In **Shyamanand Jha** (supra) the Division Bench set aside the order of the learned Single Judge quashing order of disciplinary authority in the back drop of facts that there was no disciplinary rule prevalent at the material point of time and in absence of any provision for appeal order of the President of the Board who acted as disciplinary authority *per se* not to be treated as illegal. In the present case Section 21(4) provides appeal provision and in breach of the same Municipal Commissioner/Joint Municipal Commissioner acted as disciplinary authority denying right of appeal subverting principle of natural justice.

In the present case in consideration of the scheme of the statute it appears no such window of preferring appeal/second appeal/revision is left open to the petitioner in terms of the relevant provisions of the statute since Joint Municipal Commissioner being the Appellate

Authority under Section 21(4)(d) issued charge sheet and Municipal Commissioner who is the Appellate Authority under Section 21(4)(c) issued order of punishment, resultant effect is gross denial of right to prefer an appeal before the Appellate Authority.

In view of aforesaid discussion both the orders dated 21st September, 2006 passed by the Mayor and 31st August, 2005 passed by the Municipal Commissioner are set aside.

Since it has been submitted that the petitioner would have retired had the order of punishment not been imposed upon him, on 31st October, 2010, therefore there is no scope left open to reinstate the petitioner in his post.

The period during which petitioner could not serve due to initiation of the disciplinary proceeding and no salary was paid, the concerned authority of KMC is directed to release 50% of the back salary.

Petitioner is also entitled to receive pensionary benefits in view of his superannuation on 31st August, 2010. The concerned authority of KMC is also directed to release pensionary benefits in favour of the petitioner upon

treating the petitioner on regular service on the date of his retirement on 31st October, 2010.

Arrear salary as per aforesaid direction shall be paid to the petitioner within eight weeks from the date of communication of this order.

Upon completing the formalities and necessary calculations which is required to be made for releasing pensionary benefits concerned authority of KMC is also directed to release pensionary benefits including gratuity and provident fund, if not paid, within twelve weeks from the date of communication of this order.

With the aforesaid direction, the writ petition stands disposed of.

However, there shall be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be given to the learned Advocates for the parties on the usual undertakings.

(Saugata Bhattacharyya, J.)