

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Original Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

WPO No. 341 of 2020

Abhishek Mukherjee

Vs.

The Board of Trustees and others

For the petitioner	:	Mr. Soumya Majumder, Mr. Sanjukta Dutta, Ms. Ashmita Chakraborty
For the respondents	:	Mr. Abhrajit Mitra, Sr. Advocate, Mr. A.K. Jena
Hearing concluded on	:	20.11.2020
Judgment on	:	25.11.2020

The Court:

1. The writ petitioner had joined the service of the Kolkata Port Trust (KoPT) as a Senior Medical Officer on probation vide Appointment Letter dated June 21, 2016, initially for a period of two years, and was posted at the Centenary Hospital. The petitioner was posted in the female ward, but was served with a suspension order dated February 13, 2018, in contemplation of a disciplinary proceeding. He was granted the liberty to draw subsistence allowance during the period of such suspension, subject to obtaining previous permission of the Deputy Chairman, Kolkata Port Trust before leaving the Headquarters. A rider was added to

the suspension order to the effect that if the petitioner wanted to draw subsistence allowance during any period of suspension, he might apply for payment of the same, enclosing a certificate stating that he had not been employed in any business or vocation for profit/remuneration of salary during the said period.

2. Accordingly, subsistence allowance was being paid to the petitioner and the suspension order continued to be renewed from time to time.
3. The petitioner preferred a writ petition, bearing W.P. No. 441 of 2018, against the suspension order and the initiation of disciplinary proceedings, which culminated in the charge-sheet against the petitioner being quashed and in a direction for payment of full salary towards subsistence allowance, since the service Regulations did not prescribe a rate of subsistence allowance.
4. During pendency of W.P. No. 441 of 2018, the petitioner appeared for the Entrance Examination for a Post Graduate course (NEET PG, 2019) on January 6, 2019. On qualifying for the said course, the petitioner made a representation before the respondent no. 3, that is, the Deputy Chairman, Kolkata Dock System, KoPT on March 19, 2019, seeking permission to appear for counselling. On April 10, 2019, a further representation was made in pursuance of the earlier one. The Senior Deputy Secretary-II, vide letter dated April 12, 2019, informed the petitioner that the respondent no. 3 had permitted the petitioner to

attend such counselling, which was scheduled to be held outside Kolkata.

5. Thereafter, the petitioner successfully acquired a seat for the Post Graduation (PG) course under the West Bengal University of Health Science. As such, on May 2, 2019, the petitioner sought a 'No Objection' from respondent no. 3, seeking permission to pursue the said course. A communication was made to the petitioner, by a letter dated May 23, 2019, permitting the petitioner to pursue such course. On the basis of such 'No Objection', the petitioner joined the course, upon complying with the formalities, under the West Bengal University of Health Science.
6. On July 26, 2019, the respondent no. 4 (Chief Medical Officer, Medical Department, KoPT), issued a letter to the petitioner asking for information as to whether the petitioner was drawing any stipend for undergoing the course. On August 16, 2019, the petitioner replied to the effect that the stipend, which was being received by the petitioner, did not fall within the ambit of any kind of profit/remuneration/salary for any business or vocation and that the course was governed by statutory Regulations holding the field and the matter of granting stipend was regulated by the State Government.
7. By a letter dated August 29, 2019, the petitioner sought for an order relieving him to pursue the said course as a resident student at the West Bengal University of Health Science. The respondent-authorities

continued to pay subsistence allowance to the petitioner from time to time, even thereafter.

- 8.** Meanwhile, W.P. No. 441 of 2018, along with a connected application, was taken up for hearing on several occasions. During such hearings, the respondent-authorities did not object to the petitioner's right to get subsistence allowance along with the stipend for undergoing his PG course.
- 9.** The respondents filed an intra-court appeal from the judgment of the Hon'ble Single Judge in the said writ petition, which was registered as APOT No. 151 of 2019, along with an application bearing GA No. 2875 of 2019. On December 23, 2019, a Division Bench of this court took up the matter and directed the respondents to pay the petitioner his subsistence allowance during the suspension, as directed by the learned Single Judge.
- 10.** On April 16, 2020, the petitioner received a show-cause notice dated April 15, 2020 from the respondent no. 4, asking for explanation pertaining to alleged violation of the petitioner of the Regulations in force related to leave for higher professional studies as well as the drawing of a monthly stipend, contemporaneously with subsistence allowance from KoPT, for pursuing the PG course.
- 11.** On April 23, 2020, the petitioner gave a reply to the show cause notice via e-mail to the respondent no. 4. Subsequently, a charge-sheet was

framed in the form of a Memorandum dated June 16, 2020 in respect of the petitioner. In the said charge-sheet, it was indicated that the Deputy Chairman and Disciplinary Authority proposed to hold an enquiry against the petitioner under Regulation 8 of the Kolkata Port Trust Employees (Classification, Control and Appeal) Regulations, 1987.

- 12.** Subsequently, an order of departmental enquiry was issued on September 9, 2020, pursuant to which a notice of hearing dated September 24, 2020 was given to the petitioner.
- 13.** The petitioner has challenged, in the present writ petition, the show-cause notice dated April 15, 2020, the charge-sheet dated June 16, 2020, the order dated September 9, 2020 and consequential notice dated September 24, 2020.
- 14.** Learned counsel appearing for the petitioner argues that, in view of the respondents having full knowledge and having permitted the petitioner to take the entrance examination and subsequently pursue the PG course as indicated above, the respondents do not have the right to punish the petitioner and/or hold any enquiry against the petitioner in that regard. At every step, the petitioner informed full details of the PG course and of the stipend being received by the petitioner over and above the subsistence allowance from the KoPT and the respondent-authorities had granted leave at every stage to the petitioner to pursue such course, with the consequential payment of stipend. Hence, it is

argued that the KoPT authorities are barred by the principles of Estoppel from initiating any disciplinary proceeding in that regard.

15. It is also argued that since the issue of pursuance of the PG course is governed by an independent statute, that is, the Post Graduate Medical Education Regulations, 2000, framed under the Indian Medical Council Act, 1956, the respondents have no jurisdiction to initiate disciplinary proceedings on such an issue against the petitioner.

16. The petitioner's counsel argues that even in the order dated February 13, 2018, suspending the petitioner, it was categorically stated that, should the petitioner want to draw subsistence allowance during the period of suspension, he might apply for payment of the same, enclosing with his application a certificate stating that he had not been employed in any business or vocation for profit/remuneration of salary during the said period.

17. Pursuant to such clause, it is argued, the petitioner submitted an application to the respondent no. 4 on August 6, 2018, accompanied by a self-certificate of even date declaring that the petitioner was not employed in any business or vocation for profit/remuneration of salary as mentioned in the letters dated February 13, 2018 and May 9, 2018.

18. Even subsequently, on the request of the petitioner, the respondent no. 3 permitted the petitioner to attend counselling for the NEET PG, 2019, which was scheduled to be held outside KoPT Headquarters, that is,

outside Kolkata, on several dates. Moreover, on the further request of the petitioner, a 'No Objection' certificate was issued on May 23, 2019 from the end of the respondent no. 3 to the petitioner subject to certain conditions as stipulated therein.

19. Hence, it is argued that the charges levelled against the petitioner in the impugned charge-sheet are *ex facie* not maintainable. The petitioner had taken the leave of the respondent-authorities at every stage and has not been drawing any profit/salary, but merely a stipend for his higher education, which does not contravene any of the regulations or statutory provisions governing the petitioner vis-à-vis his employment with the KoPT.

20. Learned senior counsel appearing for the respondents, by placing reliance on Clause 5 of the appointment letter of the petitioner dated June 21, 2016, argues that the petitioner is bound by each and all of the respondents' Rules and Regulations, prevalent and future, for regulating, recruitment, promotion, conduct, discipline, punishment and any other matter relating to the terms and conditions of service applicable to the employees of the KoPT or allotment of premises to them or their rights or privileges, either covered or not covered by any of the clauses of the Major Port Trusts Act, 1963 relating to its employees.

21. It is further argued on behalf of the respondents that the charges levelled against the petitioner are for contravention of several regulations

which bind the petitioner. As regards the charge of drawing 'stipend' of Rs.40,000/- per month over and above subsistence allowance at the rate of salary (pursuant to the order of the Division Bench), the said quantum of stipend was never disclosed to the respondents by the petitioner. Moreover, mere leave to join higher studies and/or draw consequential stipend does not absolve the petitioner from the charge of contravening the terms of his appointment with the KoPT and the rider to the leave granted to it.

22. The permission granted to the petitioner was qualified by the specific clause that the petitioner had to certify that he was not employed in any business or vocation for profit/remuneration of salary during the period of drawing subsistence allowance from the KoPT. It is evident that the nomenclature of 'stipend' does not *ipso facto* take the said remuneration outside the purview of profit/remuneration/salary from a vocation, so as not to amount to violation of the said rider accompanying the suspension order dated February 13, 2018.

23. Learned senior counsel places reliance on the judgment of *Executive Engineer, Bihar State Housing Board vs. Ramesh Kumar Singh and others*, reported at (1996) 1 SCC 327, for the proposition that a party should avail of an alternative remedy available to him against a show-cause notice, instead of invoking the jurisdiction under Article 226 of the Constitution of India. It was held therein that unless there is an

attack against the vires of the statutory provisions governing the matter or involvement of a question of infringement of any fundamental right guaranteed by the Constitution, a show-cause notice could not be said *ex facie* to be a ‘nullity’ or totally “without jurisdiction” if such notice was issued by a competent statutory authority.

24. By further relying on the judgment of a co-ordinate bench, reported at (2015) 3 CHN 216 [*Arup Basu Chowdhury vs. UCO Bank and others*], the respondents argue that it is generally unwise to recognize or lay down a rule of law in absolute terms, but the exception to the rule as recognized in that case would be so rare as to take it to the vanishing point. The context of such observation was that a challenge to an enquiry report, without waiting for the disciplinary authority to assess the grounds that may be urged against the findings rendered against a charged employee in the enquiry report has, almost in every case, to be regarded as premature and impermissible.

25. Thus, learned senior counsel argues, the present challenge against the show-cause notice, charge-sheet and ancillary orders of disciplinary proceedings and hearing are not amenable to the writ jurisdiction and the writ petition ought to be dismissed summarily.

26. Considering the submissions of both sides, it must first be considered as to whether the respondents acted within their authority to undertake an enquiry and disciplinary proceedings against the petitioner. It is evident

from Clause 5 of the appointment letter itself, as also admitted by the petitioner in the first paragraph of the writ petition, that the petitioner is subject to the KoPT Regulations of 1987. Even from the suspension order of the petitioner dated February 13, 2018, the petitioner was not exonerated of the charges pending against him, for which the impugned charge-sheet was subsequently framed. The order dated February 13, 2018, as communicated to the petitioner, stipulated that, in order to draw subsistence allowance during the period of suspension, the petitioner may apply for the same enclosing a certificate stating that he had not been employed in any business or vocation for profit/remuneration of salary during the said period.

- 27.** With regard to the question as to whether the stipend being drawn by the petitioner by virtue of his pursuing the NEE PG course is “remuneration” or “salary” or “profit” for employment in a vocation, is required to be ascertained upon considering several factors. Whether the quality and quantum of the stipend qualifies as remuneration sufficient to attract the bar imposed by the KoPT, where the petitioner is employed, is not possible to be determined without assessing the regulations governing the petitioner’s employment and the terms and conditions of such stipend.
- 28.** Although permission was granted to the petitioner to participate at different levels of the PG course, the same, by itself, was not a licence to

contravene the regulations and conditions binding the petitioner as an employee of the KoPT. Even if the application of the petitioner for drawing subsistence allowance during his suspension period was allowed, the same was based on a certificate authored by the petitioner himself as regards the nature of the stipend, that is, it was not a profit, remuneration or salary for employment in any vocation. Despite the common notion of 'stipend' being an incentive for carrying on (higher) education, as opposed to salary, which is a regular payment made for an employment with an organization, there may be several situations where the subtle distinction between the two is obliterated. The term "remuneration" is all the more susceptible to ambiguity, since a stipend, just as a salary or profit, is concerned with the payment of money to compensate some act on the part of the recipient on a regular basis. Hence, it is not prudent at this juncture to decide finally that the stipend being received by the petitioner is not a remuneration barred by the Regulations of the KoPT, precluding the petitioner from parallelly drawing his subsistence allowance as well. It is only the unilateral statement of the petitioner that the two are not the same. On this score, the Division Bench judgment directing subsistence allowance to be paid to the petitioner has no direct relevance, since the question of parallel withdrawal of subsistence allowance and stipend was not an issue decided by the Division Bench. The matter which fell for consideration

before this court previously was the entitlement of the petitioner to get subsistence allowance during the period of suspension, which was decided to be equal to the salary payable to him without suspension. That, by itself, does not have any bearing on the entitlement of the petitioner to draw parallel remuneration.

29. Moreover, the respondents are justified in arguing that a fact-finding exercise is best left with the enquiry officer or the disciplinary committee looking into the matter and is not appropriate for the writ court to delve into. The petitioner, in the present case, has participated full-fledged by replying to the show-cause notice and a hearing date has been given for the petitioner to ventilate all his objections to the enquiry and allegations from which the same arises. As such, it would be rather premature, as also held by a co-ordinate bench in *Arup Basu Chowdhury (supra)*, to decide a challenge to the enquiry report without waiting for the disciplinary authority to assess the grounds that may be urged against the findings rendered against the petitioner.

30. It has also been categorically laid down in *Executive Engineer (supra)* that, unless the vires of the statutory provisions governing the employee or infringement of any fundamental right is made out, a show-cause notice cannot be labelled *ex facie* as a 'nullity' or being totally without jurisdiction. In such a scenario, the writ court ought to hold its hands in entertaining a writ petition and/or deciding the issue prematurely.

31. Whether the charge-sheet was delayed or not cannot be a relevant consideration too, since the same was the product of an enquiry and might have taken some time to be framed. In fact, the respondent-authorities had full jurisdiction to initiate an enquiry and hold a disciplinary proceeding against the petitioner, giving the petitioner opportunity of being heard. Such an exercise ought not to be nipped in the bud merely because the petitioner challenges the veracity of the allegations made against him on merits. It might well be that the petitioner has a good case in the disciplinary proceedings and be exonerated at the end of it. However, such a consideration is invalid before the said proceedings are even initiated, since the same would amount to usurping the jurisdiction of the respondent-authorities.

32. Moreover, apart from drawing parallel subsistence allowance and stipend in alleged contravention of the governing Regulations, there are other components which comprise of the body of allegations against the petitioner, which also have to be looked into in the departmental proceedings. Culling out the distinction between 'stipend' and 'salary' now would be an exercise in futility in such context, particularly by a writ court, that too at the very inception of the process.

33. Under such circumstances, the writ petition fails. Accordingly, WPO No. 341 of 2020 is dismissed. It is made clear that this court has not gone into the merits of the allegations and counter-allegations made

by the respondents and petitioner *inter se*, all of which will be open to be argued and decided in the departmental enquiry initiated against the petitioner. The impugned show-cause notice dated April 15, 2020 and the charge-sheet dated June 16, 2020 and consequential orders/notices dated September 9, 2020 and September 24, 2020 are not interfered with.

34. There will be no order as to costs.

35. Urgent certified website copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)