

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

**WRIT PETITION NO. 3724 OF 2022
WITH
INTERIM APPLICATION (L) NO. 20973 OF 2022**

Suruchi Rajendra Gurjar	}	Petitioner
Versus		
Board of Trustees of the Mumbai	}	
Port Authority and Ors.	}	Respondents

Mr. S. C. Naidu with Ms. Sneha Phene, Ms. Divya Yajurvedi, Mr. Aniketh Poojari and Mr. Pradeep Kumar i/b. Mr. Amit Potnis for the petitioner.

Mr. R. S. Pai with Mr. Ajai Fernandes, Mr. Rahul Jain, Ms. Khushboo Rupani and Ms. Mahafarin Mehta i/b. HAS Advocates for respondents 1 and 2.

Mr. Neel Helekar with Mr. A. A. Garge for respondent no. 3.

**CORAM: DIPANKAR DATTA, CJ. &
ABHAY AHUJA, J.**

DATE: DECEMBER 1, 2022

ORAL JUDGMENT (Per CHIEF JUSTICE):

1. The petitioner in this writ petition dated 24th January 2022 is the Chief Law Officer (under suspension) of Mumbai Port Trust (hereafter the "MPT", for short). The trigger for this writ petition is 5 (five) disciplinary proceedings initiated against the petitioner by Sri Rajiv Jalota, Chairman of MPT, respondent no.2 and orders passed in connection therewith.

2. The writ petition, as originally instituted, reveals challenge being mounted by the petitioner to 4 (four) charge-

sheets dated 20th March 2021 (Exhibit 'D'), 20th September 2021 (Exhibit 'E'), 6th January 2022 (Exhibit 'F') 6th January 2022 (Exhibit 'F1'), *inter alia*, complaining of lack of competence, authority and jurisdiction of the Chairman, MPT to issue the same. She further complained of the charges being vague making it impossible for her to comprehend what exactly the allegations of misconduct levelled against her are, which she is required to meet. Also, an order dated 8th November 2021 was subjected to challenge whereby a penalty of withholding one increment for a period of 3 (three) years without cumulative effect was imposed on the petitioner. This order was passed by the Chairman, MPT, while taking the disciplinary proceedings initiated vide charge-sheet dated 20th March 2021 (Exhibit 'D'), to its logical conclusion.

3. During the pendency of the writ petition, a fifth charge sheet dated 31st May 2022 (Exhibit 'Z1') was issued against the petitioner by the Chairman, MPT. By amending the writ petition, the petitioner has laid challenge to such charge-sheet as well orders of the Chairman appointing inquiry officer and presenting officer and continuing the period of suspension, on the self-same ground of lack of his competence, authority and jurisdiction to do so.

4. Admittedly, disciplinary proceedings initiated vide the first charge sheet dated 20th March 2021 (Exhibit 'D') has concluded with imposition of penalty of withholding of increment. The other charge sheets are being inquired into. The petitioner's suspension from service is still continuing. Various contentions have been raised by the petitioner in the writ petition in regard to initiation, continuation and

conclusion of the disciplinary proceedings (as noted above, only one has been concluded). However, if the petitioner succeeds in the contention that the respondent no.2 as Chairman, MPT has no competence, authority or jurisdiction to issue the charge-sheet(s), the other contentions would not obviously fall for our examination. However, if we hold that the respondent no.2 as Chairman had/has the authority to initiate disciplinary proceedings against the petitioner, we need to also decide whether to leave the petitioner to pursue the departmental remedies first before embarking upon an examination of perceived illegalities in the process of conducting departmental inquiry against her pursuant to the impugned charge-sheets.

5. With this clear understanding, we have heard Mr. Naidu, learned counsel for the petitioner and Mr. Pai, learned counsel for the MPT and its Chairman.

6. Although Mr. Naidu has spared no effort to impress upon us that the respondent no.2 as Chairman could not have issued the charge-sheets against the petitioner in view of the circulars dated 9th July 2020 and 29th December 2020 issued by the Union of India, respondent no.3, we are not impressed; and, for the reasons that follow, we propose to hold that the respondent no.2 as Chairman did not lack the competence, authority and jurisdiction to issue the charge-sheets against the petitioner.

7. Since the sheet anchor of Mr. Naidu's contentions are the circulars dated 9th July 2020 and 29th December 2020, it would be profitable to read the same first.

8. What the petitioner refers to as a circular dated 9th July 2020 is, in fact, a communication made to the Chairmen of all Major Port Trusts by the Under Secretary to the Government of India, Ministry of Shipping, reading as follows: -

“Subject: Appointing Authority in respect of Deputy HoD level officers in Major Ports.

Sir,

I am directed to inform that at present the Appointing Authority as well as the Disciplinary Authority of all Dy. HoD level posts in Major Ports is Chairman of the concerned Major Port. This has been reviewed and following has now been decided for implementation with immediate effect: -

a) The Appointing Authority as well as Disciplinary Authority for all Dy. HoD level posts will be the Central Government i.e. Secretary (Shipping).

b) In this connection, all Major Ports will carry out amendments in their service regulations viz. Recruitment, Seniority & Promotion (RS&P), Classification, Control & Appeal (CCA) and other regulations (wherever required) as per the laid down procedure.

2. This issues with the approval of the Competent Authority.”

9. Similar is the case with what the petitioner claims to be a circular dated 29th December 2020. The same is also a communication addressed to the Chairpersons of all Major Port Trusts by the Under Secretary to the Government of India, Ministry of Shipping, which reads as follows: -

Subject: Appointing Authority in respect of Deputy HoD level Officers in Major Port Trusts-reg.

Sir,

I am directed to refer to this Ministry's letter of even number dated 09.07.2020 on the subject mentioned above and to say that references have been received from some Major Port Trusts stating that prior

to the issue of instructions by this Ministry vide letter dated 09.07.2020 notifications were already issued for filling up of Dy. HoD level posts in some Ports by **absorption through Composite method**. These Ports have therefore, sought clarification from this Ministry whether to hold DPC for filling up of these posts.

2. The matter has been considered and it has now been decided that till amendments in the Service Regulations viz. Recruitment Rules (RRs), Seniority and Promotion (RS&P), Classification, Control and Appeal and other relevant Regulations are notified, Dy. HoD level posts in Major Port Trusts may be filled up only **by absorption through Composite method** at Port level. Advertisement for filling up of the posts, DPC etc. may be held at Port level. However, recommendations of the DPCs may be conveyed by Major Port Trusts to this Ministry and obtain approval of the Ministry before issuing appointment orders.

3. This issues with the approval of the Competent Authority.

(underlining and bold in original).

10. Referring to the aforesaid communications as circulars purportedly issued by the Ministry of Shipping, the attempt of Mr. Naidu has been to persuade us hold that with effect from 9th July 2020, the Chairmen of all Major Port Trusts have ceased to be the appointing authority as well as disciplinary authority for all Deputy Head of the Department (Dy. HoD) level posts, for which the appointing authority as well as the disciplinary authority would thenceforth be the Central Government, i.e., Secretary (Shipping).

11. Mr. Naidu further invites our attention to section 24(1)(a)(iii) of the Major Port Trusts Act, 1963 (hereafter "the Act of 1963", for short) to contend that the appointing authority of the petitioner is the Central Government and not the Chairman.

12. In support of the contention that the petitioner is entitled to the relief claimed in the writ petition, i.e., that the impugned charge-sheets ought to be quashed for want of jurisdiction of the Chairman, MTP to issue it after the circular dated 9th July 2020 has come to existence, reliance is placed by Mr. Naidu on the decisions of the Supreme Court in **Union of India vs. B. V. Gopinath**, reported in AIR 2014 SC 88; **State of Tamil Nadu vs. Pramod Kumar**, reported in (2018) 17 SCC 677; and **Sunny Abraham vs. Union of India**, reported in 2021 SCC OnLine 1284, as well as a coordinate Bench decision of this Court (Bench at Nagpur) dated 30th September 2022 in Writ Petition No. 3274 of 2010 (**Deorao Namdeorao Warhate vs. Forest Development Corporation Ltd. and Anr.**).

13. Mr. Naidu was, however, fair to concede that the Union of India, respondent no. 3, in its affidavit in reply, did not support the contention of the petitioner that the Secretary, Shipping would be the appointing and disciplinary authorities for Deputy Head of the Department (Dy. HoD) level posts in the Major Ports of India.

14. We also place on record Mr. Naidu's submission upon hearing the exchanges in Court that if we are disinclined to accept the contention as advanced that the respondent no.2, as Chairman, MPT could not have proceeded against the petitioner by initiating disciplinary proceedings, the other points may be left open for the petitioner to urge before the appropriate authorities at the appropriate stage.

15. *Per contra*, Mr. Pai, learned counsel appearing for the respondents 1 and 2, argues that the contention of the

petitioner that the Secretary, Shipping is her disciplinary authority, in view of the circulars dated 9th July 2020 and 29th December 2020, is thoroughly misconceived. Referring to the same, he submits that the said communications cannot be construed as Government orders or circulars, containing executive instructions, brought into force in accordance with law. He too draws our notice to section 24 of the Act of 1963 to submit that the Chairman cannot be said to have been divested of his authority and continues to be the appointing authority of officers holding similar posts like the petitioner, a *fortiori*, continues to be the disciplinary authority. According to him, the field of initiation, conduct and conclusion of disciplinary proceedings for alleged misconduct are governed by statutory regulations and so long such regulations are not amended in a manner known to law, the same continue to be binding on all officers/employees covered thereby. Reliance is placed by him on the decisions of the Supreme Court in **Ajay Kumar Das vs. State of Orissa and Ors.**, reported in (2011) 11 SCC 136 and **Delhi Transport corporation vs. Balwan Singh and Ors.**, reported in (2019) 18 SCC 126, to buttress the contention that even executive instructions cannot have the effect of amending/replacing/tinkering statutory rules/regulations having regard to the hierarchy of laws and the primacy to be given to each law over and above the one that follows it.

16. Having heard Mr. Naidu as well as Mr. Pai only on the point of competence, authority and jurisdiction of the respondent no.2 to issue the impugned charge-sheets, we are firmly of the opinion, for the reasons we propose to assign

hereafter, that the Chairman of MPT continues to be the disciplinary authority of the petitioner and exercise of power by the respondent no.2 as Chairman to initiate disciplinary proceedings against the petitioner does not suffer from any lack of competence, authority and jurisdiction.

17. As a prologue, it would not be inapt to glance through the provisions of the Act of 1963 and the regulations framed thereunder which are relevant for the purpose of a decision on the point under consideration.

18. The terms 'Board' and 'Chairman' are defined in clauses (b) and (c), respectively, of section 2. Board in relation to a port means the Board of Trustees constituted under the Act for that port. Chairman means the Chairman of a Board and includes the person appointed to act in his place under section 14. Sub-section (1) of section 24 confers power on the Central Government, after consultation with the Chairman, to appoint any person to any post, whether temporary or permanent, as clarified in sub-clauses (i) to (iii) of clause (a), subject to the provisions of the Schedule for the time being in force sanctioned by the Board under section 23. However, the Chairman or such authority as may be authorized by regulations is entitled to exercise power, by virtue of clause (b), in respect of posts other than those mentioned in clause (a). Section 25 mandates that subject to any regulations made under section 28, the power of *inter alia* suspending, removing or dismissing any employee of a Board otherwise by reason of misconduct shall be exercised by the Chairman or such authority as may be prescribed by regulations. Section 28 confers power on a Board to make regulations, not

inconsistent with the Act, *inter alia*, to provide for appointment, suspension, removal and dismissal of its employees. Section 125 confers power on the Central Government to make regulations if, on its direction, the Board in relation to a port fails or neglects to comply with such direction within such period as is specified in that behalf. Section 126 contains a *non-obstante* clause and ordains that the first regulations under the Act of 1963 shall be made by the Central Government and have effect on being published in the Official Gazette.

19. In exercise of power conferred by the relevant sections referred to above, the Central Government made the first regulations, namely, the Bombay Port Trust Employees (Classification, Control and Appeal) Regulations, 1976 (hereafter "the 1976 Regulations", for short). "Appointing authority and "disciplinary authority" are defined in clauses (b) and (d), respectively, of 2 regulation reading as follows: -

- "(b) 'appointing authority' in relation to an employee means the authority prescribed as such by these regulations;
- (d) 'disciplinary authority' means the authority competent under these regulations to impose on an employee any of the punishment specified in regulation 8."

20. We need not look into the provisions contained in the 1976 Regulations in minute details except regulation 12 and the Schedule appended to such regulations. In terms of regulation 12(1), no order imposing any of the penalties specified in clauses (v) to (ix) of regulation 8 shall be made except after an inquiry is held, as far as may be, in the manner provided in such regulation (read regulation 12) and

regulation 13. Sub-regulations (2) and (3) of regulation 12 being at the heart of the matter are quoted below: -

"12(2) Whenever the disciplinary authority is of the opinion that there are grounds for inquiring into the truth of any imputation of misconduct or misbehavior against an employee, it may itself inquire or appoint under this regulation an authority to inquire into the truth thereof.

Explanation – Where the disciplinary authority itself holds the inquiry, any reference in this regulation to the inquiring authority shall be construed as a reference to the disciplinary authority.

12(3) Where it is proposed to hold an inquiry against an employee under this regulation and regulation 13, the disciplinary authority shall draw up or cause to be drawn up –

- (i) The substance of the imputations of misconduct or misbehaviour into definite and distinct articles of charge;
- (ii) A statement of the imputations of misconduct or misbehaviour" in support of each article of charge, which shall contain –
 - (a) A statement of all relevant facts including any admission or confession made by the employee;
 - (b) A list of documents by which, and a list of witnesses by whom the articles of charge are proposed to be sustained.

Note - if the employee applies orally or in writing for the supply of copies of the statements of witnesses mentioned in the list referred to in sub-regulation (3), the inquiring authority shall furnish him with such copies as early as possible and in any case not later than three days before the commencement of the examination of witnesses on behalf of the disciplinary authority."

(bold in original)

21. The Schedule appended to the 1976 Regulations, to the extent relevant, is reproduced hereunder: -

SCHEDULE

EXISTING PROVISIONS				
Sl. No.	Categories of employees	Authority competent to impose penalties and penalties which it may impose (with reference to clauses (i) to (ix) of regulation 8)		Appellate Authority
(1)	(2)	(3)	(4)	(5)
1	Employee holding posts referred to in clause (a) of sub-section (1) of section 24 of the Act.	(i)Chairman (ii) Chairman with prior approval of the Central Government	(i) Penalties specified in clauses (i) to (iv) of regulation 8 (ii) Penalties specified in clauses (v) to (ix) of regulation 8	Central Government
2	Employees holding Class I posts the maximum of the pay scale of which (exclusive of allowances) exceeds Rs.16750 but not covered by Sl. No. 1	Chairman	All	Central Government

22. These being the statutory provisions, what emerges for a decision is, whether the same or the communications dated 9th July 2020 and 29th December 2020 (circulars, as Mr. Naidu would like us to believe and accept) would have primacy. In this context, we are also required to bear in mind that the petitioner was appointed as Chief Law Officer, on probation for a period of 2 (two) years from the date of joining, vide offer of appointment dated 20th June 2019 issued from the office of the Senior Deputy Secretary, MPT, and not by the Central Government.

23. In course of hearing, Mr. Naidu conceded that the petitioner is an employee holding a Class I post and Sr. No. 2 of the Schedule (supra) applies to her. Therefore, if at all any penalty by way of disciplinary action in terms of rule 8 and the Schedule read with regulation 12 is required to be imposed on the petitioner to mark the conclusion of disciplinary proceedings, the appropriate disciplinary authority would be the Chairman. He can impose any of the penalties specified in regulation 8 and the authority to sit in appeal over the decision of the Chairman would be the Central Government. Having ascertained who the appropriate authority would be to impose penalty, a peep at sub-regulation (2) of regulation 12 would reveal that the disciplinary authority himself (i.e., Chairman in this case) has the power to inquire into the charges or to appoint an authority to inquire into the truth thereof. Sub-regulation (3) of regulation 12 authorizes the disciplinary authority to draw or cause to be drawn the substance of the imputations of misconduct or misbehaviour into definite and distinct articles of charges together with a statement of the imputations of misconduct or misbehaviour in support of each article of charge. These are, of course, initial steps for conducting due inquiry and must precede imposition of penalty.

24. Be that as it may, adverting attention to the communications dated 9th July 2020 and 29th December 2020, we do not find the same to partake the character of a Government order or instruction issued in exercise of the executive power of the Union (Article 73 of the Constitution). Even if it were so, the same would not have been defensible

since executive instructions can at best supplement, but not supplant, statutory rules. The Supreme Court in its decision in **State of Maharashtra Jagannath Achyut Karandikar**, reported in AIR 1989 SC 1133, held that Government cannot restrict operation of statutory rules by issuing executive instructions. We find reiteration of the same principle in the decision in **Ajay Kumar Das** (supra), cited by Mr. Pai, in the following words:

"14. ***** Whatever be the efficacy of the executive orders or circulars or instructions, statutory rules cannot be altered or amended by such executive orders or circulars or instructions nor can they replace the statutory rules. The Rules made under Article 309 of the Constitution cannot be tinkered by the administrative instructions or circulars."

25. A Bench of 3 Hon'ble Judges in **Delhi Transport Corporation** (supra) pointed out as follows: -

"21. ***** It is trite to say that as per Kelsen's Hierarchy of Legal Norms, the *Grundnorm*, being the Constitution of India, the applicable hierarchy would read as under:

- "(1) The Constitution of India.
- (2) Statutory law, which may be either parliamentary law or law made by the State Legislature.
- (3) Delegated legislation which may be in the form of rules, regulations, etc. made under the Act.
- (4) Administrative instructions which may be in the form of GOs, Circulars, etc."

It was emphasized therein that in view of such hierarchy of laws, the statutory rules would have primacy over administrative instructions.

26. Apart from the above, what blows the wind out of the sails of Mr. Naidu's contention is the reply affidavit of the

respondent no. 3. We consider it appropriate to quote below paragraph 1 of the reply affidavit of the respondent no. 3: -

"1. I say that even though this Ministry vide letter dated 09/07/2020 communicated to all Major Ports that Appointing Authority and Disciplinary Authority for Dy. HoD level posts will be Secretary, Ministry of Ports, Shipping and Waterways, amendments in relevant regulations has not yet taken place. As such, Appointing Authority and Disciplinary Authority for Dy. HoD level Posts in Major Ports is still Chairperson of concerned Port. I further say that in this case, Chairman, Mumbai Port Authority remains the Disciplinary Authority as amendments in the relevant regulations has not yet been notified."

27. Pertinently, the respondent no.3 also does not claim the communication dated 9th July 2020 as a circular containing executive instructions. This is obviously because of the consciousness of the deponent, i.e., the Under Secretary of the settled legal position as noticed by us.

28. One other aspect needs to be touched upon here, lest the discussion remains incomplete. The 1976 Regulations ordains that an appeal against any penalty imposed by the Chairman would lie to the Central Government. If indeed the Schedule is amended as desired vide the communication dated 9th July 2020 and the Secretary, Shipping is made the disciplinary authority by amending the Schedule to the 1976 Regulations, the same would require a corresponding amendment to specify an appellate authority or else no departmental appeal would be available to an officer aggrieved by an order of penalty.

29. The aforesaid discussion leads us to the unmistakable conclusion that the Chairman, MPT has been and continues to

be the disciplinary authority to initiate disciplinary proceedings against an officer holding the post of Chief Law Officer.

30. In view of our finding that the Chairman had/has the competence, authority and jurisdiction to issue the charge-sheet in terms of the statutory provisions, i.e., the 1976 Regulations framed in terms of statutory power conferred by the Act of 1963, we find no reason to enter into any detailed discussion with regard to the decisions cited by Mr. Naidu. None of the decisions dealt with the Act of 1963 and the 1976 Regulations. In none of the said cases did the question of administrative instructions having the effect of superseding a statutory law arise for decision.

31. We must, however, place on record that in course of hearing, we had referred to Mr. Naidu several decisions of the Supreme Court, viz. **State of Madhya Pradesh vs. Shardul Singh**, reported in 1970 (1) SCC 108, **P.V. Srinivasa Sastry vs. Comptroller and Auditor General**, reported in (1993) 1 SCC 419, **Transport Commissioner vs. A. Radha Krishna Moorthy**, reported in (1995) 1 SCC 332, **Inspector General of Police vs. Thavasippan**, reported in (1996) 2 SCC 145, and **Himachal Road Transport Corporation vs. Kewal Krishan**, reported in (1997) 9 SCC 39. The ratio of such decisions, upon consideration of the rules/regulations relating to disciplinary proceedings as applicable in such cases, is that, any officer subordinate to the disciplinary authority, not having the power to impose penalty, but holding a rank higher than that held by the delinquent/charged officer and being his controlling authority, would be competent to issue a charge-sheet but for the purpose of imposition of penalty, the power

has to be exercised by the disciplinary authority. However, in view of our finding that the Chairman is empowered by the extant laws to initiate disciplinary proceedings against the petitioner, we refrain from dilating on this topic any further.

32. We, therefore, proceed to pass the following

ORDER

(i) The charge-sheets dated 20th March 2021 (Exhibit 'D'), 20th September 2021 (Exhibit 'E'), 6th January 2022 (Exhibit 'F'), 6th January 2022 (Exhibit 'F1') and 31st May 2022 (Exhibit 'Z1') are not interfered with on the ground as urged by Mr. Naidu and considered by us hereinabove.

(ii) However, no other point in respect of alleged invalidity of such charge-sheets is examined in course of this proceeding. Whether or not the charges are vague and/or the charge-sheets suffer from any other legal infirmity are points which are left open to be raised by the petitioner at an appropriate stage of the disciplinary proceedings or even thereafter, if the occasion therefor arises, in view of the decision in **A. Radha Krishna Moorthy** (supra).

(iii) The order of penalty dated 8th November 2021 is also not interfered with, but liberty is reserved to the petitioner to question the same in an appeal that could be carried from such order but in accordance with law.

33. Subject to the aforesaid observations, the writ petition stands dismissed. No costs.

34. In the light of the dismissal of the writ petition, Interim Application (L) No. 20973 of 2022 does not survive and stands disposed of.

35. We dictated the aforesaid operative order in open Court, while observing that the reasons for our conclusions would follow. Mr. Naidu prayed for stay of operation of the order. Such prayer was refused, which we reiterate having regard to our findings recorded above.

SALUNKE
J V

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(ABHAY AHUJA, J.)

(CHIEF JUSTICE)