

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
(ORIGINAL SIDE)**

Present:

The Hon'ble Justice Rai Chattopadhyay

W.P.O No. 1348 of 2022

Sambuddha Banerjee & Ors.

Vs.

The Kolkata Municipal Corporation & Ors.

For the Petitioners

: Ms. Raghunath Chakraborti,
: Ms. Amrita De.

For the KMC

: Mr. Alak Kumar Ghosh,
: Mr. Arijit Dey.

For the State

: Mr. Arak Kumar Nag

Hearing concluded on: 11/07/2023

Judgment on: 28/07/2023

Rai Chattopadhyay, J.

1. Petitioners are aggrieved with the impugned circular, being "*Chief Manager (P)'s Circular No.51/VIII of 2021-22*", dated "*January 29, 2022*", issued by the respondent Kolkata Municipal Corporation. The said circular was related to the subject matter of creation of 01(one) new post of *Chief Manager (Systems)* in the cadre of KMC Information Technology Service, under the Information Technology Department, in the Pay Level

19 of ROPA-2019 corresponding to Pay Scale PB-4B (₹ 28,000-52,000/-) + Grade Pay ₹ 7,600/- and framing of its Recruitment Regulations.

The said circular contained that, one post of Chief Manager (Systems) would be created by freezing operation of one post of Manager (Systems) and two post of Trolley Mazdoors. Also that such creation of post, would be in anticipation of the approval of the State Government, for the same.

Being aggrieved, the petitioners have preferred the present writ petition.

2. Petitioners are gainfully employed with the respondent no.1 and are serving in the posts of *Deputy Manager (Systems)*. They have gathered working experiences for not less than four years and as many as twenty five years of service, respectively.
3. The Recruitment Regulation for the newly created post of *Chief Manager (Systems)* has been mentioned in the following manner:-

“3. For creation of the aforementioned 01 (one) post of Chief Manager (Systems) u/s 17 and its framing of its Recruitment Regulation u/s 604 of the KMC Act, 1980 post-facto approval of State Government may be solicited.”

4. The petitioners are aggrieved upon promulgation of the said impugned circular dated January 29, 2022 for various reasons. Mr. Raghunath Chakraborti, appearing for the petitioners has firstly submitted that his clients have the promotional avenue to the post of *Manager (Systems)*,

which are eight in number, as per the existing norms. He emphasizes that by freezing one of the vacancies vide the impugned circular, the respondent authority has infringed into their service condition, that too without offering them any opportunity of hearing.

5. Further it has been submitted that the petitioners, excepting three of them, have already completed the qualified period of service for promotion. Also that they are eligible to come within the zone of consideration, having completed the qualifying period of service already and in view of the vacancies having already accrued, in the promotional cadre. Therefore, it is stated that, changing service condition in any manner whatsoever by the respondent authority, without granting them any opportunity to be heard, would be an infringement of their fundamental rights.
6. Mr. Chakraborti has further made out the point with reference to Sections 17, 19 and 604 of the Kolkata Municipal Corporation Act, 1980, that the impugned circular is absolutely dehors the statutory provisions and thus illegal and could not be sustained in the eyes of law. It has been submitted that pursuant to the provision under Section 17 of the said Act, the respondent authority, before creation of any post or restructuring or the revising the cadre upwardly, should have to mandatorily obtain permission from the State Government, in accordance with the scheme of the said Act, the provision as above being mandatory under law. According to Mr. Chakraborti no post-facto

approval shall satisfy the requirement of law. Also that the respondent no.1 could not have lawfully and justifiably issued any circular regarding creation of post in anticipation of the approval of the State Government. Mr. Chakraborti, on behalf of his clients, the petitioners, has sought for an order setting aside the impugned circular dated January 29, 2022.

7. Mr. Chakraborti has argued on the point that in case the appointing authority is to alter conditions of service, the law would require the authority to afford an opportunity of hearing to the employees to whom those conditions are applicable. On this point he has relied on a judgment of the Hon'ble Apex Court reported in (1989) 1 SCC 764 (*H.L. Trehan & Ors. vs. Union of India & Ors.*). The Hon'ble Apex Court was dealing with the point as to whether compliance of natural justice and pre-decisional hearing of the affected employees was necessary in case the authority was to alter their remuneration and conditions of service. The Court was pleased to hold that any such alteration which may prejudicially affect the employee, could not be effected without affording opportunity of a pre-decisional hearing to the employees. According to Mr. Chakraborti, in this case his clients have not been afforded any such opportunity of hearing by respondent authority.
8. Mr. Chakraborti, has further argued that the very language employed in the *proviso of Sub-section (4) of Section 17* would imply that prior sanction of the State Government is a must, before making any upward revision in the cadre of the respondent corporation. It is submitted that

selection of the words in the said provision, has mandated prior sanction of the State Government before creation of any post or changing conditions of services of the present petitioners, violation of which would render such an action as illegal. He says that any post-facto sanction cannot validate or cure defects in the proceedings. On this he has relied on a judgment of this Court reported in *(2017) 2 CHN (CAL) 567 (Baladev Basu alias Dave Basu)*. In the said case the Court was dealing with the provisions of Sections 353 and 346 of the Kolkata Municipal Corporation Act, 1980, all the language employed therein. The Court relied on a verdict of the Hon'ble Apex Court reported in *(2010) 3 SCC 616 (Ashok Kumar Das & Ors. vs. University of Burdwan & ors.)*, on the same point. The decision of the Courts and the law envisaged by those, would be that a qualifying word 'prior' to the word 'sanction' would require literal compliance and any post-facto sanction would not validate any stipulated action require to be done with prior sanction and also would not cure the defect of the action taken by the authorities without prior sanction, in view of the specific stipulations in the statutory provision.

9. Mr. Ghosh has been representing the respondent no.1 in this case and put up vehement objections as to the contentions and prayer of the petitioner. Mr. Ghosh, has at the outset, challenged the *locus standi* of the petitioners to seek any redress as regards the said impugned circular. According to Mr. Ghosh, structuring of the cadre in the establishment is absolutely within the domain of the respondent no.1

and the petitioners, as employees of the organization, cannot really throw any challenge to such policy decision of the organization as regards the cadre structure. Mr. Ghosh points out that what has been urged in this case on behalf of the petitioners are only beyond their pleadings. He has further mentioned that the petitioners shall not have any right of promotion but only that for consideration for promotion. He says that the impugned circular has not prejudiced or jeopardized any legal right of the petitioners. He mentions the principles on which a writ petition may successfully be maintained and says that the petitioners in this case have not suffered any prejudice as regards any of their rights which could have empowered them to move the Court of equity for redressal of such grievance. He says that discretion of revamping or recasting the cadre lies with the respondent no. 1 and the respondent no.1 would be at liberty, in an appropriate case to do the same in accordance with the statutory frame work. By pointing out to the fact that three of the petitioners are not yet eligible for promotion in terms of qualified period of service, he submits that creation of post by dint of the impugned circular would not affect petitioners right adversely or infringe any of those.

- 10.** Mr. Ghosh, further submits that a prerogative writ like a writ of mandamus may be issued to compel the authorities to do something, only when it is shown that there is a violation of the statutory provision which imposes a legal duty upon the Authority and the aggrieved party

has a legal right under the statute to enforce its performance. On this he has relied on a judgment of the Supreme Court reported in (2008) 2 SCC 280 (*Oriental Bank of Commerce vs. Sunder Lal Jain & Anr.*).

- 11.** On the point that the respondent authority has unfettered right and power for creating or eliminating a post within its structure, Mr. Ghosh has relied on another Supreme Court decision reported in (1982) 2 SCC 273 (*K. Rajendran & Ors. vs. State of Tamil Nadu & Ors.*). In the same the Hon'ble Court has held:

“12. The power to abolish a civil post is inherent in the right to create it. The Government has always the power, subject, of course, to the constitutional provisions, to reorganise a department to provide efficiency and to bring about economy. It can abolish an office or post in good faith.”

- 12.** On the same point another Supreme Court decision of 1976 has also been referred to, that is, reported in (1976) 2 SCC 844 (*State of Haryana vs. Shri Des Raj Sangar & Anr.*). The following may be quoted from there:

“7. Whether a post should be retained or abolished is essentially a matter for the Government to decide. As long as such decision of the Government is taken in good faith, the same cannot be set aside by the court.”

- 13.** Mr. Arak Kumar Nag appears on behalf of the Department of Urban Development & Municipal Affairs, Government of West Bengal. The said department has filed a report in the form of affidavit in Court. In the said affidavit the department has pointed out to the fact that by dint of the letter dated November 13, 2020, Government has already regretted

request of the respondent authority for creation of the post as mentioned above. In the said report the department has further mentioned the relevant statutory provision to state that for creation of post or promulgation of regulations the respondent authorities would require sanction from the State Government as a pre-condition. Mr. Nag, however, has supported Mr. Ghosh, in submitting that the petitioners would not have any maintainable ground in this writ petition, having suffered no prejudice.

- 14.** As to whether or not the petitioners can challenge the impugned circular, in a Court of equity, would certainly depend on the positive answer of the question, if the same has infringed petitioner's legal right, due to violation of statutory duty by the respondent authority. The respondent authority says that the petitioners have not suffered any prejudice as regards any of their lawful rights at the instance of the respondent authority. Respondent authority also says that the issuance of the impugned notification would be solely within the discretion of the authority and according to the convenience of business and to sub-serve any public purpose, it would be at liberty to deal with the staff structure, within its domain. It is an admitted fact that the petitioners are the employees for gain with the respondent authority. The 'service' of an employee would not only entail receiving of monthly salary and other emoluments or leave or incidental benefit but also bring within its fold the prospects naturally expected from being in service. Conditions of

employment, also known as terms of employment, refer to a set of rules and policies, an employer and employee both agree at the initial stage of recruitment to abide by, during the employee's total service period. It contains rights, obligations and conditions of both parties. This includes code of conduct, policies and expectations that might affect both the employer and the employees. Employee's benefit is a vital component of his condition of service. Record shows that since from the inception of the data processing department with the respondent authority and its change of nomenclature as IT Department, the structure has been designed and remained so, in the manner as shown in the Government order dated February 20, 2008, in Clause 2, which may be set out as herein below:-

“(2) The Service constituted under sub-rule (1) consist of following posts:

(a) Manager (Systems)

(b) Deputy Manager (Systems)/ System Manager;

(c) Assistant Manager (Systems)/ System Analyst; and

(d) Assistant System Analyst.”

15. It was but natural for the petitioners to legitimately expect the scope of promotion keeping in consideration the width of the promotional field, in this case, that to be of 8 (eight) posts of Manager (Systems). Mr. Ghosh argues that the respondent being the employer only and undeniably has got the prerogative to alter the cadre structure, in accordance with as to how its business requires it to do so.

- 16.** There cannot be any denial of the proposition, that unless arbitrarily exercised, the respondent authority has an unfettered right to create or abolish a post.

An old verdict of the Hon'ble Supreme Court may be mentioned here, which still holds the field. In the case of *State of Kerala & Ors. vs. K.G. Madhavan Pillai & Ors.*, reported in (1988) 4 SCC 669, the Court adjudicated on the facts that sanction was issued for the respondents there, to open a new aided school and to upgrade the existing school. However, an order was issued 15 days later to keep the sanction in abeyance. This order was challenged by the respondents in that case. The Supreme Court ruled that the sanction had entitled the respondents with legitimate expectation and the second order violates the principles of natural justice.

An explicit promise or representation, unambiguous and clear enough and an existent, consistent practice followed from a considerable period of time in past, would bind a public authority, to vary the same only after due compliance with the principles of natural justice. This has essentially been embedded into Article 14 of the Constitution and 'non-arbitrariness' and 'reasonableness', have been made the necessary qualifiers for assessing as to whether there was a denial of legitimate expectation or not.

According to Mr. Ghosh, the petitioners would not have any right to promotion, hence are unaffected with the circular as impugned. However, Mr. Ghosh has not denied that they would have a right to be considered for promotion, upon fulfillment of the requisite criterion. Number of the promotional posts, would concern the issue, at the very root of the same.

17. The same, would be therefore be a condition of service of the petitioners, which, if the respondent authorities desire to vary at any later point of time, they should have afforded opportunity of hearing to the petitioners before any such decisions could be taken by them. Here, the petitioner's case would be squarely covered by the judgment of *H.L. Trehan (supra)*, as referred to by Mr. Chakraborty.

18. Admittedly, by dint of the letter dated November 13, 2020, the Joint Secretary to the Government of West Bengal, Department of Urban Development and Municipal Affairs (Municipal Affairs Branch) has denied permission for creation of any new post as *Chief Manager (Systems)*. The impugned notification comes thereafter, on January 29, 2022, pursuant to the decision of the Mayor-in-Council, that, in anticipation of the approval of the State Government 01 (one) post of *Manager (Systems)* be freezed along with 02 (two) posts of Trolley Mazdoors and 01 (one) post of *Chief Manager (Systems)* be created in that way. Firstly, after the concerned department denying permission for creation of new post on November 13, 2020, there could not have been

any ground for the respondent authority to issue any circular in this regard, *“in anticipation of the approval of the State Government”*. This is because on the date of issuance of the impugned notification, i.e, January 29, 2022, there was no application of the respondent authority pending before the Government with the prayer for permission to create a new post of Chief Manager (Systems), on the basis of which there might be any anticipation of future approval.

19. Thereafter, what petitioners urge in this regard is worth consideration.

That is, whether the respondent Corporation would have any right, power or authority under the statute, to revise the cadre upwardly, without obtaining ‘prior’ sanction from the State Government and in anticipation of that. Creation of a post at the highest position in the cadre, is indeed an upward revision thereof. Mr. Ghosh defends action of his client by saying that, in the present case, creation or abolition of posts are the prerogative, only for his client. He says that creation of this post, does not affect petitioner’s rights in anyway, hence they cannot challenge such action of his client. The ratio of the judgments referred to by Mr. Ghosh, are well settled and not disputed in this case.

Not rejecting but only conceding to the above submissions made on behalf of Kolkata Municipal Corporation, we may note that a flair of arbitrariness would destroy the scantity of an administrative order of the authority, though made in exercise of power, which is solely within the

domain of the said authority. Necessary is to consult with the relevant provisions of law, as herein below:-

“17. Establishment of the Corporation and schedule of posts.-

(1) *****

(2) *****

(3) *****

(4) *Every year the Municipal Commissioner shall place before the Mayor-in-Council for its consideration the schedule of posts along with the proposals, if any, for such changes therein as he may consider necessary:*

Proviso – Provided that no upward revision of the size of the establishment of the Corporation shall be made without the prior sanction of the State Government.”

19. Appointment to category A posts, category B posts, category C posts and category D posts.-

(1) *****

(2) *****

(3) *Notwithstanding anything contained in sub-section (1), prior approval of the State Government shall be necessary in the case of appointment of a person not recommended by the Municipal Service Commission.*

604. Regulations to be subject to approval of State Government.-

(1) *No regulation made by the Corporation under this Act shall have any validity unless and until it is approved by the State Government.”*

A careful consideration of the provisions as above, would reveal that any proposal of an upward revision of the employee's cadre and proposed regulation with respect to that, shall always and mandatorily be subjected to prior sanction of the State Government. The word 'prior' would assume importance, for the obvious reasons that any

enhancement as to the size of establishment would entail financial implication, to be borne by the State. Creation of higher post, by sacrificing cadre posts may satisfy the whims of the employer but is quite unknown within the scheme of the said Act. Cessation of cadre posts, which is alien to the statutory provision, would require to be justified against the touch stone of non-arbitrariness and reasonableness. Unfortunately, authority's action in issuance of the impugned notification dated January 29, 2023, is a non-speaking one, so far as allowing some reason for such an action, is concerned.

The judgment of *Baladev Basu (Supra)* of this Court would guide us to understand about literal compliance of the provision for mandatorily obtaining sanction before plunging into implementing the proposed action, which the respondent herein is far from complying with.

- 20.** In absence of prior permission for creation of a post, in terms of the statutory provision and also in view of the gross baselessness in the proposition, in the impugned circular dated January 29, 2022, that the action taken vide the same, would be subject to and in anticipation of State's permission, when such prayer has already been denied by the State and no further similar request is pending with it, the circular as above, is found to be the result of absolute arbitrariness and non-compliance of the statutory provisions. The respondent authorities have given a complete go by to the statutorily mandated provisions by arbitrarily issuing the impugned notification dated January 29, 2023,

without obtaining the prior sanction from the Government. The law does not provide any power of creation of posts unilaterally, to the respondent authority.

21. As it has been rightly pointed out on behalf of the petitioner the relevant provisions of law like that compromised in Sections 17, 19 and 604 of the Kolkata Corporation Act, 1980, would require the respondent authority to mandatorily obtain prior sanction of the posts before notifying creation of the same or specifying any regulations in connection with the same. The impugned circular dated January 29, 2020, is dehors the law, hence not maintainable.

22. On the discussion as above this Court finds that the W.P.O 1348 of 2022 merits success.

23. The impugned circular being the Chief Manager (P)'s circular No.51/VIII of 2021-22 dated 29/01/2022 is hereby set aside.

24. W.P.O 1348 of 2022 along with pending application/s, if any, is allowed and disposed of.

25. Urgent Photostat certified copy of this judgment, if applied for, be given to the parties, upon compliance of requisite formalities.

(Rai Chattopadhyay,J.)