

(1978) 07 CAL CK 0038**Calcutta High Court****Case No:** None

Corporation of Calcutta

APPELLANT

Vs

Arun Kumar Sen and Others

RESPONDENT

Date of Decision: July 19, 1978

Acts Referred:

- Constitution of India, 1950 - Article 226
- Government of India Act, 1935 - Section 240, 243

Citation: 83 CWN 43

Hon'ble Judges: Chittatosh Mookerjee, J; B.C. Ray, J

Bench: Division Bench

Advocate: Pradip Kumar Ghosh, for the Appellant; Samir Kumar Mukherjee, Amar Nath Dhole, for the Respondent

Final Decision: Allowed

Judgement

1. Arun Kumar Sen, the Respondent No.1 in this appeal and two others were initially appointed to officiate temporally as a Municipal Pleader, such Corporation of Calcutta, pending filling up of these posts permanently. On March 10, 1962 he had joined in the said post. Thereafter, the Municipal Authorities had issued advertisements inviting applications for filling up the permanent vacancies in the said posts of Municipal Pleaders. Along with others the Respondent No.1 Arun Kumar Sen, had applied. The Standing Finance Committee of the Corporation of Calcutta and its meeting held on 16th September, 1963 resolved that the present Respondent No.1, Arun Kumar Sen, and two others whose names had been recommended by the Municipal Service Commission "be permanently appointed to the three posts of Municipal Pleaders, Law Department in the grade of Rs.200-300/- subject to the service and other allied regulations of the Corporation." On November 4, 1963 the Respondent No.1 had joined the said post. The Corporation of Calcutta has claimed that Arun Kumar Sen, the Respondent No.1, was put on probation according to the Regulation 10 of the Service Regulations of the Corporation of

Calcutta. On December 18, 1964 the Chief Law Officer, Corporation of Calcutta had recommended that the period of probation of the Respondent No.1 be extended and the Commissioner, Corporation of Calcutta by his letter dated April 2, 1965 had extended his period of probation for further one year. The Respondent No.1 and two other Municipal Pleaders had objected to the said extension of their probationary periods. They claimed *inter alia* that they had been permanently appointed and they were not put on probation. According to them the Order of extension of their probationary periods was illegal. On 5th July, 1965 the Chief Law Officer, Corporation of Calcutta issued a notice to the Respondent No.1 stating that he had been directed by the Commissioner, Corporation of Calcutta to communicate to him the full order passed by him. "I do not consider the work of Shri A. K. Sen, Municipal Magistrate's Court lawyer, to be satisfactory. He is, therefore, not confirmed and is discharged. He may be paid one month's pay in lieu of notice." The Respondent No.1 had made representations against his discharge from service. Thereafter, he moved this Court under Article 226 of the Constitution of India and obtained Civil Rule No.840(W) of 1965. D. Basu, J. made the said Rule absolute. The learned Single Judge quashed the said order and commanded and restrained the respondents therein from giving any effect to the said impugned order. The learned Judge, however, made it clear that the Respondent would be at liberty to make fresh orders in accordance with law. The Corporation of Calcutta being aggrieved by the aforesaid judgment of D. Basu, J. has preferred this appeal under Clause 15 of the Letters Patent.

2. The principal point in this appeal is whether or not the Commissioner, Corporation of Calcutta as the Appointing Authority was entitled to discharge the Respondent No.1 from service in terms of Regulation 11 of the Service Regulations of the Corporation of Calcutta. When the Respondent No.1 was appointed the provision at S. 80 of the Calcutta Municipal Act before the same amended by S. 27 of the Calcutta Municipal (2nd Amendment) Act, 1964 was that appointments to the Corporation of Calcutta establishment shall be made by the Corporation of Calcutta, if the maximum salary of the office was not below rs.250/- . The Commissioner was the authority empowered to make appointments in all other cases. Therefore, when the petitioner was appointed, the Corporation of Calcutta was the authority empowered to make his appointment. Admittedly, the Standing Finance Committee had appointed the Respondent No.1 as a Municipal Pleader, D. Basu, J. has found that the Respondent No.1 was appointed on probation and rejected his contention that the Standing Finance Committee had straightway permanently appointed him as a Municipal Pleader and that therefore, the question of confirmation or discharge could not and did not arise. On December 5, 1964 the Calcutta Municipal (2nd Amendment) Act, 1964 came into force. Section 27 of the said amending Act substituted the words "exceeds Rs.500/-" for the words "is not below Rs.250/-" in clause (a) of S. 80 of the Calcutta Municipal Act, 1951. The said amendment was not given retrospective effect. After the said amendment of S. 80 of the Calcutta

Municipal Act, 1951, the Commissioner, Corporation of Calcutta became the authority to make appointments in the Corporation establishment except in respect of offices whose maximum salary exceeded Rs.500/- per month. Therefore, under the amended S. 80 the Commissioner became competent to make appointments to posts of Municipal Pleaders. The Commissioner, Corporation of Calcutta as already stated purported to act as the Appointing Authority of the Respondent No.1 and by the impugned order discharged him from service. D. Basu, J, has *inter alia* held that the Respondent No.1 by reason of his appointment as a probationer had acquired a vested right. The Standing Finance Committee who had appointed the Respondent No.1 was alone competent to discharge or to confirm him. The expression "Appointing Authority" in Regulation 11 of the Service Regulations, Corporation of Calcutta, according to D. Basu, J, was an abbreviation for the words "authority who had appointed the Respondent No.1 and not the authority competent to make appointment to the post.

3. Mr. Pradip Kumar Ghosh, learned Advocate for the appellant, Corporation of Calcutta, has submitted that the expression "Appointing Authority" in Service Regulation 11 means the authority for the time being competent to make appointment to the post in question and not the authority who actually appointed a corporation employee on probation. According to Mr. Ghosh, the expression "Appointing Authority" has not the same connection in the different sections of the Calcutta Municipal Act, 1951. Section 81(4) used the expression. "Appointing Authority" with reference to particular post or posts and in this section the said term means the authority empowered to make appointments. Mr. Ghosh further submitted that whenever the Legislature has intended that the expression "Appointing Authority" would mean the authority who actually made the appointment, the same has been expressly stated in the particular section. In this connection, Mr. Ghosh referred to the provisions of S. 87 of the Calcutta Municipal Act which specifies who would be the competent authorities for imposing punishments upon the municipal officers and servant. Section 87 clearly provides that "the authority by whom such officer or servant is appointed" can impose punishments by way of fine, reduction or rank, suspension, removal or dismissal from service, withholding of increments. But in the instant case, the discharge of the Respondent No.1 during his probation did not involve any punishment. Therefore, in interpreting the provisions of S. 81(4) or Regulation 11 the concept of the word "Appointing Authority" should be disassociated from the meaning of the said expression for the purposes of punishment. Mr. Ghosh has further submitted that the Commissioner is not an authority subordinate to the Corporation of Calcutta. The Commissioner, a statutory authority exercising by his own right those powers which have been conferred by the Act upon him. Therefore, by the subsequent legislative changes the Commissioner having become the authority competent to make appointments to the post held by the Respondent No.1, he was entitled to discharge him during his probationary period. Another submission of Mr. Ghosh

was that the Commissioner under S. 36 of the Calcutta Municipal Act exercises supervision and control over all municipal officers and servants who had been made subordinate to him. According to Mr. Ghosh, the expression "control" would include powers either to confirm or to discharge a corporation employee appointed on probation.

4. Mr. Mukherjee, appearing on behalf of the Respondent No.1 on the other hand, has submitted that the Standing Finance Committee had appointed the appellant on a substantive basis. The Respondent No.1 was never put on probation and, therefore, there could be no question of either confirmation or discharge. Mr. Mukherjee secondly submitted that the expression "Appointing Authority" in the present context means the authority who had actually appointed the Respondent No.1. A subsequent change in law did not divest the Corporation of Calcutta, the Appointing Authority of the Respondent No.1 of its powers either to confirm or to discharge the Respondent No.1. The amendment of S. 80 of the Calcutta Municipal Act was prospective after the enactment of the Calcutta Municipal (2nd Amendment) Act, 1964. Therefore, the Commissioner might have become the competent authority to make appointment to the post in question but thereby he did not become the appointing authority of the Respondent No.1 who was appointed before the Second Amendment of S. 80. Therefore, the Commissioner acted without lawful authority by discharging the Respondent No.1. Mr. Mukherjee also raised a minor point that the Respondent No.1 was not paid one month's salary simultaneously with the service of the letter of the Chief Law Officer dated 12th July, 1965. Therefore, the termination order never became effective.

5. The learned Single Judge has rightly held that the appointment of the Respondent No.1 by Annexure "B" to the writ petition was subject to the terms of probation imposed by Regulation 10 of the Service Regulation. Therefore, his probation period was validly extended and he was also liable under Regulation 11(b) to be discharged on the ground that as a probationer his work was not satisfactory.

6. The Authority under S. 80 of the Calcutta Municipal Act, 1951 to make appointments to the Corporation establishments is expressly subject to the provisions of this Act. In other words, the said authority is conditional upon fulfillment of other provisions of the Calcutta Municipal Act, 1951. The authority concerned is empowered to make appointments only in accordance with the relevant provisions of the same Act. The Clause (j) of S. 85(1) of the Act empowered the Standing Finance Committee to make Regulations prescribing conditions of service of municipal officers and servants. Accordingly, the Standing Finance Committee in consultation with the Municipal Service Commission has framed the Corporation of Calcutta Service Regulations. The Regulation 2 lays down that these Regulations would apply to all employees of the Corporation of Calcutta other than those specified therein. The Respondent No.1 did not claim that his post was excluded by the Regulation 2. The Regulation Nos.2 and 3 of the Service Regulations

would also inapplicable to this case. The Corporation of Calcutta did not enter into with him a specific contract enforceable by law. There was no written contract fulfilling the requirements of Ss. 110 and 111 of the Calcutta Municipal Act, 1951. Under sub-s. (4) of S. 111 no contract executed otherwise than as provided in S. 111 would be binding upon the Corporation of Calcutta. The resolution of the Standing Finance Committee appointing the Respondent No.1 was not a specific contract within the meaning of Regulation 3. Therefore, his appointment was subject to the Calcutta Corporation Service Regulations. The Regulation 10 inter alia stipulates that except as otherwise provided in the Regulations every substantive appointment would be subject to a period of probation for one year which may be extended by one year at a time by the Appointing Authority. If the Appointing Authority is of the opinion that the service of the probationer is satisfactory and he has passed the departmental examination, if any, the probationer would be confirmed (vide Regulation 11(a)). Under Regulation 11(a) at any time during the period of probation or at its close, if the appointing authority considers that the probationer's service is not satisfactory, he may discharge the probationer.

7. The Resolution of the Standing Finance Committee (Ext. B to the writ petition) appointing the Respondent No.1 as a Municipal Pleader did not purport to override the Regulations 10 and 11. The Committee resolved to appoint the Respondent No.1 and two others permanently as Municipal Pleaders with the express stipulation that their appointments would be subject to service and other allied Regulations of the Corporation. In other words, the said appointment of the Respondent No.1 was made conditional upon the observance of the Service Regulations including Regulation Nos.10 and 11. The service and other allied Regulations were constituted terms and conditions of the said appointment of the Respondent No.1. The use of the expression "permanently appointed" in the resolution of the Standing Finance Committee really meant that the Respondent No.1 was being appointed against a permanent post and subject to the Service and other Regulations. The appointment of the Respondent No.1 on a substantive and permanent basis without being placed on probation would have been ultra vires the powers of the Corporation of Calcutta or of the Standing Finance Committee which was presumably exercising delegated authority of the Corporation. The expressions "probation" or "probationer" have not been defined in the Calcutta Corporation Service Regulations or in the Calcutta Municipal Act, 1951. Ordinary meaning of "probation" inter alia is "action or process of testing or putting to the proof, testing or putting to the proof, testing or trial of a person; conduct, character or moral qualification (vide Shorter Oxford Dictionary 3rd Edition, Vol.II). It is not necessary to mention the various reported cases concerning termination of service of a probationer because the decision in each case turned upon its own facts. The court in each case has to consider the real nature and effect of the order of termination of services of a probationer. But at the same time a broad distinction exists between a departmental enquiry for misconduct against a permanent employee of the State an enquiry against a probationer in order to

consider his fitness for confirmation. A probationer whose service is considered not satisfactory has no right to the post (See *Bishan Lal Gupta v. State of Haryana* 1978 (1) SC 202). The order of discharge under Regulation 11(b) of the Calcutta Service Regulations does not amount to a punishment. The Respondent No.1 was appointed subject to these provisions of the Service Regulations. During the period of probation the appointing authority was competent to decide whether he should be confirmed or should be discharged. These were parts of the conditions of service of the Respondent No.1. This view finds support from the observations of the Privy Council in AIR 1949 112 (Privy Council) .

8. Lord Thankerton, J, delivered the part I of the opinion of the Privy Council in *North West Frontier Province v. Suraj Narain Anand* (supra) and had observed that the "conditions of service" in S. 243 of the Government of India Act, 1935 would include the provisions which prescribe that the employer in certain circumstances might terminate the service of his employee. In *North West Frontier Province v. Suraj Narain Anand* (supra), the Inspector General of Police, North West Frontier Province and appointed Suraj Narain Anand as a Sub-Inspector of Police. The Deputy Inspector General of Police had dismissed him on the charge of copying during departmental examination. At the date of his appointment the Inspector General of Police only could dismiss the Sub-Inspector. Subsequently, the relevant Service Rules were amended and the Deputy Inspector General of Police became competent to exercise the said power of dismissal. *Prima facie* the said dismissal by way of punishment was in contravention of S. 240(2) of the Government of India Act, 1935. The State had relied upon S. 243 of the Government of India Act, 1935 and the Police Rules which authorized the Deputy Inspector General of Police to dismiss the Sub-Inspector. The Privy Council in Part I of their opinion upheld the submission of the Government that right of dismissal was a condition of service within the meaning of s. 243 of the Government of India Act, 1935. The said section inter alia laid down that the conditions of service of subordinate ranks of police service would be such as might be determined. The Privy Council in the Part I of their opinion found as a fact that the North West Frontier Province Police Rules 1937 became operative in 1938, i.e. after the Government of India Act, 1935 had come into force on 1st April, 1937. Accordingly, the Deputy Inspector General of Police had dismissed the Respondent police officer under a valid Rule. On 4th November, 1978, Lord Du Parcq delivered the Part II of the opinion of the Privy Council and reconsidered their finding about the date on which the North Frontier Province Police Rules, 1937 had come into force. Their Lordships found that the said Rules came into force four days after the Respondent Suraj Narain Anand was dismissed and not before as held by the Part I of their opinion. Therefore, the Government could not rely upon these Rules to justify the dismissal of the respondent. Accordingly, their Lordships revised their earlier opinion and advised that the decision of the Federal Court granting a declaratory decree to the Respondent be affirmed.

9. We have set out in some detail the facts of the *North West Frontier Province v. Suraj Narain Anand* (supra), in order to show that the present case is entirely distinguishable on facts. The Respondent No.1 was not dismissed but he was discharged during his probationary period. The principal question is whether the expression "Appointing Authority" in Regulation 11 of the Calcutta Corporation Service Regulations means the authority who appointed the Respondent No.1 or it means the authority now competent to make appointments to the post of Municipal Pleaders. We have found that the Respondent No.1 was appointed as a probationer subject to the provisions of the Service Regulations including Regulations 10 and 11. His discharge under Regulation 11(b) did not amount to punishment. The Regulations 10 and 11 of Calcutta Corporation Service Regulations are incidental or consequential to the power of appointment conferred by S. 80 of the Calcutta Municipal Act. These Regulations also qualify the powers of the authority empowered to make appointments under S. 80 of the Calcutta Municipal Act, 1951. The Authority empowered to make appointments under S. 80 of the Calcutta Municipal Act is required to put on probation, any one who is substantively appointed to a permanent post. The Regulations 10 and 11 lay down the manner in which the authority competent to make appointments under S. 80 shall fill up the permanent posts. Initially the appointee to a substantive permanent post would be put on probation by the authority specified in S. 80. If the appointing authority is satisfied he would confirm the probationer in his post. On the other hand, if the said authority is not satisfied he would discharge the probationer. Therefore, the appointing authority in Regulations 10 and 11 means the authority who is empowered under S. 80 of the Calcutta Municipal Act to make appointment to the post held by a particular probationer. There is no reason why Regulations 10 and 11 should be interpreted in the light of the provisions of S. 87 of the Calcutta Municipal Act, 1951. The S. 87 has explicitly laid down that the authority by whom an officer or servant is appointed may punish such officer or servant. It would not be correct to hold that the expression "Appointing Authority" is an abbreviation of the words the authority who had appointed the probationer. If this meaning is adopted it might result in inconsistencies. In this case, after the Respondent No.1 was placed on probation in terms of a resolution of the Standing Finance Committee, the S. 80 was amended. Under amended S. 80 of the Calcutta Municipal Act the Commissioner and not the Corporation of Calcutta became empowered to make appointment to the post held by the Respondent No.1. Therefore, the Corporation under Regulations 11(a) could no longer confirm and substantially appoint the Respondent No.1. The authority who was empowered under S. 80 alone possessed the power either to confirm a probationer or discharge him respectively in terms of clauses (a) and (b) of Regulation 11. The learned Single Judge, in our view, erroneously equated the power of appointing authority under Regulation 11 with the powers of the authority who appointed a Corporation employee to punish under S. 87 of the Calcutta Municipal Act. In fact, has not used the expression. "appointing authority". A discharge under Regulation 11(b) is not a punishment and, therefore, Regulation

11(b) should not be interpreted with the aid of S. 87. A probationer whose service is satisfactory and who has passed the departmental examination, if any, is certainly entitled to be confirmed. But he has no substantive or vested right to be confirmed by any particular officer or authority who might have initially placed him on probation. The said power of confirmation of a particular employee is entitled to make appointment to the post in question. The expression "Appointing Authority", should be interpreted in the context of each particular provision as there is no reason why the said expression should be assigned one uniform meaning throughout the Calcutta Municipal Act as the Rules and Regulations made thereunder although these provisions deal with different subjects.

10. The Commissioner, Corporation of Calcutta and Standing Finance Committee, are all authorities constituted under the Calcutta Municipal Act, 1951 which also contain provisions for distribution and exercise of powers by any of the authorities. Section 24 *inter alia* provides that the Corporation shall not be entitled to exercise powers, duties or functions expressly assigned by or under the Act to the Standing Finance Committee or to the Commissioner. After S.80 was amended by West Bengal Act XVIII of 1964, the Commissioner became the authority empowered to make appointments to the Corporation establishment except in case the maximum salary of the office exceeded five hundred rupees per month. Thereafter, in relation to the post of Municipal Pleaders whose maximum salary did not exceed Rs.500/- per month, the Commissioner became the appointing authority. The Commissioner could accordingly confirm a probationer for the post of Municipal Pleader, extend his period of probation by one year at a time or discharge him. No question of deprivation of vested right of a probationer would arise if the authority empowered to make the appointment to the particular post exercises the powers under clauses (a) and (b) of the Regulation 11 of the Service Regulations. A probationer has no vested right to be confirmed or discharged by the particular authority who had placed him on probation and by no other authority or officer.

11. Mr. Ghosh, learned advocate for the appellant, had relied upon the provisions of S. 16 of the Central General Clauses Act, 1897 and upon some reported decisions under the said section. Before we refer to these decisions, it may be pointed out that S. 17 of the Bengal General Clauses Act does not contain the words which were incorporated in the Central General Clauses Act, 1897, by the Repealing and Amending Act XVIII of 1928. Secondly, S. 17 of the Bengal General Clauses Act lays down that the power to appoint would include the power to suspend or dismiss. A discharge under Regulation 11(b) of the Calcutta Corporation Service Regulations is not a dismissal. Therefore, in terms S. 17 of the Bengal General Clauses Act would not be attracted. Recently, Anil Kumar Sen and Dhiresh Chandra Chakravarti, JJ in Sisir Kumar Mitra v. Commissioner, Presidency Division & Ors., 1978(1) CLJ 545 had considered the decision in Gurdial Singh Bawa v. The Director of Industries, Haryana & Anr. 1971 SLR 161 and in Nanak Saran Srivastava v. The State of U.P. & Ors. 1971(1) SLR 168, which were cited by Mr. Ghosh, learned advocate for the appellant,

in the present case. The Division Bench in *Sisir Kumar Mitra v. Commissioner, Presidency Division & Ors.* (supra), held that the Appointing Authority under rules would include the authority who had actually appointed the Government servant concerned. Their Lordships did not further pronounce whether or not the said term ("term") would include the authority for the time being competent to make an appointment to the post held by the Government servant concerned. Their Lordships observed that even if the term included such an authority, there was nothing in Rule 75(aa) to exclude the authority who had actually appointed the Government servant concerned.

12. Our attention has been also drawn to the decision of Anil Kumar Sen J. in *Ajoy Kumar Bagchi v. The Chief Security Officer Eastern Railway & Anr.* 1975(2) SLR 407. His Lordship held that the term "Appointing Authority" in Rule 2046(H) of the Railway Establishment Code did not mean the authority who had actually appointed the person to be put on compulsory retirement. The term as defined by the note added to the proviso means the authority competent to make the first appointment to the grade which the railway servant for the time being held. It was not disputed that at the relevant time when the order was made, the Chief Security Officer was competent authority to make appointment to the grade of Inspectors Grade III. Therefore, even if the petitioner might have been appointed by the General Manager, the Chief Security Officer would be competent enough to direct his compulsory retirement under Rule 2046(H).

13. The decision of the Supreme Court in *Om Prakash Gupta Swadheen v. Union of India & Ors.* 1975(2) SLR 226, distinguishable from the facts of the present case. The said case arose out of a termination made under Rule 5(1) of the Central Civil Services (Temporary Service) Rules, 1965. The Supreme Court in *Om Prakash Gupta Swadheen v. Union of India & Ors.* (supra) had restored the decision of the learned Single Judge of the High Court that the definition of the word "Appointing Authority" in Rule 2(a) of the Central Civil Services (Classification Control and Appeal) Rules, 1965 would apply and, therefore, the Director of Administration was not competent to terminate the service of the Government servant concerned. In the penultimate paragraph of the judgment in *Om Prakash Gupta Swadheen v. Union of India & Ors.* (supra), it was observed that in the absence of any definition of Appointing Authority in the Central Civil Services (Temporary Services) Rules, 1965 in relation to a temporary government servant not holding a specified post, the term "Appointing Authority" must be understood in its plain and natural meaning, namely, the authority which appointed him. We have already indicated that the expression "Appointing Authority" in Regulation 11 of the Calcutta Corporation Service Regulations should be interpreted to the light of the provisions of S. 80 of the Calcutta Municipal Act. We have further pointed out that the Regulations 10 and 11 qualify the powers of appointment under S. 80 and these Regulations lay down the manner in which substantive appointments to permanent posts in the Corporation establishment are to be made. The confirmation of a Corporation servant on

probation must be made by the authority who is competent under S. 80 to take appointment to the post in question. In this case, at the relevant time the Commissioner, Corporation of Calcutta was the authority empowered to make appointment to the post held by the Respondent No.1. Therefore, the Commissioner, was quite competent to discharge the Respondent No.1 in terms of Regulation 11(b).

14. In the above view, it is unnecessary for us to consider the other arguments of Mr. Ghosh, learned advocate for the appellant, regarding the scope and effect of S. 36 of the Calcutta Municipal Act, 1951 and whether the power and control of the Commissioner contemplated in the said section include a power to confirm or discharge any Corporation employee appointed on probation.

15. The Clause (a) of S. 80, of the Calcutta Municipal Act, 1951, was further amended by Calcutta Municipal (Third Amendment) Act, 1972, but we have not dealt with the effect of the said Amendment of the Law which was made after the Respondent No.1 was discharged from service.

16. For the foregoing reasons, this appeal succeeds.

17. We, therefore, allow this appeal, set aside the order of the learned single Judge and discharge the writ petition of the Respondent No.1.

18. There will be no order as to costs.

B.C. Ray, J.

19. I agree.