

(2005) 09 KL CK 0026

In the High Court Of Kerala

Case No : Writ Petition (C) No. 17161 of 2005

Pradeep Kumar

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 09-09-2005

Acts Referred:

Constitution of India, 1950 — Article 243, 243S, 243W, 309
Kerala Municipal Common Service Rules, 1967 — Rule 15
Kerala Municipal Corporation Act, 1961 — Section 20, 22, 23, 24, 3(7)
Kerala Municipalities Act, 1994 — Section 14, 15, 15(1), 15(3), 15(5)

Citation : (2005) 4 KLT 396

Hon'ble Judges : K.K. Denesan, J

Bench : Single Bench

Advocate : S.V. Balakrishna Iyer, for the Appellant; P. Nandakumar, Government Pleader and V.M. Kurien and K. Balachandran, for the Respondent

Final Decision : Allowed

Judgement

K.K. Denesan, J.—The question for consideration is whether the Secretary of a Municipality is competent to suspend the Municipal Engineer, invoking Section 49(1)(k) of the Kerala Municipality Act, 1994 (hereinafter referred to for short "the Act") and/or Rule 15 of the Kerala Municipal Common Service Rules (for short "the Rules") made under the Kerala Municipal Corporations Act, 1961 which stands repealed with effect on and from 30th May, 1994.

2. Petitioner, while working as Municipal Engineer in the 4th respondent-Municipality, has been placed under suspension as per Ext. P4 order dated 20-5-2005 passed by the 5th respondent who is the Secretary of the Municipality. At the relevant time the 6th respondent was holding the post of the Secretary and she has been impleaded eo-nominee.

3. Brief facts leading to Ext. P4 may be stated as follows: The Municipal Council of the 4th respondent resolved that the Secretary of the Municipality shall offer explanation with respect to 10 items referred to in Ext. P2 letter dated

17-5-2005 of the 3rd respondent-Chairman. Ext. P3 shows that the Municipal Council passed a unanimous resolution on 17-5-2005 to request the Government of Kerala to transfer the 5th respondent-Secretary to any other Municipality. Consequent to Exts. P2 and P3, Ext. P4 order was passed by the Secretary on 20-5-2005 placing the petitioner under suspension raising allegations against him that he was the person responsible for the irregularities connected with C.F. lamps referred to in Ext. P2. On 21-5-2005 3rd respondent-Chairman issued Ext. P5 staying Ext. P4. However, the petitioner was not reinstated in service.

4. None of the respondents filed counter affidavit. However, a statement has been filed by the counsel for respondents 4 and 5.

5. Shri. P.B. Krishnan, learned Counsel for the petitioner, placed reliance on the decision in V.K. Maheswari Vs. Alappuzha Municipality and Others, and contended that the petitioner is an Officer of the Municipality, that the 5th respondent has no power to suspend the petitioner, that the powers conferred by the Commissioner under the Rules cannot be exercised by the Secretary under the Act, particularly, in a manner contrary to the object of the Act and the scheme of the Act, that the 5th respondent acted against the mandate of Section 49(1)(k) of the Act and that Ext. P4 is patently illegal.

6. Points urged by Shri. V.M. Kurien, learned Counsel for the 5th respondent may be summarised as follows: Power to place the employees and officers of the Municipality under suspension is derived by the Secretary from Rule 15 of the Rules which continues to be in force by virtue of Section 575 of the Act. As per Section 48(1) of the Act, the Secretary shall be the Executive Officer of the Municipality and that other officers and employees of the Municipality are subordinate to the Secretary. Petitioner is an officer subordinate to the 5th respondent-Secretary. Section 49(1)(k) of the Act empowers the Secretary to take disciplinary action against the Municipal employees with the knowledge of the Chairperson. Section 49(1)(k) does not insist for prior approval of the Chairperson. Ext. P4 shows that the 3rd respondent-Chairperson was given due intimation. Rule 15 of the Rules empowers the Commissioner to place an employee under suspension where disciplinary proceedings against the employee is contemplated or is pending. The Secretary under the Act is the Commissioner under the Rules. The words "disciplinary action" and "disciplinary proceedings" do not convey the same meaning. Judgment of the Queen's Bench Division in *China v. Harrow Urban District Council* ((1953) 2 All E.R. 1296) in which distinction between "proceeding" and "action" as explained in *Roberts v. Battersea Metropolitan Borough* ((1914) 110 L.T.566) has been referred to, is authority for the proposition. The Chairperson has no power to stay Ext. P4. Hence, Ext. P5 order has no legal efficacy. Shri. Bijoy Balachandran, learned Counsel for the 3rd respondent supported the contentions of the petitioner and highlighted the changes brought about by the provisions of the Act and the 74th Amendment to the Constitution of India.

7. After the hearing of the case was over and the judgment was reserved,

counsel for the 5th respondent brought to my notice a copy of Government letter No. 37042/D2/94/LAD dated 11-11-1994 issued by the Local Administration (D) Department which says that u/s 48 of the Act, the post of Municipal/Corporation Commissioner has been redesignated as Secretary and hence, the Municipal/Corporation Commissioners who have already been transferred to the service of the Municipalities constituted under the new enactment by virtue of the provisions contained in Section 575(2)(xi) shall be known as Secretaries. Hence the W.P.(C) was posted for "to be spoken to".

8. Learned Counsel for the 5th respondent argued that the above Government letter is authority for the Secretaries under the Act to exercise the powers conferred on the Municipal Commissioners under the Rules which include the power to place the employees of the Municipality under suspension. Per contra, the learned Counsel for the petitioner argued that Secretaries of the Municipalities under the Act can no more exercise the power vested in the Municipal Commissioners under the Rules in the absence of appropriate provisions incorporated in the Act itself and therefore Government letter dated 11-11-1994 cannot do what has not been done or omitted to be done by the Legislature. It was also contended that the letter written by a Deputy Secretary cannot supplant the statutory provisions.

9. The Act came into force on the 30th day of May, 1994, replacing the Kerala Municipalities Act, 1960 and the Kerala Municipal Corporations Act, 1961. Section 575 of the Act deals with repeal and saving. Clause (ii) of Sub-section (2) of Section 575 provides that any appointment, rules, bye-laws, etc. made under the repealed enactments and in force at such commencement shall, in so far as they are not inconsistent with the provisions of the Act, continue to be in force as if made, issued, imposed or granted as the case may be by the corresponding Municipalities under the provisions of the Act until superceded, amended or modified. As per Sub-section (1) of Section 222 of the Act, Government is empowered to constitute a Common Municipal Service for the employees under the service of the Municipalities and regulate the requirement and conditions of service of the employees. The Common Municipal Service invoking Section 222 (1) of the Act has not been constituted. Therefore, the Rules made under the repealed Act and the common service envisaged thereunder continue to hold the field except to the extent those Rules are inconsistent with the Act. Relevant provision in the Rules with which we are concerned is Rule 15. For convenience, the above Rule to the extent relevant for answering the question, is extracted below:

"15. Suspension:

(1) The appointing authority or the Commissioner if he is not himself the appointing authority may at any time, place an employee under suspension:

(a) where a disciplinary proceeding against him is contemplated or is pending, or"

(b) xxx xxx xxx

(c) xxx xxx xxx

(ii) xxx xxx xxx

(iii) xxx xxx xxx

(iv) xxx xxx xxx

(v) xxx xxx xxx

(vi) xxx xxx xxx"

10. In *Maheswari v. Alappuzha Municipality* (supra) this Court held that the word "employee" used in Section 49(1)(k) of the Act refers to a member of the non-gazetted staff. Petitioner says that he is a gazetted officer and is outside the purview of the disciplinary power of the Secretary. Shri. V.M. Kurien contended that *Maheswari's* case is not a binding authority on the above point as the finding made in that judgment was partly on concession made by the parties therein. In *Maheswari's* case the learned Judge, after referring inter alia to Sections 15, 48, 222, 228 and 229 of the Act, expressed the view that the Legislature has made a distinction between officers and employees of the Municipality. Taking note of the fact that there is no definition in the Act as to who are the officers and who are the employees, the learned Judge on a perusal of the above mentioned provisions, drew the inference that the officers mentioned are gazetted officers and the employees mentioned are non-gazetted staff. While saying so, the learned Judge made it clear that "both sides have endorsed this view at the time of hearing of this Original Petition." Hence there is substance in the contention that the view expressed on the above point in *Maheswari's* case, is to some extent, based on concession made by the parties to that case. Therefore, a second thought on the issue, particularly in the light of other relevant provisions of the Act, will not be improper.

11. The Act does not define the words "employees" or "officers" but uses those words in Chapter IV of the Act extensively and in such a manner as though "employees" and "officers" are distinct categories. Same is the position in Sub-section 222 (2) and (8), Sections 228, 229 and 229A of Chapter XIII of the Act. In some provisions, the word "official" is used instead of officer and the word "staff" is used instead of "employees". Having regard to the purpose of Section 222(1) of Chapter XIII, it may appear that the word "employees" is a comprehensive term which takes within its fold the entire members of the staff of the Municipality. The purpose of this discussion with reference to the legislative provisions abovementioned, is to understand the scope and ambit of Section 49(1)(k) of the Act which reads:

"Subject to the provisions of this Act and the rules made thereunder, the Secretary shall,--

xxx xxx xxx

(k) take disciplinary action against the Municipal employees with the knowledge

of the Chairperson;"

12. The Act, not only omits to define "officers" and "employees" but also does not give any clear indication as to who are "employees" and who are "officers". Some of the provisions of the Act, for eg. Section 15(3)(b), (5), (6), Sections 41(1), 50(3), 52 (3) and (4), 222 (2), (3), (8) and 228, use the words "officers" and "employees" distinctly as though they are classified separately so that reference to one of them excludes the other. But the above dichotomy does not appear as an inviolable feature of the Act. The most important provision which draws pointed attention and provides food for thought and deliberation is Sub-section (1) of Section 222 in Chapter XIII of the Act under the sub-title "Establishment" which reads as follows:

"222. Constitution of a common municipal service.-- (1) The Government may, subject to such rules as may be prescribed, constitute a common municipal service for the employees under the service of the Municipalities in the State and regulate the recruitment and conditions of service of the employees of the Municipalities."

The above sub-section read along with Sub-section (2), which immediately follows gives the impression that the words "officers" and "employees" though referred to in some sections of the Act as separate and distinct, constitute a homogenous class called "Municipal employees". In a broad sense officers also are employees of the Municipality, because the jural relationship between the Municipality and the officers is one of employer-employee. "Employees" is the genus, of which "officers" is the species. To construe Section 222(1) of the Act as authorising the Government to constitute a common municipal service for the employees under the service of the Municipalities, by excluding "officers" from the purview of that common service will be against the object of the Act as also the intention of the Legislature to have a common service taking all the employees within its fold. The Act confers power on the Government to regulate the recruitment and conditions of service of the employees of the Municipalities. If it is contended that the scope of the sub-section is confined to employees alone in the narrow or restricted sense of that term, namely, those who belong to the lower strata of the municipal common service, or those who are not competent to exercise any of the statutory powers under the Act or who are not in the gazetted rank, then none of the authorities including the Government will be competent, as authorised by the Act, to regulate the conditions of service of those officers.

13. In this context it would be useful to refer to certain relevant provisions of the Rules which continue to occupy the field to the extent not inconsistent with the Act. Rule 2(d) of the Rules defines "common service" as the service constituted for the employees of Municipalities and Corporations as contemplated in Sub-section (1) of Section 90 of the repealed Act. (Act 30 of 1961). Since common municipal service as laid down in Section 222(1) of the Act, to regulate the recruitment and conditions of service of the employees of the Municipalities as a

whole, has not been constituted, the common service constituted as per the Rules made under the repealed Act will continue to be in force and the provisions thereof will operate mutatis mutandis, to the extent permitted by Section 575(2) of the Act. As per Rule 2(g) of the Rules, "Employee" means an employee of a Municipal Council or of a Corporation holding any post included in the common service. Rule 3 of the Rules says that the employees of the Municipal Councils and Corporations holding the posts specified by the Government, by order in that behalf, shall be constituted into a common service for the State. Under Rule 3, Government, as per G.O.(MS) No. 352/67/DD dated 30-10-1967 has specified the categories of posts borne in the regular establishments under the Corporations and the Municipal Councils to constitute the common service. Posts of Assistant Engineers and Junior Engineers are included among the categories thus notified. Petitioner who is designated as Municipal Engineer is borne in the cadre of Assistant Engineer in the regular establishment of the Municipal Council. The word "employee" occurs in some of the rules framed under the repealed Act. These rules are intended to confer certain benefits to the employees of the Municipality. No distinction is seen made in any of those rules between "employee" and "officer" of the Municipality. Rule 2(d) of the Kerala Municipal Employees' Death-Cum-Retirement Benefit Rules, 1967, the Kerala Municipal Employees Medical Attendance Rules, 1961, the Kerala Municipal Pensionable Employees Central Provident Fund Rules, 1981 etc. framed under the repealed Act and the Kerala Municipality (Employees Death-Cum-Retirement Benefit) Rules, 1996 framed u/s 222(1) of the Act do not speak about "officers" but speak only about employees as the beneficiaries of those Rules and take in all full time employees in the regular establishment of Municipalities and Corporations. It is pertinent to note that Government have framed Special Rules, after the commencement of the Act, for the recruitment etc. of the municipal employees coming within the Engineering and Town Planning Branch and the Ministerial and Revenue Branch. They are (i) Special Rules for the Kerala Municipal Common Service (Engineering and Town Planning), 2001, and (ii) The Kerala Ministerial Common Service (Ministerial and Revenue Branch) Qualifications and Method of Appointment Rules, 2001. The above Special Rules have been made in exercise of the powers conferred on the Government by Sub-section (1) of Section 222 of the Act (20 of 1994) read with Rules 10 and 11 of the 1967 Rules (made under the repealed Act but given lease of life under the new Act). No doubt, going by the meaning of the word "employee" as defined in the Rules, the Municipal Engineer who is in the cadre of Assistant Engineer, is an employee of the Municipality. However, since certain provisions of the Act employ a dichotomy between "employees" and "officers" by naming those posts separately and since the power conferred on the Secretary as per Section 49(1) (k) is confined to employees only, in contradistinction to the powers vested in him under Sub-section (1) of Section 48, Sub-section (2) of Section 222, Section 228 etc. of the Act, it is possible to contend that officers are outside the purview of Section 49(1)(k).

14. Now, it would be useful to see the position the Secretary occupies under the Act vis-a-vis the other officers and employees of the Municipality. Secretary is the Executive Officer of the Municipality. He is appointed by the Government in consultation with the Municipality. Other officers and employees of the Municipality are subordinate to him vide Section 48(1) of the Act. Secretary is competent to take disciplinary action against the Municipal employees with the knowledge of the Chairperson vide Section 49(1)(k) of the Act. Power to sanction leave to the officers and employees of the Municipality is vested in the Secretary. (See Section 222(2) of the Act). Section 228 of the Act authorises the Secretary to specify the duties of the officers and employees of the municipal establishment and exercise supervision and control over them. But a perusal of the various provisions of the Act scattered in different chapters, the distinction which in the first blush seems to exist between officers and employees pales into a nebulous concept. Though it is said that the Legislature must be presumed to have used words with a purpose and not superfluously, it is difficult to discern from the provisions of the Act the purpose of using the words officers and employees separately in some of the sections of the Act. It is elementary rule that the interpretation of an enactment is to be made of all parts together and not of one part by itself. Such a survey is always indispensable even when the words are plain, for the true meaning of any passage in statute is that which best harmonises with the subject and with the other part, so that inconsistencies might be avoided and operative effect might be given to every provision of the statute, if a reasonable construction permits. In *Chandra Mohan Vs. State of Uttar Pradesh and Others*, , Supreme Court speaking through K. Subba Rao, C.J. held as follows:

"Before construing the said provisions, it should be remembered that the fundamental rule of interpretation is the same whether one construes the provisions of the Constitution or an Act of Parliament, namely, that the court will have to find out the expressed intention from the words of the Constitution or the Act, as the case may be. But, "if, two constructions are possible, then the Court must adopt that which will ensure smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well established provisions of existing law nugatory." "

Though by attributing logic and purpose for the division it is possible, as observed in *Maheswari* officers could be those in the gazetted rank while those referred to as employees belonging to the non-gazetted members of the staff, having regard to the whole scheme of the Act as also the Rules, I am of the opinion that the term "Municipal employees" in Section 49(1)(k) shall be broadly construed so as to take in higher level employees called "officers" and the rest of the employees called as such.

15. Now I may proceed to consider whether the Commissioner under the repealed Act and the Secretary under the Act are equivalent categories of posts.

The discussion made herein is limited for the purpose of examining whether the Secretary under the Act can invoke Rule 15 of the Rules by stepping into the shoes of the Commissioner under the Rules. The post of Commissioner has ceased to exist the moment the old Act has been repealed by Act 20/94. However, the rules which define the term "Commissioner" and authorise the Commissioner to do certain acts under those rules, are kept alive to the extent those rules are not inconsistent with the Act or repugnant to the provisions of the Act. u/s 3(7) of the repealed Act "Commissioner" means the Commissioner of a Municipality appointed u/s 19 of that Act. Recruitment and conditions of service of the Commissioner were governed by the Kerala Municipal Commissioners (Recruitment and Conditions of Service) Rules 1964, made by the State Government in exercise of the powers conferred by Section 344 of the repealed Act and Article 309 of the Constitution of India. The above rules provide for different grades of Commissioners, their method of appointment, probation, etc. No special rules are seen made for the recruitment, qualifications, etc. for the post of Secretary in the Municipalities and the Corporations under the Act. Section 2(43) of the Act says "Secretary" means the Secretary of a Municipality. The Commissioner under the repealed Act and the Secretary under the Act are officers of the Government and appointed by the Government in consultation with the Municipal Council or the Municipality as the case may be. (See Section 19 of the repealed Act and Section 48 of the Act). The Act specifically says that the Secretary of the Municipality shall be the Executive Officer of the Municipality. The repealed enactment as well as the present enactment provides that the officers and servants of the Municipal Council/Municipality shall be subordinate to him. The power to transfer the Commissioner under the old Act and the Secretary under the Act is vested with the Government. The power of Municipal Council to pass resolution recommending the transfer of the Commissioner or the Secretary as the case may be and the binding nature of that resolution, is the same under both the enactments. Section 24 of the repealed Act conferred certain emergency powers on the Commissioner and authorised him to issue directions for the execution of any work or the doing of any act which would ordinarily require the sanction of the Council in order to meet emergent situations, but subject to the condition that the emergency power shall be exercised in consultation with or at the instance of the Chairman. But Section 48(2) of the Act mandates that the Secretary shall not without the sanction of the Municipality or the Government, undertake any work unconnected with his office. The main function of the Commissioner under the repealed Act and the Secretary under the Act is to implement the resolutions of the Council. Under the Act the Secretary is duty bound to implement the resolutions of the Standing Committee as well. It is the duty of the Secretary to implement the directions of the Chairperson also except in cases where the Secretary is of the opinion that any direction given by the Chairperson is not in accordance with law. Secretary has got the freedom to seek review of resolutions passed by the Council. But if the Council sticks on to its earlier decision, he shall refer it to the Government after intimating the matter to the Chairperson. If on a review of the

resolution, the Council decides to implement the same and the decision of the Government has not been intimated within 15 days from the date of reference to the Government, the Secretary shall implement the said resolution with intimation to the Government. Likewise, if the Secretary feels that the direction given by the Chairperson is not in accordance with law, the difference of opinion shall be brought to the notice of the Chairperson. If the Chairperson repeats his direction and the Secretary sticks on to his earlier opinion, he shall report that matter to the Council. Under the repealed Act, the Commissioner, though entrusted with the duty to carry into effect the resolutions of the Council had the freedom to report the matter direct to the Government if he was satisfied that the resolution passed by the Council was ultra vires of the provisions of law. If the Government suspended or cancelled the resolution, the Commissioner was not bound to carry that resolution into effect. Speaking generally, the powers, duties and functions of the Commissioner under the repealed Act and those of the Secretary under the Act, in certain respects, do not show noticeable changes. All the same it will not be correct to say that the powers to be exercised and the duties to be discharged by the Secretary under the Act are identical in all respects with those of the Commissioner under the repealed Act. The Secretary under the Act is more accountable to the Council and the Chairperson than his counterpart under the repealed enactment. The Council and the Chairperson of the Municipality under the Act are competent to exercise more control and supervisory powers over the Secretary. It is obvious from a reading of Sections 20, 22 and 23 of the repealed Act that the functions, powers and rights of the Chairman under the repealed Act were not as extensive and wide as those conferred on the Chairperson under the Act. Hence, all the acts which the Commissioner under the repealed Act was free to do cannot be done by the Secretary under the Act. An automatic transposition of the word "Secretary" occurring in the Act in the place of the word "Commissioner" in the Rules wherever the word "Commissioner" occurs in the compendium of Rules may not be apt or justifiable having regard to the status of the "Secretary" with all the powers, duties and responsibilities conferred and entrusted by the Act and that of the Commissioner under the repealed Act. At any rate, such a transposition cannot be read into the Act or given effect to, by means of a letter written by the Deputy Secretary of the Government. As rightly contended by the learned Counsel for the petitioner, Government Letter No. 37042/D2/94/LAD dated 11-11-1994 is not a valid substitute for appropriate legislation. The lacuna cannot be filled up by the letter issued by the Deputy Secretary to Government. Sub-section (1) of Section 564 of the Act gives power to the Government to remove any difficulty in giving effect to the provisions of the Act, subject to the riders provided therein. Sub-section (2) prescribes limitation of two years for the exercise of that power and Sub-section (3) mandates that every order made under Sub-section (1) shall be laid before the Legislative Assembly within fourteen days. For convenience Section 564(2) & (3) are extracted below:

"(2). No order under Sub-section (1) shall be made after the expiry of two years

from the date of commencement of this Act.

(3) Every order made under Sub-section (1) shall be laid before the Legislative Assembly within fourteen days after it is made if it is in session or at the commencement of the next session of the Legislative Assembly if it is not in session."

Firstly, the letter dated 11-11-1994 is not an order of the Government. Secondly, the mandatory provision in Sub-section (3) has not been complied with. No rule is seen made invoking the power u/s 565 of the Act. It is not possible to read the word Commissioner wherever it occurs in the Rules as Secretary, unless the law making authority does what is necessary in accordance with law. It is for the State Legislature or the rule making authority to find out ways and means to remove the difficulty.

16. As I have found that the powers conferred on the Commissioner under the Rules cannot automatically be exercised by the Secretary under the Act, the contention of the 5th respondent that the petitioner can be placed under suspension by invoking Rule 15 of the Rules has to fail. However, in my opinion, there is yet another strong reason to hold that the Secretary under the Act has no power to suspend the municipal employees, for, neither Section 49(1)(k) of the Act nor Rule 15 of the Rules clothes the Secretary with the power to place an employee under suspension.

17. In Maheswari (supra) Balakrishnan Nair, J. on an analysis of the relevant provisions of the Act and Rule 15 of the Rules took the view that the powers conferred on the Secretary under the aforesaid provisions cannot override the powers vested in the Chairperson of the Municipality. With reference to Section 15(6) of the Act and other provisions authorising the Chairperson to exercise power of supervision and control over all the officers and employees of the Municipality including officers of the Government working under the respective Municipalities as also the Secretary, it has been held in Maheswari that the Secretary has no power to suspend the officers and employees when that power is conferred on the Chairperson as well. It would appear from the above judgment that the learned Judge proceeded on the basis that the Secretary has got concurrent power in disciplinary matters including suspension of the delinquent employee but the said power is not an overriding power when it comes into conflict with the concurrent power conferred on the Chairperson. Though I perfectly agree with the view expressed in Maheswari regarding the inferior position of the Secretary qua the Chairperson and the finding that the Secretary has no overriding power to place the employees under suspension, I think, based on the nature of the contentions advanced in this case by the counsel on either side the issue requires consideration from a different perspective.

18. Municipality is a body corporate by the name of the Municipality and it shall have perpetual succession and a common seal. No doubt, the Secretary occupies

an important position in the Municipality under the Act. Section 49(1)(k) of the Act says that subject to the provisions of the Act and the Rules made thereunder, the Secretary shall "take disciplinary action against the Municipal employees with the knowledge of the Chairperson." The above provision, though empowers the Secretary to take disciplinary action against Municipal employees does not, going by the plain language of that provision, authorise the Secretary to suspend the employees against whom disciplinary action is taken. The issue for consideration is whether, even in the absence of any express power conferred by Section 49(1) (k) of the Act would it be in accordance with the scheme of the Act to concede power to the Secretary to suspend the employees as an implied or incidental power which the disciplinary authority is, ordinarily, entitled to invoke.

19. The answer to the above question has to be found within the four walls of the Act which has been enacted to keep pace with the changes brought about in the Constitution of India by the 74th amendment. The amendment aims to achieve, among other, decentralisation of the executive power of the Government and transfer of certain powers to the local bodies for the welfare of the public and for ensuring peoples participation in the developmental activities. Empowerment of the people at the grass root level and transforming the local bodies as institutions of self government are also among the objects of the 74th Amendment of the Constitution as also the Act. Secretary is appointed by the Government in consultation with the Municipal Council. Secretary occupies an important position under the Act, he being the Executive Officer of the Municipality as laid down in Section 48(1) of the Act. The very same provision says that other officers and employees of the Municipality shall be subordinate to him. Section 228 of the Act says that the Secretary shall exercise supervision and control over the work of all officers and staff under the Municipality including those transferred to the Municipality by the Government. Section 49(1)(e) of the Act says that the Secretary can exercise such of the powers and perform such of the functions as may be specifically conferred or delegated by or under the Act. The power to sanction leave to the officers and employees of the Municipality is vested with the Secretary. However, it is clear from the Scheme of the Act that the Secretary has to function under the control of the Council and the Chairperson. Sub-section (3) of Section 222 says that the "Municipal Council shall have the power to impose minor penalties on any officer or employee of the Municipality." The above provision read along with Section 48(7) makes it clear that the Council shall be competent to impose minor penalties on its Secretary. Section 48(12) deals with the procedure for taking disciplinary proceedings against the Secretary. Section 48(12) is extracted below:

"48(12). Where disciplinary proceedings have to be initiated against the Secretary, the Chairperson shall have the power to conduct an enquiry against him and in the case of imposition of a major penalty, to report to the Government with approval of the council to take further action under the rules applicable to the Secretary and the Government shall as soon as the report is received, take appropriate action and intimate the final decision taken thereon, in

writing to the Chairperson."

20. Section 14 of the Act says that the Chairperson of a Municipality shall exercise supervision over the working of the Municipality and shall co-ordinate the functions of the Municipality, the Secretary and the Committees thereof. Wider powers have been conferred on the Chairperson by Section 15 of the Act than the powers vested in the Chairman under the repealed Act. The power of inspection as also the power to issue directions and orders as he thinks fit with regard to the implementation of any resolution of the Council or Committees in the discharge of the functions of the Municipality are conferred on the Chairperson. Section 15(1) assumes significance in the context of this case, in as much as the said provision mandates that the Secretary shall be bound to comply with such directions. The Chairperson is vested with the power to implement the provisions of the Act, the resolutions passed by the Council and he is directly responsible for the proper discharge of the functions imposed by or under the Act. Along with these powers, Section 15(3)(b) clearly provides that the Chairperson has got the authority to "supervise and control the acts done and steps taken by the officers and employees of the Municipality, prepare the confidential reports of the Secretary and also review the confidential reports prepared by the Secretary in respect of other employees." Chairperson has got the authority to call the Secretary or any officer or employee under the control of Municipality to discuss with him on any matters relating to the functions and administration of the Municipality. Sections 15(6) and 15(7) of the Act are relevant in this context. Section 15(6) is extracted below:

"The Chairperson shall have the power to suspend from service any officer or employee in the service of Municipality if necessary, other than the Secretary and other Government Officers in the Gazetted rank, transferred to the service of the Municipality, where disciplinary action have to be taken against them, on grounds of gross negligence of duty, dereliction of duty and violation of rules and standing orders:

Provided that the Chairperson shall place the order of suspension before the Council in its next meeting and get the order ratified by the Council, failing which the order shall stand invalid."

As per Section 15(7) the Chairperson shall have the power to call for from the Secretary or any other officer under the. Municipality, any file and record in writing relating to the administration of the Municipality and issue directions and orders thereon in accordance with the provisions of the Act, rules or standing orders made thereunder.

21. Article 243W of the Constitution of India clothes the State Legislature with the power to make law conferring the Municipalities with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Municipalities. The law thus made by the State

Legislature shall empower the Municipalities, subject to such conditions as may be specified, in respect of the preparation of plans for economic development and social justice as also the performance of functions and the implementation of schemes including those in relation to matters listed in the Twelfth Schedule. Article 243S of the Constitution of India provides for the constitution and composition of Ward Committees. Articles incorporated in Part IX A of the Constitution of India mandate that the Municipalities which are to function as institutions of self-government shall have such powers and authority as may be necessary to enable them to carry out the responsibilities conferred upon them including those in relation to matters listed in the Twelfth Schedule.

22. The Act came into force on the 30th day of May, 1994 replacing the Kerala Municipalities Act, 1960 and the Kerala Municipal Corporations Act, 1961. Preamble of the Act makes it clear that the State Legislature felt it expedient to enact such a law to replace the predecessor enactments by a comprehensive legislation in line with the Constitution (Seventy Fourth Amendment) Act, 1972 for securing a greater measure of participation of the people in planned development and in local Governmental affairs by constituting Town Panchayats, Municipal Councils and Municipal Corporations. Preamble further proclaims to endow the Municipalities with necessary powers and entrust them with functions in conformity with the intention of Article 243 of the Constitution of India. The redeeming feature of the Act is that its prime object is to carry out developmental activities and welfare measures with the active participation and involvement of the people. Municipalities which are institutions of self-governments will be able to translate the constitutional philosophy behind the 74th Constitutional Amendment into only reality if adequate power and freedom is conceded to the representatives elected by the people to the local bodies. The Act proclaims that decisions in regard to the developmental schemes and various welfare measures to secure social justice would be taken based on discussions at the ward committee level ensuring the people's participation and also through the resolutions of the Municipal Council. The Secretary is entrusted with the responsibility to see that those decisions are implemented. Powers given to the Secretary are geared to the fulfilment of the duties and responsibilities entrusted on him. The Chairperson is having supervision over the Secretary and other officers and employees of the Municipality. It is therefore clear that under the scheme of the Act the powers of the Secretary are inferior to that of the Council and the Chairperson. As already noticed, there are provisions in the Act which confers disciplinary power on the Council and the Chairperson. Such powers, to a limited extent, can be exercised over the work and conduct of the Secretary also. Section 49(1)(k) expressly confers power on the Secretary to take disciplinary action against the employees of the Municipality. At the same time Section 49(1)(k), does not authorise the Secretary to suspend the employees. In view of the superior position the Municipal Council and the Chairperson occupy under the Act and more particularly in the light of the express power conferred on the Chairperson and the Municipal Council under Sub-section (6) of Section 15 of the

Act, I am of the opinion that the legislature while authorising the Secretary to take disciplinary action, and that too, only with the knowledge of the Chairperson, consciously omitted to confer the power to place the employees under suspension on the Secretary. It is also to be noted that the Secretary is not the appointing authority of any of the municipal employees. Sub-section (6) of Section 15 empowers the Chairperson, if necessary, to suspend from service any officer or employee in the service of the Municipality, where disciplinary action has to be taken against them on grounds of gross negligence of duty, dereliction of duty and violation of rules and standing orders. Provisions in the nature of Section 15(6) were not there in the repealed Act. Sub-section (6) of Section 15 prescribes certain conditions and provides for inbuilt safeguards. If power to suspend the employee is conceded to the Secretary merely for the reason that Section 49(1)(k) confers on the Secretary the power to take disciplinary action against employees of the Municipality, any such action of the Secretary will be free from scrutiny by the Chairperson or need not be subject to any ratification by the Council. That means, the order of suspension will come into force and continue to be in force at the unfettered discretion of the Secretary notwithstanding the opinion or views of the Chairman or the Council, to the contrary. Viewed from that angle, it is reasonable to think that the Legislature did not intend to confer on the Secretary the power to suspend the employees from service and that intention is reflected in Section 49(1)(k) of the Act. Legislature has conferred the power to the Chairperson to suspend the employees by an express provision making its intention clear. A plain reading of Section 49(1)(k) makes it clear that the power of the Secretary is confined to the act of taking disciplinary action and the same has to be done with the knowledge of the Chairperson. Section 49(1)(k) does not say that the Secretary has got the power to suspend the employee from service. For reasons already stated above, the scheme of the Act discernible from the relevant provisions does not permit the conferment of an implied power on the Secretary. On the other hand it is reasonable to think that the Secretary who is empowered to take disciplinary action shall intimate the same to the Chairperson before he acts and the Chairperson on getting knowledge of that fact from the Secretary will be at liberty to decide as to what action he shall have to take. The Chairperson is free to decide whether suspension of the employee is necessary by invoking the power conferred on him u/s 15(6) of the Act. The scheme of the Act also shows that no suspension order can remain in force unless the Council which is the democratically elected body competent to take binding decisions relating to the functions and all other affairs of the Municipality, ratifies the suspension. It is difficult to visualise the conferment of unbridled and unguided powers on the Secretary to take action against the employees and officers of the Municipality, particularly the power to place them under suspension, without the Secretary being accountable either to the Chairperson or to the Council. Claim for wider powers on the Secretary whose duty is to execute the decisions of the Municipal Council, the elected body of the people, militates against the basic principles of democracy. The Secretary, who is a civil servant is accountable to the

Government as also the Municipal Council. If implied or incidental powers run counter to the scheme of the enactment, the proper way of construing the statutory provision is to restrict the power to the one expressly given and to rule out the existence of any implied or incidental powers.

23. Counsel for the 5th respondent contended that the Secretary derives power to place the employees of the Municipality from Rule 15 of the Kerala Municipal Common Service Rules made under the repealed Act. According to the 5th respondent, the petitioner is a member of the common service and being governed by the rules which are kept alive in terms of Section 575(2)(ii) of the Act, the Secretary has got the power to place the petitioner under suspension in exercise of the power under Rule 15 of the Rules. Section 575 of the Act deals with repeal and saving. Clause (ii) of Sub-section (2) of Section 575 provides that any appointment, rules, bye-laws, etc. made under the repealed enactments and in force at such commencement shall, in so far as they are not inconsistent with the provisions of this Act, continue to be in force as if made, issued, imposed or granted as the case may be by the corresponding Municipalities under the provisions of the Act until superseded, amended or modified. It is true that new rules have not been made or brought into force replacing the Kerala Municipal Common Service Rules made under the Kerala Municipal Corporations Act, 1961. That does not, however, mean that all the provisions of the Rules in its entirety will continue to be in force even if some of those rules come into conflict with the provisions of the Act and even if any of the provisions of the rules ceases to be operational on account of the changes brought about by the Act with regard to the power to make appointments, the power to take disciplinary action, the power to suspend the employees etc. I have held that the scheme of the Act discernible from the relevant provisions does not confer on the Secretary the power to place the employees of the Municipality under suspension. In that view of the matter Rule 15 of the Rules is inconsistent with the provisions of the Act. It is settled principle that a Rule framed by the authority delegated by the Legislature and breaths life from the Act made by the Legislature, cannot prevail over the Act or run counter to the Act. Hence the contention of the 5th respondent based on Rule 15 of the Rules also must fail.

24. For reasons aforesaid I hold that the Secretary of a Municipality has no power to suspend the Municipal Engineer u/s 49(1)(k) of the Act or Rule 15 of the Rules and that Ext. P4 order passed by the 5th respondent is without jurisdiction and void ab initio. Ext. P4 is quashed and the Writ Petition is allowed. Petitioner shall be reinstated in service forthwith with all consequential service benefits.