

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on May 17, 2013
Judgment Delivered on May 31, 2013

+ **W.P.(C) 2215/2012**

SH. N. K GHAI

..... Petitioner

Represented by: Mr.Raman Duggal, Advocate

versus

MUNICIPAL CORPORATION OF DELHI & ORS.

..... Respondents

Represented by: Mr.Gaurang Kanth, Advocate
for R-1
Mr.Naresh Kaushik,
Mr.Vardhman Kaushik and
Ms.Amita Kalkal Chaudhary,
Advocates for R-2
Mr.Vinay Kumar Garg,
Ms.Namrata Singh and
Mr.Amit Srivastava, Advocates
for R-3 to R-9
Mr.Raman Duggal, Advocate
for R-10

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. The challenge in this petition is to the order dated January 27, 2012 passed by a five Member Bench of the Central Administrative Tribunal,

Principal Bench, New Delhi (the Tribunal) in Transfer Application No.154/2009, whereby the Tribunal represented through its majority decision (4:1 in favour) has allowed the Transfer Application thereby, inter-alia, directing the respondent No.1 to convene, in consultation with UPSC, a DPC for post of AEOs by earmarking the vacancies year-wise and consider only those who were within the zone of consideration.

2. The issues before the five Members Bench of the Tribunal were two fold:

(i) Whether AEO (Physical) in Education Department of MCD could have been promoted on regular basis as DEO (Physical) in 2007 when neither any post of DEO (Physical) was ever created nor were they in the feeder category for promotion to the post of DEO (which posts were created) and were governed by the notified RRs, without carrying out amendment in the notified RRs simply on the basis of an administrative decision which is contrary to the statutory rules, that too by ignoring AEOs who were indeed in the feeder category for promotion to the post of DEO as per the notified RRs and had joined the service much earlier than R-3 & R-4.

(ii) Whether petitioners have any right to claim direction to the respondents to hold year-wise DPC for respective posts as per the statutory rules.”

3. The facts as noted by the Tribunal are that in the Education Department of Municipal Corporation of Delhi (hereinafter referred to as ‘Corporation’), there were initially four streams viz School Inspector (without any suffix), School Inspector (Science), School Inspector (Physical) and School Inspector (Nursery) having separate recruitment regulations with different qualifications. The promotion channel for School Inspector (Physical) was till Assistant Education Officer (Physical). But

after that they had no promotion avenues as no post of Deputy Education Officer (Physical) was created nor Assistant Education Officer (Physical) was in the feeder category of Deputy Education Officer. All the cadres are having separate seniority list and respective promotions in their own channel. It was only Assistant Education Officer (without any suffix) which was the feeder post for Deputy Education Officer.

4. On January 31, 1997 through a Resolution a decision was taken for reorganization and restructuring with a view to achieve 100% universalization of primary education by the Commissioner of Corporation which was approved by the Special Officer under Section 490(2)(b) of the MCD Act as the house stood dissolved.

5. The decision primarily relate to the following:

3(i) Propose to upgrade one post of School Inspector (Physical) ₹2000-3500 to the post of Assistant Education Officer (Physical) in the scale of ₹3000-4500. It was further proposed in terms of sub para (ii) that since the pay scale of Senior School Inspector and Assistant Education Officer is identical and their nature of duties are also more or less the same, therefore, Senior School Inspectors should be designated as Assistant Education Officer. In sub para (iii) it was proposed that all the categories of Assistant Education Officers viz. Assistant Education Officers (General), Assistant Education Officers (Physical), Assistant Education Officers (Science), Assistant Education Officers (Nursery) will form feeder grade for promotion to the post of Deputy Education Officer and henceforth inter-se seniority in respect of Assistant Education Officer (General, Physical, Science and Nursery) shall be determined by CED in the ratio of 70:15:10:5 respectively on the basis of joining the post of Senior School Inspectors/ Assistant Education Officers either on current duty, ad-hoc or regular basis for the

purpose of promotion to the post of Deputy Education Officers.

In sub para (iv) it was clarified that promotion to the post of AEO in different categories would be made from their respective feeder post of School Inspector. In sub para (v) it was recorded that one post of School Inspector (Nursery) in the grade of ₹2000-3500 was to be upgraded to the post of Assistant Education Officer (Nursery) in the grade of ₹3000-4500 and further six posts of School Inspector (Nursery) were also required to be created. It was also proposed to create eight posts of Deputy Education Officer in the pay scale of ₹3000-5000 and four posts of Assistant Education Officer (General) were to be upgraded as Deputy Education Officer. It was further proposed that the remaining 12 posts of Assistant Education Officer (General) and 4 Senior School Inspectors (General) shall be amalgamated to make it Assistant Education Officer (General). In the next sub para it was proposed that six posts of Senior School Inspectors (Science) shall be re-designated as Assistant Education Officer (Science) in the same pay scale.

6. From the above it can be seen that promotional avenues for the post of Deputy Education Officer were made available to all the four streams viz. Assistant Education Officer (General), Assistant Education Officers (Physical), Assistant Education Officers (Science) and Assistant Education Officers (Nursery). This resulted in enlargement of the zone of consideration for promotion to the post of Deputy Education Officer. Further, it was decided to prepare inter-se seniority of all the four streams in the ratio of 70:15:10:5. On the basis of their joining the posts of Senior School Inspectors/Assistant Education Officer either on current duty/ ad-hoc or regular for the purpose of their promotion to the post of Deputy Education Officer meaning thereby that a common seniority list is to be prepared as per the decision in the ratio as referred above on the basis of their joining either

current duty/ ad-hoc / on regular basis.

7. Accordingly an office order dated August 11, 1997 was issued whereby all the posts of Senior School Inspector were re-designated as Assistant Education Officer(General and Science) respectively.

8. The petitioner was appointed as AEO (Physical) under direct recruitment quota on August 31, 1998. The respondent No.10 was appointed on the same post on July 15, 1999. In so far as the respondents are concerned, the respondent No.3 was posted as Senior School Inspector on current duty charge on September 29, 1995 and was posted as Assistant Education Officer (General) on June 27, 1996 on ad-hoc basis and further as Deputy Education Officer (General) on ad-hoc vide order dated June 15, 2005. The respondent No.4 while working on the post of Senior School Inspector was given the current duty charge of Assistant Education Officer (General) and later appointed as Assistant Education Officer (General) on ad-hoc basis vide order dated September 18, 1998. The respondent No.5 was promoted as Assistant Education Officer (General) vide order dated May 01, 2001 on ad-hoc basis and further given look after charge as Deputy Education Officer (General) vide order dated June 05, 2006 and was promoted as Deputy Education Officer (General) on ad-hoc basis on November 20, 2006. The respondent No.6 was given the current duty charge of Senior School Inspector (General) vide office order dated August 23, 1994. She was initially entrusted with the current duty charge of Assistant Education Officer (General) vide order dated March 30, 1995. Later vide order dated July 25, 1996 she was appointed to the post of Assistant Education Officer on ad-hoc basis. The respondent No.7 was promoted as School Inspector (General) on November 06, 1989 and was promoted as Assistant Education Officer (General) on ad-hoc basis vide order dated

December 10, 1998. She was further promoted as Deputy Education Officer (General) on ad-hoc basis vide order dated September 29, 2005. The respondent No.8 & 9 have joined as Assistant Education Officer (without any suffix) under direct recruitment quota after being recommended by the UPSC in the year 1992. The respondent No.8 was promoted as Deputy Education Officer (General) on ad-hoc basis and then as Additional Director (Primary Education) also on ad-hoc basis vide order dated May 26, 2004. The respondent No.9 was promoted as Deputy Education Officer (General) on ad-hoc basis vide order dated September 10, 1997.

9. The primary grievance of respondent No.8 and 9 before the Tribunal was that they had joined as Assistant Education Officer in May 1992 and they were eligible for being considered to the next post of Deputy Education Officer (without any suffix) as per the existing Recruitment Regulations which are still in vogue yet they were promoted as Deputy Education Officer (General) only on ad-hoc basis in the year 1997 because after re-organization the Recruitment Regulations with regard to other streams had not been notified while by the impugned order dated April 26, 2007 the petitioner No.1 and the respondent No.10 have been promoted on regular basis as Deputy Education Officer (Physical) ignoring the claim of Assistant Education Officers, which was a feeder category for the post of Deputy Education Officer as per the existing Recruitment Regulations which hold good even as on date. Their case has been that neither the post of Deputy Education Officer (Physical) was created nor there are any Recruitment Regulations for the said post and the existing Recruitment Regulations to the post of Deputy Education Officer have not been amended till date to include Assistant Education Officer (Physical) in the feeder category. Therefore, there is no justification for promoting the stream of Assistant Education

Officer (Physical) on regular basis in 2007 ignoring the Assistant Education Officers completely. The stand of the Corporation is that in the year 1997 Corporation had decided to strengthen and upgrade the existing zones by creating 15 more posts of Deputy Education Officers on the proportionate ratio in respect of feeder cadre posts namely 70% for Assistant Education Officer (General), 15% for Assistant Education Officer (Physical), 10% for Assistant Education Officer (Science) and 5% for Assistant Education Officer (Nursery) vide resolution/ decision dated January 31, 1997. However, since there were no notified Recruitment Regulations in respect of different categories of Deputy Education Officer like physical, science and nursery except the notified Recruitment Regulations of 1976 for Deputy Education Officer, therefore, the cases of the concerned Assistant Education Officers could not be sent to UPSC for promotion/ regularization to the post of Deputy Education Officer (General), Deputy Education Officer (Physical) etc. According to the Corporation, it is due to the exigency of the work that the ad-hoc promotions were given to the concerned Assistant Education Officers including the respondents in respect of their own feeder cadre to the post of Deputy Education Officer (General). According to them that in deference to the orders passed by this Court on December 16, 2005 in Writ Petition No.23600/2005 that the matter was referred to the UPSC for holding DPC to the posts of Deputy Education Officer (Physical) on regular basis. Even though certain queries were raised by the UPSC, which were answered to, and the case of petitioner herein and the respondent No.10 was considered and were promoted to the post of Deputy Education Officer (Physical) vide letter dated April 26, 2007.

10. The Corporation also states that since number of cases have been filed by other officers relating to their promotion, seniority or regularization to

the posts of Deputy Education Officer, it was decided to refer the matter to the UPSC to either review the DPC for the post of Deputy Education Officer (Physical) or for considering the cases of other Assistant Education Officer or Deputy Education Officer (General) who are working on ad-hoc basis since 1997 and regular Assistant Education Officer (General) since 1992 for their promotion as Deputy Education Officer (General) on the basis of existing notified Recruitment Regulations of 1976 from the date of their holding the post as Deputy Education Officer (General) on ad-hoc basis on the same analogy in which the petitioner and the respondent No.10 were considered and promoted as Deputy Education Officer (Physical) on regular basis to avoid any further dispute in regard to their seniority.

11. Stand of UPSC was that the Recruitment Regulations notified by the Corporation on October 19, 1976 for the post of Deputy Education Officer stipulate that for promotion to the post of Deputy Education Officer the feeder category is Assistant Education Officer with three years regular service in the grade on regular basis. According to the UPSC, a proposal was received from the Corporation for considering promotion in the grade of Deputy Education Officer (Physical) for two vacancies and the directions of this Court dated December 16, 2005 in Writ Petition No.23600/2005. Further, that even though the Recruitment Regulations do not mention any category of post as Deputy Education Officer (Physical) the Corporation informed that they had divided the grade of Deputy Education Officer in four categories and earmarked the vacancies for each of the categories. In the category of Deputy Education Officer (Physical) two posts were sanctioned and hence the Corporation had requested them for considering promotion in the grade of Deputy Education Officer (Physical) by taking into consideration only the feeder grade of Assistant Education Officer

(Physical). Therefore, the other categories of Assistant Education Officer could not be considered for promotion in the grade of Deputy Education Officer (Physical). The petitioner who was respondent No.3 before the Tribunal supported the action of the Corporation and has taken certain preliminary objection about the maintainability of the writ petition. It is the case of the petitioner before the Tribunal that he and the respondent No.10 are senior on the post of Deputy Education Officer. According to him he has been promoted on regular basis while the others have been promoted on ad-hoc basis and the respondent No.8 and 9 herein who were petitioner Nos.6 and 7 cannot be placed on the same footing because they are also from different cadres.

12. After dealing with the preliminary submissions made on behalf of petitioner the Tribunal dealt the case on merit. One of the first issue which was considered by the Tribunal is that whether, when the existing Recruitment Regulations for the post of Deputy Education Officer were not amended to include Assistant Education Officer (Physical) in the feeder category and no post of Deputy Education Officer (Physical) has been created, the petitioner herein and the respondent No.10 could not have been promoted as Deputy Education Officer (Physical) on regular basis while denying even consideration to the Assistant Education Officer. It was also an issue before the Tribunal, whether regular promotion could have been affected without decision resulting in the Recruitment Regulations being amended. The Tribunal held that the resolution dated January 31, 1997 could not have been acted upon without following due procedure as laid down in the Act and administrative decision dated January 31, 1997 could not mean that the Recruitment Regulations stood amended.

13. The Tribunal negated the submission on behalf of petitioner herein

that his promotion was on the basis of the judgment of this Court dated December 16, 2005 in Writ Petition No.23600/2005 by holding that this Court in the said Writ Petition had only directed the Corporation to hold DPC for the post of Deputy Education Officer as per the recruitment regulations from amongst the Assistant Education Officer (Physical). The Tribunal held that there was a clear direction to consider all eligible persons as per regulations for the post of Deputy Education Officer which are statutory in nature and the Corporation has committed grave mistake by only considering the petitioner and respondent No.10 for regular promotion as Deputy Education Officer (Physical) even though they were not in feeder cadre in terms of regulations of Deputy Education Officer.

14. The further submission on behalf of petitioner that since the policy decision has been taken by the Special Officer to include all the streams in the feeder category, it could have been acted upon without amending the Recruitment Regulations. The Tribunal held even if such a plea is accepted, the respondent Nos.8 and 9 have a better case since they have been promoted as Deputy Education Officer or Deputy Education Officer (General) in 1997 when the petitioner and respondent No.10 were not born in the cadre of Assistant Education Officer (Physical). In so far as the contention of the petitioner that the respondents having taken benefit of the decision dated January 31, 1997 for accepting further promotions, it was not open for them to challenge his as well as respondent No.10's promotion, was rejected by the Tribunal by holding that decision which was taken was to include all the streams in the feeder category and to upgrade certain posts or red-designate them as Assistant Education Officer in different streams. The grievance arose only when the petitioner and respondent No.10 were promoted in the year 2007. Hence there was no question of challenging their

ad-hoc promotion pursuant to the decision dated January 31, 1997. The Tribunal had even rejected the contention that the respondents herein being in the cadre of Assistant Education Officer (General), they could not have challenged the promotion of the petitioner and the respondent No.10 to the post of Deputy Education Officer (Physical).

15. We have heard learned counsel for the parties. Mr.Raman Duggal, learned counsel for the petitioner and respondent No.10 would justify their promotion on the basis of resolution dated January 31, 1997 and since the same was approved by the special officer under Section 490(2)(b) of Delhi Municipal Corporation Act, 1957 (The Act of 1957). According to him the decision could have been acted upon without requirement of the notification under Section 480(2) of the said Act. He submit that the existing recruitment regulations did not contemplate the re-organization and re-structuring of zonal set up which was approved in 1997, to that extent the field remained unoccupied by any existing regulations, the executive authority was within its right to fill up the gap by issuing necessary administrative instructions. He would further state that the resolution dated January 31, 1997 was uniformly implemented and the respondent Nos.3 to 9 have been promoted from time to time by the Corporation to the post of Deputy Education Officer (General), Deputy Education Officer (Physical), Deputy Education Officer (Science) on ad-hoc basis from the feeder post of Assistant Education Officer (General), Assistant Education Officer (Physical), Assistant Education Officer (Nursery) and Assistant Education Officer (Science). Mr.Duggal relies upon the following judgments in support of his contentions; (i) JT 1998 2 SC 111 Vimal Kumari vs. State of Haryana; (ii) 2011 9 SCC 645 Chandigarh Administration vs. Usha Kheterpal Waie & Ors.; (iii) AIR 1967 SC 1910 Sant Ram Sharma vs. State of Rajasthan; (iv)

AIR 1966 SC 1942 B.N Nagarajan vs. State of Mysore and Ors.

16. On the other hand, Mr.Vinay Kumar Garg, learned counsel for respondent Nos.3 to 9 would support the judgment of the Tribunal by stating that what has been held by the Tribunal in the impugned order, is in conformity with the law laid down by Supreme Court. According to him, no appointment can be made without following Recruitment Regulations and for promotion there must exist on feeder post. If a person is not in feeder post, then he can't claim promotion. He would further submit that an equivalent category cannot be transposed as feeder category unless provided by Recruitment Regulations. He also submit that executive instructions can't over ride statutory rules, which have to be followed scrupulously. He relies on the following judgments in support of his contentions; (i) (2008) 1 SCC 575 Mahbood Deepak vs. Nagarpanchayat Gajrola & Anr.; (ii) (2007) 9 SCC 189 Mangi Lal vs. State of Rajasthan; (iii) (2009) 7 SCC 205 Uttranchal Jal Sansthan vs. Laxmi Devi; (iv) (2007) 9 SCC 369 Gopal Singh vs. State Cadre Forest Officer's Association & Ors.; (v) (1997) 3 SCC 639 H.R Ramchandriah & Anr. vs. State of Karnataka & Ors.; (vi) (1968) 1 SCR 111 Sant Ram Sharma vs. State of Rajasthan & Anr.; (vii) (1972) 2 SCC 188 State of Haryana vs. Shamsher Singh Bahadur; (viii) (2007) 15 SCC 129 State of Orissa and Anr. vs. Prasana Kumar Sahoo; (ix) (1987) 3 SCC 622 P.D Aggarwal & Ors. vs. State of U.P & Ors.; (x) (1998) 8 SCC 469 K.Kuppu Swamy & Ors. vs. State of Tamil Nadu and Ors.

17. The question that arises for our consideration is, whether the resolution dated January 31, 1997 supplement the Recruitment Regulations of 1976, or could not be given effect to without being approved by the Central Government and duly published by the Central Government and duly published with Gazette in terms of Section 480(2) of The Act of 1957,

and thereafter properly amending the Recruitment Regulations before effecting the promotion.

18. It is an admitted position, Recruitment Regulations of 1976, have been framed in terms of the provision of the Act and are statutory in nature. The Rules contemplates, the post of Deputy Education Officer would be filled up by Assistant Education Officer with 3 years regular service and the same is a selection post. No post of Deputy Education Officer (Physical) is prescribed in the Recruitment Regulations. If certain posts have been created, then surely the Recruitment Regulations, must necessarily to be framed before they could be filled. The Ratio has been fixed as 70:15:10:5 for Assistant Education Officer (General), Assistant Education Officer(Physical), Assistant Education Officer (Science) and Assistant Education Officer (Nursery). Regrettably, no Rules, framed to govern the eligibility. Out of 15 posts, 3 were pre-existing. The Recruitment Regulations of 1976 governed these 3 posts. Surely when the three posts form part of the 15 posts, it is the Recruitment Regulations of 1976 which should govern the promotion against 3 posts, provided, the same are amended in terms of the provisions of The Act of 1957 (The Act of 1957). The resolution of January 31, 1997 except creating / upgrading the post at the level of Deputy Education Officer, does not prescribe the eligibility for filling up the post of Deputy Education Officer (Physical). Even it is not the case of the Corporation that draft regulations have been prepared. 3 provisions of the Act of 1957 are of relevance here, the same are Section 98, 480 & 490(2) and are reproduced hereunder.

Section 490 (2)(b)

“during the period of dissolution of the Corporation, all powers and duties conferred and imposed upon the Corporation by or under this Act or any other law, shall be

exercised and performed by such officer or authority as the Central Government may appoint in that behalf”.

Under this section, the Special Officer can exercise at best those powers which are vested in the Corporation. Section 98 gives power to the Corporation to make rules laying down conditions of service of officers and other employees as follows:-

“(c) The qualifications of candidates for appointment to posts specified in sub-Section (1) of Section 89 and to posts dealt with in the First Schedule of posts referred to in sub-section (2) of Section 90 and the manner of selection for appointments to pots dealt with in the Second Schedule of posts referred to in that sub-section.

(e) any other matter which is incidental to, or necessary for, the purpose of regulating the appointment and conditions of service of persons appointed to services and posts under the Corporation and any other matter for which in the opinion of the Corporation provisions should be made by regulations”.

Section 480 of MCD Act is also relevant here, which for ready reference, is quoted below:-

“480. Supplemental provisions respecting regulations

(1) Any regulation which may be made by the Corporation under this Act, may be made by the Central Government within one year of the establishment of the Corporation; and any regulation so made may be altered or rescinded by the Corporation in the exercise of its powers under this Act.

(2) No regulation made by the Corporation under this Act shall have effect until it has been approved

by the Central Government and published in the Official Gazette”.

19. The aforesaid provisions reveal that Section 98 empowers the Corporation to make provisions. The exercise of the said power is subject to Section 480(2) of the Act which stipulates the regulations to be approved by the Central Government and duly published in the official Gazette. Section 490(2)(b) of the Act only stipulates all powers and duties conferred and imposed upon the Corporation under the Act or any other law shall be exercised and performed by such officer as the Central Government may appoint. Even if the resolution is approved by the officer, the same is still required to be approved by the Central Government and duly published in the Gazette. The officer is only a substitute of Corporation and not of Central Government. The Supreme Court interpreting the Bihar Agricultural Universities Act, 1987 in its opinion reported as (2010) 1 SCC 730 Rajendra Agricultural University vs. Ashok Kumar Prasad & Ors. has held as under:

10. Section 35 of the Act deals with and enumerates the topics on which statutes can be framed by the University. Section 35(25) provides that subject to the provisions of the Act, the Statutes may provide for the conditions of service, remuneration and allowances to be paid to teachers employed under the University. Section 36 of the Act provides how statutes are to be made. It is extracted below:

“36. Statutes how made : (1) the Board of Management may, from time to time, make new or additional statutes or may amend or repeal the statutes in the manner hereinafter provided in this section.

Provided that the Board of Management shall not make any Statute or any amendment to a Statute affecting the statutes, powers or constitution of any

existing authority until such authority has been given an opportunity of expression on opinion on the proposal and any opinion so expressed shall be in writing and shall be considered by the Board of Management:

Provided further that no Statute shall be made by the Board of Management affecting the discipline of instruction education and examination except after consultation with the Academic Council.

(2) Every new Statute or addition to the Statute or any amendment or repeal of a Statute shall require the approval of the Chancellor, who may assent thereto or withhold assent or remit the same to the hoard of Management for reconsideration.

(3) A new Statute or a Statute amending or repealing an existing Statute shall have no validity unless it has been assented by the Chancellor.

(4) All Statutes made under this Act shall be published in the official Gazette.”

11. The Bihar and Orissa General Clauses Act, 1917, defines a notification as “a notification in the Gazette”. [Vide clause (36) of section 4.] Section 28 of the said General Clauses Act provides:

“28. Publication of orders and notifications in the Gazette: Where in any Bihar and Orissa Act or Bihar Act or any rule made under any such Act, it is directed that any order, notification or other matter shall be notified or published, such notification or publication shall, unless the Act otherwise provides, be deemed to be duly made if it is published in the Gazette.”

12. Section 36 lays down three steps for making or amending a Statute. They are:

(a) The Statute should be made by the Board of Management in the manner specified in sub-section (1);

(b) The Statute should be approved and assented by the Chancellor;

(c) The Statute so made and assented, shall be published in the official Gazette.

When the Act lays down the manner in which a statute under the Act should be made, it shall have to be made in that manner and no other. The requirement that the statute should be published in the official Gazette, is an integral part of the process of "Statute making" under section 36 of the Act. It is mandatory and not directory. Until publication in the official Gazette, the Statute will be considered as still being in the process of being made, even if had received the assent of the Chancellor. A "Statute in the making" or a "Statute-in-process" is incomplete and is neither valid nor effective as a statute. So long as the statute is not completely made, but is still in the process of being made, it can be cancelled or withdrawn or modified, without the need for "publication" of such cancellation, withdrawal or modification. The Chancellor kept the "Statute-in-process" pending and later reconsidered it and held that the Statute proposing the time-bound promotion scheme was still-born and non-est."

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26. In view of the above, it is not possible to accept the contention that the statute contained in the Notification dated 4-9-1991 came into effect or became enforceable even in the absence of publication in the Official Gazette. The High Court committed an error in holding that the teachers became entitled to the benefit of the Statute relating to time-bound promotion scheme, when the said Statute made by the Board of Management was assented to by the Chancellor even though it was not published in the gazette. The High Court also committed an error in observing that the non-publication was unreasonable and arbitrary, as it ignored the valid reasons assigned by the Chancellor for withdrawing his assent to the incomplete Statute, in his Order dated 19-3-1996."

20. On the aspect of the provisions of the Act of 1957, the Tribunal held as under:

“Let us examine contentions of both the counsel. We have already noted above that in the Resolution dated 31.1.1997, the only posts created were of DEO which were governed by the statutory rules framed under Section 98 and duly approved and notified under Section 480 (2) of the DMC Act. In these RRs it was only AEOs (without any suffix) who were eligible to be considered for promotion. No other stream was eligible for promotion as DEO. It is correct that on 31.1.1997 a Resolution was approved by the Special Officer under Section 490(2)(b) of the MCD Act to include all the streams in the feeder category for the post of DEO but that would at best be an administrative decision which was contrary to the notified statutory rules. The legal question which thus arises is, whether an administrative decision can override the statutory rules or amount to amending the rules without actually amending the RRs. The answer would be no because Section 490(2)(b) of MCD Act reads as under:-

Section 490 (2)(b)

“during the period of dissolution of the Corporation, all powers and duties conferred and imposed upon the Corporation by or under this Act or any other law, shall be exercised and performed by such officer or authority as the Central Government may appoint in that behalf”.

Under this section, the Special Officer can exercise at best those powers which are vested in the Corporation. Section 98 gives power to the Corporation to make rules laying down conditions of service of officers and other employees as follows:-

“(c) The qualifications of candidates for appointment to posts specified in sub-Section (1) of Section 89 and to posts dealt with in the First Schedule of posts referred to in sub-section (2) of

Section 90 and the manner of selection for appointments to posts dealt with in the Second Schedule of posts referred to in that sub-section.

(e) any other matter which is incidental to, or necessary for, the purpose of regulating the appointment and conditions of service of persons appointed to services and posts under the Corporation and any other matter for which in the opinion of the Corporation provisions should be made by regulations”.

Section 480 of MCD Act is also relevant here, which for ready reference, is quoted below:-

“480. Supplemental provisions respecting regulations

(1) Any regulation which may be made by the Corporation under this Act, may be made by the Central Government within one year of the establishment of the Corporation; and any regulation so made may be altered or rescinded by the Corporation in the exercise of its powers under this Act.

(2) No regulation made by the Corporation under this Act shall have effect until it has been approved by the Central Government and published in the Official Gazette”.

Perusal of above provisions shows that Section 98 of the MCD Act, gives power to the Corporation to make rules/regulations but that is subject to Section 480(2) which makes it clear that no such Regulation shall have effect unless it has been approved by the Central Government and published in the official Gazette. Section 480 also gives power to the Corporation to alter or rescind the Regulation but that is also subject to Section 480(2). When the main Regulation itself cannot be given effect to

without it being approved by the Central Government or Notification in the Gazette, naturally the same would apply to the amendment or alteration also. We find no merit in the contention of counsel for R-3 that Resolution could have been acted upon, without following the due procedure as laid down in the Act. It is trite law that when a procedure is mentioned in the Act, it has to be followed and acted upon in the same spirit. Section 21 of the General Clauses Act would be relevant here which for ready reference reads as under:-

“21. 2[Power to issue, to include power to add to, amend, vary or rescind, notifications, orders, rules or bye- laws.- Where, by any 3[Central Act] or Regulation, a power to 4[issue notifications,] orders, rules, or bye- laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any 5[notifications,] orders, rules or bye- laws so 6[issued]”.

In A. Manoharan and Others Vs. U.O.I. & Others
reported in 2008 (3) SCC 641 it was held as under:-

“The legal principle that an administrative act must yield to a statute is no longer res integra. Once a regulation has been framed, in terms of the provisions of the General Clauses Act, the same must be amended in accordance with the procedures laid down under the principal enactment. Even assuming that the Central Government had the jurisdiction to direct the authority to amend the regulations, it was required to be carried out in accordance with law, and, thus all requisite procedures laid down therefore were required to be fulfilled”.

From above, it is clear that even for amendment, the same procedure has to be followed.

Even otherwise, the administrative decision dated 31.1.1997 with regard to enlarging the feeder cadre was only the first step in the process of framing regulations. The modalities as to how the 4 streams would be considered, what would be the qualifications, what would be basic requirement for the feeder category, whether it would require regular service/ad hoc/current duty charge for making them eligible were yet to be finalized. Since the decision taken was to increase the feeder category by including other streams which were not already included, naturally it was contrary to the existing notified RRs. Moreover in the RRs, the feeder category was AEO who should have 3 years of regular service, whereas it was decided to consider even those AEOs in the Resolution/Decision dated 31.1.1997 who were posted either on ad hoc/current duty charge or regular, therefore, naturally it required amendment in the existing RRs. Simply because an administrative decision was taken it does not mean the rules stood amended.”

21. The aforesaid conclusion of the Tribunal is correct in as much as it can't be said that the Rules have been amended as amendment has necessarily to be carried out in terms of the prescribed procedure. Further, the Rules of 1976 are holding the field for promotion to Deputy Education Officer, the increase in the number of posts with a changed nomenclature and new feeder categories necessarily must be incorporated in the regulations. The judgments relied upon by Mr.Duggal are in peculiar facts of the case where the Supreme Court has held pending notification by the Central Government, drafts rules can regulate the service conditions; till statutory rules are framed Government can issue administrative instructions; there is no bar for making appointments under the States Executive Powers without framing statutory rules. The aforesaid position of law was in the context where there are no statutory rules holding the field but where the Regulations exist holding the field, the Regulations are required to be

followed scrupulously. If the scope of the Regulations have to be expanded, the same has to be by way of an amendment as per procedure so as to include the increased posts, change of nomenclature and the newly created feeder posts etc. Suffice would it be to state that the executive instructions or decisions taken, which does not have the effect of regulations cannot over ride validly made regulations. We agree with the submission of Mr.Garg that executive instructions cannot over ride statutory rules. The Resolution dated January 31, 1997 cannot be a ground to grant promotion to the petitioner and respondent No.10 by excluding the respondent Nos.3 to 9.

22. We see that the Tribunal has also dealt with the preliminary and other submissions advanced on behalf of the petitioner. Those have been appropriately considered and dealt with by the Tribunal and we don't see any infirmity with regard to the said conclusions.

23. Mr.Naresh Kaushik, learned counsel for UPSC would submit that the Resolution is basically under Chapter VI of The Act of 1957. We are of the view that it may not be necessary to go into that particular aspect in view of what we have stated above.

24. We find no infirmity in the order of the Tribunal and accordingly dismiss the writ petition directing the parties to bear their own costs.

(V.KAMESWAR RAO)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

MAY 31, 2013
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