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

+ **W.P.(C) 704/2012**

Date of Decision: 17th November, 2016

KUSUM LATA DEVI

..... Petitioner

Through: **Mr. Vishwendra Verma & Ms. Neha,**
Advocates

Versus

MUNICIPAL CORPORATION OF DELHI & ORS..... Respondents

Through: **Mr. Rajesh Sachdeva & Ms. Shobha**
Gupta, Advocates for EDMC
Mr. Satyakam, ASC for respondent
No.5

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL)

The petitioner- Kusum Lata Devi, an Assistant Teacher with the respondent- Municipal Corporation of Delhi since 16th November, 1983, had applied, and was selected, for temporary promotion to the post of Trained Graduate Teacher ('TGT') [Sanskrit] with the Delhi Administration (now Government of NCT of Delhi).

2. By letter dated 17th December, 1992 the petitioner was required to report for duty and join as TGT, latest by 30th December, 1992. Owing to

personal and family reasons, the petitioner, vide letters dated 21st January, 1993 and 6th April, 1993 had requested for an extension of the joining date upto 31st July, 1993.

3. The petitioner, by the letter dated 27th July, 1993, had expressed her willingness to join her new posting, but by then the respondent-Corporation was not ready to relieve her or permit her to handover the charge.

4. On 13th September, 1993, the petitioner was served with a charge-sheet on account of an incident on 4th May, 1992, while she was working as Assistant Teacher in respondent-Corporation Primary School, Gokul Puri-I, Shahdara, Delhi.

5. In spite of the said chargesheet, the petitioner continued to represent that she should be relieved and permitted to join as TGT (Sanskrit) in the GNCTD. The said requests were not accepted.

6. In the aforesaid circumstances, the petitioner filed WP(C) No.116/1995 in the High Court of Delhi, *inter alia*, praying that she should be allowed to join as TGT(Sanskrit) in the GNCTD on transfer and, by way of promotion from respondent-Corporation. The writ petition was transferred to the Principal Bench of the Central Administrative Tribunal, Delhi and registered as TA No. 757/2009. The Tribunal disposed of the

transfer application vide order dated 23rd March, 2010 recording that the charge-sheet dated 13th September, 1993 had ended with the penalty of stoppage of four increments with future effect. This decision also refers to another departmental proceeding initiated vide RDA 3/189/95, which was dropped by the order dated 9th November, 2009. For the sake of clarification and convenience, we would like to reproduce paragraphs 5 and 6 of the decision dated 23rd March, 2010 passed by the Tribunal, disposing of TA No.757/2009:

“5. It is not in dispute that the applicant was promoted to the post of Language Teacher (Sanskrit) vide Govt. of NCTD Order No.31 dated 17.11.1992 (Annexure –P2). Though respondent – MCD avers that there were two cases against the applicant, we find that the applicant was issued Show Cause Notice in the first case vide Notice dated 31.07.2000 and penalty of stoppage of 4 increments with future effect was imposed. With regard to the second case the RDA No.3/189/95 against the applicant was dropped vide order dated 9.11.2009 and it was stated that this case was not pending at the time of applicant’s promotion as TGT (Sanskrit) in November, 1992. Since the counsel for MCD informed us that the RDA cases pending against the applicant was the ground for not granting vigilance clearance for her promotion as TGT (Sanskrit) and our above analysis shows that no charges were pending against the applicant on the date her promotion was ordered (17.11.1992), we are of the considered view that the applicant was entitled for the post of TGT (Sanskrit) as per the order dated 17.11.1992.

6. Before we part with this order, we would like to mention that about 17 years had elapsed since the order was issued in November, 1992. The respondent MCD in its additional affidavit dated 17.03.2010 submits that the applicant is senior enough to

be considered for the post of Principal, we leave the option to the applicant to decide whether she would continue in MCD or join Govt. of NCTD. In case the applicant chooses to stay in MCD and await her case to be considered for promotion to the post of Principal, this adjudication becomes academic. However, in case, she is willing to avail the option to approach the Government of NCTD (respondent No.5) she will do so within a period of one month from the date of receipt of a copy of this order and in that event the respondent No.5 will consider her case for promotion to the post of TGT (Sanskrit) with effect from the date her junior was posted. Consequently, she would get her seniority but since she has not worked on the post for such a long period from 1992, her pay shall be fixed notionally from that date and pay and allowances paid with effect from the date she joins the post of TGT (Sanskrit). We make it clear that she will not be entitled to any back wages. The respondent No.5 shall carry out the exercise within two months from the date of receipt of her representation to the respondent No.5.”

7. Paragraph 6 of the decision gave the petitioner an option to either continue as an Assistant Teacher in respondent- Corporation or opt for being appointed as a TGT(Sanskrit) in the GNCTD. The option was to be exercised within one month from the date of receipt of this order. The petitioner exercised her option to join as TGT(Sanskrit) vide her communication dated 19th April, 2010, addressed to the GNCTD. The GNCTD was to thereafter carry out the necessary exercise and take up the issue with the respondent-Corporation.

8. The Tribunal vide decision dated 23rd March, 2010 had denied back wages to the petitioner, stating that she had not worked in the post of TGT

(Sanskrit) from 1992. However, it was directed that her pay would be notionally fixed and the pay and allowance, so fixed, would be paid with effect from the date she joins the post of TGT (Sanskrit) with the GNCTD.

9. The petitioner, aggrieved by the denial of back wages, had filed WP(C) No.5724/2010, which was disposed of by a short order dated 25th August, 2010, remanding the case to the Tribunal. The order reads:

“1. The grievance of the petitioner is that without giving any reasons the Tribunal has held that the petitioner would not be entitled to any back wages. Learned counsel points out that the Tribunal has found fault with the action of the MCD in not releasing the petitioner to join as a TGT (Sanskrit) under Govt. of NCT of Delhi. The Tribunal has further found that if petitioner was to continue to serve under MCD she was senior enough to be considered for promotion to the post of Principal. Counsel urges that the petitioner has opted to join Govt. of NCT Delhi as TGT (Sanskrit) which rights enured to her on 17.11.1992.

2. Notice. Mohd. Rafi, Advocate accepts notice for A-1 & 2. Ms. Purnima Maheshwari accepts notice for A-3 to 5.

3. There is no need to await any counter affidavit for the reason the pleadings before the Tribunal has been placed before us.

4. We find that the Tribunal has given no reason as to why the petitioner would not be entitled to backwages if she opts to join as TGT(Sanskrit). We do not adjudicate upon this issue for the reason the Tribunal must speak its mind at the first instance.

5. Accordingly, we dispose of the petition maintaining the impugned order passed by the Tribunal but quashing the limited direction therein that the petitioner would not be entitled to any backwages. We do not substitute with any direction for the reason we remand the matter to the Tribunal with a direction that after hearing the parties reasoned decision would be taken with respect to the entitlement of the petitioner to backwages.

6. Petition stands disposed of, restoring TA No.757/2009. Direction is issued to the Tribunal to hear the parties and give reasons on the entitlement of the petitioner to backwages on her opting to join as TGT (Sanskrit) under the Govt. of NCT of Delhi.”

10. The High Court had directed the Tribunal to examine the question of back wages afresh, observing that the Tribunal had failed to give any reason why the petitioner was not entitled to back wages, even when she had opted to join the GNCTD at the post of TGT(Sanskrit).

11. By the impugned order dated 23rd September, 2011, the Tribunal has decided the aforesaid question of back wages against the petitioner. The petitioner has filed the present petition impugning this order and claims that she is entitled to back wages from 1992 till the date she had joined as TGT(Sanskrit) on 7th April, 2011.

12. The contention of the petitioner is that she had suffered monetary loss

on account of utter failure and inaction by the respondent-Corporation in not issuing No-Objection Certificate ('NOC'). The first charge-sheet in the present case was issued on 13th September, 1993, whereas the petitioner was offered appointment to the post of TGT (Sanskrit) by the GNCTD much earlier, on 17th December, 1992. In support of her claim for back wages, she relies on ***Union of India & Ors. v. Anil Kumar Sarkar, (2013) 4 SCC 161.***

Paragraphs 14 and 21 of the said judgment read as under:-

“14. As per para 2 of the said memorandum, at the time of consideration of the government servants for promotion, the following details of government servants in the consideration zone for promotion falling in the categories mentioned should be specifically brought to the notice of the DPC viz. (i) Government servant is under suspension; (ii) Government servant has been served with a charge-sheet and the disciplinary proceedings are pending; and (iii) Government servant is facing prosecution for a criminal charge and the said proceedings are pending. As rightly observed by the High Court, if the above conditions are available, even one of them, then the DPC has to apply the “sealed cover process.” In the case on hand, it is not in dispute that the relevant date is 21-4-2003, when the respondent’s batchmates were promoted, admittedly on that date the respondent was not under suspension, no charge-sheet was served upon him nor was he facing any criminal prosecution. In

such circumstances, in terms of para 2 referred to above, the recommendation of the DPC has to be honoured and there is no question of applying “sealed cover process.”

.....

21. We also reiterate that the disciplinary proceedings commence only when a charge-sheet is issued. Departmental proceeding is normally said to be initiated only when a charge-sheet is issued.”

The aforesaid decision relies upon the earlier decision of the Supreme Court of India in ***Union of India v. K.V. Jankiraman, (1991) 4 SCC 109***, which holds that the departmental proceedings would commence on the issue of charge-sheet and thereupon sealed cover procedure is required to be adopted.

13. We have considered the said contention but express our inability to accept the contention of the petitioner that she would be entitled to back wages for the entire period. We have referred to two letters written by the petitioner, dated 21st January, 1993 and 6th April, 1993, by which she had requested for extension of time for joining till 31st July, 1993. These two letters refer to her family problems and that she was unable to join the new posting. The letter dated 11th May, 1993 written by the petitioner states that the petitioner had applied for an NOC from the Vigilance Department and had come to know that regular departmental proceedings were pending

against her. The reference was to the ensuing charge-sheet, which was subsequently issued on 13th September, 1993, which was then pending consideration before the Vigilance Department. The respondent-Corporation was, therefore, not ready and willing to issue the NOC, till vigilance clearance was granted.

14. We would, at this stage, also like to reproduce the charge, as alleged in the charge-sheet dated 13th September, 1993. On 4th May, 1992, on the directions of the petitioner, a student of Class-IV along with her classmates had left the school premises during the recess period from the main gate to bring some eatables for the petitioner. While returning, the student met with an accident and died on the spot. The investigation had revealed the petitioner was in the habit of asking her students to fetch her eatables from outside the school premises. This was in violation of the departmental instructions and amounted to gross misconduct.

15. We do not think that, in the aforesaid factual background, the decision in *Union of India v. K.V. Jankiraman*(supra) and *Union of India & Ors. v. Anil Kumar Sarkar* (supra) would help and assist the petitioner. In the present case, the petitioner had to join another employer, i.e., GNCTD and the matter regarding issuance of the NOC was pending consideration with

the earlier employer, i.e., the respondent- Corporation. Vigilance clearance was required. As noticed above, the petitioner had suffered punishment of stoppage of four increments with future effect vide order dated 31st July, 2000.

16. In the meanwhile, the petitioner was charge-sheeted in another departmental proceeding which had commenced in the year 1995. These proceedings were dropped vide order dated 9th November, 2009.

17. Given the aforesaid facts, the period up to 9th November, 2009 stands explained. The petitioner could not be issued an "NOC" and allowed to join the new employer as a TGT (Sanskrit) till 9th November, 2009. The claim for back wages for the said period, therefore, should be denied.

18. There is another reason why we feel that back wages for this period should be denied. We have also quoted paragraph 6 of the order dated 23rd September, 2010. The said order reflects and records the predicament of the petitioner. The petitioner was due for promotion as principal in the respondent-Corporation, her present employer. In these circumstances, the petitioner was given an option either to continue with her present employer or opt, within one month, to join as TGT (Sanskrit) with the GNCTD. The post of Principal is senior and higher to the post of TGT (Sanskrit).

19. Paragraph 6 of the order dated 23rd March, 2010 had given the petitioner one month's time to exercise the said option and thereafter two months' time to the GNCTD to process the case. The petitioner exercised the option on 19th April, 2010. It is accepted and admitted at the Bar that thereafter the GNCTD had processed the case and sent a letter dated 8th July, 2010 to the respondent-Corporation. The reminders dated 21st July, 2010, 29th July, 2010, 4th August, 2010, 18th August, 2010, 1st September, 2010, 9th September, 2010, 16th September, 2010 and 2nd November, 2010 were written by the GNCTD to the respondent-Corporation. The respondent-Corporation was requested to send the dossiers of the petitioner. The aforesaid facts have been recorded on the basis of the documents produced by the GNCTD and the notings in the order dated 7th February, 2011 which is enclosed by the Directorate of Education, GNCTD, along with their affidavit.

20. Learned counsel for the respondent-Corporation accepts the aforesaid position, but submits that the GNCTD had only requested for submission of dossiers. Further, the respondent-Corporation had to examine their records, collect papers from different schools, ensure that no dues were payable and only thereafter were the dossiers sent by the respondent-Corporation to the

GNCTD on 24th November, 2011. The GNCTD ensuingly passed the order dated 7th February, 2011, affirming that the documents had been verified and the petitioner should be allowed to join.

21. By letter dated 17th March, 2011, the GNCTD wrote to the Director (Primary Education), respondent-Corporation to relieve the petitioner as Assistant Teacher and to enable her to join her new assignment as TGT (Sanskrit) in the Directorate. The said letter was received by the respondent-Corporation on 30th March, 2011 and thereupon the respondent-Corporation immediately wrote the letter dated 31st March, 2011, stating that the petitioner stood relieved from the respondent-Corporation (Education Department) with effect from the said date and would report to the Department of Education of the GNCTD. This letter was received by the petitioner on 6th April, 2011 and the petitioner joined as TGT (Sanskrit) on 7th April, 2011.

22. This leaves us with the question whether the petitioner is entitled to any back wages from or after 9th November, 2009. Before we decide this issue, we would like to deal with the contention raised by the learned counsel for the respondent-Corporation regarding back wages or differential back wages, as the petitioner had been paid a salary as a teacher but the

higher salary payable to a TGT was not received. The Transfer Application No. 757/2009 was disposed of vide the order dated 23rd March, 2010. The contention is that the petitioner had not raised the issue of back wages. The submission is wrong and fallacious. The Delhi High Court in its order dated 25th August, 2010 in WP(C) No.5724/2010 had specifically directed the Tribunal to re-examine the question, on challenge being made. The direction of the High Court has attained finality and was not challenged by the respondent-Corporation, either by review or by way of special leave to appeal.

23. Returning to the question, whether the petitioner would be entitled to back wages from 9th November, 2009, we find that the issue must be decided in light of paragraph 6 of the order dated 23rd March, 2010. The petitioner faced the predicament whether to join as TGT or not, as she was senior enough to be considered for the post of Principal (sic. Head Mistress in the MCD as pointed out by the learned counsel for the petitioner). The petitioner herself was not absolutely sure whether she should opt for the said position and, therefore, had sought and asked for time to exercise her option. The Tribunal had given her time to exercise her option and thereafter directed the GNCTD to carry out the necessary exercise within two months from the date

they received the option, if any, exercised by the petitioner. The petitioner did not immediately exercise her option and had exercised the same only on 19th April, 2010.

24. The aforesaid factual matrix would lead us to conclude that the period of two months necessarily has to be excluded and cannot be counted for the purpose of back wages, as this time was specifically mentioned and recorded in the order dated 23rd March, 2010. This leaves us with the period from 19th June, 2011 till 6th April, 2012, i.e., a period of about one year. Keeping in view the aforesaid facts, we feel it will be just and fair in the present case if the respondents are asked to pay the differential in pay which the petitioner would have been entitled to, if she was appointed and paid as a TGT (Sanskrit), and the amount actually paid as the post of Assistant Teacher in the respondent-Corporation. The differential in the pay for the said period would be computed by the GNCTD in consultation with the Education Department of the respondent-Corporation within a period for three months from today. The aforesaid differential shall be borne in the ratio of 60:40 (60% by the MCD and 40% by the GNCTD). The said ratio has been fixed by us, keeping in view the relative faults and the time period taken by the respondent-Corporation and the GNCTD.

25. We would, at this stage, record and reject the contention of the learned counsel for the GNCTD that they cannot be burdened with the aforesaid back wages, for their role was limited and initially the petitioner was not appointed as TGT(Sanskrit), as the respondent-Corporation had refused to issue NOC. He further submits that the GNCTD had written a number of letters from 8th July, 2010 till November, 2010 to the Department of Education, Municipal Corporation. Regarding the first aspect, we would only note that we have not awarded back wages or differential in back wages for the period prior to the first judgment of Tribunal dated 23rd March, 2010. For the period post 23rd March, 2010, the letters written by the GNCTD have been duly noted, while fixing the aforesaid ratio. It is noticed that the dossiers of the petitioner was received by the GNCTD on 24th November, 2010. The office noting accepting the petitioner's absorption was recorded and approved on 7th February, 2011. There was, therefore, delay between November, 2010 and February, 2011. Thereafter, the GNCTD had written the letter dated 17th March, 2011 after a gap of more than one month. Mere table movement of files cannot be a ground to completely exonerate them and fasten the liability on the respondent-Corporation.

26. The writ petition is accordingly disposed of, with no order as to costs.

Dasti.

SANJIV KHANNA, J

CHANDER SHEKHAR, J

NOVEMBER 17, 2016/tp