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

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W.P.(C) 6606/2003

Reserved on : 21st April, 2016

Date of decision: 5th August, 2016

NEENA GANDHI

..... Petitioner

Through: Ms. Jyoti Singh, Sr. Advocate with
Ms. Tinu Bajwa and Mr. Sameer
Sharma, Advocates.

Versus

UOI & ORS.

.... Respondent

Through: Mr. G. Tushar Rao, Advocate with
Mr. Mayank Sharma and Mr. Anshul
Kulshrestha, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE NAJMI WAZIRI

SANJIV KHANNA, J.:

Neena Gandhi, the petitioner in this writ petition, impugns the final order and judgment dated 26th June, 2003 passed by the Principal Bench of the Central Administrative Tribunal, New Delhi, whereby her OA No.1610/2003, seeking regular appointment to the post of Lower Division Clerk (LDC) under Rule 5 of Debts Recovery Tribunal-II, Delhi (Group C and D posts) (Non-Gazetted) Recruitment Rules, 2002, has been dismissed.

2. The facts are not in dispute. They are:

(i) On 13th March, 2001, a requisition was sent by the Debts Recovery Tribunal, Delhi to the Employment Exchange for employment of four LDCs on daily wages, for a period of 89 days. A list of 34 candidates, duly enrolled with the employment exchange was sent to the Debts Recovery Tribunal indicating that the said candidates were between the age of 20-25

years and were at least matriculate, having typing speed of minimum 30 words per minute in English. The list included the petitioner, who was enrolled with the Employment Exchange on 10th December, 1999 vide registration No.99/8/04630.

(ii) The original record produced before us shows that the candidates were made to undergo shorthand and typing test. The petitioner was ranked amongst the top eight candidates on the basis of shorthand skills, computer knowledge and extra educational qualification.

(iii) The shortlisted candidates were called for an interaction with the Presiding Officer and five candidates were called for further interaction before the Board, which included the Presiding Officer, the Assistant Registrar and the Section Officer. The petitioner was placed at Sr. No.2 in the order of merit.

(iv) By office order dated 4th June, 2001, the petitioner was informed about her selection for appointment to the post of LDC on an *ad-hoc* basis for a period of 89 days in the scale of Rs.3050-4590. The petitioner was appointed with effect from 4th April, 2001. As the said letter is of relevance, we are reproducing the same in entirety:-

“Consequent upon her selection for appointment to the post of Lower Division Clerk on Ad-hoc basis for a period of 89 days in the scale of pay of Rs.3050-75-3950-80-4590/- Ms. Neena Gulati, Daughter of Sh.O.P. Gulati, is appointed as Lower Division Clerk in Debts Recovery Tribunal-II, Delhi with effect from 4th April, 2001 (FN). The pay of Ms. Neena Gulati is fixed at Rs.3050/- with effect from 4.04.2001.

Her appointment has been made purely in exigencies of services for a period of 89 days or till such time the regular appointee to be recruited on deputation basis, join in her place, whichever is earlier. Her services are liable to be terminated at

any time either on completing 89 days or even earlier also and no notice to the same is required to be given to her. She will not be entitled to have any claim for regular appointment on the basis of this appointment.

(v) By another office order dated 13th July, 2001, the tenure of the petitioner as an LDC in Debt Recovery Tribunal-II was extended for another period of 9 months, i.e., upto 3rd April 2002 on the terms and conditions as mentioned in the letter dated 4th June, 2001.

3. A reading of the office order/letter dated 4th June, 2001 would show that petitioner was appointed to the post of LDC in the DRT-II, Delhi i.e. Debts Recovery Tribunal-II at Delhi. For some reasons, which the respondents are unable to explain and clarify, vide notification dated 11th March, 2002, published in the Gazette of India, G.S.R.187(E), separate Rules i.e. Debts Recovery Tribunal-II Delhi, (Group 'C' and 'D' posts) (Non-Gazetted) Recruitment Rules, 2002, were published and promulgated with effect from 11th March, 2002. The respondents, for unfathomable and unexplained reason or justification, did not follow and apply The Debts Recovery Tribunal, Delhi (Group 'C' and 'D' posts) (Non-Gazetted) Recruitment Rules, 1998, which were in force and applicable with effect from 29th December, 1998 for the posts in Debts Recovery Tribunal-I, Delhi. It is accepted by both sides that separate rules were published and notified on 11th March, 2002, for the posts in the Debts Recovery Tribunal-II.

4. However, for clarity, we would begin by referring to the Debts Recovery Tribunal, Delhi (Group 'C' and 'D' posts) (Non-Gazetted) Recruitment Rules, 1998 relating to the post of LDC. The 1998 Rules had stipulated that 90% of the posts would be filled up by direct recruitment, failing which, by deputation, failing which by absorption. There was a

stipulation of filling up of 5% of the vacancies from other mechanisms and the remaining 5% vacancies on seniority-cum-fitness basis. The essential qualification as stipulated was matriculation or an equivalent with a minimum typing speed of 30 words per minute in English, or 25 words per minute in Hindi typewriting. The term 'direct recruitment' was defined to mean selection through the Staff Selection Commission or local employment exchange. As recorded above, the petitioner was appointed as an LDC on an *ad-hoc* basis in Debts Recovery Tribunal-II as her name was included in the list sent by the local employment exchange. A selection process as per the 1998 Rules, it is undisputed, was followed.

5. The 2002 Rules i.e. Debts Recovery Tribunal-II, Delhi (Group 'C' and 'D' posts) (Non-Gazetted) Recruitment Rules, 2002, on the other hand, state that 90% of the LDC's posts will be filled by direct recruitment, the term 'direct recruitment' is defined to mean direct recruitment through the Staff Selection Commission. Thus, the 2002 Rules do not postulate direct recruitment through requisition from the local employment exchange, whereas the 1998 Rules had the said stipulation.

6. The office order dated 4th June, 2001 by which the petitioner was appointed, and the second office order dated 13th July, 2001, extending the tenure of the petitioner, were issued and notified before the 2002 Rules became applicable with effect from 11th March, 2002. We have only noted the aforesaid facts to clarify and state the accepted position that the petitioner's appointment in terms of office order dated 4th June, 2001 and continuation vide office order dated 13th July, 2001 was in accordance with the 1998 Rules and not *de hors* or contrary to the said Rules. It is not the case of the respondents that the petitioner's initial appointment vide office order dated 4th June, 2001 and extension vide office order dated 13th July, 2001 was illegal for it was strictly as per the 1998 Rules. In fact, the contention of the respondents is that the 1998 Rules were not applicable to

the Debts Recovery Tribunal-II, Delhi and the recruitment rules for the Debts Recovery Tribunal-II, had not been framed when the petitioner was initially appointed on *ad-hoc* basis and when the extension was granted. The 2002 Rules were framed and made applicable only with effect from 11th March, 2002, when the said Rules were notified. We accept the said contention and have considered the impact and consequences thereof subsequently.

7. However, reference must be made to the legal position on the absence or non-existence of recruitment rules for making appointments to statutory posts. The law does not mandate existence of statutory rules as a pre-condition to appoint an eligible and fit person to a post. In the absence of rules, executive power which is co-extensive with the legislative power can be exercised to create civil posts and fill them up, provided the right to equality is not violated and appointments are in consonance with Articles 14 and 16 of the Constitution. In ***J & K Public Service Commission versus Dr. Narinder Mohan***, (1994) 2 SCC 630, the Supreme Court had lucidly explained and held: -

7. " Existence of Statutory Rules is not a condition precedent to appoint an eligible and fit person to a post. The executive power is co-extensive with legislative power of the State and under Article 162, the State can create civil posts and fill them up according to executive instructions consistent with Article 14 and 16 of the Constitution."

8. This brings us to the crucial question; whether or not the petitioner has any right under the 2002 Rules. It would be appropriate to recall that vide letter dated 13th July, 2001, the tenure of the petitioner was extended for a period of nine months i.e. up to 3rd April, 2002, which was beyond

and after the enforcement of the 2002 Rules, which became applicable with effect from 11th March, 2002.

9. The petitioner relies upon Rule 5 of the 2002 Rules, whereas the respondents rely upon Rule 7 of the 2002 Rules. In order to appreciate the contentions raised, we would like to reproduce Rule 5 and Rule 7 of the 2002 Rules:-

“5. Initial Constitution:- The employees holding the posts mentioned in the Schedule to these rules in the Debts Recovery Tribunal-II Delhi on the date of commencement of these Rules shall be deemed to have been appointed at the Initial Constitution stage of the said posts, if so opted within 30 days of publication of these rules. The regular service rendered by them before the publication of these rules shall count for the purpose of probation period, qualifying service for promotion, confirmation and pension.

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7. Regularization/Absorption:- (1)

Notwithstanding anything contained in the provisions of these rules, the persons holding the posts in the Debt Recovery Appellate Tribunal-II Delhi, on the date of commencement of these rules, either on transfer or on deputation basis and who fulfil the qualifications and experience laid down in these rules and who are considered suitable by the Departmental Promotion Committee shall be eligible for regularisation/absorption in the respective grade subject to the condition that such persons exercise their option for the absorption and that their parent departments do not have any objection to their being absorbed in the Tribunal.

(2) The seniority of officers mentioned in sub-rule (1) shall be determined with reference to the dates of their regular appointment to the post concerned.

Provided that the seniority of officers recruited from the same source and in the post held by them in the parent Department shall not be disturbed

(3) The suitability of persons for absorption may be considered by a Departmental Promotion Committee.”

Before interpreting the said Rules, we would like to refer to some other relevant and pertinent facts and complete the factual narration. This narration relates to the developments post the enforcement of the 2002 Rules.

10. The petitioner wrote letter dated 16th May, 2002, to the Registrar, Debts Recovery Tribunal-II stating that her case had been recommended to the Ministry of Finance (Banking Division) for permanent absorption in accordance with the 2002 Rules. She referred to the advertisement published in the Employment News in March 2002 for filling up various posts in the Debts Recovery Tribunal-II and another advertisement published in the Employment News for the week 11-17th May, 2002 for appointment to various posts in the Debts Recovery Tribunal-I. The petitioner explained that as she had been recommended for permanent absorption, she had not applied for selection. Drawing attention and relying on Rule 5 of the 2002 Rules, the petitioner had highlighted that she was working and holding the post of an LDC in the Debts Recovery Tribunal-II. She proclaimed her right and entitlement to appointment on the said post of LDC in the Debts Recovery Tribunal-II as an initial constituent. By letter dated 29th May, 2002, the petitioner was informed by the Recovery Officer, Debts Recovery Tribunal-II, that her representation had been examined but could not be acceded to for it did not merit consideration. Aggrieved, the petitioner had filed OA No.1715/2002 before the Central Administrative Tribunal. In the counter affidavit filed by the respondent,

the substantive and main plea taken by them was in paragraph 4.7, which reads as under:-

“4.7 That in reply to this para it is denied that the applicant acquired any right much less the vested right for her regular appointment on the post of LDC in the respondent Tribunal ever as per recruitment rules on which reliance has been placed (Rule 5 and Rule 7 of the recruitment rules are relevant). According to the recruitment rules if a employee working in the Tribunal wanted himself or herself considered for regular appointment or permanent absorption was under an obligation to give her option within 30 day of the date of publication of the rules and furthermore only these employees of the Tribunal can be considered for regular appointment/absorption who came in the Tribunal either by transfer or on deputation basis from either department of Central Government, State Government or Government Public Undertaking. The appointment of the applicant was neither on deputation basis nor by way of transfer. The applicant did not give not any option as required to be given under Rule 5 of the Recruitment Rules notified by the Government on 11.3.02. It is respectfully submitted that the case of the applicant for regular appointment to the post of LDC is not all covered under the recruitment rules on which the applicant has placed reliance.”

A reading of the aforesaid paragraph would show that reference was made to Rules 5 and 7 of the 2002 Rules and the Respondent had stated that an employee working in the Tribunal, who wanted himself or herself to be considered for regular appointment or permanent absorption, was under an obligation to exercise the option within 30 days of publication of the rules. At the same time, reference was made to Rule 7 which refers to ‘regular appointment’ either by transfer, or on deputation from either a department of Central Government, State Government or public undertaking. The

petitioner was not appointed on deputation or transfer. The OA No.1715/2002 was disposed of by the order dated 5th February, 2003. This order reproduces Rule 5 and notices the claim of the petitioner and that she was not allowed to exercise her right to opt under Rule 5. The tribunal had also noted the contra contention of the respondents that the petitioner was appointed on an *ad-hoc* basis and, therefore, was not holding a post as per service jurisprudence. The OA No. 1715/2002 was disposed of on 5th February 2003, with a direction that the petitioner would make a consolidated representation exercising her option and the respondents would decide her representation within 30 days as if the petitioner was one of the candidates, who could be said to be holding the post mentioned in the schedule, and also, as if she was being considered “for the said option”. For the sake of completeness and for clarity so that there is no confusion, we would like to reproduce the exact directions given by the tribunal:-

“3. In my view, this OA can be disposed of with the direction that applicant shall make a consolidated representation containing the option also and the respondents shall decide the same within a period of 30 days from the receipt of the representation as if the applicant was also one of the candidates who could said to be holding the post mentioned in the schedule as if they were considered for the option. Applicant shall make the representation within one week from the date of receipt of the order. Respondent No.2 shall decide the representation within 30 days from the receipt of the representation.”

The use of words “as if” twice would show that the tribunal had specifically observed that the petitioner would be considered to be holding the post mentioned in the Schedule and had exercised the option referred to in Rule 5, quoted above.

11. The petitioner made the representation dated 21st February, 2003 specifically referring to the last paragraph of the order dated 5th February, 2002 passed in OA No.1715/2002. She exercised her option in terms of Rule 5 of the 2002 Rules. Another representation dated 27th February, 2002, was made by the petitioner, which again made reference to Rule 5.

12. The Debts Recovery Tribunal-II vide their letter dated 20th March, 2003, rejected the representations holding that the petitioner was not covered under Rule 5 of the 2002 Rules as she was not holding the post of LDC as per the schedule of the 2002 Rules at the stage of initial constitution. The reason being that she was appointed on *ad-hoc* basis for 89 days and one of the conditions in the appointment order was that the petitioner would have to vacate the post after the expiry of 89 days or on availability of such person as permissible under the Recruitment Rules. Reference was made to Rule 7 of the 2002 Rules and it was held that the petitioner was not covered by the said Rule as she was not holding the post of the LDC either on transfer or on deputation.

13. Consequent thereto, the petitioner filed OA No.1610/2003, impugning the action of the respondents, which has been dismissed by the impugned order dated 26th June, 2003. The impugned order records that Rule 7 would not be applicable because the petitioner was not appointed either on transfer or on deputation basis. Rule 5, it was observed, would not be applicable for the following reasons:-

“5.....The provisions of Rule 5 relate to the initial constitution of the posts mentioned in the schedule of the Rules *ibid*. The question is whether it can be accepted that the applicant held the post of LDC in the manner that she could be regularised in service at the initial constitution on coming into existence of the said Rules. The rules also specify “the regular service rendered by them before the publication of these Rules shall count for the purpose of probation period, qualifying service for

promotion, confirmation and pension.” It is absolutely clear that only such persons who held any posts mentioned in the schedule of the Rules on a regular basis could be accepted for reckoning at the initial constitution in terms of Rule 5. Applicant had been selected on ad hoc basis for a short period of 89 days. Her term was extended again on ad hoc basis and her services could be terminated at any time without putting her on notice. The import of the Tribunal earlier order is not that she has compulsorily to be treated on regular service and provided with the option. Respondents had the liberty to consider applicant’s candidature for regularization in terms of the Rules. The Rules came into existence in March, 2002. Applicant had not been appointed before coming into existence of the Rules on a regular basis. As an ad hoc appointee and in the light of the terms and conditions on which she was appointed it cannot be held that she had any right for regularisation. As such, there is no merit in the O.A. However, as the applicant has been working with the respondents for some time before publication of the said rules, even if on ad hoc basis, it would be appropriate that respondents consider her candidature, in case she applies for such consideration and meets the prescribed qualifications as and when recruitment on the post of LDC is made by the respondent No.2.”

A reading of the aforesaid reasoning shows the confusion which had prevailed and was accepted by the tribunal, for it makes reference to the second part of Rule 5, which stipulates that regular service rendered by such candidates before the publication of the rules shall be counted for the purpose of probation period, as qualifying service for promotion, confirmation and pension. The first part of Rule 5, however, does not refer to ‘regular service’. On the other hand, the first part of the Rule states that the employees holding the posts mentioned in the Schedule to the Rules on the date of commencement of the Rules, shall be deemed to have been

appointed at the initial constitution stage of the said posts, if they so opt within 30 days of publication of the Rules. The first part does not mention or refer to appointment on regular basis, for there could not have been appointments on regular basis in the Debts Recovery Tribunal-II before the recruitment rules for the Debt Recovery Tribunal-II were framed. The 2002 Rules did not replace the existing recruitment rules as per the respondents. If we hold that the 2002 Rules had replaced the 1998 Rules, then the petitioner's selection and appointment as a direct recruit through local employment exchange would be "regular appointment". Appointment to posts when recruitment rules are yet to be finalized and are pending consideration is normally on *ad-hoc* basis for a specified period. This is neither unusual nor peculiar, when recruitment rules are being framed for the first time. It is difficult to perceive and accept that there could have been appointments on regular basis or "permanent employment" in such cases. It is obvious that the Rule making authority, when framing the 2002 Rules, was conscious and attentive to the said factual position. A reading of Rule 5 makes it apparent that the first sentence would cover all employees holding the posts mentioned in the Schedule to the Rules on the date of commencement. The Rule does not disqualify or stipulate that a person holding a post mentioned in the Schedule on an *ad-hoc* basis was not covered. Rule 5 was meant to cover all such employees who had been appointed on an *ad-hoc* basis pending enactment of the Rules. The absence of the word "Regular" in the first sentence of Rule 5 is significant and consequential. This is reflective of the legislative intent. The use of the word "Regular" in the second sentence must be contrasted with the absence of the word "regular" in the first sentence and given due recognition and acknowledgment.

14. Rule 7, in our opinion, would not be applicable because it applies to those holding post in the Debts Recovery Tribunal-II on the date of the

commencement of the 2002 Rules, either on deputation or transfer, and when they fulfil the requisite qualifications. The petitioner was never appointed on transfer or deputation. To this extent, the tribunal has rightly held that Rule 7 would not apply and we have to consider whether Rule 5 would be applicable.

15. There is another error in the impugned order, for, to some extent, it seeks to undo and re-write the directions given in the earlier order dated 5th February, 2003 passed in OA No.1715/2002. We have quoted the directions portion in the order dated 5th February, 2003 to the effect that the petitioner was to be considered as one of the candidates, who were holding the post mentioned in the Schedule, and she was to be considered as if she had exercised her option.

16. The Office Memorandum dated 30th March, 1988, issued by the Department of Personnel and Training regarding revision of instructions on *ad-hoc* appointments, refers to *ad-hoc* appointments in the absence of recruitment rules and in case of Group C and D posts, it was directed as under:-

“Ad hoc appointments are frequently resorted to on the grounds that Recruitment Rules for the post are in the process of being framed. In the case of Group 'C' and 'D' posts which are outside the purview of UPSC, powers to frame Recruitment Rules without consulting the Department of Personnel and Training have already been delegated to the Administrative Ministries vide this Department's O.M. dated 21st March, 1985. Therefore, no appointment may be made to any post on an adhoc basis on the ground that no Recruitment Rules exist for the same.”

The OM states that as the power to frame Recruitment Rules for Group C and D employees had been delegated to the administrative ministries, they should not make appointments on ad hoc basis for no

Recruitment Rules exist. Appointments should be made as per the Recruitment Rules. Breach or violation of the OM would not effect and undo the ad hoc appointment and the stipulations regarding initial constitution as per the 2002 Rules.

17. There were other similar group C and D employees, who were appointed on an *ad hoc* basis in the Debt Recovery Tribunal-II, before formulation of 2002 Rules. Manoj Kumar Sharma and Bhagat Singh, who were appointed as *ad hoc* peons and Rajender Kumar, who was appointed as *ad hoc* farash-cum-sweeper had filed OAs before the Tribunal, which were disposed of with the direction that the respondents would not replace them with the new set of ad hoc appointees. They had subsequently made a representation dated 15th July, 2004 and their services were regularised vide office order dated 29th July, 2004 with effect from the respective dates of their appointment. These orders are available and form part of the records produced by the respondents before us. One Tejender Pal Singh, who was appointed as a Driver on an *ad hoc* basis initially for 89 days, which term was extended thrice. Tejender Pal Singh was regularised vide office order dated 29th July, 2004, from the date of initial appointment itself. Tejender Pal Singh had filed an OA before the tribunal, but the same was dismissed and yet, benefit under the 2002 Rules was given. The respondents have interpreted the 2002 Rules in the manner suggested in case of the aforementioned persons, and it is only the case of the petitioner that she has been treated differently.

18. In view of the aforesaid discussion, we accept the prayer of the petitioner that she was covered by Rule 5 as she was holding the post of LDC at the time of initial constitution, and was, therefore, entitled to regular appointment to the post of LDC.

19. On the question of the relief which should be granted to the petitioner, the question assumes importance on account of considerable delay as the

petitioner had first filed OA No. 1715/2002 before the Tribunal in 2002 and the writ petition has remained pending since 2003. The petitioner has not worked for nearly 13 years. In order to balance the equities in the aforesaid circumstances, we would refer to and accept the solution enumerated in *Union of India and Ors. Vs. Satya Prakash Vasisht*, 1994 Supp (2) SCC 52. In the said case, the respondent had filed an application in response to an advertisement issued in January, 1978 for the post of Sub-Inspector (Executive), but was denied appointment on the ground that he was suffering from colour blindness. The respondent subsequently succeeded and was appointed in 1988 i.e. nearly 10 years after the advertisement. In these circumstances, the Supreme Court had directed as under:-

“4. The question now is of the nature of relief which should be granted to the respondent in view of the fact that he was actually appointed in February 1988 after refusal of stay in this matter by this Court. The selections were made in 1978 and the other selected candidates had been duly appointed and were working for several years prior to the date of actual appointment of the respondent in 1988. In such a situation, the grant of back wages to the respondent does not appear to be just and proper. Learned counsel for the respondent in all fairness accepted this position. We are also of the opinion that even though the respondent is entitled to the benefit of service for the earlier part commencing from the date on which he should ordinarily have been appointed on being duly selected yet it would not be appropriate to treat the earlier period prior to the date of his actual appointment as a period to be reckoned as ‘actual service’ if a period of actual service is prescribed as a necessary qualification for promotion. We also make it clear that the promotions already made of persons junior to the respondent in the merit list on account of the late appointment of the respondent shall not be disturbed

as a result of this relief granted to the respondent. Subject to these limitations, the entire earlier period commencing on the date on which the respondent should have been ordinarily appointed would be treated as a part of his continuous service for all other purposes including the retiral benefits and fixation of his seniority.”

20. Accordingly, we hold that the petitioner would not be entitled to back wages as the same would not be just and proper. However, the petitioner would be entitled to the benefit of service for the earlier part, commencing from the date of initial appointment and the period after 4th April, 2002 till the date of pronouncement. However, this service would not be reckoned as “actual service” for the purpose of promotion. Promotions of persons already promoted shall not be disturbed as a result of this judgment. Subject to these limitations, the period with effect from 4th June, 2001 onwards, including the period after 4th April, 2002, till the date of pronouncement of the judgment will be treated as continuous service for all purposes including fixation of pay and retirement benefits. From the date of pronouncement of this judgment, the petitioner would be entitled to salary, allowances etc. The writ petition is allowed in the aforesaid terms. No Costs.

(SANJIV KHANNA)
JUDGE

(NAJMI WAZIRI)
JUDGE

AUGUST 5th, 2016
NA/VKR /ssn