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

+ **W.P.(C) 358/2015, CM Nos. 567/2015 and 12452/2015**

*Date of Decision : 1<sup>st</sup> February, 2017*

NIRMALA

..... Petitioner

Through

Mr. R.P. Luthra, Mr. U.Srivastava  
and Mr. Jagdish Prasad, Advocates

versus

NORTH DELHI MUNICIPAL CORP. & ANR

..... Respondents

Through

Ms. Biji Rajesh for Mr. Gaurang  
Kanth, Adv. for NDMC/R-1  
Mr. Naresh Kaushik, Adv. for UPSC/R-2

**CORAM:**

**HON'BLE MR. JUSTICE SANJIV KHANNA**

**HON'BLE MR. JUSTICE CHANDER SHEKHAR**

**SANJIV KHANNA, J. (ORAL)**

The petitioner- Nirmala, in this writ petition, has impugned the order dated 31<sup>st</sup> July, 2013 passed by the Principal Bench, Central Administrative Tribunal (Tribunal) disposing of MA No. 1893/2012 filed by the petitioner in CP No. 563/2010.

2. The petitioner who was working as an Assistant Education Officer 'AEO' (Physical) had filed a writ petition in this Court in the year 2007 for promotion as Deputy Education Officer 'DEO'(Physical) with effect from 2002-03 with notional seniority. Direction for holding a Review Department Promotional Committee was prayed. This writ petition on

transfer to the Tribunal was registered as TA No. 116/2009 and disposed of vide order dated 6<sup>th</sup> May, 2009 along with TA No. 115/2009 filed by Mr. Som Prakash. The operative portion of this order dated 6<sup>th</sup> May, 2009 reads:-

*“18. The provisions of the two memoranda of the DoP&T dated 6.06.1978 and 9.08.1998 are unequivocal and leave no room for doubt that a candidate must join the post within six months of receiving the offer of appointment. There is no exception to this Rule. There is no provision that seniority of the candidate would be revived in case extension beyond six months is given by the employer. In the instant case, the offer of appointment to the third Respondent was given on 21.07.1998. Since she joined on 15.07.1999, after almost a delay of one year, she will lose seniority, which was fixed on the basis of merit in the selection and would be placed at serial number 4 in the seniority list below Shri N.K. Ghai and the Applicants in Transfer Applications, which we are considering. We have, therefore, no hesitation in holding that the final seniority list of AEO (Phy) dated 17.05.2006 is contrary to the instructions and the Applicants representation against the provisional seniority list should have been accepted by placing him at serial number 2 in the final seniority list and the Applicant in TA number 116/2009 at serial number 3 in the final seniority list. The first Respondent has already stated that there were two posts available at the time of DPC held on 24.04.2007 for the year 2002-03.*

*Further, in view of the fact that two additional posts have been created only for the category of DEO (General), there would be no increase in the number of posts of DEO (Phy.)*

*19. In the light of the above discussion, the final seniority list of AEO (Phy) dated 17.05.2006 is quashed and set aside with directions to recast in the light of our observations above. The Respondents are also directed to hold a review DPC and consider the Applicant for*

*promotion to the post of DEO (Phy). If the Applicant is found fit for promotion, his/her seniority would be fixed from the date of vacancy on notional basis. We, however, make it clear that the Applicant would not be eligible for back wages. Although the fourth and the fifth Respondents have not filed any reply in this OA, yet in view of the fact that they are also before the Honourable Delhi High Court in some writ petition, we would leave it to the first Respondent to decide their continuation as ad hoc DEO (Phy.). The above directions shall be complied with as expeditiously as possible but not later than four months from the date of receipt of a certified copy of this order. A copy of this order may be placed in TA-116/2009.”*

3. Alleging non-compliance of this order, the petitioner had filed Contempt Petition No.563/2010. The said Contempt Petition, however, remained pending in view of the order dated 9<sup>th</sup> November, 2010, which reads as under:-

*“Counsel for the parties are ad idem that his matter needs to be heard after final decision is recorded by Division Bench of this Tribunal in TA No.154/2009.  
This matter is adjourned sine die with liberty to apply.”*

4. TA No. 154/2009 had a chequered history with an order being passed by a Three Member Bench on 15<sup>th</sup> September, 2010.

5. Thereafter, the order dated 18<sup>th</sup> October, 2010 was passed by the same Full Bench to the following effect:-

*“3. We are conscious that in view of the submissions made by the learned counsel representing the parties from time to time during the course of hearing before the Full Bench, additional questions have also been framed. There would have been no difficulty in answering the said questions, but once, the reference in itself is incompetent in view of the*

*circumstances fully detailed in our order dated 15.09.2010, we have absolutely no choice but for to remit the matter to the Division Bench. If the Division Bench be of the view that the opinion expressed by it on the two issues referred to the Full Bench was tentative, it may say so on its own or on the application that may be filed on that behalf by the concerned parties. If the opinion of the Division Bench be that it has recorded the final verdict on the two issues, it may proceed to dispose of the matter. No doubt, since the Division Bench has not finally disposed of the matter and rather referred the issues to the Full Bench, if arguments on additional issues, as have been framed by the Full Bench, are raised before the Division Bench, it may decide the said points as well. The Division Bench may have multiple choices, but we cannot order or direct it to act in a particular manner. We have only mentioned some of the options that may be open to the Division Bench, which would also include reviewing its order either on its own or on the application as may be made by the concerned parties. It would also have a choice to send to the Full Bench only that question on which it noted that there may be a conflict.*

*We may mention that there is no conflict insofar as, the order passed by the Division Bench and the one passed by the coordinate Bench in TA Nos.115/2009 and 116/2009 are concerned. The conflict, if at all it may be, would be in implementing the two judgments. To that extent, of course, there would be some difficulty. It is for the Division Bench to see whether in these circumstances the matter needs to be referred to the Full Bench or the parties are to be left to seek appropriate remedy.*

*4. With the observations as made above, this matter is sent back to the Division Bench for proceeding in accordance with law.”*

6. The reference to the Division Bench, vide the order dated 18<sup>th</sup> October, 2010 passed in TA No. 154/2009 did not result in the final order,

for the matter was referred to the Five Member Bench of the Tribunal and became the subject matter of order dated 27<sup>th</sup> January, 2012.

7. Paragraph 2 of the order dated 27<sup>th</sup> January, 2012 in TA No. 154/2009 reads as under:-

*“2. After hearing all the parties, detailed order was passed on 16.7.2009 by the Division Bench taking the view that the regular promotion of R-3 and R-4 as DEO Physical, who were earlier AEO (Physical) was not sustainable in law because the RRs had not yet been amended for the purpose. However, the Division Bench was informed by the counsel for R-3 that in other TAs bearing No.115/2009 and 116/2009 contrary directions have been given by the Co-ordinate Bench viz. that AEO (Physical) should be considered for the post of DEO (Physical) by holding review DPC. Since there would have been apparent contradiction in implementing the directions as mentioned above, therefore, as a measure of abundant precaution, keeping in view the mandate of Hon’ble Supreme Court in the case of SI Roop Lal and Another Vs. Lt. Governor through Chief Secretary, Delhi and Others reported in 2000 (1) SCC 644, the matter was referred to the Full Bench by framing 2 questions viz.-*

*“(1) Whether AEO (Physical) can be considered for promotion to the post of DEO (Physical) merely on the basis of resolution which has not been notified in the Gazette in terms of Section 480 (2) of the MCD Act 1957.*

*(2) whether AEO (Physical) can be considered for the sanctioned post of DEO without the RRs being amended.”*

The issue which had arisen before the Five Member Bench was whether the Resolution/decision of the MCD dated 31<sup>st</sup> January, 1997 creating 15 new posts of Deputy Education Officer (DEO) and fixing the quota of DEO under different heads i.e. DEO (General) - 10; DEO (Physical) - 2; DEO (Science) – 2; and DEO (Nursery) – 1, was legal and

valid as no amendment had been made and carried out as per law in the Recruitment Rules. As per Recruitment Rules, there were only three posts of DEO without any division or classification between DEO(General), DEO (Physical), DEO (Science) and DEO (Nursery).

8. The Five Member Bench of the Tribunal, vide order dated 27<sup>th</sup> January, 2012, held that the executive instructions dated 31<sup>st</sup> January, 1997, and the subsequent communication dated 11<sup>th</sup> October, 2006 were invalid as an executive instruction could not have amended the Recruitment Rules, which were statutory. The Five Member Bench of the Tribunal, accordingly, held as under:-

*“41. Seen from any angle, the regular promotion of R-3 and R-4 as DEO(Physical) cannot be sustained in law. The same is accordingly quashed and set aside. However MCD may treat the promotion of R-3 and R-4 as DEO(Physical) to be on adhoc basis as was done with others. Ultimately we must uphold the rule of law as is the consistent view taken by the Hon’ble Supreme Court in catena of cases including Secretary, State of Karnataka and Ors. Vs. Uma Devi and Ors. Reported in 2006(4) SCC 1.*

*42. The next question is what relief should be granted in these circumstances. We have already held that as on date almost the entire department of education in MCD is working on adhocism. An endeavor must be made to make regular promotion by holding regular DPCs. As far as petitioner nos. 1 to 5 are concerned, they were admittedly promoted initially on current duty and subsequently as AEO on adhoc basis. They have sought a direction to the respondents to convene year wise DPC for promoting the petitioner on their respective posts as per their eligibility in accordance with law. MCD had filed their reply in July, 2008 in which they had stated as follows:-*

*That under the aforesaid circumstances, the matter was*

*referred to UPSC with the request to either review the DPC to the post of DEO (Physical) held in the case of Shri N.K. Ghai and Smt. Pushpa Devi, (who joined MCD as regular AEO (Physical) on 1998-99), and promotion to the post of DEO(Physical) or for considering the case of other AEO/DEO (Gen.), who are working on adhoc basis since 1997 and regular AEO (Gen.) since 1992 for their promotion as regular DEO(Gen.) on the basis of existing notified RRs of 1976, from the date of their holding the post of DEO (General) on adhoc basis on the same analogy in which Shri N.K. Ghai and Smt. Pushpa Devi were considered and promoted to the post of DEO(Physical) on regular basis, to avoid any further dispute/litigation in regard to their seniority. Accordingly, the matter has already been referred to the UPSC for necessary action in this regard vide this office letter dated 17.3.2008 and 18.6.2008.*

*We are already in December, 2011. The status of CR is not known till date. The fact remains that even the DPC for AEOs has not been held which means unless positive directions are given by the Court, DPC would not be held for another 10 years on the specious ground that CRs are not available. After all CRs are to be written and maintained by the department. Why the CRs for last 10 years are not available has not been explained by the MCD. The instructions on this point are clear that if CRs are not available for some reasons, a certificate to that effect should be issued and candidate should be assessed on the basis of available CRs. The officers cannot be denied their right of consideration, if they are eligible, on the ground that CRs are not available. The controversy seems to be starting from the stage of AEO, therefore,*

- (1) MCD is directed to convene in consultation with UPSC DPC for the post of AEOs by earmarking the vacancies year-wise and consider those who were within the zone of consideration.*
- (2) In case CRs are not available, certificate to that effect*

*should be issued so that such candidates may be considered on the basis of available CRs.*

*(3) MCD should take a final decision in the matter as to how the posts of DEO are required to be filled and finalise the RRs as per their decision, get it approved and publish it in the official Gazette. This shall be done within 6 months from the date of receipt of a copy of this order.*

*(4) MCD shall then request UPSC to hold DPC for the post of DEO in accordance with the amended/New notified RRs as may be decided by the MCD by earmarking the vacancies year-wise and consider only such of the officers who were eligible against those vacancies and prepare year-wise panel so that final promotion orders may be issued in accordance with law.*

*(5) MCD is directed to complete all other formalities simultaneously viz. preparation of seniority list etc. so that no further time is wasted in these things.*

*Before we part with this case, we would like to reiterate that our endeavor has been to uphold the rule of law with a view to ensuring that no further litigation crops up in MCD at least on account of the questions raised in this case. We would also gracefully accept that the case of petitioner No.7 in TA No. 158/2009 should not have been disposed of on 1.4.2011. In any case the issues as raised in the present case were neither discussed nor decided at that time whereas now the controversy has been discussed threadbare and decided by a Larger Bench on merits, therefore, we direct that MCD should act in accordance with the directions given now. As far as TA No.154 of 2009 is concerned, the Full Bench had already observed in its order dated 18.10.2010 that there is no conflict in the judgment because in that case, these issues were neither raised nor discussed. It was suggested that liberty may be given to the parties to seek appropriate remedy, therefore, nothing more need be said on this account.”*

9. The aforesaid judgment dated 27<sup>th</sup> January, 2012 was upheld by this



Court vide judgment dated 31<sup>st</sup> May, 2013 in Writ Petition (C) 2215/2012 titled **Sh. N.K. Ghai vs. Municipal Corporation of Delhi & Ors., inter alia**, observing:-

*“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.”*

The last portion of the aforesaid judgment clearly held that the resolution/decision dated 31<sup>st</sup> January, 1997 cannot be a ground to grant

promotion to the petitioner therein namely N.K. Ghai and Pushpa Devi, the third respondent in TA No. 116/2009 preferred by the petitioner herein – Nirmala. In other words, the promotion granted to Pushpa Devi, the third respondent in TA No. 116/2009 was itself quashed.

10. In view of the aforesaid factual position, the Tribunal, in our opinion, was right in dismissing MA No. 1893/2012 filed by the petitioner for revival of Contempt Petition No. 543/2010. The effect of the order of the Five Member Bench of the Tribunal dated 27<sup>th</sup> January, 2012, as affirmed by the judgment of this Court dated 31<sup>st</sup> May, 2013 in Writ Petition (C) No. 2215/2012 was that the very basis for seeking promotion was quashed. There were no promotional or vacant post in the cadre of DEO, as the resolution dated 31<sup>st</sup> January, 1997 was struck down. Consequently, there was no need to hold Review DPCs as vacancies did not exist. In view of the decision dated 31<sup>st</sup> May, 2013 and the subsequent orders, the directions vide order dated 6<sup>th</sup> May, 2009 given in TA No. 115/2009 filed by Som Prakash and TA No. 116/2009 filed by the petitioner herein, were rendered infructuous.

11. The contention of the petitioner is that she was not a party to TA No. 154/2009. The petitioner had, in fact, filed an application for intervention before the Five Member Bench of the Tribunal, which was disposed of, with observations in the last paragraph of the order dated 27<sup>th</sup> January, 2012. Reference in the last paragraph of the said order was made to TA No. 154/2009, which it is stated by learned counsel is a typographical error and in fact, reference in the last paragraph of the order dated 27<sup>th</sup> January, 2009 was to TA No. 116/2009 filed by the petitioner herein. As noted above, the effect of the Five Member Bench in the decision dated 27<sup>th</sup> January, 2012 in

TA No. 154/2009 and the judgment dated 31<sup>st</sup> May, 2013 in Writ Petition (C) No. 2215/2012 titled N.K. Ghai vs. MCD and Ors. was to negate and nullify the new posts/vacancies in the cadre of DEO. The issue involved therein was larger, broader and to this extent different from the issue involved in TA No. 116/2009. However, once the larger and broader issue was decided and the increase in the number of posts in the cadre of DEO was set aside, the order passed in TA No. 116/2009 dated 6<sup>th</sup> May, 2009 became impossible to implement and execute.

12. In view of the aforesaid position, we do not find any merit in the writ petition and therefore, the same is dismissed. There will be no order as to costs.

**SANJIV KHANNA, J**

**CHANDER SHEKHAR, J**

**FEBRUARY 01, 2017**

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