

CASE DETAILS

GOVERNMENT OF NCT OF DELHI

v.

UNION OF INDIA & ORS.

(Writ Petition (Civil) No. 1268 of 2023)

NOVEMBER 29, 2023

**[DR. DHANANJAYA Y. CHANDRACHUD, CJI,
J.B. PARDIWALA AND MANOJ MISRA, JJ.]**

HEADNOTES

Issue for consideration: Whether the Union Government has the unilateral power to appoint the Chief Secretary of NCTD and; whether the Union Government has the power to extend the service of the incumbent Chief Secretary.

Constitution of India – Article 239AA(3)(a); VIIth Schedule, State List, Entry 41 – Government of National Capital Territory of Delhi Act 1991 as amended by the Government of National Capital Territory of Delhi (Amendment) Act 2023 – Writ petition filed by Government of NCTD stating that they have reason to believe that the Union of India will unilaterally appoint the Chief Secretary in the exercise of the power u/s. 41 r/w s.45A(d) r/w s.45H(2), 1991 Act as amended by the 2023 (Amendment) Act – 2023 Constitution Bench judgment (Govt. of NCT of Delhi vs. Union of India) had dealt with control over “services” pertaining to the National Capital Territory of Delhi – Constitutional validity of the provisions of the 2023 Amendment Act pending adjudication before the Constitution Bench, no stay on the operation of the amendment Act – *Prima facie* view taken:

Held: Though the Government of NCTD is the appointing authority for all posts in NCTD in terms of the 1954 Rules, the Transaction of Business Rules places the appointments to the posts of Chief Secretary and Commissioners of Police, Secretary (Home) and Secretary (Lands) outside the competence of the GNCTD – Unlike other States, the GNCTD only has the power to propose a candidate for the appointment as the

Chief Secretary – The Lieutenant Governor is bound to refer the proposal to the Central Government and the decision of the Central Government on the proposal is final – There can be no dispute about the basic position that the Chief Secretary, as the head of the administration, exercises jurisdiction of an administrative nature over the entirety of subjects which fall within the domain of the executive functions of GNCTD which would include those subjects (Entries 1, 2 and 18 of List II) over which the Legislative Assembly and the State Government do not have jurisdiction – Once it emerges that the Chief Secretary performs important functions, among other things, in relation to the excluded subjects as well, it would be farfetched to postulate that the Central Government is divested of the power to appoint the Chief Secretary – Further, r.16 of the 1958 Rules is a general rule which is applicable to members of the service holding the post of Chief Secretary across all States – The provision does not make a distinction between the Chief Secretary serving in NCTD and the Chief Secretaries serving in other States though the procedure for the appointment of the Chief Secretary of NCTD is different from the procedure for the appointment of Chief Secretaries in other States in terms of the 1954 Rules read with the Transaction of Business Rules – The position of the Chief Secretary of the GNCTD is significantly distinct in that the Chief Secretary performs delegated executive functions which straddle both subjects which fall within the executive and legislative competence of GNCTD as well as those which lie outside – Consequently, the restrictions which operate in relation to the grant of extension u/r.16 of the 1958 Rules in relation to the Chief Secretary of one of the State Governments would not strictly apply in relation to the GNCTD – At this stage, in view of the principles enumerated in the judgment of this Court in 2023 Constitution Bench judgment, and the subsequent developments which have taken place resulting in the enactment of the amendment to the GNCTD Act 1991, the decision of the Union Government to extend the services of the incumbent Chief Secretary for a period of six months cannot be construed to be violative of law – Transaction of Business of the Government of National Capital Territory of Delhi Rules 1993 – r.55(2) (b) – Indian Administrative Service (Cadre) Rules 1954 – All India Services (Death-cum-Retirement Benefits) Rules 1958 – Schedule to the

Indian Administrative Service (Fixation of Cadre Strength) Regulations 1955. [Paras 17, 24-26, 32, 33]

LIST OF CITATIONS AND OTHER REFERENCES

State (NCT of Delhi) Vs Union of India, (2018) 8 SCC 501: [2018] 7 SCR 1; *Govt. of NCT of Delhi Vs Union of India*, (2023) 9 SCC 1; *E.P. Royappa v. State of Tamil Nadu & Anr.*, (1974) (4) SCC 3: [1974] 2 SCR 348 – referred to.

OTHER CASE DETAILS INCLUDING IMPUGNED ORDER AND APPEARANCES

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No.1268 of 2023

(Under Article 32 of The Constitution of India)

Appearances:

Dr. Abhishek Manu Singhvi, Sr. Adv., Shadan Farasat, Amit Bhandari, Aman Sharma, Siddharth Seem, Harshit Anand, Aman Naqvi, Ms. Hrishika Jain, Ms. Natasha Maheshwari, Ms. Mreganka Kukreja, Advs. for the Petitioner.

Tushar Mehta, Solicitor General, Sanjay Jain, Sr. Adv., Kanu Agrawal, Padmesh Mishra, Arkaj Kumar, Arvind Kumar Sharma, Advs. for the Respondents.

JUDGMENT / ORDER OF THE SUPREME COURT

JUDGMENT

DR DHANANJAYA Y CHANDRACHUD, CJI

1. The incumbent Chief Secretary of the Government of the National Capital Territory of Delhi (GNCTD) is due to demit office on superannuation on 30 November 2023. The petitioner approached this court on the ground that they have reason to believe that the Union of India will unilaterally appoint the Chief Secretary in the exercise of the power under Sections 41 read with 45A(d) read with 45H(2) of the Government of National Capital

Territory of Delhi Act 1991¹ as amended by the Government of National Capital Territory of Delhi (Amendment) Act 2023². The petitioner initiated proceedings under Article 32 of the Constitution seeking:

- a. A direction restraining respondents from making a unilateral appointment of the Chief Secretary of the GNCTD or extending the tenure of the incumbent Chief Secretary; and
- b. An order appointing one of the five senior most officers serving in the AGMUT cadre with the requisite experience of having served in the GNCTD.

The Solicitor General has apprised the Court that the Union Government proposes to grant an extension of six months to the incumbent.

2. Article 239AA(3)(a) of the Constitution stipulates that the Legislative Assembly shall have power to make laws with respect to any matter in the State List or Concurrent List insofar as any such matter is applicable to Union Territories except for certain excluded matters. Among the excluded matters are Entries 1, 2 and 18 of the State List and Entries 64, 65 and 66 of the State List insofar as they relate to Entries 1, 2 and 18. Consequently, the subjects of (i) Public order (Entry 1); (ii) Police (Entry 2); and (iii) Land (Entry 18) lie outside the legislative domain of the Legislative Assembly. The division of legislative power between NCTD and the Union of India as stipulated in Article 238-AA(3) is summarized below:

- a. The Legislative Assembly of NCTD has the competence to enact laws for the whole or any part of NCTD in respect of matters enumerated in the State List or Concurrent List insofar as such matters are applicable to Union territories except matters with respect to Entries 1,2, and 18 of the State List and Entries 64,65, and 66 of the State List insofar as they relate to Entries 1 (public order), 2 (police), and 18 (land) of the List³;

1 "GNCTD Act 1991"

2 "2023 Amendment Act"

3 Article 239-AA(3)(a)

- b. Parliament shall have the power to enact laws for NCTD with respect to all entries in the State List and Concurrent List⁴;
- c. If any provision of a law made by the Legislative Assembly of NCTD is repugnant to a provision of a law made by Parliament, the law made by Parliament shall prevail.⁵

3. Two Constitution Benches of this Court have dealt with the constitutional status imparted to the National Capital Territory by virtue of the provisions of Article 239AA of the Constitution. These are:

- (i) **State (NCT of Delhi) Vs Union of India⁶**
- (ii) **Govt. of NCT of Delhi Vs Union of India⁷**

4. The second decision of the Constitution Bench (2023 Constitution Bench judgment) specifically dealt with control over “services” pertaining to the National Capital Territory of Delhi (NCTD). The subject of services is comprised in Entry 41 of the State List to the Seventh Schedule (“State Public Services; State Public Services Commission”). The 2023 Constitution Bench judgment held that Article 239-AA(3)(a) does not exclude the legislative power of NCTD over entries other than those expressly excluded in the provision, and thus, NCTD has legislative competence over “services”. Since executive power is co-extensive with legislative power, this Court held that NCTD will have executive power over “services”. An incidental issue that arose was with respect to the scope of the executive power over entries over which both the Union of India and NCTD have legislative competence. Drawing upon the principles in Articles 73 and 162, the 2023 Constitution Bench held that on entries over which Parliament also has legislative competence, the executive power shall ordinarily lie with NCTD. However, such executive power would be “subject to and limited by” the executive power expressly conferred upon the Union of India by provisions of the

4 Article 239-AA(3)(b)

5 Article 239-AA(3)(c)

6 (2018) 8 SCC 501-

7 (2023) 9 SCC 1 – “2023 Constitution Bench”

Constitution or a law made by Parliament.⁸ The relevant observation is extracted below:

“85. [...] The executive power of NCTD shall extend to all entries in List II and List III, other than the entries expressly excluded in Article 239AA(3). Such power shall be subject to the executive power of the Union (through the Lieutenant Governor) only when the Union has been granted such power by the Constitution or a law of Parliament. Therefore, the executive power of NCTD, in the absence of a law by Parliament, shall extend to all subjects on which it has power to legislate.”

[...]

“95. [...] The executive power of the Union, in the absence of a law upon its executive power relating to any subject in the State List, shall cover only matters relating to the three entries which are excluded from the legislative domain of NCTD. As a corollary, in the absence of a law or provision of the Constitution, the executive power of the Lieutenant Governor acting on behalf of the Union Government shall extend only to matters related to the three entries mentioned in Article 239-AA(3)(a), subject to the limitations in Article 73. Furthermore, if the Lieutenant Governor differs with the Council of Ministers of GNCTD, he shall act in accordance with the procedure laid down in the Transaction of Business Rules. However, if Parliament enacts a law granting executive power on any subject which is within the domain of NCTD, the executive power of the Lieutenant Governor shall be modified to the extent, as provided in that law. Furthermore, under Section 49 of the GNCTD Act, the Lieutenant Governor and the Council of Ministers must comply with the particular directions issued by the President on specific occasions.”

⁸ The proviso to Article 73 states that the Union of India shall not have executive power on matters over which the State can also enact on unless such power is expressly granted by the Constitution or law of Parliament. The proviso to Article 162 states that on matters over which both the state legislature and Parliament can make laws, the executive power of States shall be subject to and limited by the executive power expressly conferred upon Union of India by a law of Parliament or by the Constitution.

The Court held that NCTD has legislative and executive power with respect to services under Entry 41. Since, however, the subjects of Public order, Police and Land are excluded from the domain of the Legislative Assembly, this Court observed :

“160. [...] The legislative and executive power of NCTD over Entry 41 shall not extend over to services related to “public order”, “police” and “land”. However, legislative and executive power over services such as Indian Administrative Services, or Joint Cadre services, which are relevant for the implementation of policies and vision of NCTD in terms of day-to-day administration of the region shall lie with NCTD.”

5. After the judgment of the 2023 Constitution Bench, the President in the exercise of powers under Article 123 of the Constitution promulgated the Government of National Capital Territory of Delhi (Amendment) Ordinance 2023 by which a provision⁹ was included in the GNCTD Act 1991 excluding the legislative competence of the NCTD over Entry 41 of the List II. By an order dated 20 July 2023, this Court referred the issue on the contours of the power of Parliament to enact a law under Article 239-AA(7) to a Constitution Bench. By the said order, the application for the stay of the 2023 Ordinance was dismissed.

6. On 11 August 2023, Parliament enacted the 2023 Amendment Act. The petitioners filed an interlocutory application¹⁰ seeking an amendment to the writ petition challenging the provisions of the 2023 Amendment Act. The constitutional validity of the provisions of the 2023 Amendment Act is pending adjudication before the Constitution Bench.

7. Rule 55(2)(b) of the Transaction of Business of the Government of National Capital Territory of Delhi Rules 1993¹¹ requires the Lieutenant Governor to refer a proposal to appoint the Chief Secretary to the Central Government:

“(2) Subject to any instructions which may from time to time be issued by the Central Government, **the Lieutenant Governor shall make a**

9 Section 3A of the 2023 Ordinance

10 IA No. 160111 of 2023 in WP (C) 678 of 2023

11 “Transaction of Business Rules”

prior reference to the Central Government in the Ministry of Home Affairs or to the appropriate Ministry with a copy to the Ministry of Home Affairs **in respect of the following matters:-**

- (a) Proposals affecting the relations of the Central Government with any State Government, the Supreme Court of India or any other High Court;
- (b) **Proposals for the appointment of Chief Secretary and Commissioner of Police, Secretary (Home) and Secretary (Lands);**
- (c) important cases which affect or are likely to affect the peace and tranquility of the National Capital Territory; and
- (d) cases which affect or are likely to affect the interests of any minority community, Scheduled Castes or the backward classes.”

(emphasis supplied)

8. Section 41 which deals with matters on which the Lieutenant Governor shall act in his sole discretion has been amended to include, in clause (iii) of sub-section (1), the discharge of functions under Part IV-A of the Act. Part IV-A has been introduced by way of an amendment. Section 45A(d) defines the Chief Secretary to mean “the Chief Secretary of the Government of National Capital Territory of Delhi appointed by the Central Government”. Clause (i) of Section 45A defines “Group A officers” in the following terms :

“(i) “Group ‘A’ officers” means the officers serving in the affairs of the Government of National Capital Territory of Delhi—

- (a) belonging to All India Services, except the officers of the Indian Police Service;
- (b) who are classified as Group ‘A’ officers, under rule 4 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965,

but shall not include the officers who are serving in connection with any subject matter, whether fully or in part connected with Entries 1, 2 and 18 of List II of the Seventh Schedule to the Constitution, and Entries 64, 65 and 66 of List II of the Seventh Schedule to the Constitution

insofar as they relate to Entries 1, 2 and 18 or any other subject matter which is connected therewith or incidental thereto:

(emphasis supplied)

9. Among other amendments, Section 45E provides for the constitution of the National Capital Civil Service Authority. In terms of sub-Section (2) of Section 45E, the Authority shall consist of the Chief Minister of NCTD, the Chief Secretary of GNCTD, and the Principal Home Secretary of GNCTD. Section 45H defines the powers and functions of the authority. Sub-section (1) of Section 45H provides as follows:

“45-H.(1) Notwithstanding anything contained in any other law for the time being in force, the Authority shall have the responsibility to recommend the transfers and postings of all Group ‘A’ officers and officers of DANICS serving in the affairs of the Government of National Capital Territory of Delhi but not officers serving in connection with any subject matter, either fully or in part, connected with Entries 1, 2 and 18 of List II of the Seventh Schedule to the Constitution; and Entries 64, 65 and 66 of List II of the Seventh Schedule to the Constitution insofar as they relate to Entries 1, 2 and 18 or any other subject matter which is connected therewith or incidental thereto, to the Lieutenant Governor:

Provided that Authority may, if it deems appropriate, by way of a recommendation, delegate the responsibility to any other authority of the Government of National Capital Territory of Delhi.”

(emphasis supplied)

10. Dr Abhishek Manu Singhvi, senior counsel appearing on behalf of the petitioners submits that:

- a. The decision of this Court in **E.P. Royappa v. State of Tamil Nadu & Anr¹²**, dwelt with the importance of the post of Chief Secretary in terms of its sensitivity, responsibility and the rapport which is required between the Chief Secretary and the Chief Minister;

- b. The provisions of Section 45A(d) contain only a definition of the expression “Chief Secretary” and cannot be construed to be a substantive provision governing the appointment of the Chief Secretary by the Central Government;
- c. Section 45E of the amended statute which deals with the transfers and postings of the Group A officers under the auspices of the National Capital Civil Service Authority cannot encompass the Chief Secretary who is a *ex officio* part of the authority;
- d. The power under Rule 55(2)(b) of the Transaction of Business Rules has always been exercised by the Lieutenant Governor on the aid and advice of the NCTD Government;
- e. In terms of the third proviso of Rule 16(1) of the All India Services (Death-cum-Retirement Benefits) Rules 1958¹³, an extension to a member of the All India Service holding the post of Chief Secretary to a State Government can be granted for a period of not more than six months “on the recommendations made by the concerned State Government with full justification and in public interest with the prior approval of the Central Government”;
- f. Reference to the State Government in the third proviso to Rule 16 of the AIS (DCRB) Rules 1958 can only mean the GNCTD bearing in mind the observations in paragraph 173 of the judgment in the 2023 Constitution Bench. Thus, in the absence of its recommendation, which has to be backed by a justification and in public interest, no extension can be granted unilaterally by the Central Government;
- g. No extension has been granted to the Chief Secretary in GNCTD even in a single instance over 30 years; and
- h. Apart from the three expressly excluded entries of the State List pertaining to Police, Public Order and Land, the Chief Secretary also deals with 110 other entries of the Seventh Schedule in the performance of his functions. That is why a recommendation for

13 “1958 Rules”

the appointment of the Chief Secretary has emanated from the GNCTD while the appointment is actually made by the Union Government. Hence, the proposed extension which is sought to be granted to the Chief Secretary is without the authority of law.

11. In response to the plea which has been made by the petitioner, an affidavit has been filed by the Joint Secretary (Union Territories) in the Union Ministry of Home Affairs. The affidavit sets out that:

- a. Extensions have been granted in the previous 12 months alone to the Chief Secretaries in the States of West Bengal, Rajasthan, Uttar Pradesh and Madhya Pradesh, as set out in the table extracted below :

Name of the Officer Serving as Chief Secretary	State/Union Territory	Date of superannuation	Period of Extension Granted
HK Dwivedi, IAS (WB:1988)	West Bengal	30.06.2023	06 Months (from 01.07.2023 to 31.12.2023)
Usha Sharma, IAS (RR: 1985)	Rajasthan	30.06.2023	06 Months (from 01.07.2023 to 31.12.2023)
Durga Shanker Mishra, IAS (UP: 1984)	Uttar Pradesh	31.12.2021	01 year (from 01.01.2022 to 31.12.2022) 01 year (from 01.01.2023 to 31.12.2023)
Iqbal Singh Bains, IAS (MP:1985)	Madhya Pradesh	30.11.2022	06 Months (from 01.12.2022 to 31.05.2023) 06 months (from 01.06.2023 to 30.11.2023)

- b. Senior IAS as well as IPS officers in the AGMUT cadre have been granted extensions of tenure on superannuation on the following occasions in the previous ten years:

Name of the Officer Serving as Chief Secretary	State/ Union Territory	Date of superannuation	Period of Extension Granted
Shri Subhash Kumar, IAS (UK: 1977)	Uttarakhand	30.04.2014	06 Months (from 01.05.2014 to 31.10.2014)
Dr. Varesh Sinha, IAS (GJ: 1977)	Gujarat	30.04.2014	03 Months (from 01.05.2014 to 31.07.2014) 03 Months (from 01.08.2014 to 31.10.2014)
Shri Rinchen Ongmu, IAS (SK: 1977)	Sikkim	31.01.2015	03 Months (from 01.02.2015 to 30.04.2015)
			03 Months (from 01.05.2015 to 31.07.2015)
Shri Shakuntala Jakhu, IAS (HY: 1978)	Haryana	30.09.2014	02 Months (from 01.10.2014 to 30.11.2014)
Shri D.M.Spolia, IAS (AGMUT: 1979)	Delhi	31.01.2015	01 month (from 01.02.2015 to 28.02.2015)
Shri Kaushik Mukherjee, IAS (KN: 1978)	Karnataka	30.09.2015	03 Months (from 01.10.2015 to 31.12.2015)
Shri C. C. Rajan, IAS (RJ:1978)	Rajasthan	31.12.2015	03 Months (from 01.01.2016 to 31.03.2016)
Shri Alok Ranjan, IAS(UP:1978)	Uttar Pradesh	31.03.2016	03 Months (from 01.04.2016 to 30.06.2016)
Dr. Rajiv Sharma, IAS (TG:1982)	Telangana	31.05.2016	03 Months (from 01.06.2016 to 31.08.2016)

Shri Arvind Jadav, IAS (KN: 1978)	Karnataka	30.06.2016	03 Months (from 01.07.2016 to 30.09.2016)
Shri Rajesh Kumar Srivastava, IAS (AGMUT: 1984)	Goa	30.06.2016	03 Months (from 01.07.2016 to 30.09.2016)
			03 Months (from 01.10.2016 to 31.12.2016)
Shri S.P. Tucker, IAS (AP:1981)	Andhra Pradesh	31.12.2016	03 Months (from 01.01.2017 to 31.03.2017)
Shri Swadheen S Kshatriya, IAS (MH: 1980)	Maharashtra	31.01.2017	03 Months (from 01.02.2017 to 30.04.2017)
Shri V.K. Pipersenia, IAS (MP: 1980)	Madhya Pradesh	31.08.2017	06 Months (from 01.09.2017 to 31.03.2018)
Shri Rajani Ranjan Rashmi, IAS (MN: 1983)	Manipur	30.09.2017	03 Months (from 01.10.2017 to 31.12.2017)
			03 Months (from 01.01.2018 to 31.03.2018)
Shri Bharat Bhushan Vyas, IAS (JK/ AGMUT: 1986)	Jammu & Kashmir	30.11.2017	03 Months (from 01.12.2017 to 28.02.2018)
			03 Months (from 01.03.2018 to 31.05.2018) 01 Year (from 01.06.2018 to 31.05.2019)
Shri Anjani Kumar Singh, IAS (BH: 1981)	Bihar	28.02.2018	03 Months (from 01.03.2018 to 31.05.2018)

Ms. Ratna Prabha, IAS (KN: 1981)	Karnataka	31.03.2018	03 Months (from 01.04.2018 to 30.06.2018)
Shri Basant Pratap Singh,IAS (MP:1984)	Madhya Pradesh	30.06.2018	06 Months (from 01.07.2018 to 31.01.2019)
Shri Sudhir Tripathi,IAS(JH: 1985)	Jharkhand	30.09.2018	03 Months (from 01.10.2018 to 31.12.2018)
			03 Months (from 01.01.2019 to 31.03.2019)
Shri Dinesh Kumar Jain, IAS (MH: 1983)	Maharashtra	31.01.2019	06 Months (from 01.02.2019 to 31.07.2019)
Dr. Anup Chandra Pandey, IAS (UP:1984)	Uttar Pradesh	28.02.2019	06 Months (from 01.03.2019 to 31.08.2019)
Dr. J.N. Singh, IAS (GJ: 1983)	Gujarat	31.05.2019	06 Months (from 01.06.2019 to 30.11.2019)
Shri Ajoy Mehta, IAS (MH:1984)	Maharashtra	30.09.2019	06 Months (from 01.10.2019to 31.03.2020)
			06 Months (from 01.04.2020 to 30.06.2020)
Shri Deepak Kumar, IAS (BH: 1984)	Bihar	29.02.2020	06 Months (from 01.03.2020 to 31.08.2020)
			06 Months (from 01.09.2020 to 28.02.2021)

Shri Nilam Sawhney, IAS (AP: 1984)	Andhra Pradesh	30.06.2020	03 Months (from 01.07.2020 to 30.09.2020)
			03 Months (from 01.10.2020 to 31.12.2020)
Shri T.K. Shamugam,IAS (TN: 1985)	Tamil Nadu	31.07.2020	03 Months (from 01.08.2020 to 31.10.2020)
			03 Months (from 01.11.2020 to 31.01.2021)
Shri Anil Mukim, IAS (GJ:1985)	Gujarat	31.08.2020	06 Months (from 01.09.2020 to 28.02.2021) 06 Months (from 01.03.2021 to 31.08.2021)
Shri Alapan Bandopadhyay, IAS(WB:1987)	WestBengal	31.05.2021	03 Months (from 01.06.2021 to 31.08.2021)
Shri Tripurari Sharan, IAS (BH: 1985)	Bihar	30.06.2021	03 Months (from 01.07.2021 to 30.09.2021)
			03 Months (from 01.10.2021 to 31.12.2021)
Shri Aditya Nath Das, IAS (AP: 1987)	Andhra Pradesh	30.06.2021	03 Months (from 01.07.2021 to 30.09.2021)
Dr. Sameer Sharma, IAS(AP: 1985)	Andhra Pradesh	30.11.2021	06 Months (from 01.12.2021 to 31.05.2022)

			06 Months (from 01.06.2022 to 30.11.2022)
Shri Durga Shanker Misra, IAS (UP:1984)	Uttar Pradesh	31.12.2021	01 Year (from 01.01.2022 to 31.12.2022)
			01 Year (from 01.01.2023 to 31.12.2023)
Shri Suresh Chandra Mahapatra, IAS (OD: 1986)	Odisha	28.02.2022	06 Months (from 01.03.2022 to 31.08.2022)
			06 Months (from 01.09.2022 to 28.02.2023)
Dr. Rajesh Kumar, IAS (MN: 1988)	Manipur	30.06.2022	06 Months (from 01.07.2022 to 31.12.2022)
			06 Months (from 01.01.2023 to 31.05.2023)
Shri Pankaj Kumar, IAS (GJ: 1986)	Gujarat	31.05.2022	08 Months (from 01.06.2022 to 31.01.2023)
Shri Iqbal Singh Bains, IAS (MP: 1985)	Madhya Pradesh	30.11.2022	06 Months (from 01.12.2022 to 30.05.2023)
			06 Months (from 01.06.2023 to 30.11.2023)
Shri Hari Krishna Dwivedi,IAS (WB: 1988)	West Bengal	30.06.2023	06 Months (from 01.07.2023 to 31.12.2023)

Smt. Usha Sharma, IAS (RJ: 1985)	Rajasthan	30.06.2023	06 Months (from 01.07.2023 to 31.12.2023)
Dr. Sukhbir Singh Sandhu, IAS (UD: 1988)	Uttarakhand	31.07.2023	06 Months (from 01.08.2013 to 31.01.2024)

- c. There are as many as 57 instances since 2013 where extensions have been granted to superannuating Chief Secretaries which have been tabulated in the affidavit;
 - d. Section 45A, though a part of the definition provisions of the amended Act, expressly recognises the power of appointment of the Central Government of the Chief Secretary of the NCTD;
 - e. Though the power of granting an extension to a member of an All India Service holding the post of Chief Secretary under Rule 16 of the 1958 Rules is to be exercised by the Central Government on the recommendations of the State Government, in the case of the NCTD, the relevant cadre deploying the officers is the AGMUT cadre which is a Joint Cadre. Rule 2(1)(m) defines the State Government in the case of a joint cadre to mean the Joint Cadre Authority¹⁴; and
 - f. The Government of India Allocation of Business Rules 1961 provide, in relation to the Union Ministry of Home Affairs, that :
- “(d) General Questions relating to public services in the Union Territories and service matters in so far as these fall within the purview of State Government relating to:
- (i) the officers of Indian Administrative Service and Indian Police Service serving in connection with the affairs of the Union Territories;

14 Rule 2(1)(m): State Government means the State Government on whose cadre the member of the Service was borne immediately before retirement or death and in relation to a member of an All India Service borne on a joint cadre, the joint cadre Authority.

- (ii) NCT of Delhi, Andaman and Nicobar Islands, Lakshdweep, Daman and Diu and Dadra and Nagar haveli Civil and Police Services (DANICS and DANIPS);
- (iii) Pondicherry Civil and Police Services.”

12. The submissions which were urged by the Solicitor General have been supplemented by Mr Sanjay Jain, senior counsel. Mr. Jain submitted that:

- a. The decision of this Court in the 2023 Constitution Bench makes it clear that the executive role of the NCTD does not extend to services related to public order, police and land keeping in view that Entries 1, 2 and 18 stand excluded from the legislative power of NCTD;
- b. The Chief Secretary indivisibly performs functions relating to Entries 1, 2 and 18;
- c. Consequently, in the appointment of the Chief Secretary, as well as in the appointment of the Secretary (Home), Secretary (Land) and Commissioner of Police, the elected Government of NCTD would not have any control;
- d. After the insertion of Article 239AA, a proposal for the appointment of officers to these four posts was invariably moved by the Lieutenant Government to the Central Government in the Ministry of Home Affairs in terms of Rule 55(2)(b) of the Transaction of Business Rules;
- e. In terms of Rule 56, whenever a proposal is received under Rule 55(2)(b) from the Lieutenant Governor, the Central Government would have to take the appropriate decision; and
- f. Section 41 of the GNCTD Act deals with matters in which the Lieutenant Governor may act in his sole discretion and even prior to the amendment, it was permissible for him to act without aid and advice in all matters falling outside the purview of the Legislative Assembly, namely Entries 1, 2 and 18 of the State List.

13. At this stage, it must be noted that the reference before the Constitution bench is pending and there is no stay on the operation of the amendment Act. Thus, only a *prima facie* view is formed on the merits of the rival submissions.

14. In its decision in 2023 Constitution Bench, this Court held that :

- a. The subject of ‘services’ falls within the ambit of the legislative and executive competence of NCTD under Entry 41 of the State List of the Seventh Schedule;
- b. However, the legislative and executive power of NCTD over Entry 41 does not extend over services related to the excluded subjects of public order, police and land;
- c. In the absence of a law conferring upon it executive power relating to any subject in the State List, the executive power of the Union Government covers only matters relating to the three entries which are excluded from the legislative domain of NCTD;
- d. If Parliament enacts a law granting executive power on any subject which is within the domain of NCTD, the executive power of the Lieutenant Governor shall be modified to that extent as provided in the law;
- e. The Lieutenant Governor is bound by the aid and advice of the Council of Ministers of NCTD in relation to matters which fall within the legislative domain of NCTD; and
- f. NCTD has legislative power over services excluding public order, police and land. Hence, the Lieutenant Governor is bound by the decisions of GNCTD on services, save and except for the excluded subjects and as modified by the law.

These principles have been culled out *prima facie* at this stage on an analysis of the observations of the judgment in 2023 Constitution Bench.

15. Two issues fall for the consideration of this Court: *firstly*, whether the Union Government has the unilateral power to appoint the Chief Secretary of NCTD; and *secondly*, whether the Union Government has the power to extend the service of the incumbent Chief Secretary.

16. We will first deal with the issue of whether the Union Government has the unilateral power to appoint the Chief Secretary of NCTD. Rule 2(b) of the Indian Administrative Service (Cadre) Rules 1954¹⁵ defines Cadre post as any of the posts specified under item 1 of each cadre in the Schedule to the Indian Administrative Service (Fixation of Cadre Strength) Regulations 1955¹⁶. The 1955 Regulations mention Chief Secretary as one of the cadre posts. Rule 7 of the 1954 Rules states that all appointments to cadre posts in a joint cadre shall be made by the State Government concerned. The State Government is defined in relation to a Joint cadre to mean the Joint Cadre Authority. Rule 11A of the 1954 Rules states that the power of the State Government, *inter alia*, under Rule 7 in relation to the members of the Service serving in connection with the affairs of any of the constituent States shall be exercised by the Government of that State, and State is defined to include Union Territory¹⁷. The 2023 Constitution Bench judgment interpreted the above provisions and held that the GNCTD has the power to make appointments to cadre posts in NCTD:

“173. We shall take the example of the Indian Administrative Service (Cadre) Rules, 1954, which deal with the posting of IAS Officers. Rule 2(a) defines “cadre officer” to mean a member of IAS. Rule 2(b) defines “Cadre post” as any post specified under Item I of each cadre in the Schedule to the Indian Administrative Service (Fixation of Cadre Strength) Regulations, 1955. Rule 2(c) defines “State” to mean a State specified in the Schedule I to the Constitution and includes a Union Territory. Rule 2(d) defines “State Government concerned”, in relation to a Joint cadre, to mean the Joint Cadre Authority. The constitution and composition of a “Joint Cadre Authority” is understood with reference to the All-India Services (Joint Cadre) Rules, 1972. The 1972 Rules apply to a “Joint Cadre constituted for any group of States other than the Joint Cadre of Union Territories”. Rule 3 of the IAS (Cadre) Rules, 1954 provides for the constitution of cadres for each State or group of States “as a “State Cadre” or, as the case may be, a “Joint Cadre”. Rule 5 empowers the Central Government to allocate

15 “1954 Rules”

16 “1955 Regulations”

17 Rule 2(c) of the 1955 Regulations

cadre officers to various cadres. In terms of Rule 5(1), the allocation of cadre officers to the various cadres shall be made by the Central Government in consultation with the State Government or the State Government concerned. Rule 7 stipulates that all appointments to cadre posts shall be made “on the recommendation of the Civil Services Board” — by the State Government “in the case of a State cadre”, and by the State Government concerned, as defined in Rule 2(d), “in the case of a joint cadre”. Under Rule 11-A, the “Government of that State” is provided with powers to take decisions under Rule 7 (and other mentioned rules) in relation to the members of the Joint Cadre Service “serving in connection with the affairs of any of the Constituent States”. **A combined reading of Rules 2, 7 and 11-A indicates that the postings within the State Cadre as well as Joint Cadre of a Constituent State shall be made by the “Government of that State”, that is, by the duly elected Government.** In our case, it shall be the Government of NCTD. We accordingly hold that references to “State Government” in relevant Rules of All-India Services or Joint Cadre Services, of which NCTD is a part or which are in relation to NCTD, shall mean the Government of NCTD.”

(emphasis supplied)

17. However, the scope of Rule 55(2)(b) of the Transaction of Business Rules must also be noticed. Rule 55(2)(b) requires the Lieutenant Governor, subject to any instructions which may be issued by the Central Government, to make a prior reference to the Central Government of proposals for the appointment of Chief Secretary and Commissioner of Police, Secretary (Home) and Secretary (Lands). Rule 56 provides that when a matter has been referred by the Lieutenant Governor to the Central Government under Rule 55, further action shall not be taken except in accordance with the decision of the Central Government. Though the Government of NCTD is the appointing authority for all posts in NCTD in terms of the 1954 Rules, the Transaction of Business Rules places the appointments to the posts of Chief Secretary and Commissioners of Police, Secretary (Home) and Secretary (Lands) outside the competence of the GNCTD.

18. The reason for this provision would emerge from the three excluded subjects of Entries 1, 2 and 18 of List 2 of the State List which fall outside

the purview of the GNCTD. The excluded subjects being ‘Police’, ‘Public order’ and ‘Land’, the Commissioner of Police and the Secretaries In-charge of the Home and Land Departments are specifically brought within the purview of those matters where the Lieutenant Governor has to make a prior reference to the Union Government. The Chief Secretary has, in addition, been brought within the purview of Rule 55(2)(d) for the reason that the Chief Secretary of the GNCTD exercises overall supervision and control over all the departments including the departments which are relatable to the excluded subjects.

19. Significantly, at this stage, it will be material to note that the amendments which have been made to the GNCTD Act 1991 by the insertion of Part IV-A contain analogous provisions in clause (i) of Section 45A by excluding officers who are serving in connection with any subject matter whether fully or in part connected with Entries 1, 2 and 18 of List II (and Entries 64, 65 and 66 insofar as they relate to Entries 1, 2 and 18) from the ambit of the definition of Group A officers. Likewise, while defining the powers and functions of the National Capital Civil Service Authority in Section 45H, officers who are serving in connection with any subject matter, either fully or in part, connected with Entries 1, 2 and 18 of List 2 are excluded specifically.

20. The petitioners submit that the Lieutenant Governor has always exercised the power under Rule 55(2) under the aid and advice of the Council of Ministers. In terms of Article 239-AA(4), the Lieutenant Governor shall exercise his functions with the aid and advice of the Council of Ministers in relation to matters with respect to which the Legislative Assembly has the power to make laws, except insofar as he is, by or under any law, required to act in his discretion.

21. Section 41 of the GNCTD Act lists the matters on which the Lieutenant Governor may act at his discretion. The provision states that the Lieutenant Governor may act in his discretion: (a) on matters which are beyond the powers of the Legislative Assembly and where the President has delegated the powers and functions to the Lieutenant Governor in relation to such matters; and (b) on matters which by law require him to act in his discretion or where he is exercising judicial or quasi-judicial functions.

22. The question of whether the Lieutenant Governor should act on the aid and advice of the Council of Ministers while discharging the function under Rule 55(2)(b) must be answered in light of the following position of law:

- a. The judgment of this Court in the 2023 Constitution Bench that the legislative and executive power of NCTD shall extend to services except services related to the excluded entries (that is, public order, police, and land); and
- b. The Lieutenant Governor is required to act on the aid and advice of the Council of Ministers only on matters over which the Legislative Assembly of NCTD has competence. Even with respect to such matters, the Lieutenant Governor may act on his discretion if the law provides so. [*2023 Constitution Bench judgment, Article 239-AA(4) of the Constitution and Section 41 of the GNCTD Act*]

23. The Lieutenant Governor while exercising the power under Rule 55(2)(b) is required to act at their discretion without the aid and advice of the Council of Ministers for the following reasons:

- a. The provision mandates the Lieutenant Governor to make a reference to the Central Government of every proposal which relates to the appointments stipulated in the provision. This is clear from the usage of the words “the Lieutenant Governor **shall** make a prior reference;
- b. Rule 55(2) begins with the phrase “subject to any instructions which may from time to time be issued by the Central Government”. The exercise of power by the Lieutenant Governor under Rule 55(2)(b) is subject to the control of the Central Government;
- c. As discussed above, Rule 55(2)(b) deals with proposals for the appointment of the Commissioner of Police and the Secretaries In-charge of the Home and Land Departments in addition to the Chief Secretary. The Chief Secretary has been brought within the purview of Rule 55(2)(b) because the Chief Secretary of the GNCTD exercises overall supervision and control over all the

departments including the departments which are relatable to the excluded subjects; and

- d. The Central Government has a veto over the proposal in terms of Rule 56.

24. The position which emerges from the above analysis is that unlike other States, the GNCTD only has the power to propose a candidate for the appointment as the Chief Secretary. The Lieutenant Governor is bound to refer the proposal to the Central Government and the decision of the Central Government on the proposal is final.

25. Section 45A(d) defines the Chief Secretary to mean the Chief Secretary of the GNCTD “appointed by the Central Government”. At this stage, it may not be necessary to enquire into whether clause (d) of Section 45A is purely a definition section, as the petitioners submit, or whether it contains a substantive power of appointment, as is submitted by the respondents. At the present stage, it would suffice to note that there can be no dispute about the basic position that the Chief Secretary, as the head of the administration, exercises jurisdiction of an administrative nature over the entirety of subjects which fall within the domain of the executive functions of GNCTD which would include those subjects (Entries 1, 2 and 18 of List II) over which the Legislative Assembly and the State Government do not have jurisdiction.

26. In the 2023 Constitution Bench judgment, this Court, while holding that the subject of services in Entry 41 of List II falls within the domain of GNCTD, has nonetheless clarified that this would not extend to control over services insofar as they pertain to the excluded subjects. In the very nature of things, it would not be possible or for that matter practicable to divide these functions of the Chief Secretary or bifurcate them between those areas which fall within the domain of GNCTD and those which lie outside. Nor can such a bifurcation be logically attempted based on the numerical strength of the number of administrative subjects which lie within or outside the province of GNCTD. Once it emerges that the Chief Secretary performs important functions, among other things, in relation to the excluded subjects as well, it would be farfetched to postulate that the Central Government is divested of the power to appoint the Chief Secretary.

27. The petitioners while referring to the observations of this Court in **Royappa** (*supra*) contend that the Central Government cannot unilaterally appoint the Chief Secretary because the Chief Secretary in addition to the subjects of land, police, and public order also assists the Government of NCTD on a variety of other matters which falls within the legislative and executive competence of NCTD. However, these are grounds which can be raised when the challenge to the constitutional validity of the provisions of the 2023 Amendment Act is adjudicated. In view of the fact that this Court has not stayed the provisions of the NCT Amendment Act, this Court must adjudicate the controversy based on the position of law as it exists today.

28. The petitioners seek that the Court to appoint one of the five senior most officers from the pool of officers who are serving in the AGMUT cadre and who has had the experience of having served as the Chief Secretary in the Government of NCTD. The relief sought by the petitioner is beyond the scope of powers exercisable by this Court. This Court cannot usurp the powers of the appointing authority conferred by law.

29. The issue which survives for consideration is as to whether the Central Government has the power to extend the service of an incumbent Chief Secretary. The Union Government, *inter alia*, relied upon the provisions of Rule 16 of the AIS (DCRB) Rules 1958. Dr Singhvi urged that the third proviso to Rule 16 clearly stipulates that an extension of service can be granted to a person holding the post of Chief Secretary to a State Government on the recommendations made by the concerned State Government “with full justification and in public interest” with the prior approval of the Central Government. Hence, it was urged that the power of extension can be exercised only on the recommendation of the State Government which, in the present case, must mean, the GNCTD.

30. On the other hand, an effort has been made on behalf of the Union Government to submit that in a case involving a joint cadre, the expression State Government must mean the Joint Cadre Authority and bearing in mind the Transaction of Business Rules 1961 of the Union Government, it is the Ministry of Home Affairs which alone would exercise jurisdiction on general questions relating to public services in the Union Territories and service matters pertaining to IAS and IPS officers serving in connection with the affairs of the Union Territories.

31. This submission of the Union Government has not found acceptance in the 2023 Constitution Bench judgment. Paragraph 173 of the judgment (extracted above) holds that the GNCTD would exercise jurisdiction over public services in NCTD.

32. Rule 16 of the 1958 Rules is a general rule which is applicable to members of the service holding the post of Chief Secretary across all States. The provision does not make a distinction between the Chief Secretary serving in NCTD and the Chief Secretaries serving in other States though the procedure for the appointment of the Chief Secretary of NCTD is different from the procedure for the appointment of Chief Secretaries in other States in terms of the 1954 Rules read with the Transaction of Business Rules. The post of Chief Secretary in the GNCTD is a post entrusted with significant functional responsibilities including overall administrative control and supervision over subjects which stand excluded from the legislative domain and the executive powers of the GNCTD. In relation to Chief Secretaries who are appointed to the States, Rule 16 of the 1958 Rules contemplates that an extension can be granted with the prior approval of the State Government on the recommendation by the State Government with a “full justification” and in “public interest”. This provision has been made in relation to the role of the State Government where the Chief Secretaries perform functions in relation to the States. The position of the Chief Secretary of the GNCTD is significantly distinct in that the Chief Secretary performs delegated executive functions which straddle both subjects which fall within the executive and legislative competence of GNCTD as well as those which lie outside. Consequently, the restrictions which operate in relation to the grant of extension under Rule 16 of the 1958 Rules in relation to the Chief Secretary of one of the State Governments would not *stricto sensu* apply in relation to the GNCTD. Rule 16 undoubtedly would, however, apply in relation to the extension of service of such other officers of GNCTD whose functions do not extend to any of the subjects which are excluded, namely, Entries 1, 2 and 18 of List 2 and Entries 64, 65 and 66 insofar as they are relatable to Entries 1, 2 and 18.

33. For the above reasons, we have come to the conclusion that at this stage, bearing in mind the principles which have been enumerated in the judgment of this Court in 2023 Constitution Bench judgment, and the

subsequent developments which have taken place resulting in the enactment of the amendment to the GNCTD Act 1991, the decision of the Union Government to extend the services of the incumbent Chief Secretary for a period of six months cannot be construed to be violative of law.

34. We, however, clarify that the analysis in this order is confined to the evaluation of the case at the present stage without entering into any conclusive determination of the issues which are pending for adjudication before the Constitution Bench.

35. We also deem it appropriate to record a few observations on the role of the Chief Secretary. As observed by this Court in **Royappa** (*supra*), the post of the Chief Secretary is a “post of great confidence- a lynchpin in the administration.” This Court in the 2023 Constitution Bench judgment observed that civil servants are required to be politically neutral and must abide by the directions of the elected arm to give effect to the principle underlying the triple-chain of collective responsibility. The post of a Chief Secretary is uniquely placed. The Chief Secretary performs functions which fall both within and outside the executive competence of the GNCTD. The Chief Secretary though appointed by the Central Government, must comply with the directions of the elected government over matters on which their executive competence extends. The actions (or inactions) of the Chief Secretary must not put the elected government at a standstill.

36. The writ petition is disposed of in terms of the above observations. Pending application(s), if any, stand disposed of.

Headnotes prepared by:
Divya Pandey

Writ petition disposed of.