

*

IN THE HIGH COURT OF DELHI

+

W.P.(C) 726/2003

PROMILA SHARMA Petitioner
Through : Mr.Rajeev Awasthi, Advocate.

versus

GOVT. OF NCT OF DELHI & ORS. Respondents
Through: Ms.Zubeida Begum, Advocate and
Ms.Iram Majid, Advocate
for respondent No.1.
Ms.Avnish Ahlawat, Advocate
for respondent No.2.
Mr.R.K.Kapoor, Advocate
for respondent No.3.

W.P.(C) 20057/2004

SURINDER KAUR Petitioner
Through : Mr.Rajeev Awasthi, Advocate.

versus

GOVT. OF N.C.T. OF DELHI & ORS. Respondents
Through: Ms.Zubeida Begum, Advocate and
Ms.Iram Majid, Advocate
for respondent No.1.
Ms.Avnish Ahlawat, Advocate
for respondent No.2.
Mr.R.K.Kapoor, Advocate
for respondent No.3.

RESERVED ON:
11.07.2008

DATE OF DECISION:
15.07.2008

%

CORAM:
Hon'ble Mr.Justice Pradeep Nandrajog

1. Whether reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

: **PRADEEP NANDRAJOG, J.**

1. Writ petitioners in the above captioned petitions seek issuance of a mandamus against the Directorate of Education, Government of NCT Delhi as also Sant Nirankari Girls Sr. Sec. School, directing regularization of their service as Assistant Teacher under the school with effect from 18.8.1989 (petitioner Smt. Surinder Kaur) and 3.9.1991 (petitioner Smt. Promila Sharma).

2. It may be noted at the outset that the school is a recognized aided school and the Directorate of Education pays, by way of grant in aid, 95% expenditure incurred by the school.

3. Case of the petitioner is that Smt. Surinder Kaur, petitioner of W.P.(C) No.20057/2004 joined the school as an ad-hoc teacher on 18.8.1989. Petitioner Promila Sharma claims to have joined the school on ad-hoc basis on 3.9.1991. Both allege that except for artificial break in service they worked under the school continuously for a long period of time and since their requests for regular appointment were not being acceded to, they filed a writ petition numbered as W.P.(C) No.659/1997 praying that their services be regularized with effect from the date they were appointed as Assistant

Teachers in the school. The said writ petition was disposed of vide order dated 28.4.1998 which reads as under:-

“The petitioner Smt. Pramila Sharma and Surinder Kaur were appointed by 3rd and 4th respondents. The Management of the School is willing to regularize the services of the above two who were appointed as assistant teachers. The first respondent, Director of Education has not considered the case of the petitioner. The 3rd respondent (school) is a aided school and therefore, under the statute Governing body to run the school is the Director Education is the property authority to pass appropriate order. In the counter affidavit filed by the Director Education nothing has been mentioned and no reason has been given as to why the services of the assistant teachers could be regularized.

On the basis of the material on record, I am satisfied that the case of the petitioner and the other teachers appointed along with the petitioner should be considered for being regularized and the Director of Education shall pass appropriate order on or before 30.6.1998 approving the regularization services of the school teachers and also issued appropriate directions for the payment of salary to the school teachers and the base of their appointment. Needless to say that the salary to the school teachers and the base of their appointment. Needless to say that the salary to the school teachers to the extent of 98% shall be paid by the Director of Education.

Accordingly, the writ petition stands disposed of. There shall be no order as to costs.”

(N.B. The order is reproduced as disclosed in the petition with all errors of syntax and grammar.)

4. Petitioners state that further challenge to the order dated 28.4.1998 failed right till the Hon'ble Supreme Court, in

that, the Letters Patent Appeal filed by the Directorate of Education being LPA No.97/1999 was dismissed and petition for Special Leave to Appeal challenging the decision of the Division Bench being SLP (C) No.12231/2000 was also dismissed.

5. According to the petitioners, the Directorate of Education passed an order on 25.6.1998 informing that their services have been regularized. The said order reads as under:-

“GOVT. OF NATIONAL CAPITAL TERRITORY OF DELHI
DIRECTORATE OF EDUCATION (DISTT. NORTH
WEST) HAKIKAT NAGAR

Order No.425
DATED: 25.6.98

ORDER

In pursuance of Order issued by the Hon'ble High Court regarding the regularization of Smt. Promila Sharma and Smt. Surinder Kaur of Sant Nirankari Govt. Girls Sr. Sec. School. It is to be informed to the school that the Services of above said teachers are to be regularized.

It is further stated that the payment of salary to school is to be paid at the basis of their appointment.

Sd/-
(DR. BHUPINDER SINGH)
DY. DIRECTOR OF EDUCATION
DISTT. NORTH WEST.
DATED:-

No.

Copy to:-

1. Manager Sant Nirankari Gr. Sr. Sec. School,
Nirankari Colony.
2. Teacher concerned. Smt. Surinder Kaur,
through School
3. Additional Director of Edn. (Act).

Sd/-24.6.98
(DR. BHUPINDRA SINGH)
DY. DIRECTOR OF EDUCATION
DISTT. NORTH WEST."

6. According to the petitioners, the mandate of the order dated 28.4.1998 passed by the court requires their services to be regularized with effect from the date they joined service under the school and that, since order dated 25.6.1998 does not indicate that their services were regularized with retrospective effect, directions have to be issued to the Directorate of Education to modify the order dated 25.6.1998 and regularized their services with retrospective effect i.e. from the date the petitioners joined service under the school.

7. According to the Directorate of Education, the school being a recognized aided school, the management thereof was obliged to follow the mandate of Rule 96 of the Delhi School Education Rules 1973 which reads as under:-

“96. Recruitment – (1) Nothing contained in this Chapter shall apply to an unaided minority school.

(2) Recruitment of employees in each recognized private school shall be made on the recommendation of the Selection Committee.

(3) The Selection Committee shall consist of :-

(a) in the case of recruitment of the head of the school,-

(i) The Chairman of the managing committee;

(ii) in the case of an unaided school, an educationist is nominated by the managing committee, and an educationist nominated by the Director;

(iii) in the case of an aided school, two educationists nominated by the Director, out of whom at least one shall be a person having experience of school education;

(iv) a person having experience of the administration of schools, to be nominated, in the case of an unaided school by the managing committee, or in the case of an aided school, by the Director;

(b) in the case of an appointment of a teacher (other than the head of the school),-

(i) the Chairman of the managing committee or a member of the managing committee nominated by the Chairman;

(ii) the head of the school;

(iii) in the case of a primary school, a female educationist having experience of school education;

(iv) in the case of an aided school, one educationist to be nominated by the Director, and one representative of the Director;

(v) in the case of appointment of a teacher for any class in the middle stage or any class in the higher secondary stage, an expert on the subject in relation to which the teacher is proposed to be appointed, to be nominated, in the case of an unaided school by the managing committee, or in the case of an aided school, by the Director.

(c) in the case of an appointment of any other employee, not being an employee belonging to ["Group D"].

(i) the Chairman of the managing committee or a member of the managing committee, to be nominated by the Chairman;

(ii) head of the school;

(iii) a nominee of the Director;

(iv) in the case of an aided school, two officers having experience of the administration of school, to be nominated by the Director;

[(d) in the case of an appointment of a Group 'D' employee:-

(i) the Chairman of the Managing Committee or a member of the Managing Committee nominated by the Chairman;

(ii) the head of the school;]

[(3-A) Notwithstanding anything contained in sub-rule (3), in the case of an aided minority school, the educationists nominated under paragraph (iii) of clause (a) of sub-rule (3), persons nominated by the Director under paragraph (iv) of clause (b) of sub-rule 93), an expert nominated under paragraph (v) of clause (b) of sub-rule (3), officers nominated under paragraph (iv) of clause (c) of sub-rule (3), a

person nominated under paragraph (iii) of clause (b) of sub-rule (3), shall act only as advisers and will not have the power to vote or actually control the selection of an employee.

(3-B) Notwithstanding anything contained in sub-rule (3), the selection committee of a minority school shall not be limited by the number specified in the said sub-rule and its managing committee may fix such number.]

(4) Nomination of any educationist or expert as a member of the Selection Committee shall be made out of a panel prepared for the purpose by the Advisory Board.

(5) The Chairman of the managing committee, or, where he is not a member of the Selection committee, the member of the managing committee who is nominated by the Chairman to be a member of the Selection Committee, shall be the Chairman to the Selection Committee.

(6) The Selection committee shall regulate its own procedure.

(7) Where any selection made by the Selection committee is not acceptable to the managing committee of the school, the managing committee shall record its reasons for such non-acceptance and refer the matter to be Director for his decision and the Director shall decide the same.

(8) Where a candidate for recruitment to any post in a recognized school is related to any member of the Selection Committee, the member to whom he is related shall not participate in the selection and a new member shall be nominated, in the case of any aided school, by the Director, and in the case of any other school, by the managing committee, in place of such member.

(9) No managing committee shall entertain any application for employment from a person who is already serving as teacher in a recognized school,

whether aided or not, unless the application from such person is duly forwarded by the manager of the school in which such applicant is serving:

Provided that every application from such person shall be forwarded by the manager, but any application in excess of three in a year shall not be forwarded unless the managing committee, for reasons to be recorded by it in writing, so directs:

Provided further that no such teacher shall be relieved of his duties except after the expiry of a period of:-

- (i) three months, in the case of a permanent teacher, from the date on which notice of intimation to leave the school is given; and

- (ii) one month, in the case of a teacher who is not permanent, from the date on which notice of intimation to leave the school is given:

Provided also where the managing committee is in a position to provide for substitute for such teacher earlier than the respective period specified in the foregoing proviso, the managing committee may relieve the teacher of his duties on the expiry of such earlier period."

8. The Directorate of Education asserts that admittedly, neither petitioner was appointed by following the procedure prescribed by the Rule. It is further asserted by the Directorate of Education that both petitioners were appointed without any selection process being followed and that they were initially appointed against temporary vacancies in the school and that at the time of appointment it was clearly made known to both petitioners that the temporary appointment

offered to them would confer no right on them for regularization. According to the Directorate of Education, after order dated 28.4.1998 was passed in W.P.(C) No.659/1997, the Directorate of Education sought information from the school whether there existed any regular vacancy in the school when petitioners were given short term ad-hoc appointment. Further information was sought from the school as to when did regular vacancy accrue and whether they were notified for being filled up and whether petitioners applied to the school for consideration when said regular vacancies were notified. The Directorate of Education pleads that the school informed the Directorate of Education that neither petitioner applied for being considered for regular appointment when regular vacancies arose and notwithstanding that, petitioners were considered for appointment but were not found suitable. It is pleaded that the order dated 28.4.1998 does not direct that service of the petitioners be regularized. It only directs that the Director of Education would consider the matter and pass suitable orders.

9. Being relevant for the purposes of the present decision it may be noted that aforesaid facts relating to petitioners not applying when regular vacancies were notified and notwithstanding that, being considered by the Selection

Committee for appointment and not being found suitable have been pleaded by the Directorate of Education in para 6 of the preliminary submissions in the reply filed to the petition by Surinder Kaur. Said para reads as under:-

“6. That the Manager of the school vide his letter dated 16.08.1996 has clearly stated that the petitioner herein was engaged as Assistant Teacher on purely temporary and adhoc basis and was paid from the fund/grant of Sant Nirankari Management. No formal letter was issued in regard to engaging the petitioner even on adhoc or temporary basis. As and when the vacancies occurred for regular appointment, the selection committee called the petitioner for interview but she could not be regularized on merit. Annexed hereto and marked as **ANNEXURE-R-1/3** is a copy of the letter dated 6/8/1996.”

10. Annexure R-1/3 annexed to the reply, finding mention in para 6 reads as under:-

“Annexure -R-1/3

Sant Nirankari Girls Sr. Sec. School
(Recognized by the Education Department of
Delhi Admn.)
Nirankari Colony, Delhi – 110009

Ref. 235

Dated: 16-8-96

Sh. B.Srivastava,
Education Officer, Zone IX, Distt.,
North West, Hakikat Nagar,
Delhi-9

Sub: Exemption from upper age limit for
recruitment to the post of teachers

Respected Sir,

With reference to your office letter No.1207 dated 19.6.96 and No. 1346/IX dated 18.7.96 on the above subject the reply to the points raised in your letter is given seriatim as follows:-

1. Mrs. Surinder Kaur was engaged purely on temporary and adhoc basis against the post of Asstt. Tr. In r/o Sudesh Matneja w.e.f 18.8.89 to 14.5.90 and 20.8.90 to 14.5.91 and against Mrs. Usha Bakshi w.e.f. 25.7.91 to till date, who was removed from service under order No. 113 dt. 24-7-91 as a measure of punishment.
2. Mrs. Promila Sharma was engaged as teacher on purely temporary & adhoc basis against vacant post of P.G.T. Hindi.
3. The above teachers were paid from the fund grant of S.N.M.
4. No formal letter engaging them as teachers on temporary and adhoc basis was issued.
5. As and when the vacancies occurred the above teachers did apply for their regular appointment. They were called for the interview by the Selection Committee but the number of vacancies was limited and they could not come on merit up to the number of vacancies occurred.
6. As per reply given against item No.5.
7. The details of appointments made year-wise from 1991-1996 in various categories is given in the list attached as annexure II.
8. Reply to this item has already been given against item No.5.

Thanking you,

Yours faithfully,
Sd/-
(Y.P.Sachdeva)

Manager.”

11. Surinder Kaur has not filed any rejoinder meaning thereby has not controverted the averments made in para 6 of the preliminary submissions in the reply filed by the Directorate of Education. As regards the other petitioner, Smt. Promila Sharma, averments to said effect have been made in para 5 of the preliminary submissions in the reply filed to the writ petition filed by Promila Sharma. The averments of the Directorate of Education read as under:-

“5. That the Manager of the School vide letter dated 6.8.1996 clearly stated that petitioner herein was engaged as teacher on purely temporary and ad hoc basis against a vacant post of PGT (Hindi) and was paid from the fund/grant of Sant Nirankari Management. No formal letter was issued engaging these teachers even on ad hoc or temporary basis. As and when the vacancies occurred, the above teachers did apply for the appointment. They were called for interview by the Selection Committee but the vacancies being limited, they could not give on merit up to the number of vacancies. They also submitted the details of regular appointments made during the period 1991-92. A copy of the letter dated 6.8.1996 is annexed herewith as **ANNEXURE R/3.**”

12. Promila Sharma has filed a rejoinder to the reply filed by the Directorate of Education. She has responded to preliminary submissions in paras 1 to 10 made by the Directorate of Education in its reply. Response to all 10 paragraphs is in a single para. It reads as under:-

"1 TO 10. That the contents of these paras of the counter affidavit are wrong and denied. The contents of the corresponding paras of the facts are reiterated. All the contentions raised by the respondents herein have been rejected by this Hon'ble Court while hearing the C.W.P. No.659/1997 and this Hon'ble Court had directed the respondents to regularize the services of the petitioner. As such, the direction of this Hon'ble Court was clear, but the replying respondents sitting over the judgment of this Hon'ble Court, with malafide intentions did not regularize the services of the petitioner w.e.f. 3.9.91, as per the true meaning of the directions of this Hon'ble Court on 28.4.1998. All the alleged facts mentioned herein are wrong and have been made just to misled this Hon'ble Court. As such, as per the directions of this Hon'ble Court in C.W.P. No.659/1997, the present petition is liable to be allowed. The copies of the L.P.A. No.97/99, SLP (C) No.12231/2000 & 659/1997 filed by the respondents No.1 & 2 and reply filed by the petitioner herein to the SLP are annexed herewith for further clarification of the position/facts as ANNEXURE-P-12 TO P-14. The respondents have made contradicting statements, as at some places they have mentioned the date of regularization of the petitioner as 28.4.98 and at some places as 25.4.1998, which clearly shows that the respondents are fond of making false statements, without any basis."

13. It would be important to note that Promila Sharma has not denied the averments made in para 5 of the preliminary submissions by the Directorate of Education.

14. The position which emanates is this. Neither petitioner has denied that as and when regular vacancies arose they did not respond to the management of the school for

being regularly appointed. Obviously, neither petitioner wanted to undergo the selection process. Further, notwithstanding petitioners not applying for being considered when regular vacancies were notified, the school management considered the petitioners for appointment along with other candidates and did not find them suitable. The further admitted position is that the initial appointment of the petitioners was without following the selection procedure. It is also not in dispute that the salary of the petitioners was not being paid from out of the funds of the schools but was paid from out of the funds of the sponsoring body establishing the school namely Sant Nirankari Mission. Prima facie, neither petitioner can have any grievance pertaining to non-regularization of their services. The petitioners are lucky to have their services regularized by and under the order dated 25.6.1998. In my opinion, they can ask for no more. It is not a case of an irregular appointment. It is a case where the initial appointment was irregular. Initial appointment was wholly illegal, for the reason Rule 96 of the Delhi School Education Rules 1973 which mandates the selection process to precede an appointment in a recognized school was admittedly not followed. No applications were invited from eligible candidates. It is a case of a back door entry. Not only that,

when regular vacancies arose, neither petitioner responded to the notice inviting applications. Notwithstanding that, they were considered for regular appointment but were found not suitable. The ratio of law laid down by the Constitution Bench of the Hon'ble Supreme Court in the decision reported as 2006 (4) SCC 1 Secretary, State of Karnataka and Ors. Vs. Uma Devi & Ors. is squarely attracted. The Hon'ble Supreme Court categorically held that a person who has not undergone the process of selection, more so when there was no regular vacancy at the time person was given employment on ad-hoc basis, would not be entitled to regularization of his service. In para 45 and 47 of the report their Lordships observed as under:-

“45. While directing that appointments, temporary or casual, be regularized or made permanent, the courts are swayed by the fact that the person concerned has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with open eyes. It may be true that he is not in a position to bargain – not at arm's length – since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will

be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succour to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution.

x x x x

47. When a person enters a temporary employment or get engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only be following a proper procedure for selection and in cases concerned, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or4 casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.”

15. The difference between an irregular and an illegal appointment was explained in para 53 of the report which reads as under:-

“53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in *S.V.Narayanappa, R.N.Nanjundappa and B.N.Nagarajan* and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases aboveresferred to and in the light of this judgment. In that context, the Union of India,

the State Governments and their instrumentalities should take steps to regularize as a one-time measure, the services of such *irregularly* appointed, who have worked for ten year or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme.”

16. In my opinion, neither petitioner is entitled to claim a right to be regularized with retrospective effect. As noted above, petitioners are lucky to have their service regularized in the year 1998. No retrospective benefit can be granted to the petitioners.

17. The petitions are dismissed.

18. No costs.

July 15, 2008
MM

(PRADEEP NANDRAJOG)
JUDGE