

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

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**W.P(C) No.4647/03**

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**Date of decision: 8<sup>th</sup> March, 2010**

**SMT. LEELA SHARMA & ORS.**

**..... PETITIONERS**

Through: Mr. R.S. Tomar, Advocate.

Versus

**DIRECTOR OF EDUCATION**

**..... RESPONDENT**

Through: Ms. Avnish Ahlawat with Ms. Latika Choudhary & Mr. Srestha Sharma, Advocates.

**AND**

**W.P(C) No.14179/2004**

**STAFF OF JANTA SECONDARY SCHOOL & ANR**

**..... PETITIONERS**

Through: Mr. R.S. Tomar, Advocate.

Versus

**DIRECTOR OF EDUCATION**

**..... RESPONDENT**

Through: Ms. Avnish Ahlawat with Ms. Latika Choudhary & Mr. Srestha Sharma, Advocates.

***CORAM :-***

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

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|----|-----------------------------------------------------------------------|-----|
| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not?                                | YES |
| 3. | Whether the judgment should be reported in the Digest?                | YES |

**RAJIV SAHAI ENDLAW, J.**

1. The petitioners in both these writ petitions were the teachers/staff of Janta Secondary School, Ghoga, Delhi – 110 039 a Government aided school, with the 95% of the salary being paid by the Government and 5% by the management of the school. The said school was closed down in or about August, 2001. Rule 47 of The Delhi School Education Rules, 1973 is as under:-

- “47. Absorption of surplus [employee] etc. – (1) Where as a result of–**  
(a) the closure of an aided school or any class or classes in any aided school; or  
(b) withdrawal of recognition from an aided school; or  
(c) withdrawal of aid from an aided school,

Any student of employee becomes surplus, such student or employee, as the case may be, [may be absorbed] as far as practicable, in such Government school or aided school as the Administrator may specify:

Provided that the absorption in Government service of any employee who has become surplus shall be subject to the availability of a vacancy and shall be subject further to the condition that the concerned employee possesses the requisite qualifications for the post and has not been retrenched by the management of the aided school on any ground other than the ground of closure of the school or any class or classes of the school, or withdrawal of recognition or aid from the school:

Provided further that where any such surplus employee is absorbed in a Government school, he shall be treated as junior to all the persons of the same category employed in the Government Schools on the date immediately preceding the date on which he is so absorbed, and where such surplus employee is absorbed in an aided school, he shall rank as junior to all the persons of the same category employed in that school on the date immediately preceding the date on which he is so absorbed.

(2) Where any surplus [employee] is absorbed under sub-rule (1):-

- (a) the salary and other allowance last drawn by him at the school from which he has become surplus shall be protected;
- (b) his provident fund account shall be transferred to the school in which he is so absorbed, and thereupon such provident fund shall be governed in accordance with the rules and regulations in force in that school in relation to provident fund; and
- (c) the period of his qualifying service in the school in which he had worked before such absorption and any previous period of qualifying service, if any, in any recognized aided school in Delhi shall be taken into account for the purpose of computing his pension and other retirement benefits.

(3) Without prejudice to the provisions of sub-rules (1) and (2), where an [employee] becomes surplus by reason of the closure of any class or section thereof or the discontinuance of the teaching of any subject, such [employee] [may be absorbed] in the first instance, as far as practicable, in such Government or aided school as the Administrator may specify, and if the class or section which was closed is reopened by the former school or if any new class or section thereof is opened by such school or if the subject, the teaching of which was discontinued, is re-introduced by such school, or strength of the [staff] of the former school is increased, such [employee] shall be reabsorbed in the former school; but if such re-absorption does not take place within a period of five years from the date of absorption of such [employee] in the Government or aided school, such [employee] shall be regularly absorbed in such Government or aided school, as the case may be.

(4) Re-absorption of a [employee] in a former school shall not affect his continuity of service or his seniority in relation to that school or his emoluments, provident fund, gratuity and other retirement benefits.

*Explanation* - For the purposes of sub-rules (3) and (4), "former school" means the school from which an [employee] had become surplus."

It is the case of the petitioners that on closure of the school aforesaid of their initial appointment, they under Rule 47 were absorbed in Government schools as distinct from Government aided schools and commenced discharging their duties but the Government instead of paying them full salary was paying them only 95% of the salary.

2. The respondent Director of Education, in or about 2003-04 i.e. after about 2/3 years of closure of the Janta Secondary School, Ghoga, Delhi – 110 039 (supra) ordered the absorption of the petitioners in other Government aided schools and asked the petitioners to join in the said schools. It was then that the present petitions came to be filed seeking the writ of restraining the respondent from interfering with the petitioners working in the present post in the Government school and to restrain the respondent from treating the petitioners as surplus staff and for a further direction to the respondents to pay to the petitioners the arrears of the balance 5% of the salary. It is the plea of the petitioners that on the closure of their school of initial appointment they were absorbed in the Government schools in which they were working under Rule 47 (supra) and having been so absorbed could not be transferred to Government aided schools, to the prejudice of their seniority. The writ petitions were accompanied with applications for interim relief and this Court vide *ex parte* orders in these petitions directed status quo to be maintained regarding the postings of the petitioners. The said orders continue to remain in force.

3. The respondent Director of Education has filed counter affidavit pleading that the petitioners were never absorbed in the Government schools on the closure of the school of their initial appointment; they were merely adjusted in the Government schools till the vacancies arose in the Government aided schools; that upon vacancies having arisen in the Government aided schools, the petitioners were finally absorbed in those schools and could not claim a right to continue in the Government schools.

4. Though the petitioners in W.P.(C) 4647/2003 did not file the order of their alleged absorption in the Government schools in which they are working but a copy of an order dated 2<sup>nd</sup> August, 2001 has been filed in W.P.(C) 14179-80/2004. The same clearly reads that “Since there is not a single student in the JANTA SECONDARY SCHOOL, DELHI (AIDED) and the staff working there has become surplus, it is therefore decided to adjust all the said staff i.e. teaching and non teaching in the Govt. Schools temporarily till further orders. Hence the following adjustment is hereby ordered temporarily with immediate effect”.

5. The question which arises for consideration is, if the teachers and staff, under Rule 47 (supra), on closure of the school of their initial appointment are expressly temporarily adjusted in a school, whether they acquire a right to continue in the said school only and whether this Court can interfere in their subsequent absorption on a permanent basis in another school. The counsel for the petitioner contends that the teachers and staff acquire a right to remain/continue in the school where they are first

absorbed even if on a temporary basis. It is urged that if the teachers are so shifted from time to time, it would affect their seniority. It is also urged that shifting the petitioners from Government schools where they are presently working, to Government aided schools is also to their prejudice. On asking as to how, it is stated that it is a well known fact that the managements of Government aided schools do not pay and/or default in payment of full salary and the teachers in Government schools enjoy better rights than the teachers in the Government aided schools.

6. I am unable to accept the contention of the petitioners for the following reasons. The petitioners did not challenge the order of 2<sup>nd</sup> August, 2001 by which, they immediately on closure of the school of their initial appointment were directed to join the Government schools temporarily. If the petitioners had any grievance to the use of the word “temporarily” and/or “till further orders”, they ought to have objected then. The petitioners having availed benefit/advantage of the order, owing where to there was not a single day’s gap in the closure of the school of their initial appointment and the petitioners continuing to work in Government schools, the petitioners are now estopped from contending otherwise. The petitioners in WP (C) 4647/2003 rather suppressed the said order of 2<sup>nd</sup> August, 2001 and falsely claimed that they were absorbed under Order 47 in the Government schools when their assignment was temporary and only till their absorption under Rule 47.

7. Rule 47 is a benevolent provision. But for the said rule, the teachers and staff of a school which has closed down would be rendered jobless. The petitioners were employed in an aided school which otherwise would be a privately managed school. The Division Bench of this Court in judgment dated 29<sup>th</sup> February, 2008 in W.P.(C) 7579/2007 titled **Smt. Chander Prabha Vs. Lt. Governor (Administrator)** has held that sub Rule (1) of rule 47 does not cast any absolute authority upon the Govt./Administrator to absorb such an employee in all circumstances, which is clear from the terminology used namely “may be absorbed as far as practicable”. The word was “May” in 1990 brought in place of the word “shall be absorbed as far as practicable”. Once the word “shall be” have been intentionally substituted by the words “may be”, it is indicative of such absorption being not mandatory. The literal interpretation is that the teachers and staff of a school which has closed down cannot mandatorily claim to be absorbed in another school. The juxtaposition of “may be, as far as practicable” and “subject to the availability of a vacancy” are all indicative of several conditions being required to be fulfilled before such absorption in another school.

8. The scheme of Rule 47 does not require absorption of the teachers and staff of a school which has closed down, with immediate effect. As aforesaid such absorption is subject to several contingencies including of availability of a vacancy. Thus there may be a hiatus between closing down of the school of initial appointment and absorption in a Government or Government aided school. No right of immediate absorption can be claimed. That being the position, merely because to avoid any inconvenience to the teachers and employees, they are first temporarily accommodated in a Government school awaiting vacancy, the same cannot confer a right on them to continue in the said Government school. The provision in sub Rule (3) of re-absorption in the school of initial appointment within a period of five years is also indicative of such teachers and staff, even after absorption, not acquiring any right to continue in the school in which they are absorbed. Thus there can be no question of the petitioners acquiring any right to remain/continue in the school in which they are temporarily accommodated.

9. Once it is found that there is no immediate right of absorption, the argument of the counsel for the petitioners of the petitioners losing in seniority by such shunting from school to school also loses its shine. Moreover, the counsel for the respondents has contended that owing to a much larger number of teachers in the Government schools, the seniority which the petitioners are likely to have in the Government aided schools will be much higher than the seniority in the Government schools.

10. The Rule itself provides for absorption in a Government school or a aided school. There is thus no right to be absorbed in a Government school only for the reason of the same being more advantageous to the teachers and the staff. The discretion whether to absorb the teachers and staff in the Government school or in the aided school has been vested in the Administrator and unless such discretion is shown to have been exercised in circumstances whereunder interference by this Court is permissible, this Court would not, at the asking of the petitioners, or merely for the reason of being employed in a Government school being more advantageous than being employed in a Government aided school, interfere in the said discretion. Moreover the school of initial appointment of the petitioners in the present cases was a Government aided school and the petitioners cannot claim a larger benefit than what was intended to be given to them under Rule 47.

11. The counsel for the petitioners had sought to contend that the present controversy is fully covered by the judgment dated 10<sup>th</sup> November, 2008 of another single judge of this Court in WP (C) 17785-86/2004 titled ***Harish Chandra Pathak Vs. Government of NCT of Delhi***. In that case a mandamus was issued directing absorption of the

petitioners. However this Court in the said judgment had no occasion to consider the question which has arisen for adjudication in the facts of the present case. In that case the petitioners were not being absorbed and there was no question of their first being asked to temporarily join one school and thereafter being permanently absorbed in another school. The counsel for the petitioners has also fairly admitted that the said judgment does not apply to the facts of the case.

12. Faced with the aforesaid, the counsel for the petitioners sought to urge that some other teachers belonging to the same school of initial appointment have been absorbed in the Government school and the petitioners are being discriminated against by their absorption in a Government aided school. For a plea of discrimination to succeed, the two entities alleged to be discriminated have to be similarly placed and the classification is to have no rational nexus to the object sought to be achieved. The said criteria is not met in the present case. The absorption under Rule 47 is dependent on the availability of vacancies and on the qualifications for the post. It is possible that the vacancy for some teachers/staff as per their qualification may be available in the Government school and for others in the Government aided schools.

13. The *ex parte* order of status quo regarding posting which the petitioners have continued to enjoy for the last approximately six years was made on the premise of similar interim orders having been made in a number of other writ petitions pending in this Court. I have enquired from the counsels for the parties whether any of the said writs have been decided. The answer is in the negative. My research however finds that this Court in ***Baljeet Vs. Lt. Governor of Delhi*** MANU/DE/0659/2000 struck down transfer to school of initial appointment, after the teacher had worked for eleven years in a Government School. The plea of the Government that the teacher had not been absorbed in the Government school and was posted there temporarily was not accepted because in the order posting him to Government school it was not mentioned that such posting was temporary and because of long lapse of eleven years. However, in the present case, the order of posting expressly provides for the same to be temporary and absorption in another aided school was within three-four years.

14. The counsel for the petitioners next contended that the petitioners have been working in the present schools now for the last about nine years and are soon attaining the age of superannuation and on humanitarian and equitable grounds should be directed to be absorbed in the Government schools in which they are presently working. It is further contended that vacancies exist in the said schools also. Certain documents to show

the said vacancies were also handed over in the court and it is further contended that if now the petitioners are asked to join the Government aided school where they were ordered to be absorbed vide orders impugned in these petitions, they would be sufferers in terms of seniority in those schools also.

15. My sympathies are with the petitioners but one cannot lose sight of the fact that the delay of the petitioners in joining the Government aided schools where they were ordered to be permanently absorbed is the own creation of the petitioners themselves. It is the petitioners who obtained an *ex parte* order of status quo of their posting from this Court. In fact it was found that the petitioners, after obtaining the *ex parte* order, were not having the matter heard and it was for this reason only that on 15<sup>th</sup> February, 2010 the petitions were directed to be heard definitely on 4<sup>th</sup> March, 2010. This Court without finding any right in favour of the petitioners cannot direct the respondent to allow the petitioners to continue in the same schools. The counsel for the petitioners has however informed that the petitioners have since been paid arrears of the balance 5% of their salary and the relief to that extent does not survive.

16. The petitions therefore fail and are dismissed. However since considerable time has elapsed since the orders of absorption of the petitioners in the Government aided schools were made, and several other factors may have intervened, therefore the respondent to sympathetically reconsider the cases of the petitioners i.e. whether the vacancies for the petitioners still exist in the schools where they were ordered to be absorbed and if not, where the petitioners can be absorbed.

No orders as to costs.

**RAJIV SAHAI ENDLAW  
(JUDGE)**

**8<sup>th</sup> March, 2010**

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