

. * **HIGH COURT OF DELHI : NEW DELHI**

+ **WP (C) No.1234/2010**

% Judgment decided on : 26.11.2010

SMT. PROMILA DIXIT Petitioner

Through: Mr. Ravi Gupta, Sr. Adv. with
Mr. Sudhandhu Tomar, Adv.

Versus

GOVT. OF NCT OF DELHI & ORS. Respondents

Through: Mr. Sushil Dutt Salwan, Adv. for
Respondent Nos.1-3.
Mr. R.K. Kapoor, Adv. with
Mr. Ramraghavendra, Adv. for
Respondent No.4.

Coram:

HON'BLE MR. JUSTICE MANMOHAN SINGH

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| 1. Whether the Reporters of local papers may
be allowed to see the judgment? | No |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported
in the Digest? | Yes |

MANMOHAN SINGH, J.

1. By way of this writ petition under article 226 of the Constitution of India, the petitioner seeks directions for quashing the letter dated 24.02.2010 issued by the Principal of the Sant Nirankari School, thereby informing the petitioner about rejection of her appointment on the post of Librarian, based on the instructions received by the respondent School from Director of Education vide their letter No. 114, dated 19.02.2010.

2. The case of the petitioner is that the respondent No. 4 gave an advertisement for the vacant posts in its school in the Hindustan Times dated 07.06.2008. The petitioner applied for the post of TGT Librarian. The petitioner was called by the respondent No.4 on 19.06.2008 for verification of her certificate vide letter dated 17.06.2008. After verification of the document, by letter dated 01.07.2008 the petitioner was asked to appear for interview before the selection board on 08.07.2008.

3. The interview of various candidates was conducted by the staff selection committee as per the rules of the Delhi School Education Rules, 1973. And that after the selection, the petitioner was given an offer letter dated 23.07.2008 to join as TGT Librarian. The petitioner joined the School of respondent No. 4 on 25.07.2008 initially on probation of 2 years.

4. As no salary was paid to the petitioner, she filed W.P. (C) No. 581/2010 titled as “Promila Dixit vs. Govt. of NCT & Ors.” seeks direction to respondents to release the salary of the petitioner along with all consequential benefits. The petitioner alleged that during the pendency of the aforesaid petition, the petitioner came to know that the respondents are planning to terminate the services of the petitioner. The petitioner moved a Misc. application in the said writ petition which was listed before the Court but the same was withdrawn unconditionally.

5. Meanwhile the respondents issued a letter No. 114 dated 19.02.2010 to the school whereby the Director of Education rejected the appointment of the petitioner and immediately on the same day, the Principal of the school orally communicated to the petitioner that her appointment has been rejected on the ground of over age. On 24.02.2010 Principal of respondent school issued a letter, stating therein that the services of the petitioner are no more required. Thus, the present writ petition has been filed by the petitioner.

6. The main contentions of the petitioner are that the post of Librarian falls in the category of TGT Misc. category. At the time of appointment for the post of Librarian, the age of the petitioner was 35 years and six months and 28 days and as per order No.F-1/16/3/R and S/79 dated 1.11.1980 issued by Delhi Administration there was a provision for age relaxation for a period of ten years to the women candidates in case of appointment of teacher. Even as per DO letter No.F.44-7/75/UTI dated 29.10.1975 the relaxation period of maximum 15 years period can be added in case of experience of teaching in recognized school. As the post of Librarian is equivalent to the post of miscellaneous teacher, the petitioner is entitled to the benefit of relaxation of age. It was alleged that similar benefit of relaxation is provided to the other woman candidates including one Mrs. Amita who has been appointed to the post of TGT Librarian in an aided school namely S.D. Secondary School (Gujrat), Kirti Nagar, New Delhi.

7. The petitioner has also referred an advertisement dated 01.06.2008 published in Times of India issued by the Lakshmi Devi Jain Girls Sr. Sec. School, Pahari Dhiraj, Delhi-110006, for the post of Librarian, General Category wherein the age limit offered for the said post is below forty years.

8. In order to take the benefit of relaxation of age, it is stated that the petitioner applied before the respondent no.4 school through proper channel. She was earlier employed with Little Star Public Sec. School which was recognized. The experience certificate was counter signed by the Education Officer, Zone-IV, Distt. North-East, Yamuna Vihar, Delhi, and the same was submitted before the Staff Selection Committee. The petitioner resigned from the earlier school after accepting the offer letter dated 23.07.2008 of appointment from the respondent No.4. Therefore, the selection of the petitioner was made as per the rules and regulations of Delhi School Education Rules, 1973.

9. It is submitted that since the petitioner asked for the release of her salary for more one and half years, the respondents in revengeful manner issued the impugned letter.

10. The petitioner submits that after having served for more than 1-1/2 years, the service of the petitioner could not have been rejected. Her appointment complied with the provisions of Rule 98 as the nominee of the Director of Education was present in the Selection Committee.

11. The respondent Nos.1 to 3 in their counter affidavit submits that the petitioner is not a trained Graduate Teacher (TGT), and she doesn't have required qualifications to be treated as a TGT. The qualification for the post of Librarian is different from that of teachers. For teachers it is compulsory that the candidates should be B.Ed. However, same is not required for the Post of Librarian.

12. Also that there exists no post known as TGT Librarian, Therefore, the petitioner can not be construed as a TGT teacher and is not eligible for the scheme of age relaxation. The petitioner has not challenged the recruitment rules and hence is not entitled to be heard.

13. The certificate No. SSA/SCERT/ACAD/2009-10 17556 appears to have been issued inadvertently showing her as TGT. The certificate cannot qualify the petitioner as a TGT, as she does not possess the required qualification for the post of TGT and has not undergone the required training.

14. Later on, the respondents Nos.1 to 3 have also filed the additional affidavit of Sh. Khan Chand wherein it was stated that as per the recruitment rules notified in Delhi Gazette on 23.1.2003, the age limit for direct recruitment of librarian prescribed is 30 years. There is a relaxation for Government Servant up to 5 years in accordance with instructions/orders issued by the Central Government. It is alleged that the petitioner in the present case was overage at the time of her selection and therefore, is not eligible to be considered for recruitment, however, it

was not denied that as far as relaxation part is concerned, the Selection Committee has to recommend such a case and unless the recommendation is previously approved by the Director, any request contrary to that cannot be allowed.

15. It is also stated in the additional affidavit that the Selection Committee was neither authorized nor competent to recommend the case of the petitioner for selection and therefore, Rule 98 could not be applicable in the present case, however, it was admitted in the affidavit that in one or two other cases, the department erroneously granted the age relaxation for more than 10 years to librarian, but the petitioner cannot take the benefit of the said mistake as the petitioner's case has to be considered on its own merit.

16. The respondents have relied upon notification dated 16.01.2003 bearing No.F.DE. 4(19)/3/E.IV/99 EDN./12255-269 published on 23.1.2003 in Delhi Gazette in which the age limit for Librarian through direct recruitment has been prescribed. According to the respondents the circular No. F.38(11)/Misc/08/Vol.III dated 21.1.2009 issued by Directorate of Education, GNCTD, only speaks about pay scale. It is stated that there is no category or post as Misc./allied teachers as far as recruitment rules are concerned. Actually it was applicable to the misc./applied category of staff and it does not amount to change of rules. As per recruitment rules there is no category or post as misc/applied teachers.

17. The respondent No. 4 (school) in its reply submitted that after appointment of petitioner her case was forwarded to the department for releasing the grant in aid for payment of salary to the petitioner w.e.f. 25.07.2008. The said letter was written on 25.10.2008 but no response was received from the Department.

The respondent No. 4 school is a grant-in-school and if any appointment is made by the staff selection Committee duly constitutes then the department is bound to pay the grant in aid of 95% for payment of salary of the employee duly appointed in accordance with the prescribed criteria through the staff selection Committee. Lastly, it is argued by the counsel for respondent No.4 that his client would abide by any order passed in this Court in the matter.

18. Learned senior counsel Shri Ravi Gupta appeared on behalf of the petitioner has made the following submissions in support of his case.

a) Firstly that the appointment of the petitioner was made in due compliance of the Delhi School Education Rules, 1973. The selection committee was constituted under the rules wherein the director of education and directorate of education were duly represented. After the due process, the decision was taken to appoint the petitioner. It is the contention of the petitioner that the respondent No.4 school as well as the directorate of education were aware of the petitioner's true age at the time of the appointment and thereafter the respondents went ahead to select

the petitioner. The said selection cannot thus be called irregular by the respondent and thus the said letter stating so is bad in law. Further, the respondent also cannot call the petitioner being overage as the respondent themselves have kept the petitioner and utilized her services for more than one and a half years.

b) The post of librarian has been classified under Group B, non ministerial. However, in circular dated 21.6.2007 bearing No.DE22/11/PFC/Aided/2006-07/3367-71 the post of Librarian has been classified under miscellaneous category of teachers.

c) Secondly, learned senior counsel urged that the petitioner is a TGT teacher and thus the age relaxation if at all needs to be counted must be in consonance to the age relaxation given to the teacher. The counsel for the petitioner relied upon the circular dated 20.01.2009 issued by the central government wherein it is stated that the pay scale of the librarian and miscellaneous teacher would be in parity with the TGT teacher.

Learned counsel further read the appointment letter and sought to contend that the words TGT teacher and librarian are used interchangeably and thus it means the same. Further the aid is drawn from the minutes of the selection committee and marksheets after the selection round to state that the librarian is actually a teacher. The age relaxation of TGT teacher is 10 years and thus if the age of the petitioner is considered in the light of the relaxation of the TGT teacher, the appointment of the petitioner is a valid one

and cannot be said to be irregular.

d) Thirdly, Mr. Ravi Gupta, learned senior counsel for the petitioner, contended that the action of the respondents suffer from the arbitrariness and actuated by malice as the respondents were fully aware of the age of the petitioner at the time of the appointment and the rejection of the selection of the petitioner by the respondent by the petitioner after one and a half years is totally arbitrary.

It is further submitted by the petitioner counsel that the said action of the responded is arbitrary and violative of article 14 in as much as the directorate of the education under the rules have appointed several other librarians. The petitioner has given the following instances of the appointment wherein the invitation was given by the schools coming under the directorate of education and appointments made of the persons as librarians and age relaxations were given as that of TGT teachers:

- a) An order of appointment was issued by the office of Deputy Directorate of Education, Distt. North-West – A to Mr. Hari Prakash in which it was clearly stated that Librarian is a TGT Post.
- b) One Mrs. Amita was selected as a Librarian in an aided school namely S.D. Secondary School (Gujarat), Kirti Nagar, New Delhi. The Staff Selection Committee selected her and general age relaxation of ten years for women was also given to the said teacher.

By citing these appointments, it is argued that the petitioner being similarly situated cannot be discriminated by way of malafide actions of the respondents. Thus, the petitioners appointment must

be equated as TGT teacher and also deserves the same age relaxation.

e) Fourthly, Learned senior counsel submitted that the petitioner was appointed under the rules and the respondent/ directorate of education has to approve the appointment in view of the provisions made in rule 98 (4) of the rules. If no intimation of the approval or disapproval is made within 15 days, the said appointment is deemed to be approved by the director. In the present case, the petitioner submitted that the appointment was made on 8.07.08 and the letter of rejection was received on 19.2.2010 which is not in compliance of the rule 98(4) of Delhi School Education Act & Rules 1973.

19. Learned counsel for the petitioner referred to the judgment passed by the learned single judge of this court in ***Surender Singh Vs. Manager Haryana Senior Sec. School & Others***, cited as 95(2002) DLT 135 where in this court held that rule 98(4) will operate in cases to save the employee from the situation where he has worked in his employment for considerable length and later he has been told that his original appointment was non est. Thus, this court has held in that case, the appointment of the petitioner as a valid one. The petitioner counsel relied heavily on this judgment to support this argument.

20. Per Contra Mr. Sushil Dutt Salwan learned counsel appearing on behalf of the respondent nos. 1 to 3 and Mr. R.K. Kapoor appearing

on behalf of respondent No.4 have made their submissions which can be outlined as under:

- a) Firstly the post of the librarian cannot be equated with teacher. Learned counsel for respondents relied upon the advertisement inviting application, mark sheets, interview minutes etc and sought to urge that the post of librarian is always treated separate from that of the TGT teacher although it may be different issue that the pay scale is the same. Thus, the petitioner case cannot be considered as if there is an appointment of TGT teacher.
- b) Secondly, learned counsel for the respondent argued that the present case of the petitioner can also not be equated as if the petitioner is the permanent employee, the petitioner was duly informed by its appointment letter that the petitioner is being kept on probation which means that the respondent is at liberty to remove the petitioner at any time.

The respondent counsel has argued and states that the courts have time and again held that the temporary employee or a daily wager has no say and he/she cannot claim the employment as a matter of right.

- c) Thirdly, the counsel submitted that the once the petitioner is a librarian on probation and not a teacher, the relaxation age prescribed as per the notification No.F.DE 4(19)/3/E.IV/99 EDN./12255-269 dated 16.1.2003 published on 23.1.2003 in Delhi Gazette is 30 years which means that the maximum relaxation

which can be given to the librarian is 5 years and not beyond the same. Once that is so, thus, the petitioner appointment was illegal and the same cannot be regularized.

d) Mr. Salwan, the learned counsel for the Directorate of Education also submitted that the petitioner appointment is irregular as informed in the letter and it is the respondent no.2 and its management who has taken the wrong decision of appointment of person who is overage and does not qualify the requirements. The said fact is also recorded in the rejection letter dated 19.2.2010. Thus, the directorate of education cannot be stated to have taken any such decision and it is school management which is responsible. It is also argued that in any case, once the petitioners appointment is illegal at the inception and the same cannot be regularized.

e) The learned counsel has also referred two unreported decisions in which orders were passed by the single judge of this Court.

(i) In the case of ***Priti Sharma Vs. Govt. of NCT of Delhi and Others*** in W.P.(C) No. 5384/2008 wherein on the basis of guidelines of the notification no. F.1/16/3/RandS/79/Dated 1st November, 1980 for the post of fixation in Government and Government Aided Schools separately provides for teaching staff and ancillary staff thereof has come to the following conclusion:

“....A perusal of the said guidelines would show that the post of Librarian is included in the ancillary staff at Serial No.7 of the said guidelines. The contention of Ms. Jyoti Singh is that the post of Librarian cannot be equated with the post of a teacher because the nature of duties of both of them are quite different. She has also relied upon an unreported judgment of this Court in WP(C) No.16051/2004 decided on 23.09.2008 wherein it was held that the post of Librarian cannot be equated with that of a teacher.

6. This Court having already considered the point as to whether the post of Librarian can be equated with the post of a teacher and decided the said question holding that the post of Librarian cannot be equated with that of a teacher, the question raised by the petitioner in the present writ petition is no longer res-integra This Court is of the opinion that the post of a Librarian by no means can be equated with that of a teacher. The post of Librarian falls in the category of non-teaching staff for which the maximum age prescribed in the Recruitment Rules is 30 years. It may be noted that the petitioner in the present writ petition has not challenged the vires of the Recruitment Rules applicable to the post of Librarian which have been notified by the Director of Education to be strictly adhered to by the schools and in fact the petitioner herself has placed reliance on the said Recruitment Rules annexed along with the petition at page 21 of the paper book. Under the circumstances, I have no hesitation in holding that the petitioner is not entitled to benefit of age relaxation in terms of notification dated 1.11.1980 at page 22 of the paper book.”

- (ii) In another unreported case of ***Amrit Pahuja Vs. Director of Education & Ors.*** being W.P.(C) No.

16051/2004 an order was passed on 23.09.2008 in

which the court has made the following observation:

“The document (Annexure I at page 174 of the Paper Book) deals with revision of the pay-scales of the school teachers and on a perusal of the said document, it cannot be said that the post of Librarian was equated with the post of teachers in the school. The Librarian is a Librarian and a teacher is a teacher. The Librarian cannot claim parity with a PGT or Vice-Principal. The Recruitment Rules clearly provide that an incumbent for his/her eligibility for promotion to the post of Principal must possess ten year’s of teaching experience either in the capacity of Vice-Principal or a PGT. Any teaching experience possessed by the petitioner working as Librarian cannot be equated with the teaching experience of a Vice-Principal or a PGT in the school.”

The learned counsel for the respondent submits that where the appointments were made in contravention of the provisions of the act or the rules, the same cannot be held to be valid.

21. Learned counsel for the respondents has relied upon the following judgments in support of his submissions:

1. ***Mahboob Deepak Vs. Nagar Panchayat, Gajraula and Anr.*** (2008) 1 SCC 575.
2. ***A. Umarani Vs. Registrar, Cooperative Societies and Ors.,*** (2004) 7 SCC 112.

i) In ***Mahboob Deepak Vs. Nagar Panchayat, Gajraula and Anr. (supra)***, it was observed:

“8. The respondent is a local authority. The terms and conditions of employment of the

employees are governed by a statute and statutory rules no appointment can be made by a local authority without following the provisions of the recruitment rules. Any appointment made in violation of the said rules as also the constitutional scheme of equality as contained in Articles 14 and 16 of the constitution of India would be a nullity.”

ii) In ***A. Umarani Vs. Registrar, Cooperative Societies and Ors.***, it was observed:

“39. Regularisation, in our considered opinion, is not and cannot be the mode of recruitment by any “State” within the meaning of Article 12 of the Constitution of India or any body or authority governed by a statutory Act or the Rules framed thereunder. It is also now well settled that an appointment made in violation of the mandatory provisions of the statute and in particular, ignoring the minimum educational qualification and other essential qualification would be wholly illegal. Such illegality cannot be cured by taking recourse to regularization. (See State of H.P. v. Suresh Kumar Verma)
40. It is equally well settled that those who come by back door should go through that door. (See State of U.P. v. U.P. State Law Officers Assn.)
41. Regularisation furthermore cannot give permanence to an employee whose services are ad hoc in nature.”

22. In rejoinder submissions, it is argued by Mr. Ravi Gupta, Senior Counsel, that the petitioner was issued the pending certificate of TGT under the RTI information from another school i.e. S.D. Secondary School (aided school), it has been admitted that the post of Librarian is a Misc. Category. Even the Govt. of NCT, Delhi, on 18.1.2000 had approved appointment of one Sh. Hari Prakash on the post of TGT Librarian.

23. It is stated by the counsel that the other aided school has also advertised the advertisement for the post of Librarian with age limit of 40 years and Govt. of NCT of Delhi has issued the post fixation of the respondent school for the year 2006-2007 which included the post of Librarian as TGT Misc. Category and as per the circular issued by the respondent, the Misc. category includes teacher.

24. It is argued by Mr. Gupta that the procedure for appointment by the Screening Committee issued by the respondent on 16.7.2007 confirms the appointment of the petitioner as per Rule 96(3)(b) of Delhi School Education Rules, 1973. The petitioner has also filed the copy of the RTI information dated 31.3.2010 and copy of DSSB advertisement No.001/2010, copy of RTI information dated 27.4.2010, copy of resignation letter as well as copy of relevant pages of Dixit School Manual in support of his submissions.

25. The response to the additional affidavit has been filed by the petitioner in which the contention of the Sh. Khan Chand in the additional affidavit has been refuted. It is specifically stated that Khan Chand was the representative of respondents No.1 to 3 in the Staff Selection Committee which was held on 8.7.2008 who had selected the petitioner for the post of librarian. It is specifically stated in the response affidavit that as per the post fixation for the year 1998-99, the librarian was in the ancillary staff. However, later on the post of librarian was included in the Misc. Category of teachers as per post fixation letter. The reference is also made to Minutes of Selection to show that even earlier the post of

librarian was considered in the ancillary which has been mentioned in paragraph No.3 by the Staff Selection Committee. The post fixation on the basis of the selection was made.

26. I have considered the submissions made by the learned counsel for the parties at the bar and have also carefully perused the petition, counter affidavit, rejoinder and the documents filed by the parties. I shall now deal with the arguments addressed by the parties.

27. The relevant rules 96 and 98 of Delhi School Education Rules 1973 are reproduced herein after:

Rule 96

“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 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

- (iv) educationist having experience of school education; 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.
- [(3A) Notwithstanding anything contained in sub-rule (3), in the case of an aided minority school, the educationists nominated under paragraph (iii) of clause (a), persons nominated by the Director under paragraph (iv) of clause (a) of sub-rule (3), persons nominated under paragraph (iv) of clause (b) of sub-rule (3), a person nominated under paragraph (iii) of the clause (c) 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.

(3B)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 the 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 a 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.”

Rule 98

“98. **Appointing authority** – (1) The appointment of every employee of a school shall be made by its managing committee.

[(2) Every appointment made by the managing committee of an aided school shall, initially, be provisional and shall require the approval of the Director :

Provided that the approval of the Director will be required only where Director's nominee was not present in the Selection Committee/DPC or in case there is difference of opinion among the members of Selection Committee :

Provided further that the provision of this sub-rule shall not apply to a minority aided school.]

(3) The particulars of every appointment made by the managing committee of an aided school shall be communicated by such committee to the Director (either by registered post acknowledged due or by messenger who will obtain an acknowledge of the receipt thereof), within seven days from the date on which appointment is made.

(4) The Director shall be deemed to have approved an appointment made by the managing committee of an aided school if within fifteen days from the date on which the particulars of the appointment are communicated to him under sub-rule (3), he does not intimate to the managing committee his disapproval of the appointment, [and the person so appointed shall be entitled for his salary and allowance from the date of his appointment.]

(5) Where any appointment made by the managing committee of an aided school is not approved by the Director, such appointment may (pending the regular appointment to the post) be continued on an ad hoc basis for a period not exceeding three months and the salary and allowances of the person so continued on an ad hoc basis shall qualify for the computation of the aid to be given to such school.”

28. From the conjoint reading of the aforesaid rules, the following situation emerges:

- a) For the purposes of appointment of the teacher, the committee shall consist of the members as stated in Rule 96 (3) (b) which are The Chairman of the Managing Committee, the Head of the

School, one Educationist to be nominated by the Director, and one representative of the Director. However, the committee which shall appoint other employee (other than employee of Part D) shall consist of the members as stated in Rule 96(3)(c) which reads as under :

“96.(3) (c) in the case of an appointment of any other employee, not being an employee belonging to :
(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”

b) The appointment of every employee shall be made by Managing committee which is enunciated in Rule 98 (1) which reads as under:

“98. **Appointing authority** – (1) The appointment of every employee of a school shall be made by its managing committee.”

c) The appointment made by the managing committee shall be provisional and shall require the director's approval. The directors approval is required only when the director's nominee was not present at the time of appointment or there is a difference of opinion amongst the members of the committee.

d) The managing committee shall send the particulars of the appointment to the director within seven days of the appointment.

- e) The director shall deem to have approved the said appointment in case there is no disapproval or approval which is received from the director within 15 days of the date of the receipt of the particulars
- f) The managing committee's appointment of any person without the approval of the director may be continued on ad hoc basis for a period not exceeding 3 months.

29. The reading of these rules more specifically rule 98 also makes it amply clear that rule 98(4) creates a fiction of law wherein the director's approval is deemed if there is no approval or disapproval within 15 days of the receipt of the particulars.

30. The said provision creates the fiction for the protection of employees from the belated approvals or rejections by the directors so that the employee must be made certain about its continuity of employment. This creates an obligation upon the directors also to approve or reject the appointment at the earliest opportunity failing which the fiction of law will operate and the same shall be deemed approval.

31. The corresponding embargo is made by way of rule 98 (5) upon the managing committee to continue the appointment without approval for the period not exceeding 3 months. This again indicates that the employees must be made certain about the status of the employment by the managing committee or the director.

Thus the rule 98(4) and rule 98(5) are indicators of the intent behind the rules which is to protect the employee from the untimely confirmation/ approval or rejection by the employer/ managing committee or the director. It rather creates fetters upon both the director and the managing committee to not to exploit the services of the employees endlessly unless they are approved appointees.

32. There is no res integra to the proposition that when the provision enacts the fiction in the given circumstances and if the same are satisfied, the necessary consequences flow from the said fiction must be given full effect as if the said things are real. It is, as noted above, a deeming provision. Such a provision creates a legal fiction. As was stated by James, ***L.J. in Levy, Re, ex p Walton***, 1881 (17) Ch.D 746:

“when a statute enacts that something shall be deemed to have been done, which in fact and in truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to. After ascertaining the purpose full effect must be given to the statutory fiction and it should be carried to its logical conclusion and to that end it would be proper and even necessary to assume all those facts on which alone the fiction can operate.

33. When a thing is to be "deemed" something else, it is to be treated as that something else with the attendant consequences, but it is not that something else per ***Cave, J., R. Vs. Norfolk County Court*** 1891 (60) LJ QB 379.

34. When a statute gives a definition and then adds that certain things shall be 'deemed' to be covered by the definition, it matters not whether without that addition the definition would have covered them or not.

Thus, the statutory fiction created under rule 98(4) is a deeming fiction and the same must be given full effect in the given circumstances. It is another thing that without deeming fiction what would be the effect of such employment.

35. It is also equally trite that when the things are prescribed to be performed in a particular manner, then the said things must be performed in the manner prescribed to the exclusion of the others.

36. Thus if the rule 98 prescribes that the appointment of the employee shall be made by the managing committee who shall send the particulars of the appointment within 7 days of the appointment and within 15 days thereafter the director shall approve the said appointment, failing which there will be deemed approval. The managing committee cannot continue the appointment without approval for a period exceeding 3 months, then the said scheme must be complied with fully. Otherwise, the rules and procedure prescribed therein shall be rendered redundant.

37. In the present case, when we apply the rule 98 to the given circumstances, it is highly doubtful as to whether the managing committee or selection committee of the respondent and the director has duly

adhered to the rules and procedure under rule 98 while issuance of the letter of rejection dated 19.2.2010.

38. The appointment of the petitioner was made on 23.7.2008, there is nothing in the counter affidavit to reveal as to when the selection committee has sent the said particulars of the appointment to the director for approval. In the absence of the anything to the contrary on record, it is presumed that the said particulars were duly sent after 7 days of the appointment which means that the respondent/ directorate of the education shall have the bounden duty to give approval or rejection within 15 days, else the deeming consequences shall follow. In the present case, the respondent has not responded within 15 days of the receipt of the particulars.

39. Thus, the deeming fiction envisaged under 98(4) shall be given full operation and by virtue of the said deemed provision, the said appointment was duly approved appointment. Further, if the said appointment was not duly approved by the director, it was upon the management who cannot continue the said employment for more than 3 months to have pressed for approval from the director within reasonable time which the management has not done so. In that event, it can be safely concluded that the appointment cannot be rejected by the director on one ground or other after the operation of the deeming fiction of law.

40. The said committee consisted of five members which includes three members of respondent no.1 i.e. Director Nominee, Education

Officer, Zone-27 and one subject expert appointed by the Education Department. It is not denied by the parties that the selection of the petitioner was made unanimously by the Staff Selection Committee for the post of Librarian as per Rule 96(3)(b) of Delhi School Education Rules, 1973. There is nothing in the counter affidavit to reveal as to when the selection committee sent the said particulars of the appointment to the director for approval.

41. Further, it is also not beyond doubt as to whether the appointment actually required the approval of the director as the said appointment was actually made of an employee wherein the committee shall be constituted under Rule 96 the said members of the committee were present in the meeting, the representative of the director was also present in the said selection committee and the respondent no. 4 who has filed the affidavit was also present in the meeting.

42. The relevant part of minutes of the meeting of the Management Committee of Sant Nirankari Sr. Sec. School, Pahar Ganj, New Delhi dated 19.07.2008 are reproduced below:

- | | |
|----------------------|--------------------------|
| 1. Sh. M.L. Handa | Chairman |
| 2. Sh. G.P. Singh | Manager |
| 3. Dr. S.D. Junega | School Principal |
| 4. Sh. A.K. Upadhyay | Teacher's Representative |
| 5. Sh. A.K. Bhardwaj | Teacher's Representative |
| 6. Sh. Jawahar Lal | Member(PTA) |
| 7. Sh. Sohan Singh | Member |
| 8. Sh. Lal Chand | Member |

9. Sh. Ram Avtar Member
10. Sh. Arun Arya Govt. Nominee.

Agenda Item No.3

Approval for appointment the recommendations of the Staff Selection Committee for newly selected teachers TGT (Natural Science – 1) T.G.T. (English -1) and Librarian (1) through direct recruitment.

The Managing Committee unanimously approved the recommendations of Staff Selection Committee for appointment of newly selected teachers as detailed below:

- | | |
|------------------------------------|-----------------------|
| (i) TGT (English)- (OBC) | Ms. Meema Yadav |
| (ii) TGT (Natural Science) – (OBC) | Sh. Jai Prakash Nagar |
| (iii) Librarian UR | Ms. Promila Dixit |

43. After having considered the procedure for appointment of the petitioner made by the Staff Selection Committee which was constituted under Rule 96(3)(b) of the of the Rules and since expiry of period of fifteen days after the date of communication to the Director who did not intimate the Managing Committee about disapproval of the appointment, this court is of the view that the appointment made was not contrary to any rule and was not unlawful as it appears that the appointment of the petitioner was made as per rues and regulations.

44. The related argument which requires consideration is that the committee at the time of the appointment was not authorized to appoint the petitioner, it is too late to contend the same for the respondent and the respondent has not shown any material on record to show any steps that have been taken to inform the school management about the improper constitution of the committee and the irregular appointment made therein.

If that is so, then only when to shift the burden upon management for the said appointment, it is not proper for the respondent/ director to contend that the said appointment was illegal due to non authorization of the committee. The director's nominee was present in the committee appointing petitioner. The submission of the respondent is thus rejected as meritless.

45. Thus, the response from the director 's office on 19.02.2010 which is reply to the letter dated 25.10.2008 informing the rejection of the appointment of the petitioner is not sustainable as the said appointment already stands approved by that time due to deeming fiction.

46. The second argument of the respondents that the post of the librarian is not equated to the teacher and thus the relaxation at the time of appointment cannot be given which is available to the teacher is correct and cannot be disputed with. But the respondent themselves have appointed the librarians of the similar age with that of the petitioners in various schools coming under their directorship. The schools including the respondent schools have utilized their services inclusive of the petitioner for years like in the present case 1.5 years.

47. The rules provide for approval or rejection to be communicated within the reasonable time and with the said intent rules 98 (4) and (5) provides for the duties of the directors and the managing committee. In these circumstances, once there are several named employees along with their age mentioned in the documents wherein the

employees of age beyond 35 were kept as librarian. It would be unjust to discriminate the similarly situated petitioner and more so when the respondents are themselves contravening all the rules and prescribed procedure.

48. It requires no reiteration that two persons similarly situated cannot be discriminated by the same state action.

49. The petitioner through her friend got moved an application under Right to Information Act in regard to the appointment of Smt. Amita who was appointed in an aided school namely S.D. Secondary School (Gujarat), Kirti Nagar, New Delhi. It is not denied by the respondent No.1 to 3 that the appointment was made by the Staff Selection Committee on 25.06.2008 and general age relaxation of ten years for women was also given to the said teacher. Therefore, the grant of aid was also released in her favour yet again by an order vide reference No. 27 dated 18.01.2000 issued by the office of Deputy Director of Education, District North-West 'A' wherein an order of appointment is issued to one candidate namely Hari Prasad wherein it is stated that the Librarian is a TGT post.

50. The fixation letter issued by the Government of NCT of Delhi to the petitioner school i.e. respondent no.4 shows the post of Librarian is in the category of miscellaneous teacher. The post of drawing teacher, work experience teacher, physical education teacher, Librarian and Laboratory Assistant, having the similar pay scales and same facility as

provided to all TGTs. The miscellaneous category teachers are also subjected to attend the training program held by the Directorate of Education. They have also attended a training program in compliance of the Circular dated 29.04.2009 issued by the State Council of Educational Research and Training (SCERT). The respondent No.4 sent the file of the petitioner, after her appointment, to the Accounts Officer for releasing the grant of aid.

51. As regards the two unreported orders referred by the learned counsel for the respondent nos. 1 to 3 passed by the learned Single Judge of this Court, the said orders have no binding force in the present case as circular dated 21.6.2007 bearing No.DE22/11/PFC/Aided/2006-07/3367-71 in which the post of Librarian has been classified under miscellaneous category and the circular No. F.38(11)/Misc/08/Vol.III dated 21.1.2009 which speaks about the pay-scale were not brought to the notice of the court and were not discussed in the said orders, further material facts and circumstances in the present case are different.

52. The respondent Nos. 1 to 3 also appointed other Librarian Teachers on the basis of the above stated post fixation. Apart from this, one of the aided-school namely Lakshmi Devi Jain Girls Sr. Sec. School also published an advertisement in the “Times of India” on 01.06.2008 wherein specifically mentioning the age limit for the Librarian as below 40 years.

53. Thus, the petitioner being a librarian employed on 23.7.2008 cannot be discriminated by the respondent/ director when the other schools namely Lakshmi Devi Jain Girls Sr. Sec. School is also employing the librarians of the same age and retaining them. Thus, the contention of the respondent that the librarian is not a teacher howsoever meritorious does not come into the aid of the respondent.

54. This court is also conscious that Article 14 cannot be pressed into service to enforce negative equality in as much as if the appointments made were illegal, the mere fact that some individual or group of individuals are given benefit does not mean that this court should enforce article 14. However, as stated earlier in this case, by way of deeming fiction of law, the said appointments are deemed to be approved appointment. The respondent/ director of education was aware of the rules and regulation and age calculation and relaxation at the time of appointment of individuals including the petitioner. The respondent still chose to remain silent neither accepting or rejecting the appointment for 1.5 years. The respondent director and the school has not followed the due procedure as envisaged under the rules. Thus, by not calling the respondent's action arbitrary in this case would mean that the court is accepting the illegality and blatant flouting of the rules by both the respondents repeatedly. The employees cannot be made to suffer due to ignorance of the rules by the respondent schools and the director. This is not the single case but the petitioner has pointed out several cases one after another. The respondent school cannot be so much ignorant of the

rules and regulations relating to relaxation and cannot keep on exploiting the services of the employees like this if they are not falling within the prescribed age. In these circumstances, all these persons can be nothing but similarly situated ones (suffers standing on the same pedestal) and the petitioner cannot be singled out from the same.

55. The third submission of the respondent that the respondent is the temporary employee on probation and thus more lenient view must be adopted while considering his rejection as the respondent is empowered to terminate the services of the temporary employee whenever they deem fit. In this respect, I would say that the rejection of the employment in the present case is made on the ground that is irregular at the inception that without informing the employee about the same at the time of giving the appointment letter and also not providing the intimation about the rejection or approval as per the rules. The rule 96 and 98 provides the recruitment. The said rules provide for the provisions of temporary retention of the employees for two year. The rule 98 (4) while engrafting the deeming fiction does not distinguish between the temporary employee or the permanent employee. The intent and the purport behind the same is that the employee must be given knowledge as to whether he is befitting for the employment in the organization or qualify for the same or not by providing approval or rejection. The said rule enacted does not give the differential treatment to the temporary employee as expounded by the learned counsel for the respondent. Thus, the argument that the temporary employee must be treated differently from the permanent employee is of

no consequence when it comes to operation of fiction envisaged under rule 98(4). It is true that the appointment letter states that the employment of the petitioner is temporary in the following words:

“.....With reference to your interview for the post of Librarian-Unreserved held on 08.07.2008, you are hereby offered appointment to the said post in the pay scale of Rs.5500-175-9000 in this school on the following terms and conditions :

1. You will be on probation for a period of two years. Your service may be terminated without notice during this period, if your work and conduct during the said period is not found satisfactory.
2. You will be governed by the provisions of the Delhi School Education Act & Rules 1973 as amended from time to time.
3. If you are already employed, you should produce a relieving order from your employer.
4. On joining the post, you will be required to take an Oath of Allegiance to the constitution of India or make a solemn affirmation to that effect.
5. If you are married, a declaration to the effect that you are not having more than one spouse living shall be furnished in the enclosed Marital Declaration.
6. This offer of appointment is further subject to your producing a Medical Certificate of fitness in the enclosed proforma from a Hospital/Dispensary established or maintained by the Govt.
7. If any declaration given or information/certificates furnished by you are found to be false/fictitious or if you are found to have willfully suppressed any material information, you will be liable for removal from service and such other action as may be deemed necessary.....”

56. The bare reading of the said clause makes it clear that the employment of the petitioner is on probation for two years and the employer is empowered to adjudge the performance and basing upon the

same can confirm or reject the employment. However, the temporariness or permanency on the ground of the performance satisfaction is altogether different from the ground of the rejection of the employment on the technicality that the employment is irregular due to age. For the said ground, it is again reiterated that the procedure is prescribed under the rules with the sole intent to provide the information to the employee about his appointment at the earliest possibility and not linger on with the same and keep on using the services and thereafter rejecting the employment on one good day like in the present case.

57. Moreover the view expressed by the learned Single Judge in ***Surendra Singh*** (supra) is the same as in the present case. In that case also the employee was employed on probation as against permanent, further there was an appointment which was made on the basis of wrong calculation of age of relaxation by the management and directorate like in the present case. The learned Single Judge in those circumstances interpreted Rule 98(3) to state that the said Rule is meant to curb the impasses of persons commencing their employment and later being told that their appointment was irregular and therefore *non est* and restored the employment of the employee. The relevant paras of the said judgment reads as follows:

“3. Reliance has been placed by learned counsel for all the parties on the Notification dated 21.12.1998 of the Government of India, Ministry of Personnel, Public Grievances and Pensions. It is by virtue of this Notification that the Petitioner can claim two year relaxation. Since this is so he must be bound by the

Notification in its entirety, it would be anomalous and hence impermissible for him to claim the advantage of the age relaxation and simultaneously dispute the application of the Notification thereto. Paragraph three of the Notification reads as follows:

"3. Increase in the upper age limit:-

The upper age-limit for recruitment by the method of Direct Open Competitive Examination to the Central Civil services and civil posts specified in the relevant Service/recruitment rules on the date of commencement of the Central Civil Services and Civil posts (Upper Age-limit for Direct Recruitment) Rules 1998, shall be increased by two years.

Note:- "Direct Open Competitive Examination" for the purpose of these rules shall mean direct recruitment by Open Competitive Examination Conducted by the Union of Public Service Commission or the Staff Selection Commission or any other authority under the Central Government and it shall not include recruitment through Limited Departmental Examination or through shortlisting or by interview or by contract or by absorption or transfer or deputation."

4. On 16.6.1999, the date when the Selection Committee had met, at least the nominees appointed by the Director of Education ought to have been aware or made aware of the requirement of this Notification. The Selection Committee after due deliberations had granted relaxation of not more than two years in the case of Petitioner. Learned counsel for Respondents have also relied on a Circular issued by the Additional Director of Education dated 17.10.1999, which reads as under:

"CIRCULAR

The Govt. of India vide its notification No. 15012/6/98-Estt.(D) dated 31.12.98 notified Central Civil Services and Civil Services and Civil posts (upper age limit for direct

recruitment) the rules 1993 which inter-alia provided that the upper age limit for recruitment by the method of direct open competitive examination to the Central Civil Services and Civil posts shall be increased by two years. The said notification was endorsed by the Dy. Secretary Services and was further circulated by the JDE(Admn) vide circular dated 17.5.99,

It has come to the notice that in some of the aided school the recruitment of employees is being done keeping in view the increased age limit of two years. It is hereby clarified that:

"Direct Open Competitive Examination" shall mean direct recruitment by open competitive examination conducted by UPSC or SSC and shall not included recruitment through limited departmental examination or by interview or by contract or short listing.

In aided school, all the appointments are to be finalised by Staff Selection Board under Rule 96 through an interview. Therefore, upper age limit of two years shall not be extended to the existing upper age limit of recruitment for non teaching staff of 25 years and for teaching staff in case of Assistant Teachers and TGTs 30 years and for PGT's 35 year.

This issue with the prior approval of the Director of Education.

(N.S. TOLIA)
ADDL. DIRECTOR OF EDUCATION
(ACT) SCHOOLS"

5. I am unable to appreciate why a clarification was required when the Notification of the Central Government was itself quite explicit. perhaps it was issued keeping in perspective the fact that a number of persons had been appointed by Selection Committees of various Private Aided Schools by granting age relaxation. Such persons' services have already been regularised, or not objected to. It is also explained by Sh. Kamaldeep, and not without reason, that this Circular was necessitated because of the vast number of persons who are

involved in the various Schools receiving grant-in-aid by the Respondents. One aspect which is borne out of the Circular is the admission contained in paragraph 2 thereof to the effect that in some of the Aided Schools the recruitment of employees is being done keeping in view the increased age limit of two years. This palpably refers even to the Petitioner and the respondents. It is not in dispute that an employment has already been received by a number of persons on a misunderstanding or wrong interpretation of the two year relaxation. There must be very strong reason to treat the Petitioner differently to other persons similarly placed.

6. The identical question came up for consideration in C.W.P. 6626/99 in which Hon'ble Mr. Justice A.K. Sikri has, in almost identical circumstances, declared that the petitioner before his Lordship was eligible to be considered for the post of L.D.C. and that he was rightly considered. In that case, by granting the benefit of two years, the age limit stood increased from 25 to 27 years. In the present case of the petitioner, since he was appointed to the post of T.G.T., the effect of the relaxation was to increase the upper limit from 30 to 32 years. The impact of the Notification and of the circular was fully considered in the previous writ petition and it was only thereafter that my Learned Brother A.K. Sikri, J. had directed that the appointment letter be issued to the Petitioner within two weeks. That writ petition had been allowed.

7. Learned counsel for the respondent has drawn my attention to the fact that an L.P.A. No. 408/2000 had been filed against the said Order. The fact remains that the appeal was dismissed with the observation that the Hon'ble Division Bench did not find any ground to interfere in the order passed by the Learned Single Judge. There is also an observation that those orders will not be treated as a precedent but it is nebulous as to whether this refers to the orders of the Hon'ble Division Bench or to that of Single Judge."

58. In the light of the same and due to the peculiar facts and circumstances of the case I am not inclined to take any different view and have no hesitation to say that the letter No. 114 and the letter dated 19.2.2010 and 24.2.2010 informing the rejection of the employment of the petitioner are in contravention of the DHER rules. By deeming provision and operation of rule 98, the said employment of the petitioner is a deemed approved employment by the respondents. The said letters are in violation of the procedure prescribed under the rules. Further once there are similarly situated persons who are also employed for the post of the librarians under the directorship of the respondent, it can also be safely held that the impugned letters also suffers from the vice of the arbitrariness. However, it is made clear that the appointment of the petitioner by the respondents be not treated as precedent but the same has been allowed on the peculiar facts and circumstances of this case only.

59. Accordingly, the writ petition is allowed, the letter dated 19.2.2010 issued by the respondent No. 1 to 3 and the letter dated 24.2.2010 issued by respondent No.4 are quashed. Consequently, the petitioner is entitled to join back to the respondent school with effect from 1.12.2010.

60. No costs.

MANMOHAN SINGH, J.

NOVEMBER 26, 2010
dp/jk