

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

+ **W.P.(C) No. 4479/2008**

% Judgment reserved on 05.02.2010
Judgment delivered on:24.02.2010

The Managing Committee Diwan Chand
Arya Senior Secondary School Petitioner
Through: Mr. Rakesh Agarwal with
Mr. Pulkit Aggarwal,
Advocates

versus

Director of Education and Anr. Respondents
Through: Mr. Rajeev Sharma, Adv. for R-1.
Mr. Bapurao Pakhiddey with
Mr. Vikas Pakhiddey and
Ms. Shilpa Mahajan, Advocate for
R-2.

CORAM:
HON'BLE MR. JUSTICE KAILASH GAMBHIR

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

KAILASH GAMBHIR, J.

1. By this petition filed under Article 226 and 227 of the Constitution of India, the petitioner seeks quashing of the order dated 21st April, 2008 whereby the Director of Education has given directions to expunge the adverse entries made in the ACR of respondent No. 2 for the year 2005-06 and to upgrade the grading from "Average" to "Good".

2. Brief facts relevant for deciding the present petition are that the respondent no.2 is a teacher in the petitioner school and in the ACR for the year 2005-2006 the head of the petitioner school as a reporting officer assessed the performance of the respondent no. 2 as "Average". The said ACR was reviewed by the Managing Committee of the school and the adverse remarks were communicated to the respondent no.2 vide memorandum dated 2.1.2007. Feeling aggrieved with the same, respondent no. 2 made a representation to the Managing Committee which was replied by the petitioner vide letter dated 9.2.2007. Thereafter, the respondent no. 2 preferred an appeal to the Director of Education for review of the ACR as per the Rule 112(7) of the Delhi School Education Rules, 1973 vide representation dated

28.2.2007. Consequently, the Appellate Authority constituted a Committee to scrutinize the records of the school and to inquire into the matter, which recommended that the adverse entries in the ACR be expunged and the grading of respondent no.2 be upgraded. Thereafter, the Director of Education issued a show cause notice dated 23.1.08 to the petitioner and after filing reply a personal hearing was given to the petitioner as well as respondent no.2 on 13.3.2008 after which the impugned order dated 21.4.2008 was passed by the Appellate Authority directing the expunction of the adverse entries in the ACR of the respondent no.2 for the year 2005-06 and upgrading the grading from "Average" to "Good". Feeling aggrieved by the said order, the present petition has been preferred by the petitioner.

3. Mr. Rakesh Agarwal, counsel for the petitioner submitted that the impugned order passed by the Director of Education suffers from non-application of mind besides the same being cryptic and a non-speaking order. Counsel also submitted that the petitioner never received any notice of the appeal filed by respondent No. 2 against the decision of the petitioner managing committee of

recording adverse entry in the ACR of respondent No. 2 for the year 2005-06. Counsel further submitted that the appeal filed by respondent No. 2 was not within the time limit prescribed under Rule 112(7) of the Delhi School Education Rules, 1973 and even the memorandum of appeal was not accompanied by an application seeking condonation of delay. Counsel further submitted that the committee was also illegally constituted by the Appellate Authority in contravention of Rule 112(7) of the Delhi Education Rules and even that committee, without affording any hearing to the petitioner, reached its own conclusions at the back of the petitioner management. Counsel for the petitioner further submitted that the committee totally ignored the adverse comments given by the reporting officer and in fact there were 19 adverse remarks against the total entries of 51, but yet the committee recommended expunging the adverse entries made in the ACR of respondent No. 2 for the year 2005-06 and the Director of Education blindly followed the recommendations of the committee. Counsel for the petitioner further submitted that in the reply dated 18.02.2008 filed by the petitioner to the show cause

notice issued by respondent No.1, necessary material was produced by the petitioner management to substantiate the recording of the adverse entries but respondent No.1 callously ignored the said material produced by the petitioner and passed a perverse, illegal and unjustified order. Counsel for the petitioner further submitted that the impugned order is even against the OM No. 21011/1/2006 Estt (A) GOI, Ministry of Personnel and Pension, Deptt. of Personnel and Training dated 28.03.2006, which clearly stipulates that overall grading recorded in the ACR's is not to be changed in any way even after the expunction of the adverse remarks either fully or partially by the competent Authority. Counsel for the petitioner further submitted that respondent No. 1 gravely erred in taking the academic result as the sole criteria for expunging the adverse entries without realizing the fact that the academic result can be one of the several criteria's for overall assessment and performance of the teacher. Based on the above submissions, counsel for the petitioner sought quashing of the said impugned order.

4. Refuting the said submissions of counsel for the petitioner, counsel for the respondent No.1 submitted that no fault or illegality can be found in the order passed by the Director of Education in exercise of his Authority derived under Rule 112(7) of the Delhi School Education Rules, 1973. The contention of counsel for respondent No. 1 was that respondent No. 2 being aggrieved with the adverse entries made in his confidential report for the year 2005-06 had preferred an appeal under the said rule before the Director of Education. The Director of Education constituted a committee to examine and scrutinize the ACR of respondent No. 2 and the said committee examined the entire record produced by the petitioner management including the comments of the reporting officer and reviewing officer for the relevant ACR for the period 2005-06. Counsel for respondent No. 1 further submitted that the reply filed by the petitioner dated 18.2.2008 was fully considered by respondent No. 1 and opportunity of hearing was also given to both i.e. petitioner as well as respondent No. 2 by the Director of Education before passing the impugned order dated 21st April, 2008. Even the contention raised by the School that the

appeal was not filed by respondent No.2 within the time prescribed was also examined by the Director of Education and he clearly observed that 26 days delay in filing the appeal was condoned in the interest of justice. Counsel for respondent No. 1 further submitted that the petitioner cannot be heard to complain that the principles of natural justice were violated by respondent No. 1 as reasonable opportunity of being heard was given to the petitioner and even the reply filed by the petitioner was taken into consideration. Counsel for respondent No. 1 further submitted that since the petitioner management failed to substantiate the reasons for recording the said adverse entries in the ACR's of respondent No. 2 for the year 2005-06, therefore, no fault can be found with the said order accepting the recommendations of the committee suggesting the expunging of adverse entries made in the ACR for the year 2005-06 and for upgrading the grade from "Average" to "Good" for the year 2005-06.

5. Counsel for respondent No. 2 on the other hand submitted that the adverse entries in the ACR's were made as a result of bias on the part of the reporting officer against

respondent No. 2. Counsel for respondent No. 2 further submitted that the principal of petitioner's school is acting under the influence of the Manager of the school who has been inimical towards respondent No. 2 because of some previous incidents that had taken place in the school. Counsel for respondent No. 2 also supported the stand taken by respondent No. 1 justifying the findings given by the Committee constituted by respondent No. 1 and also the reasoning given by respondent No. 1 after taking into consideration the reply submitted by the petitioner management. Counsel for respondent No. 2 further submitted that the order has been passed by respondent No. 1 after applying its judicious mind to the whole gamut of facts and the same does not suffer from any illegality, perversity or error.

6. I have heard learned counsel for the parties at considerable length and perused the records.

7. To adumbrate the scenario, it is the case that the petitioner is a school recognized and duly aided by the Directorate of Education, Government of NCT of Delhi. The ACR of respondent

No. 2 for the year 2005-06, which was graded as “Average” by the reporting officer and reviewing officer of the petitioner school, is under question in the present writ petition. It is not in dispute that the said ACR for the year 2005-06 was duly communicated by the petitioner school to respondent No. 2 vide memorandum No. F(APA)/2006-07/371 dated 2nd January, 2007 and feeling aggrieved with the same respondent No. 2 preferred an appeal in terms of Rule 112(7) of the Delhi School Education Rules, 1973 before the Director of Education. After having accepted the recommendations of the committee the Director of Education vide orders dated 21st April, 2008, directed upgrading of the grading “Average” to “Good” for the year 2005-06 and to expunge the adverse entries made in the said ACR. The petitioner school seeks quashing of the said order primarily on the ground that the Director of Education has not properly followed the provisions of Delhi School Education Rules, 1973 besides having not applied his judicial mind to the detailed reasons given by the reporting officer for downgrading the performance of respondent No. 2 for the year 2005-06 as “Average”. Serious objection was taken by the counsel for the

petitioner on the constitution of a separate committee by the Director of Education to scrutinize and examine the adverse entries in the ACR and this act of Director of Education as per the petitioner, was wholly illegal as under the Delhi School Education Rules no such provision or mechanism has been provided for the constitution of such a committee. Counsel for the petitioner took yet another objection that the Director of Education has no powers to condone the delay in filing of the appeal and in any case, not without any application being made in this regard disclosing sufficient reasons for condoning the delay. The petitioner has also assailed the impugned order being cryptic and non-speaking as the same was passed without disclosing any reasons for upgrading the ACR from "Average" to "Good".

8. Before proceeding further in the matter it would be vital to reproduce Rule 112 of the Delhi School Education Rule, 1973:-

"Confidential reports-(1) Confidential reports in relation to the heads of schools and other employees of recognized schools, whether aided or not, shall be maintained in form specified by the Administrator in this behalf.

(2) The form referred to in sub-rule(1) shall consist of two parts, of which the first part shall contain factual

assessments with regard to the work done by the employee concerned and the second part shall contain the opinion with regard to the performance of the employee concerned.

(3) The signature of the concerned employee shall be obtained on the first part of the confidential report before any opinion with regard to his performance is recorded in the second part of the report:

Provided that if the head of the school or other employee refuses to affix his signature to the factual assessment of his work, the authority recording the confidential report shall make a record of such refusal and complete the confidential report.

(4) The confidential report shall be recorded , every year, by the head of the school in respect of the employees working under him and every such confidential report shall be reviewed by the managing committee.

(5) The confidential report in respect of the head of the school shall be recorded, every year, by the Chairman of the managing committee and every such confidential report shall be reviewed by the managing committee.

(6) Any adverse entry in the confidential report, in relation to any head of the school or other employee shall be communicated to him by the Chairman of the managing committee and every such communication shall be made in accordance with the instructions issued by the Central Government in respect of the employees of that Government.

(7) Any employee of an aided school who is aggrieved by any adverse entry in his confidential report may, within thirty days from the date on which such adverse entry is communicated to him, prefer an appeal against such entry to the Director, and the Director may, after giving to the managing committee a reasonable opportunity of showing cause, make such alterations in the entries in the confidential reports as he may think fit and may, for that purpose require the managing committee to produce the concerned confidential report.

(8) The confidential report in relation to the head of the school shall be kept in the safe custody of the Chairman of the managing committee and the confidential reports in relation to the other employees of the school shall be kept in the safe custody of the head of the school.

9. At the outset, I would deal with the contention of the counsel with regard to condonation of delay in the appeal filed by respondent no.2. The adverse entry for the year 2005-06 was conveyed to respondent No. 2 by the petitioner school on 2.1.2007 and feeling aggrieved with the same respondent No. 2 had preferred an appeal before the Director of Education vide representation dated 28.02.2007. No doubt that there was a delay of about 26 days in preferring the said appeal by respondent No. 2, but perusal of the impugned order dated 21st April, 2008 would clearly show that the said delay was condoned by the Appellate Authority. Undoubtedly a period of 30 days has been provided under sub Rule 7 of Rule 112 of the Delhi School Education Rules , 1973 for preferring an appeal from the date of communication of the adverse entry, but since the said Special Statute has not provided any remedy of condonation of delay in the event of appeal not being preferred within a period of 30 days, therefore,

nothing wrong can be found in the order of the Director of Education condoning the delay in filing the said appeal drawing his power from the general law of the Limitation Act. It is an established principle of law that procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice. The provisions contained in Rule 112 are not to be construed as a rigid matter of principle but must ever be viewed as a flexible tool of convenience in the administration of justice. Hence technical objections which tend to be stumbling blocks to defeat and deny substantial and effective justice should be strictly viewed for being discouraged, except where the mandate of law inevitably necessitates it. I, therefore, do not find any infirmity in the impugned Award condoning the delay of 26 days in filing of the appeal by respondent No.2.

10. Coming to the contention of the counsel for the petitioner with regard to the constitution of committee by the Director of Education, the argument is equally devoid of any force. No fault can be found with the constitution of the said committee

who was entrusted with the job of scrutinizing the ACR record of the respondent No.2 supplied by the school and to make necessary recommendations with regard to the correctness of the said adverse entries in the ACR of respondent No. 2 and other teachers. The petitioner cannot raise any grievance against the constitution of the said committee as the petitioner had produced its records before the said committee and a copy of the report submitted by the said committee was duly supplied to the petitioner along with the show cause notice dated 23rd January, 2008. It is not the case of the petitioner that the Appellate Authority has delegated its own power to the said committee for taking a decision on the said ACR of respondent No. 2 as the same was constituted merely to scrutinize the records of the school and place its recommendations before the Appellate Authority, the acceptance or non-acceptance of which was the prerogative of the Director of Education. Even otherwise the petitioner cannot complain about the constitution of the said committee when the petitioner was duly supplied with the copy of the report as submitted by the committee to the Director of Education and the

petitioner was given ample opportunity to dispute the correctness of the findings given by the said Committee. I, therefore, do not find any illegality in the order of the Director of Education in constituting the said committee whose recommendations were not binding upon the Appellate Authority. The petitioner in the present case although has alleged violation of principles of natural justice and passing of a cryptic order by the Director of Education but the facts appearing on record proves to the contrary. The petitioner was duly served with the show cause notice by the Appellate Authority and was also given a personal hearing. The petitioner was also served with the copy of the report of the committee constituted by the Appellate Authority. The records produced by the petitioner were duly scrutinized by the said committee and also by the Appellate Authority. Reply dated 18.2.2008 was taken into consideration by the Appellate Authority before passing the impugned order and opportunity of hearing was also afforded to the petitioner before the said decision was taken by the Appellate Authority.

11. It is a settled position of law that the rules of natural justice has many facets and cannot be put in a straitjacket formula. The contention of the petitioner was that the rules of natural justice have been violated as it had not been given an opportunity of hearing before the committee constituted by the Director of Education. It has been time and again held by the Apex court that the rules of natural justice are synonymous to fairness in the backdrop of common sense. It would be pertinent to refer to the judgment of the Apex Court in ***Dev Dutt vs. Union of India &Ors. (2008)8 SCC*** 725 where while dealing with the adverse entries in confidential reports it interpreted the rules of natural justice analyzing a number of authorities on this issue.

"29. In Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant this Court held (AIR vide para 2): (SCC p. 188)

"2. ... the doctrine (natural justice) is now termed as a synonym of fairness in the concept of justice and stands as the most accepted methodology of a governmental action."

In the same decision it was also held following the decision of Tucker, L.J. in Russell v. Duke of Norfolk: (All ER p. 118 E)

"The requirements of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth."

30. *In Union of India v. Tulsiram Patel (AIR vide para 97) a Constitution Bench of this Court referred to with approval the following observations of Ormrod, L.J. in Norwest Holst Ltd. v. Secy. of State for Trade: (All ER p. 295a-b)*

"The House of Lords and this Court have repeatedly emphasised that the ordinary principles of natural justice must be kept flexible and must be adapted to the circumstances prevailing in any particular case."

31. *Thus, it is well-settled that the rules of natural justice are flexible. The question to be asked in every case to determine whether the rules of natural justice have been violated is: have the authorities acted fairly?*

32. *In Swadeshi Cotton Mills v. Union of India this Court following the decision in Mohinder Singh Gill v. Chief Election Commr held that the soul of the rule (natural justice) is fair play in action".*

It was then held that:

"What is natural justice? The rules of natural justice are not codified nor are they unvarying in all situations, rather they are flexible. They may, however, be summarised in one word: fairness. In other words, what they require is fairness by the authority concerned. Of course, what is fair would depend on the situation and the context".

Hence in the light of the aforesaid observations and applying it to the background of facts of the present case, it cannot be said that

there was any violation of principles of natural justice on the part of the Appellate Authority or due opportunity as envisaged under Rule 112(7) was not afforded to the petitioner. What the appellate authority did was an act of fairness by issuing a show cause notice to the petitioner and also giving an opportunity of personal hearing to the petitioner. I cannot by any stretch of imagination visualize what prejudice has been caused to the petitioner if he was not heard by the said committee. It cannot be overlooked that counsel for the petitioner has also not disputed the fact that the observations of the committee taking a view that respondent No. 2 gave excellent results in the school in the said period were not incorrect.

12. This Court while exercising jurisdiction under Article 226 of the Constitution of India would not interfere and reappreciate the findings of the facts based on which the Appellate Authority has given its decision. The Apex Court has held in the judgment of ***Ashok Kumar vs. Sita Ram (2001)4 SCC 478*** that:

"The question that remains to be considered is whether the High Court in exercise of writ jurisdiction was

justified in setting aside the order of the Appellate Authority. The order passed by the Appellate Authority did not suffer from any serious illegality, nor can it be said to have taken a view of the matter which no reasonable person was likely to take. In that view of the matter there was no justification for the High Court to interfere with the order in exercise of its writ jurisdiction. In a matter like the present case where order passed by the statutory authority vested with power to act quasi-judicially is challenged before the High Court, the role of the Court is supervisory and corrective. In exercise of such jurisdiction the High Court is not expected to interfere with the final order passed by the Statutory Authority unless the order suffers from manifest error and if it is allowed to stand it would amount to perpetuation of grave injustice. The Court should bear in mind that it is not acting as yet another appellate court in the matter. We are constrained to observe that in the present case the High Court has failed to keep the salutary principles in mind while deciding the case."

Therefore, it would be evince from above that ordinarily the court would not set out to remedy a quasi judicial decision if there is no patent illegality in the said action, which the petitioner has failed to show in the case at hand.

13. However, it cannot lose sight of the fact that the object of making an ACR is to serve a positive purpose and not to embark on a litigative voyage between the parties. The Apex Court in the

case of **S.T Ramesh vs. State of Karnataka (2007)9 SCC 436**

observed that:

"The confidential report is an important document as it provides the basic and vital inputs for assessing the performance of an officer and further achievements in his career. This Court has held that the performance appraisal through CRs should be used as a tool for human resource development and are not to be used as a fault-finding process but a developmental one."

In yet another judgment in the case of **Swatantar Singh vs. State Of Haryana (1997)4SCC14** while emphasizing the importance of making of confidential reports it held that:

"It is true that in view of the settled legal position, the object of writing the confidential reports or character roll of a government servant and communication of the adverse remarks is to afford an opportunity to the officer concerned to make amends to his remissness; to reform himself; to mend his conduct and to be disciplined, to do hard work, to bring home the lapse in his integrity and character so that he corrects himself and improves the efficiency in public service. The entries, therefore, require an objective assessment of the work and conduct of a government servant reflecting as accurately as possible his sagging inefficiency and incompetency. The defects and deficiencies brought home to the officer, are means to the end of correcting himself and to show improvement towards excellence. The confidential report, therefore, would contain the assessment of the work, devotion to duty and integrity of the officer concerned."

14. The onerous task of making of the assessment falls upon the ones who are higher in rank to the ones assessed and in the case of schools, it is the head of the institution that is responsible for performing this duty. In the instant case it was alleged by the respondent no.2 that the adverse entries in his ACR were due to an unpleasant incident in the past because of which the head of the institution was biased against him and recorded the said adverse remarks. The importance of the task of making the ACR objectively without being influenced by extraneous considerations has been eloquently held by the Apex Court in the case of **State Bank of India vs. Kashinath Kher (1996) 8 SCC 762** as:

"It would appear that the confidential reports and character rolls are being prepared by the officers of the same rank in the same MMGS-II working in the establishment department over the same cadre officers working elsewhere and the reporting officers are the same. Ms Nisha is right and the High Court is well justified in holding that such a procedure is violative of the principles of natural justice. Such procedure and practice is obviously pernicious and pregnant with prejudices and manipulation violating the principles of natural justice and highly unfair. The object of writing the confidential report is twofold, i.e. to give an opportunity to the officer to remove deficiencies and to inculcate discipline. Secondly, it seeks to serve improvement of quality and excellence and efficiency of public service. This Court in Delhi Transport Corpn. case pointed out the pitfalls and insidious effects on service due to lack of objectives by the controlling officer. Confidential and character reports should, therefore, be written by superior officers higher above the cadres. The

officer should show objectivity, impartiality and fair assessment without any prejudices whatsoever with the highest sense of responsibility alone to inculcate devotion to duty, honesty and integrity to improve excellence of the individual officer. Lest the officers get demoralised which would be deleterious to the efficacy and efficiency of public service."

Citing the aforesaid judgment the Apex Court in the case of **State of U.P vs. Yamuna Shanker Misra (1997)4 SCC 7** reiterated it in the following words:

"It would, thus, be clear that the object of writing the confidential reports and making entries in the character rolls is to give an opportunity to a public servant to improve excellence. Article 51-A(j) enjoins upon every citizen the primary duty to constantly endeavour to prove excellence, individually and collectively, as a member of the group. Given an opportunity, the individual employee strives to improve excellence and thereby efficiency of administration would be augmented. The officer entrusted with the duty to write confidential reports, has a public responsibility and trust to write the confidential reports objectively, fairly and dispassionately while giving, as accurately as possible, the statement of facts on an overall assessment of the performance of the subordinate officer. It should be founded upon facts or circumstances."

15. Lastly, the OM No. No. 21011/1/2006- Estt.(A) issued by Govt. of India, Ministry of Personnel, PG & Pensions, Department of Personnel & Training relied upon by the petitioner does not help its case as under Rule 112(7) of the Delhi School Education Act, 1973, the Appellate Authority is competent to direct alteration in

the entry in the confidential report and, therefore, no fault can be found with the said direction of the Appellate Authority directing upgrading of the report from “Average” to “Good”.

16. Hence, in the light of the above discussion, I do not find any merit in the present petition and the same is hereby dismissed.

FEBRUARY 24, 2010

KAILASH GAMBHIR,J