

R-138

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

% *Date of Judgment: 04.01.2011*

+ **RSA No.161/2003**

BADRI PRASAD TIWARI .....Appellant  
Through: Mr.Vijay Hansarai, Sr. Adv. with  
Ms.Sneha and Mr. B.K.Mishra ,  
Advocates.

Versus

THE DIRECTORATE OF EDUCATION & ORS. ....Respondents  
Through: Ms.Avnish Ahlawat, Advocate.

**CORAM:**

**HON'BLE MS. JUSTICE INDERMEET KAUR**

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

**INDERMEET KAUR, J.** (Oral)

1. This appeal has been directed against the impugned judgment and decree dated 1.7.2002 which had endorsed the finding of the Trial Judge dated 17.2.1998 whereby the suit of the plaintiff, Badri Prasad Tiwari had been dismissed.

2. The plaintiff had been appointed as a teacher in the 'Sita Ram Sanskrit Vidya Mandir' w.e.f. 12.10.1984 at a salary of

Rs.350/- per month. It was a recognized school. The plaintiff had appeared before the Selection Committee for the post of Assistant teacher against which he was selected; thereafter the school had closed for summer vacation; on 16.7.1988, the school was finally closed. Contention of the plaintiff was that the select list of the candidates in which the plaintiff had been selected was not acted upon; present suit was accordingly filed for declaration and injunction seeking a declaration that the plaintiff stood duly selected against the post of Assistant teacher and was entitled to all consequential benefits.

3. In the course of the proceedings the plaintiff had withdrawn his claim against the defendants no. 3 and 4 who had been struck off from the array of parties; defendants no. 1 and 2 had not contested the proceedings. Plaintiff had examined himself as PW-1. Trial Judge held that the plaintiff had failed to produce on record any document/agreement by virtue of which he claimed entitlement to the post of Assistant Teacher. Trial Judge had dismissed the suit of the plaintiff.

4. Before the first Appellate Court, an application under Order 6 Rule 17 of the Code of Civil Procedure (hereinafter referred to as the 'Code') had been filed by the plaintiff. In para 5 of the application, he had contended that he had made several

representations to the Director of Education to absorb him in another school as similarly placed persons, that is, Mahesh Chand Satyawali, Krishan Prasad, Ahsok Kumar Singh and Jagdish Mathpal had been absorbed by the department. This application was dismissed vide a speaking order dated 1.7.2002. The contention of the appellant is that in the reply filed to this application it was not disputed by the department that the representations mentioned by him had been made by him to the department to absorb him. It is further contended that although admittedly no appeal had been filed against the order dated 1.7.2002 dismissing his application under Order 6 Rule 17 of the Code, he could nevertheless challenge the same under Section 105 of the Code even at the stage of second appeal provided that this grouse found mention in the memo of appeal. Attention has also been drawn to the memo of appeal where this ground finds mention. Counsel for the appellant places reliance upon the judgment of the Apex Court reported in AIR 1969 Supreme Court 941 S.Ghoshal & Ors. vs. Smt.Deorajin Debi & Anr. to substantiate this submission.

5. Be that as it may even presuming that this contention can be raised by the appellant at this stage and representations had been made by the appellant to the department to absorb him, yet this

fact cannot be overlooked that the contention now raised that other four similarly placed persons (names mentioned supra) had been absorbed in the Government Schools was an amendment which had been sought for by the appellant but which amendment had been refused. The Court while disposing off the amendment application had correctly noted that if the amendment is allowed, it would change the entire structure of the case raising a new cause of action and had thus rightly dismissed the said application.

6. Counsel for the appellant has placed reliance upon the provisions of Rule 47 of the Delhi School Education Act and Rules 1973. His contention is that he is adequately covered by the said Rule. The said Rule inter alia reads as follows:

“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 or employee becomes surplus, such student or employee, as the case may be absorbed as far as practicable, in such Government school or aided school as the Administrator may specify:”

7. Averments made in the present plaint have been perused. Contention of the plaintiff is that the Sita Ram Sanskrit Vidya Mandir is a recognized school. There was no positive contention

that it is an aided school. Before the trial judge, defendants no. 1 and 2 were ex parte. In the reply filed in the present proceeding, it is stated that the said school was unaided and no grant was given by the NCT to the said school. The applicability of the provisions of Rule 47 of the Delhi School Education Act and 1973 would thus be excluded and being an un-aided school this Rule cannot come in aid of the appellant.

8. This is the second appeal and the substantial question of law had been formulated on 20.9.2010. It inter alia reads as follows:

“Whether the impugned judgment dated 14.05.2003 disentitling the appellant for the relief of absorption was discriminatory and if so, its effect?”

9. On 1.7.2002 the application of the applicant seeking amendment of his plaint had been dismissed; he had not been permitted to incorporate the plea that from four other similarly placed persons had been absorbed in Government Schools and he had been discriminated upon. No revision or appeal had been filed against the said order. Even presuming that this order can be the subject matter of challenge under Section 105 of the Code in the present proceedings yet this plea if permitted to be incorporated at the second appellate level would bounce back the whole case raising a new cause of action and setting up an altogether new foundation for a new case. Application for

amendment was rightly rejected. The question of discrimination qua the appellant thus does not arise. There was no pleading before the trial judge that similarly placed persons had been absorbed and he had been left out. Rule 47 of the Delhi School Education Rules would also be inapplicable as the present school was an unaided school. His challenge on this ground must also fail.

10. At this stage learned counsel for the appellant sub mits that he wishes to place on record certain documents. Admittedly these documents had not seen the light of the day in either of the two Courts below i.e. either before the trial judge or before the first appellate Court. This request cannot be acceded to at this stage.

11. There is no merit in the appeal. It is dismissed.

**JANUARY 04, 2011**  
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**INDERMEET KAUR, J.**