

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

Date of decision: 4th July, 2011

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W.P.(C) 2149/2010

SRI YENNI SRINIVASA RAO

..... Petitioner

Through: Mr. Navin Chawla & Mr. Gaurav
Kaushik, Advocates.

Versus

ANDHRA EDUCATION SOCIETY (REGD.)

& ANR.

....Respondents

Through: Mr. B.K. Sood & Mr. Vipul Sharda,
Advs. for R-1.
Mr. Vinod Wadhwa, Advocate for
R-2.

AND

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W.P.(C) 2189/2010

MS. MARPU SHEKINA PRIYA

..... Petitioner

Through: Mr. Navin Chawla & Mr. Gaurav
Kaushik, Advocates.

Versus

ANDHRA EDUCATION SOCIETY (REGD.)

& ANR.

....Respondents

Through: Mr. B.K. Sood & Mr. Vipul Sharda,
Advs. for R-1.
Mr. Vinod Wadhwa, Advocate for
R-2.

AND

+

W.P.(C) 2257/2010

MARRAPU VENUGOPALA RAO

..... Petitioner

Through: Mr. Navin Chawla & Mr. Gaurav
Kaushik, Advocates.

Versus

**ANDHRA EDUCATION SOCIETY (REGD.)
& ANR.**

....Respondents

Through: Mr. B.K. Sood & Mr. Vipul Sharda,
Advs. for R-1.
Mr. Vinod Wadhwa, Advocate for
R-2.

AND

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W.P.(C) 2259/2010

KUNA RAMANAYYA

..... Petitioner

Through: Mr. Navin Chawla & Mr. Gaurav
Kaushik, Advocates.

Versus

**ANDHRA EDUCATION SOCIETY (REGD.)
& ANR.**

....Respondents

Through: Mr. B.K. Sood & Mr. Vipul Sharda,
Advs. for R-1.
Mr. Vinod Wadhwa, Advocate for
R-2.

AND

+

W.P.(C) 8157/2010

P. URMILA DEVI

..... Petitioner

Through: Mr. Vikrant Yadav & Ms. Monica
Nagi, Advocates.

Versus

**DIRECTOR (EDUCATION), GOVT. OF NCT OF DELHI
& ORS**

..... Respondents

Through: Mr. Vinod Wadhwa, Advocate for
R-1 & 2.
Mr. V.S.R. Krishna, Adv. for R-3
to 7.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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|----|--|----|
| 1. | Whether reporters of Local papers may
be allowed to see the judgment? | No |
| 2. | To be referred to the reporter or not? | No |
| 3. | Whether the judgment should be reported
in the Digest? | No |

RAJIV SAHAI ENDLAW, J.

1. W.P.(C) 2149, 2189, 2257 & 2259 all of 2010 impugn the order dated 4th / 17th March, 2010 of the respondent no.1 Andhra Education Society (Regd.) (hereinafter called the Society) discharging the petitioner in each case from the service as Assistant Teacher (OBC) / PGT

(Chemistry) (OBC) / PGT (Economics) (OBC) in the schools run by the said Society.

2. Each of the said petitioners had, in pursuance to the advertisement issued by the Society in December, 2007, applied for the post of Assistant Teacher/PGT in the OBC category and pursuant to the selection in March, 2008 had joined the schools as Assistant Teacher/PGT on 31st March, 2008. It is further their claim that they had for about two years prior to being discharged as aforesaid been performing their duties diligently and with all sincerity and had also undergone programmes/courses meant for Assistant Teachers and for PGTs.

3. The petitioners were discharged from service for the reason of the OBC certificate produced by each of them at the time of appointment having not been issued by a Competent Authority of the Govt. of NCT of Delhi and in terms of letters dated 19th February, 2010 and 10th March, 2010 of the Director of Education of Government of NCT of Delhi (DOE).

4. When the petitions came up before this Court first, it was the contention of the counsel for the petitioners that though they had been

appointed on the basis of the OBC certificate issued by the Competent Authorities of the State of Andhra Pradesh but they belonged to the OBC category as applicable to Delhi also and had applied to the Competent Authority at Delhi also for issuance of the OBC certificate(s) and which was/were likely to be issued shortly. On the said submission, vide interim orders in the writ petitions, the communications dated 4th March, 2010 were directed to be kept in abeyance. The said order has continued till date and the petitioner in each of the said four petitions has continued in the employment of the schools of the Society till now.

5. Counter affidavits have been filed on behalf of the Society and DOE. Rejoinder has been filed by the petitioners to the counter affidavit of the Society.

6. The contentions of the counsel for the petitioners in the said four petitions may be encapsulated as under:-

A. That as per the selection procedure only short listed candidates were called for the interview; once the respondents had short listed the petitioners and called the petitioners for

interview, they are deemed to have considered the petitioners to be eligible for appointment in the OBC category on the basis of the OBC certificate issued by the authorities of the State of Andhra Pradesh;

- B. that the appointment of each of the petitioners was not subject to the production of certificate, of belonging to the OBC category issued by the Competent Authority at Delhi;
- C. that the petitioners have not only joined the employment of the schools but also worked for over two years and have been treated as regular teachers;
- D. that even though the appointment of each of the petitioners was “subject to the approval of Director of Education, Delhi Administration, Govt. of NCT of Delhi” but since the Selection Committee which had selected the petitioners included nominees of DOE, under Rule 98 of the Delhi School Education Rules, 1973 no approval was required and/or approval is deemed to have been granted;

- E. that respondent School though being an aided school but nevertheless being a Minority Aided School, the appointments made by the Managing Committee of the Society, as per the second proviso to Rule 98(2) did not require the approval of DOE;
- F. That the respondents by their action having made the petitioners believe and presume that the petitioners have been regularly employed with the schools of the Society and owing to which belief the petitioners having not availed of other opportunities and being now overage therefor, the respondents are estopped from discharging the petitioners from service;
- G. that other Minority Aided Institutions similarly placed as the respondent viz. Delhi Tamil Education Association have been making appointments of teachers in OBC category on the basis of OBC certificates issued by the authorities in the State of Tamil Nadu without objection thereto by the DOE and thus DOE is not entitled to object to the employment of the

petitioners also for the reason of the OBC certificate(s) having not been issued by the Competent Authority of the Govt. of NCT of Delhi;

H. that the Society being a Minority Educational Institution is not bound by the policy of the Govt. of NCT of Delhi of reservation for OBC category and thus the requirement of the DOE of the OBC certificate issued by the Competent Authority of the Govt. of NCT of Delhi is not really attracted.

7. Per contra, the counsel for the Society has contended:-

a.) that the petitioners obtained the interim order on the representation that they had applied for the OBC certificate to the Competent Authority of the Govt. of NCT of Delhi also and the same was likely to be issued shortly; that inspite of the petitions having remained pending for over one year, no such certificate has been produced till date; the same leads to only one inference i.e. that the petitioners do not belong to the

OBC category in Delhi and have wrongfully obtained employment;

- b.) that another teacher namely Sh. Nitesh Kumari similarly placed as the petitioners who was able to produce a certificate issued by the Competent Authority at Delhi of belonging to the OBC category was retained in employment;
- c.) that the aid to the Society and its schools is provided by the Govt. of NCT of Delhi and thus the Govt. of NCT of Delhi is entitled to lay down the condition of reservation in employment and of the certificate of belonging to the Reserved category being of the Competent Authority of the Govt. of NCT of Delhi.
- d.) that the case argued is beyond pleadings and it has not been pleaded that reservation did not apply to the Society;
- e.) that the Society has been acting at the behest of DOE and has not discharged the services of the petitioners of its own;

f.) that the petitioners have the alternative remedy of appeal before the Delhi School Tribunal thus the present writ petitions are not maintainable;

8. The counsel for the petitioners in rejoinder has contended that the appointment of the petitioners is under the Union of India and therefore the Central List would apply and the petitioners being OBCs as per the Central List, the certificate issued by the authorities of the State of Andhra Pradesh is valid; that the alternative remedy of appeal before the Delhi School Tribunal is not available since the order of discharge is not of own initiative of the Society but at the behest of DOE; that the order of discharge is a void order; that the rule of exclusion of jurisdiction of writ remedy by alternative remedy is a rule of discretion and the question involved being a question of Constitutional Law, the alternative remedy of appeal before the Delhi School Tribunal is not an efficacious remedy.

9. The counsel for the petitioners has referred to:-

a) ***The Principal v. The Presiding Officer*** AIR 1978 SC 344;

- b) *Management of M.S. Ramaiah Medical College & Hospital v. Dr. M. Somashekar* MANU/KA/0672/2003;
- c) *Dr. Sahdeo Singh Solanki v. Govt. of NCT of Delhi* 65(1997) DLT 390 (DB);
- d) *Dr. (Smt.) Kuntesh Gupta v. Management of Hindu Kanya Mahavidyalaya, Sitapur (UP)* (1987) 4 SCC 525;
- e) *Whirlpool Corporation v. Registrar of Trade Marks* AIR 1999 SC 22;
- f) *State of U.P. v. M/s. Indian Hume Pipe Co. Ltd.* AIR 1977 SC 1132;
- g) *Union of India v. Classic Credit Ltd.* 154 (2008) DLT 538 (DB) &
- h) *Chemical Sales Corporation v. NDMC* 64(1996) DLT 160 (DB)

on the aspect of alternative remedy, and to:-

- i. *Surendra Singh v. Manager, Haryana Shakti Sr. Sec. School* 95 (2002) DLT 135 where approval of the DOE under Rule 98(4) to the appointment was deemed to have been granted for the reason of no objection to the appointment having been made within 15 days;

- ii. ***Promila Dixit v. Govt. of NCT of Delhi*** 2011 (121) DRJ 177 where the challenge to the rejection of appointment on the ground of overage succeeded for the reason of relaxation having been allowed to others;
- iii. ***Sindhi Education Society v. Chief Secretary, Govt. of NCT of Delhi*** (2010) 8 SCC 49 laying down that merely receiving grant-in-aid per se would not make such school or institution “State” within the meaning of Article 12 of the Constitution of India without there being deep and pervasive control over the working of the institution. On the basis of the said judgment, it was contended that the Linguistic Minority Institution as the Society is and its schools are not bound by the policy of reservation;
- iv. ***Delhi Tamil Education Association (DTEA) v. Directorate of Education*** 153 (2008) DLT 261 holding that DTEA being a Minority Aided School was not required to take approval under Rule 98(2) from the DOE in making appointments in

the school and also for the reason of the presence of the nominees of the DOE in the Selection Committee.

10. The counsel for the respondent Society has referred to:-

- a) ***Action Committee on issue of Caste Certificate to Scheduled Castes and Scheduled Tribes in the State of Maharashtra v. Union of India*** (1994) 5 SCC 244 laying down that a person belonging to SC/ST in relation to his original State of which he is permanent or ordinary resident cannot be deemed to be so in relation to any other State on his migration to that State for the purpose of employment, education etc.;
- b) ***MCD v. Veena*** (2001) 6 SCC 571 where the certificates of belonging to backward classes in States other than Delhi were held to be not good for the purpose of recruitment to the posts of primary and nursery teachers in MCD schools in the National Capital Territory of Delhi;
- c) ***Sunita Yadav v. MCD*** 2006 VI AD (Delhi) 113 where the aforesaid judgment was followed;

- d) Judgement dated 28th October, 2010 in W.P.(C)5205/2010 titled *Ms. Akanksha Dokania v. Netaji Subhas Institute of Technology* laying down that for admission to Educational Institutions in Delhi in OBC category, production of OBC certificate issued by Competent Authority of the Govt. of NCT of Delhi was essential;
- e) *Tej Singh v. FCI* 152(2008) DLT 243 laying down that the person invoking the writ jurisdiction without exhausting the alternative remedy has to make out a strong case as to why available alternative remedy has not been exhausted;
- f) *Govt. of Andhra Pradesh v. P. Chandra Mouli* (2009) 13 SCC 272 also laying down that owing to availability of alternative remedy the writ petition ought not to have been entertained;
- g) *Internsil P. Ltd. v. UOI* 2006 VIII AD (Delhi) 332 (DB) wherealso the writ petition was held to be not maintainable owing to availability of effective statutory remedy;

h) ***Brahmo Samaj Education Society v. State of West Bengal***

(2004) 6 SCC 224 laying down that the right to establish and administer an educational institution does not prevent the State from prescribing basic qualifications for appointment of teachers but selection and appointment of teachers from amongst the qualified teachers is the exclusive right of educational institutions;

i) ***Subhash Chandra v. Delhi Subordinate Services Selection***

Board (2009) 15 SCC 458 laying down that Article 16(4) cannot be made applicable to grant of benefit of reservation for SCs/STs who have migrated to another State or Union Territory.

11. The counsel for the petitioners has sought to distinguish the judgment in ***Veena*** (supra) by contending that the same dealt with MCD schools and/or schools of Delhi Govt. while the schools in the present case are of a Linguistic Minority. It is also contended that in ***Veena*** also, though holding the appointment to be invalid but for the reason of the petitioners

therein having worked in the schools for long, the schools were directed to accommodate the petitioners in the general quota.

12. I will first take up the aspect of maintainability of the writ petitions owing to the availability of the alternative remedy of appeal before the Delhi School Tribunal. Section 8(3) of the Delhi School Education Act, 1973 provides for the remedy of appeal to any employee of a recognized private school who is dismissed, removed or reduced in rank. Though the Division Bench of this Court in ***Kathuria Public School v. Director of Education*** 123 (2005) DLT 89 (DB) had held that the said remedy of appeal is available against all grievances of the employees but the Full Bench of this Court in O.REF.1/2010 titled ***Presiding Officer Delhi School Tribunal v. Govt. of NCT of Delhi*** decided on 27th August, 2010 has held that the remedy of appeal to the Tribunal under Section 8(3) (supra) is available only to employees who are dismissed, removed or reduced in rank.

13. The petitioners in the present case have been discharged from service for the reason of being not eligible for appointment and/or their

appointment being erroneous and/or under a mistaken belief. That being the stand of the respondents and which is to be adjudicated, strictly speaking the petitioners cannot be said to be employees of a school who have been dismissed or removed, for the remedy of appeal to be available to them. Even otherwise, I am of the opinion that the writ petitions having been entertained and the interim relief having been granted and arguments on merits having been heard and entailing questions of reservation , it is not deemed expedient to football the petitioners to the Delhi School Tribunal. Thus it is deemed expedient to entertain the writ petitions.

14. As far as the reliance by the petitioners on Rule 98 is concerned, DOE in its counter affidavit has stated that the petitioners having failed to meet the eligibility criteria and/or having failed to submit the document required to be submitted for appointment, cannot be said to have been validly appointed for the deeming provision in Rule 98(4) to come into operation; else it is not disputed that the Selection Committee which selected the petitioners did include the nominee of the DOE.

15. I find this Court to have in *U.R. Arya Vs. Director of Education* 80 (1999) DLT 203 and in *N. Usha Vs. Director of Education* MANU/DE/3421/2010 and the Supreme Court in *Bank of India v. Avinash D. Mandivikar* (2005) 7 SCC 690 to have held that where the very foundation of appointment collapses, the same is no appointment in the eyes of law and Rule 98 cannot be relied upon to continue in employment. I am of the opinion that the petitioners cannot claim a right of appointment and/or of remaining in employment against a post belonging to the OBC category if found to be not belonging to the said category. Allowing the petitioners to continue in the said post would be to the prejudice and deprivation of a person belonging to the OBC category and who cannot be condemned unheard. If the same is allowed, it would defeat the very purpose of reservation and deprive protection to those who under the Constitution and law of the country are entitled to such protection. The present is not a case of a mere irregularity in appointment and which irregularity can be overlooked or to which the deeming provisions of Rule 98 (supra) can be applied. If it were to be held that the petitioners do not belong to the Reserved category in which they have sought employment,

the same goes to the very root of the matter and the petitioners cannot be allowed to continue occupying the post for which they are not eligible.

16. However, need is not felt to adjudicate the question of applicability of Rule 98 to the schools of the Society or the applicability of reservation to the schools of the Society. The counsel for the Society is right in contending that the petitioners did not approach this Court with the plea of reservation being not applicable to the schools of the Society.

17. The Society in the advertisement pursuant to which the petitioners had applied clearly specified the posts reserved for the OBC category. The petitioners at that time did not contend that reservation in the schools of the Society was/is not permissible or was/is bad. They rather took advantage of the said reservation and applied in the Reserved category. The petitioners thus instead of competing with the other candidates in the unreserved category, competed only with those who had also applied in the Reserved category. The petitioners having benefited from the reservation, cannot now be heard to contend otherwise. If said arguments of the petitioners were to be accepted, the same again would strike at the very root of the

selection procedure in which the petitioners had participated and/or through which they were selected. Had the posts which the petitioners sought and are seeking to retain been not reserved for the OBC category, a large number of other persons would have been eligible to apply therefor and to compete with the petitioners; it is well nigh possible that the petitioners in such case may not even have been selected. Thus the writ petitions have to be decided on the premise of the posts being available for OBC category only.

18. Once it is so found, the matter is squarely covered by the judgments in *Veena* and in *Subhash Chandra* (supra). The counsel for the petitioners is not correct in contending that the said judgments would not apply. The aid to the Society and/or its schools is being provided by the Govt. of NCT of Delhi and the said Govt. providing the said aid/finances is very well entitled to insist upon the reservation being limited to the categories reserved in Delhi notwithstanding the petitioners belonging to the Reserved categories in the State of their origin.

19. There is merit also in the contention of the counsel for the Society that the petitioners obtained interim order from this Court by representing that the certificates of belonging to the OBC category were likely to be issued shortly. No certificates have been produced till date. The necessary inference is that the petitioners do not belong to OBC so far as Delhi is concerned. The reservation being only for OBC within Delhi, the petitioners did not qualify therefor.

20. As far as the arguments of the counsel for the petitioners of discrimination is concerned, once it is found that the petitioners do not have a right in law, merely because somebody else has been wrongly appointed would not entitle the petitioners to claim the same relief. The Apex Court recently in *Union of India Vs. M.K. Sarkar* (2010) 2 SCC 59 has held that there can be no claim to negative equality under Article 14 of the Constitution of India.

21. Thus even though the sympathies of this Court are with the petitioners but the Court is unable to find any right in the petitioners to be entitled to the relief. Moreover this Court is wary of on sympathetic

grounds starting a trend which can have repercussions on others not even before the Court. Thus while dismissing W.P.(C) 2149, 2189, 2257 & 2259 all of 2010, it is only suggested to the Society/Schools to consider whether the petitioners can be accommodated in any other capacity.

22. The petitioner in W.P.(C) 8157/2010 had sought appointment which was denied for the reason of having not furnished the OBC certificate issued by the Competent Authority of the Govt. of NCT of Delhi. He seeks the relief of appointment and relies upon the appointment granted to the petitioners in the other aforesaid writ petitions. In view of what has been held hereinabove, the said petitioner also cannot be granted the relief of appointment.

23. Accordingly, all the writ petitions are dismissed.

No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

July 4, 2011

PP