

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

% *Judgment Reserved on: April 03, 2013*
Judgment Pronounced on: April 08, 2013

+ **W.P.(C) 2677/2012**

GOVT. OF NCT OF DELHI & ORS. Petitioners
Represented by: Mrs.Avnish Ahlawat, Advocate with
Mr.Nitesh Kumar Singh, Ms.Latika
Chaudhary and Dr.Poonam Sehgal,
Advocates

versus

MITHILESH SWAMI Respondent
Represented by: Mr.Shanker Raju, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

1. On September 04, 2006, the Cabinet of the Government of NCT Delhi took decision No.1113 recommending age of superannuation of teachers in schools established by the Government of NCT Delhi to be enhanced from 60 years to 62 years and pending approval from the Union Government resolved that subject to fitness and vigilance clearance, teachers on retirement would be entitled to serve till the age of 62 years. The resolution in question reads as under:-

“In pursuance of Cabinet Decision No.1113 dated 4.9.2006 conveyed vide letter No.F.3/3/2004-GAD/CN/20491-502 dated 8.9.2006, the Lieutenant Governor, Govt. of National Capital Territory of Delhi is pleased to allow automatic re-employment of all retiring teachers upto PGT level, subject to fitness and vigilance clearance, till they attain the age of

62 years or till clearance from Government of India for extending retirement age is received, whichever is earlier. The terms and conditions of re-employment are being notified separately.”

2. Litigation ensued soon thereafter when the Government of NCT Delhi took the stand that its decision was applicable only to teachers who taught in classes and not Vice Principals, Principals and Headmasters/Headmistresses.

3. Since the decision was applicable to the schools recognized under the Delhi School Education Act, 1973, a Vice Principal of Delhi Public School Mathura Road, on being denied re-appointment till the age of 62 years approached this Court. In the decision reported as 2009 (VII) AD (Delhi) 246 Sushma Nayar Vs. M.C.Delhi Public School Mathura Road & Ors., taking note of the fact that clause (w) of Section 2 of the Delhi School Education Act, 1973 defined a teacher to include the Head of a School as per provisions of Rule 110 of the Delhi School Education Rules, 1973, which required Vice Principals and Principals to be treated as teachers, a learned Single Judge of this Court held that the decision would be applicable to Vice Principals and Principals as well. Challenge to the decision of the learned Single Judge failed when LPA No.415/2009 was dismissed by the Division Bench on July 17, 2009.

4. On June 26, 2008, even the Municipal Corporation of Delhi resolved to implement the resolution passed by the Government of NCT Delhi on January 29, 2007. The Corporation denied benefit thereof to Headmasters, the Head of a School. On November 23, 2010 deciding W.P.(C) No.5808/2010 MCD Vs. Giriraj Sharma & Ors. taking note of the decision in Sushma Nayar's case (supra); both by the Single Bench as also

by the Division Bench, it was held that Headmasters would be entitled to be re-employed till the age of 62 years. It was observed as under:-

“The issue at hand is apparently covered by a decision of this Court dismissing LPA No.415/2009 and upholding the judgment and order dated 17.7.2009 passed by a learned Single Judge of this Court which is reported as 2009 (VII) AD (Delhi) 246 Sushma Nayar vs. Managing Committee, Delhi Public School, Mathura Road & Ors. The learned Single Judge as also the Division Bench has decided the question: Whether the Cabinet Decision notified on 29.1.2007 pertaining to Senior Secondary Schools would encompass within its fold a Vice Principal or a Principal. The answer was in favour of the Vice Principals and Principals. In brief, the learned Single Judge noted the definition of ‘Teacher’ as defined under Section 2(w) of the Delhi School Education Act 1973 which defined a ‘Teacher’ to include the Head of School. The learned Single Judge noted that as per Rule 110 of the Delhi School Education Rules 1973, Ministerial Staff in a School would retire on attaining the age of 58 years and sub-rule (2) of Rule 110 specifically provided that Teachers, Laboratory Assistants, Librarian, Principal or Vice Principal shall retire at the age of 60 years. It was opined that in view of the definition of ‘Teacher’, Head of a School would have to be treated as a Teacher. The Division Bench concurred.”

5. It was expected that by November 23, 2010 the issue would get finally resolved; but alas! It did not.

6. The respondent, working as a Senior Science Counsellor, having duties of supervising Science laboratories in Government and Government aided schools attained the age of superannuation on April 30, 2011. But before that, on March 29, 2011 she sought extension of her service base upon the decision of the Government of NCT Delhi aforementioned.

7. Receiving no communication on her request and made to superannuate, the respondent filed OA No.2467/2011 which was disposed WP(C) 2677/2012

of by the Tribunal without notice to the respondents thereof on the very first date of its listing i.e. July 13, 2011; noting that the request of the respondent for re-employment had not been decided, direction issued was to decide the said request.

8. Complying with the direction issued by the Tribunal, on August 04, 2011 the Directorate of Education denied the request noting that there were some contra views taken by Benches of the Tribunal.

9. We highlight. The order dated August 04, 2011 does not record a finding that a Senior Science Counsellor cannot be treated as a Teacher.

10. The respondent challenged the decision dated August 04, 2011 under OA No.3530/2011 which was allowed on November 03, 2011 with a direction issued that the respondent should be re-employed forthwith with salary to which she would be entitled from the next day of her superannuation.

11. Order dated November 03, 2011 passed by the Tribunal would reveal that even before the Tribunal it was not the case of the petitioner that a Senior Science Counsellor is not a Teacher. The justification was that the issue was under consideration of a Division Bench of this Court, a fact which was wrong.

12. Having complied with the direction issued to re-engage services of the respondent and taking her back on service on February 07, 2012, instant petition has been filed challenging the impugned decision. We note that the extended term of re-engagement of the respondent would come to an end on April 30, 2013. Therefore, the short question which arises for consideration in the instant writ petition is: 'Whether on the principle of *No*

work no pay' the respondent should not be entitled to any wages from May 01, 2011 till she was re-engaged on February 07, 2012.

13. Learned counsel for the petitioners cited a decision dated March 29, 2012 passed by a Division Bench of this Court in W.P.(C) No.6450/2011 Directorate of Education Vs. Ajit Kumar, as per which a superannuated teacher on being denied re-employment and having successfully won the litigation before the Tribunal was denied back wages by the Division Bench taking note of the decisions reported as 1958 SCR 442 S.S.Shetty Vs. Bharat Nidhi Ltd., 2001 (2) SCC 54 PGI of Medical Education & Research Chandigarh Vs. Raj Kumar, AIR 2006 SC 586 U.P. State Brassware Corporation Ltd. & Anr. Vs. Udai Narain Pandey, 2005 IILJ 847 SC Allahabad Jal Sansthan Vs. Daya Shankar Rai & Anr., 2005 IILJ 153 SC Kendriya Vidyalaya Sangathan & Anr. Vs. S.C.Sharma, 2009 LLR 1 U.P.State Electricity Board Vs. Laxmi Kant Gupta and AIR 2006 SC 2427 Haryana State Electronics Development Corporation Vs. Mamni, it was observed that there was no hard and fast rule to be applied as to when back wages need to be paid and that the trend of judgments was that even when dismissal from service was found to be illegal, the employee would not be entitled to full back wages.

14. Now, as we understand the law declared in various decisions, legal discretion can never be left to the whims and fancies of a Judge. It is a wrong impression that the law on the subject of payment of back wages is without any guiding stars.

15. We do not intend to make a catalogue of the various cases, but would simply highlight that the discretion to pay or deny back wages has to be on the following principles:-

(i) Where the termination or disengagement is found to be tainted with mala fides i.e. it is found that the employer used the power to dismiss/disengage the services as a camouflage, full back wages need to be paid for the reason the employer was not litigating bona fide.

(ii) As a corollary to the first, if the employee bona fide exercises power to terminate the services of the employee or disengage the employee from service, upon a procedural or a technical defect being found in the decision making process or it being opined that the weight of the evidence did not justify services being terminated, back wages may be denied in full or in part. The reason would be that the employer had acted bona fide and on the subject of weight of evidence or a default in procedure there is always a possibility of two equally reasonable persons taking diametrically opposite views.

(iii) With respect to point No.(ii) above, denial of full or part back wages has to be with reference to:-

(a) Length of previous service rendered.

(b) Likelihood of the employee finding alternative employment.

(c) Reason for the delay in adjudication.

16. With respect to points (a), (b) and (c), the logic would be that where a person has served for say 2 to 3 years, it would be unjust to burden the employer with full back wages inasmuch as the employer should not be made to suffer due to docket explosions in judicial Foras and courts. Further, presumably such an employee would be young in age and in today's environment of '*catch them young*' there would be a greater chance for such an employee to be finding alternative employment in the interregnum. Further, on the likelihood of the employee finding alternative employment, the nature of the job performed would be relevant, for the

reason for some kind of skilled/semi-skilled jobs it is easy to find alternative employment and qua some it is difficult. For example it is easy for a person with driving skills to drive a light motor vehicle to find a job, but not so for a person who drives a heavy duty vehicle. The reason is the number of passenger cars vis-a-vis heavy duty vehicles on the roads in India would be in the ratio 100:1. On the subject of delay in adjudication, if it is found that the employer unnecessarily dragged on the proceedings by seeking adjournment, said circumstance has to be weighed against the employer and vice versa.

17. We highlight that aforesaid facts and circumstances are illustrative and not exhaustive. But one thing is clear, the decision to deny back wages has not to be a mechanical exercise or at the whims and fancies of the decision maker. Every relevant fact and circumstance, for and against the employer and the employee have to be taken into account.

18. Now, on matters of discipline, it can be argued that by the very act which constituted the misdemeanour of indiscipline, the employee triggered the process leading to his dismissal from service. That something alleged against a person cannot be proved does not mean that the person is innocent. It only means that the person alleging has not been able to make good the allegation. Thus, ultimate acquittal or a verdict of not guilty, though relevant, would not be determinative to pay back wages.

19. But, where the employee is just not at fault and there are enough judicial verdicts on a matter of interpretation of a policy, it has to be held that the persistent act of disobedience by the employer to the judicial verdicts would entitle the employee to full back wages. Any judicial view to the contrary would encourage useless litigation for the reason if a dispute pertaining to a policy which applies in rem is adjudicated by a judicial Fora

and the same is upheld by the superior courts, the employer and especially if it happens to be the state or its instrumentality is expected to apply the same in rem.

20. Aforesaid principles of law were not brought to the notice of the Division Bench when Ajit Kumar's case (supra) was decided.

21. Facts noted above would reveal that by April 2011 the issue in dispute had been resolved in favour of the respondent by two Division Benches of this Court, and yet in spite thereof the petitioner obstinately took the stand that a teacher would be only she who teaches the 3 R's in a classroom, a view which was negated time and again because under the Delhi School Education Act, 1973 a teacher was defined widely and as per Rule 110 of the Delhi School Education Rules, 1973 even personnel engaged with laboratory activities in schools were required to be treated as teachers. The reason being obvious. Practical teaching and theoretical teaching are two sides of the same coin of education. A Chemistry Teacher in class teaches theories about chemicals and how different chemicals react and why do they react. When do two chemicals react to form a salt or an Esther or release a gas and why? This is taught in the classroom. In the laboratory practical teaching of the theory in its application is done. We highlight that it is not the case of the petitioner that the post held by the respondent, with reference to its nomenclature, would not entitle the respondent to be treated as a Teacher. We highlight. The petitioner was litigating before the Tribunal by pleading that notwithstanding the decisions of two Division Benches of this Court in Sushma Nayar's case and Giriraj Sharma's case, the matter was under re-consideration, a stand which is factually incorrect.

22. On the facts of the instant case applying the principles of law which we have noted above, we see no reason why the respondent should be denied back wages for the reason it is the petitioner who has prevented her from working in spite of the law being settled.

23. The writ petition is dismissed but without any order as to costs.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

APRIL 08, 2013
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