

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

Judgment reserved on November 26, 2015
Judgment delivered on December 22, 2015

+ W.P.(C) 8138/2010, CM No. 20972/2010
SALWAN BOYS SENIOR SECONDARY SCHOOL
..... Petitioner

Through: Mr.Vinay Sabharwal,
Advocate

versus

HEM RAJ AND ORS

..... Respondent
Through: Ms.Avnish Ahlawat, Adv. for
R-1
Mr.Siddharth Yadav, Adv.
for R-2
Mr.D.Rajeshwar Rao,
Advocate with Mr.Charanjeet
Singh, Adv. for R-3

CORAM:
HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

For order, see W.P.(C) 7360/2010.


(V.KAMESWAR RAO)
JUDGE

DECEMBER 22, 2015

ak

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

Judgment reserved on November 26, 2015
Judgment delivered on December 22, 2015

+ W.P.(C) 7360/2010, CM Nos.14590/2010, 512/2011 &
 11450/2011
 MEENU SHOKEEN

.... Petitioner

Through: Mr.Siddharth Yadav, Adv.

Versus

DIRECTOR OF EDUCATION AND ORS

..... Respondent

Through: Mr. Arjun Mitra, Adv. for R-
 1 with Dr. S.K. Sharma, DEO
 (Zone 28)
 Ms.Avnish Ahlawat, Adv. for
 R-2
 Mr. Vinay Sabharwal, Adv.
 for R-3

+ W.P.(C) 8138/2010, CM No. 20972/2010
 SALWAN BOYS SENIOR SECONDARY SCHOOL

..... Petitioner

Through: Mr.Vinay Sabharwal,
 Advocate

versus

HEM RAJ AND ORS

..... Respondent

Through: Ms.Avnish Ahlawat, Adv. for
 R-1
 Mr.Siddharth Yadav, Adv.
 for R-2
 Mr.D.Rajeshwar Rao,
 Advocate with Mr.Charanjeet
 Singh, Adv. for R-3

CORAM:
HON'BLE MR. JUSTICE V.KAMESWAR RAO
V.KAMESWAR RAO, J.

1. As both these writ petitions involve challenge to a common order dated September 8, 2010 with identical facts, the same are being disposed of, by this common order. The parties shall be referred to, in terms of their status in W.P.(C) No.7360/2010 i.e Petitioner as "Petitioner", Director of Education (respondent No.1), Mr. Hemraj (respondent No.2) and Salwan Boys Senior Secondary School, the writ petitioner in W.P.(C) No.8138/2010 (respondent No.3).
2. By the impugned order dated September 8, 2010, passed by the Directorate of Education respondent No.1 pursuant to the directions issued by this Court in Writ Petition (Civil) No.694/2009 dated March 17, 2010, the Director of Education has directed the promotion of respondent No.2 Hemraj to the post of PGT (Maths) with immediate effect.
3. Some of the relevant facts are, in the year 2005 the post of PGT (Maths) fell vacant in the respondent No.3 School; on the retirement of Mr. K.K. Nakra. On September 28, 2007, a DPC was held in the respondent No.3 School. As the respondent No.2 only was eligible for promotion as per recruitment Rules, the DPC on consideration noting the ACR grading of Mr. Hemraj, the respondent No.2 for the period 2002-03

to 2006-07 consisted of three 'Good' and two 'Average', decided to refer the matter to the Act Branch. A communication dated October 6, 2007, in that regard, was sent to Assistant Director of Education, Act Branch. The Act Branch, vide its communication dated October 18, 2008, had, on a consideration of the DPC and the show-cause notice issued to the respondent No.3 School and the reply given by the School, rejected the minutes of the DPC held on September 28, 2007 and directed the School to conduct fresh DPC for promotion of eligible candidates. It is noted that Mr. Hemraj respondent No.2 filed W.P.(C) No.694/2009 against convening a fresh DPC. The writ petition was listed on July 14, 2009, when this Court had directed that a fresh DPC be held but the selection may not be finalised till the next date. It appears that, against the said order, Mr. Hemraj filed an intra-court appeal i.e LPA No.541/2009, which was dismissed by the Appellate Court noting that the impugned order i.e July 14, 2009 was an interlocutory order. The DPC was held on October 29, 2009. It consisted of five Members, two representing the School and three being from the Education Department/Subject Expert.

4. The decision of the DPC was not unanimous, the Members gave their views vide two annexures A and B, which were appended to the DPC proceedings. Annexure A was signed by the two Members representing the School and annexure B by the three outside Members. In

annexure A, the Members representing the School, were of the view that the EO/DE nominee/Subject Expert have commented on the ACR grading of the respondent No.2. They have also stated that EO/DE nominee were of a biased mind in favour of the respondent No.2. Whereas, in annexure B, the three other Members have, by noting that Mr. Hemraj was the senior most Teacher and also noting that the ACR grading does not reflect the work done by Mr. Hemraj, have recommended his promotion as PGT (Maths). It is also noted, a meeting of the Management Committee of the respondent No.3 School was held on February 20, 2010, wherein, the Committee approved the promotion of the petitioner to the post of PGT (Maths) with immediate effect. This aspect was noted by this Court in its hearing dated March 17, 2010 in W.P.(C) No.694/2009, wherein this Court disposing of the petition, directed that the recommendation of the fresh DPC along with the decision, if any taken by the Management Committee, be placed by the School before the Director of Education within a period of two days from the date of the order and the Director of Education respondent No.1 was directed to take decision strictly in terms of the Delhi School Education Rules, 1973 and guidelines of the Government, if any governing the issue. It was also made clear, the decision shall be taken within a period of 15 days from the date of submission of papers by the respondent School and no provisional

appointment shall be made by the School to the post of PGT (Maths). Accordingly, vide letter dated March 31, 2010, the respondent No.3 School had sent a reference enclosing therewith the relevant documents. It appears, no decision was taken by the Directorate of Education till the impugned order dated September 8, 2010 was issued. In the meantime, the respondent No.3 School, noting that 143 days have since passed and the School has not received the disapproval of the Director of Education of the decision of the Management Committee to appoint the petitioner Mrs. Meenu Shokeen to the post of PGT (Maths) and also noting the provisions under Rule 98(4) of the Delhi School Education Rules, 1973, decided to appoint the petitioner Mrs. Meenu Shokeen on promotion as PGT (Maths) in the pay-scale of Rs.9300-34800 with grade pay of Rs.4800 with immediate effect. Whereas, vide the impugned order dated September 8, 2010, the Director had directed the appointment of the respondent No.2 Hemraj on promotion to the post of PGT (Maths).

5. Mr. Siddharth Yadav, learned counsel for the petitioner would attack the impugned order primarily on four grounds. According to him, the respondent No.1 had considered the ACRs of the petitioner and the respondent No.2 with effect from 2004-2005 and not with effect from 2003-2004, which is contrary to the O.M. of the DoP&T dated October 6, 2000. According to him, the impugned order ignores the O.M. dated

April 10, 1989, which prescribes instructions on the constitution and functioning of the DPC, which prescribes that 'Good' is the benchmark for promotion and any candidate not achieving the prescribed benchmark, is to be marked unfit and should not be included in the zone of consideration. He also states, that as per Rule 98, the respondent No.1 could have either accepted or rejected the appointment of the petitioner. It was not within his jurisdiction to appoint respondent No.2, meaning thereby, that the respondent No.1 could have only accepted or rejected the recommendation of the Management Committee appointing the petitioner but it was not within the purview of the respondent No.1 Director to substitute the recommendation of the Management Committee with his own reasoning and appoint the respondent No.2. He would also state, that applying the provisions of Rule 98(3) and 98(4), the respondent No.1 is divested of his power upon expiry of 15 days time since the intimation of decision of the Management Committee. The decision of the Management Committee was taken on February 20, 2010, which was immediately conveyed to respondent No.1. Even otherwise, the same was conveyed to respondent No.1 on March 17, 2010 during the course of hearing before this Court. According to him, even otherwise, it was certainly conveyed to respondent No.1 when complete papers were submitted on March 31, 2010 as per the directions

of this Court. Therefore, the decision of accepting or rejecting the decision of the Management Committee should have certainly been taken not later than April 15, 2010 by respondent No.1. Having failed to do so, the petitioner by virtue of Rule 98(3) and 98(4) is deemed confirmed on the post of PGT (Maths). He also plead equity, inasmuch as the petitioner, since her appointment in the year 2010, has been working as PGT (Maths) for the last five years and she stood confirmed in August, 2010. According to him, equity demands that she, being a more capable teacher, under whose aegis students have shown exceptional results, should continue on the said post. He would rely upon the judgments in the case of *Chander Pal Jain vs. Delhi Administration*, 61 (1996) DLT 464, *Santosh Kumari vs. Ordnance Battalion*, 1988 (6) SLR 45, *Sushma Banga vs. Delhi Administration*, 2003 (70) DRJ 220, *Apinder Kaur vs. Delhi Administration* 2001 (59) DRJ 493, *Surendra Singh vs. Manager, Haryana Shakti Sr. Secondary School* 95 (2002) DLT 135, *Promila Dixit vs. Govt. of NCT of Delhi* 2011 (121) DRJ 177, *Amrik Singh vs. Union of India* (2001) 10 SCC 424.

6. Mr. Vinay Sabharwal, learned counsel appearing for the respondent No.3 School, would submit that entire exercise for appointment of the petitioner as PGT (Maths) has been bona fide and

4)

there was no allegation of mala fide or bias against the management in conduct of the said exercise. The Appointing Authority for appointment of every employee of a School, is its Management Committee as has been prescribed in Rule 98 of Delhi School Education Rules, 1973 and not the Directorate of Education. He would state, that the procedure to be adopted by the DPC, have been laid down in various circulars of the DoP&T, which have been adopted and followed by the Directorate of Education. According to him, O.M. dated March 10, 1989 prescribes that the DPC should assess the suitability of the officers for promotion on the basis of their service record and with particular reference to the ACRs for the five preceding years.

7. Mr. Sabharwal also refers to different DoP&T circulars, which are in the nature of guidelines to be followed by the DPC. He would state that only in the eventuality, that a candidate is found fit for promotion with a benchmark of 'Good' after making assessment in terms of Confidential Report's preceding five years, a candidate can be said to have been promoted. He would compare the ACRs grading of the petitioner and the respondent No.2 to contend that the petitioner is much superior in merit compared to respondent No.2 and the decision of the Management Committee to recommend the name of the petitioner cannot be faulted. He also states, that the grading 'Average' in the ACR of the

42

respondent No.2 being not adverse, and it was only on April 13, 2010 direction was issued that even below benchmark ACR will have to be communicated to the concerned employee and the DPC in the present case, having been held much before the said notification, the same is not applicable to the case in hand. He would also state, by virtue of Rule 98(4) of the Delhi School Education Rules, the promotion of the petitioner deemed to have been granted by the Directorate of Education on the failure of the Director to approve the appointment made by the Management Committee within 15 days. According to him, it is pursuant thereto that the appointment letter was issued to the petitioner by the respondent No.3 School. The impugned order dated September 8, 2010 is in violation of the statutory Rules and the action of the respondent No.3 School promoting the petitioner cannot be faulted.

8. On the other hand, learned counsel for respondent No.1 Mr. Arjun Mitra, would submit that in view of the order dated March 17, 2010, the respondent No.3 School could not have appointed the petitioner to the post of PGT (Maths), even provisionally. This, according to him, is because the said order clearly restricts the School from making any provisional appointment to the post of PGT (Maths) without the prior approval of the respondent No.1. However, despite the same, the School proceeded to appoint the petitioner to the post of PGT (Maths) even

43

without the requisite approval. He also state, that the respondent No.1 had sought information/clarifications from the School vide letter dated May 11, 2010 and reminder dated May 26, 2010. The information requested was of core importance to the decision on the promotion being whether or not the 'Average' ACRs had been communicated to Sh. Hemraj, respondent No.2. According to him, the law needs no elaboration as below benchmark ACRs could not have been held against the employee if the same were not communicated to him. The deeming fiction is not attracted since the order dated March 17, 2010 of this Court in W.P.(C) No. 694/2009 created a procedure to be followed and the said order has to be seen in the context of the submissions of the parties. According to him, even otherwise, the deeming fiction is not attracted since the appointment letter of the petitioner is dated August 23, 2010 while the decision of the respondent No.1 was within a period of 15 days i.e September 8, 2010 and he would dispute the proposition advanced by learned counsel for the petitioner that the respondent No.1 had no power to direct appointment of respondent No.2 and the same is derived from Rule 98 read with order dated March 17, 2010. He would support the order passed by the respondent No.1 on the merits of the case on the basis of material on record and available with it after calling for clarification from the School and no extraneous material was considered.

Moreover, the speaking order is entirely justified and not being hit by the vice of arbitrariness, illegality or lack of, it should not be interfered with.

9. Mrs. Avnish Ahlawat, learned counsel for respondent No.2 would submit that the School in question is an aided school where 95% grant is given by the Government. For recruitment/appointment which is by promotion or direct recruitment, Rule 96 of the Delhi School Education Rules, 1973 prescribes the procedure. Under Rule 96 (2) (b), the Selection Committee, in case of appointment of a teacher other than Head of the School shall consist of (i) Chairman of the Managing Committee or a Member of the Managing Committee nominated by Chairman; (ii) Head of the School; (iii) in the case of primary school, a female educationist having experience of school education; (iv) in the case of aided school one educationist to be nominated by the Director and one representative of the Director (v) in the case of appointment of the teacher for any class in the middle stage or any class at the higher secondary stage and 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. She would also submit that under Rule 96 (7), where selection is made by the Selection Committee and the same is not acceptable to the Managing Committee of the school, the Managing

45

Committee shall record its reasons for such non-acceptance and refer the matter to the Director for its decision and Director shall decide the same.

10. She would further submit, that after the selection is made by the Selection Committee, the appointment is made by the Managing Committee under Rule 98 but only of the candidates selected by the Departmental Promotion Committee. She would also submit, under Rule 98 (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 approval of the Director will be required only where the Director's nominee was not present in the Selection Committee/DPC or in case there is difference of opinion amongst the members of the Selection Committee. She would also submit, Sub Rule (3) of Rule 98 further provides that particulars of every appointment shall be communicated to the Director within 7 days from the date on which the appointment is made and under sub clause (4) the Director shall be deemed to have approved an appointment made by the Managing Committee of an aided school if, within 15 days from the date on which the particulars of appointment, are communicated to him under Sub Rule (3), he does not intimate to the Managing Committee his disapproval of the appointment.

11. She would also submit, on September 28, 2007 following the

46

procedure prescribed under Rule 96 of the Rules, a DPC was constituted which met on September 28, 2007. The post of PGT (Maths) fell vacant due to retirement of Shri K.K. Nakra on 31st August 2005. As per the seniority list, the DPC found that only one teacher-respondent no.2 herein was eligible for promotion as per recruitment rules. The minutes were signed by Head of School, by subject experts, by DE Nominee and by Education Officer, Zone 28. However, Chairman showed arrogant behaviour and used unpleasant language for Education Officer and DE Nominee, hurting and insulting them and did not sign the minutes for the reason best known to him but, later on he signed those minutes also. And as per the Delhi School Education Act and Rule, the respondent no.2 thus stood selected unanimously by all the members of DPC of September 28, 2007. She would also submit, that inspite of respondent no.2's selection, he was not given appointment to the post of PGT (Maths). She would also submit, the school authorities, however, had submitted the case for approval to Director Education on October 6, 2007 along with DPC minutes which were signed by the Chairman. But the respondent no.1 instead of approving the appointment of respondent no.2 moved in a totally different direction and treated this as a manipulation of record and sought explanation of the Chairman vide show cause notice dated February 12, 2008. She would also submit, from

this, it is clearly evident that though initially the Chairman may have some reservation, but, later on, the minutes which were signed by the four members of the departmental Promotion Committee, were also signed by him. Respondent no.2 should have been promoted as PGT (Maths). It is her submission that the respondent no.2 after making number of representations to the school as well as respondent no.1 then filed W.P. No.694/2009 seeking direction of the Court to direct respondents to act on the recommendation of DPC dated September 28, 2007 and to give him appointment to the post of PGT (Maths). She would also submit, during the pendency of the said writ petition the Director of Education passed an order dated October, 18, 2008 for holding a fresh DPC. Fresh DPC also has to be for the vacancy which became available on August, 31, 2005 and for which only Respondent no.2 was eligible.

12. She would also submit, since the Director of Education had already passed the order dated October 18, 2008 this Court without going into the merit of W.P.(C) No. 694/2009, disposed of the petition vide its order dated 17th March 2010 directing Director of Education to take a decision on the minutes of fresh DPC, which was held on October 29, 2009. Meaning thereby that even if the DPC would have unanimously taken any decision of selecting a candidate, it is Director of

Education who will ultimately have to take final decision as to who should be given the appointment. The Court also directed that till the decision of D.E., no appointment will be made. She would also submit that fresh DPC was held on October 29, 2009, in which along with the respondent No.2 petitioner was also considered. Though, this DPC was for a vacancy of the year 2005 and petitioner was not even eligible to be considered for the same. The Director's nominee, EO Zone 28 and subject expert found respondent No.2 fit for the post of PGT (Maths), but the Vice Principal of the School and the Chairman again gave a separate note making certain allegations against the Director's nominee which were uncalled for. In any case, the DPC considered all the ACRs and found manipulation in the ACR of the respondent No.2, who's good ACR was re-assessed as average. She would also submit that there being a difference of opinion in the DPC minutes, the matter was to be sent to the Directorate of Education on March 31, 2010 though the same has to be sent to DE within two days from the date of the order who was to decide the matter within 15 days from the date of submission of papers by the School. She would also submit that the matter was examined by the District Authorities and the Act Branch of the Directorate with regard to the rules and instructions issued by the Govt. from time to time and lot of correspondence took place between the School and the Directorate

and vide impugned order dated September 8, 2010 held that respondent No.2 Hemraj who was selected by the DPC is to be promoted and that Hemraj should be allowed to join the duties. The Director of Education as a matter of fact did not approve the dissent note of the Chairman and Vice Principal. All the official members of the DPC selected the respondent No.2 which selection was approved. She would also submit that in the meanwhile, the Managing Committee, even though the DPC was held on October 29, 2009 which had not categorically selected the petitioner-Meenu Shokeen, the Manager vide his letter dated August 23, 2010 appointed her as PGT (Maths) with immediate effect which was also in violation of the order passed by the Court on March 17, 2010. This letter was received in the Directorate on 25th August 2010 and Dy. Director of Education (C/ND) vide his letter dated September 8, 2010 informed the Manager of the School that the Director has not approved Ms. Meenu Shokeen's appointment. Rightly so, she was never selected. She would also submit that on September 8, 2010, Director of Education communicated a detailed order on this point also holding that the respondent No.2 Hemraj be promoted to the post of PGT (Maths). She would also submit, Ms. Meenu Shokeen was neither eligible for being considered for promotion to the post of PGT (Maths) nor she was selected by the DPC. In the DPC, Vice Principal and Chairman had

given their dissenting note but, the majority decision was that the respondent No.2 Hemraj is to be promoted as PGT (Maths). There being a difference of opinion, this Court as per Rule 96(7) of Delhi School Education Rules, 1973, directed the Director Education to take a decision and thus the order of Directorate of Education dated 8th September 2010 is perfectly legal and valid.

13. Having heard the learned counsel for the parties, first dealing with the submission made by Mrs. Avnish Ahlawat, that on the basis of the DPC held on September 28, 2007, the respondent No.2 could have been promoted is concerned, as noted, the respondent No.2 was only eligible for consideration for promotion as per the Recruitment Rules. Because, there was no clear conclusion of the DPC primarily for the reason, the DPC was not able to decide that with two 'Average' and three 'Good' ACRs, the respondent can be promoted, it decided to refer the matter to the Act Branch. The Act Branch, in its communication dated October 18, 2008, directed to conduct fresh DPC for promotion of the eligible candidates. The Act Branch, has not said that the case of the respondent No.2 only be considered. It appears that the communication dated October 18, 2008 was challenged by the respondent No.2 before this Court in W.P.(C) No.694/2009. In its interim order, this Court directed a fresh DPC be held but the selection may not be finalized till the next

51

date. In any case, in its final order, this Court had not disturbed the communication dated October 18, 2008 nor has concluded anything on the DPC of September 28, 2007. If the respondent No.2 had any grievance on that ground i.e by a fresh DPC, the zone of consideration is sought to be enlarged, he should have sought such a direction. In any case, the petitioner has accepted the final outcome of the W.P.(C) No.694/2009 and the plea of Mrs. Ahlawat that the respondent No.2 should have been promoted on the basis of the DPC held on September 28, 2007 need to be rejected in view of what I have concluded and moreover the challenge in this writ petition is by the petitioner and respondent No.3 School to the communication of the respondent No.1 dated September 8, 2010. The petitioner has not approached this Court seeking such a relief.

14. Insofar as the submissions made by Mr. Sidharth Yadav are concerned, the submission of Mr. Yadav that the relevant ACRs of the years 2003-2004 to 2007-2008 should have been considered, relying upon the O.M. dated September 17, 1998, which according to him stipulate the cut off date as January 1 is concerned, suffice to state, that there is no dispute on this aspect between the respondent No.3 School nor, the respondent No.1 Directorate. I note, from the DPC proceedings held on October 29, 2009, the DPC has taken into consideration the

52

ACRs for the period between 2004-2005 to 2008-2009. I also note, that neither the two Members representing the School nor the three Members representing the Education Department/Subject Expert in their notes annexed as annexure A and B respectively raised the issue with regard to the years for which the ACRs need to be considered. The Committee had considered the ACRs of the last 5 years immediately preceding the meeting on October 29, 2009, and the last one being of the year 2008-2009. If that be so, the first ACR of the five years would necessarily be of the year 2004-2005. Even otherwise, in the impugned order, the respondent No.1 had commented that "in 2003-2004 despite giving a result of about 80% he was graded 'Average', which possibly could mean he could have been graded better. Even on that count, the final outcome, would have been the same. Hence, the submission of Mr. Yadav that the relevant period for which the ACRs need to be considered is 2003-2004 to 2007-2008 need to be rejected as it would not have made any difference.

15. The submission of Mr. Yadav, based on sub-Rule 4 of Rule 98 of the Education Rules, the Director shall be deemed to have approved the appointment made by the Management Committee of an aided School, if within 15 days from the date on which the particulars of the appointment were communicated to him under sub-Rule 3, if he did not intimate to

53

the Management Committee his disapproval of appointment is concerned, I reproduce, for convenience Rule 98 as under:-

"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 the 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 acknowledgment due or by messenger who will obtain an acknowledgment of the receipt thereof), within seven days from the date on which the 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, 2 [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 adhoc basis

54

for a period not exceeding three months and the salary and allowances of the person so continued on an adhoc basis shall qualify for the computation of the aid to be given to such school."

16. The scheme of Rule 98 envisages that (i) appointment of every employee of a School shall be made by its Management Committee; (ii) every appointment made by the Management Committee of an aided School shall initially be provisional and shall require the approval of the Director; (iii) the proviso clause clarifies 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 a difference of opinion among the Members of the Selection Committee; (iv) Rule 98(3) prescribes, the particulars of every appointment made by the Management Committee of an aided School shall be communicated by such Committee to the Director within 7 days from the date on which appointment is made; (v) the Director shall be deemed to have approved the appointment made by the Management Committee of an aided School if within 15 days such an approval is not communicated. There is no dispute that there was a difference of opinion amongst the Members of the Selection Committee and it required the approval of the Director. There is no dispute, the decision was taken by the respondent No.1 in terms of the direction of this Court dated March 17, 2010, which

55

reads as under:-

"Mr. Vinay Sabharwal counsel for respondent no.2 submits that the respondent school shall take a decision so as to appoint a candidate on the post of PGT (Maths) strictly in terms of the Delhi School Education Rules. Counsel also submits that the Managing Committee of the school has taken a decision to provisionally appoint Ms. Meenu Shokeen on the said post of PGT (Maths).

On the other hand, counsel for the petitioner submits that even in the fresh DPC the case of the petitioner was recommended for promotion to the said post of PGT (Maths) by three members but two members i.e. Principal and Chairman of the Managing Committee gave their dissent. The contention of the counsel for the petitioner is that in the case of such a dissent or difference of opinion no appointment can be made by the Managing Committee even provisionally as under the proviso of Rule 98 of Delhi School Education Rules the matter necessarily has to go to the Director of Education for his opinion. Mr. Rajiv Nanda counsel for respondent no.1/Director of Education has also taken the said stand as taken by the counsel for the petitioner. Without expressing any opinion on the merits of the contentions raised by the counsel for the parties, I deem it fit that let the recommendations of the fresh DPC along with the decision if any, taken by the Managing committee be placed by the school before the Director of Education within a period of two days from the date of this order and the decision thereon shall be taken by the respondent Director of Education strictly in terms of Delhi School Education Rules 1973 and the guidelines of the Govt. if any, governing the issue. The decision shall be taken by the Director of Education within a period of 15 days from the date of submission of papers by the respondent school. Before the said decision is taken by the Director of Education, no provisional appointment be made by the school on the said post of PGT (Maths). In view of the above directions, the present petition stands disposed of."

56

17. The respondent No.3 School had sent complete papers on March 31, 2010. It appears that certain clarifications were sought from the School vide letter dated May 11, 2010 and reminder dated May 26, 2010 by the respondent No.1 Directorate. It is pursuant thereto, the impugned order was communicated by the Directorate respondent No.1 to the School. To consider whether the deeming provision of approval would be applicable in the facts of this case, it need to be considered whether this Court vide its order dated March 17, 2010 has evolved a special procedure, which is not akin to the procedure laid down in Rule 98. No doubt, this Court, in its order dated March 17, 2010 had directed the School to communicate the recommendation of the DPC along with the decision, if any taken by the Management Committee within two days from the date of the order and the Director was to take a decision within 15 days thereafter strictly in terms of the Delhi School Education Rules, 1973, at the same time, the Court had also directed, no provisional appointment be made by the School on the said post of PGT (Maths). This direction is a departure from Rule 98 of the Education Rules, inasmuch as the Rule 98 of the Education Rules contemplate even if there is a difference of opinion amongst the Members of the Selection Committee, the Management Committee could have made an

appointment subject to the approval of the Director of Education. Further, when there is a direction of the Court, not to make any appointment to the post of PGT (Maths) till the Director takes a decision, the mandate of the order is, the appointment to the said post shall be as per the decision of the Director respondent No.1. In other words, the decision of the Director respondent No.1, shall prevail. The issuance of the appointment letter dated August 23, 2010, without the leave of the Court, also demonstrate the keenness of the School to accommodate the petitioner instead of respondent No.2, who despite the only Teacher in 2007, was not promoted; even in 2009, despite majority view in his favour, he was not promoted. Surely, the delay on the part of the Director respondent No.1, cannot be to the prejudice of the respondent No.2, in whose favour the Director had ultimately passed the impugned order.

18. The plea of Mr. Yadav, that the deeming provision would come into effect, would not be sustainable at least in the facts of this case when there was a difference of opinion amongst the Members of the Selection Committee and order of this Court dated March 17, 2010 which is a departure from Rule 98. These facts, would distinguish the judgments in *Surendra Singh (supra)* and *Promila Dixit (supra)*, relied upon by Mr.

Yadav, wherein this Court has held that under Rule 98(4) of the Rules, the approval of the appointment by the Director can be deemed to have been granted, if not objected to within 15 days as the said provision is a salutary provision intended to obviate the impasse of a person commencing his employment and later being told that his appointment was irregular. If that being the intent of the Rule, the School should have waited for the decision of the Director or sought his permission. It could not have itself appointed the petitioner on the pretext of Rule 98(4). As no appointment was to be made, Rule 98(4) has no applicability.

19. Insofar as the submission of Mr. Yadav that the respondent No.1 could not have in the impugned order directed the promotion of the respondent No.2 by relying upon the judgment of this Court in *Chander Pal Jain and another(supra)*, is concerned there is no dispute that in the case in hand, there was a difference of opinion amongst the Members of the Selection Committee. Both sides have given their notes/views by way of annexure A and B. The views were also sent to the Director of Education pursuant to the orders of this Court on March 17, 2010. It is not a case where the Selection Committee was unanimous and had sent the name of the recommended person for approval of the Director. No

doubt, in such a situation, the Director would have given his approval or refusal thereof. But in a case of this nature, where there was a difference of opinion amongst the Members of the Selection Committee, the Director would have to agree with one view. The Director, in the impugned order, noting the ACRs of the petitioner and the respondent No.2 and commenting on the low grading given to the respondent No.2, despite good results during that period, had agreed with the views given by three members of the Committee for promotion of respondent No.2 on certain additional grounds as spelt out in para 10 of the impugned order and directed promotion of the respondent No.2. In *Chander Pal Jain (supra)*, the Court was primarily concerned with a case wherein the petitioner had sought direction to grant him selection grade by quashing the order dated March 31, 1975 and August 2, 1975 and order dated July 25, 1974 awarding selection grade to respondent No.5. He sought a further direction to promote him to the post of PGT (Maths) by enforcing the order contained in letter dated February 17, 1975 by cancelling the order dated March 31, 1975. The petitioner was initially appointed as a Language Teacher on October 10, 1962 in the D.A.V. Higher Secondary School, Gandhi Nagar, New Delhi. He was confirmed on the said post. The said School was bifurcated in two Schools; one D.A.V. Higher Senior Secondary School No.1 and D.A.V. Higher Secondary School

No.2. Upon bifurcation of the School there were five sanctioned post of Language Teachers and in fact five Language Teachers were working in the School. After bifurcation three Language Teachers were posted in D.A.V. Higher Senior Secondary School No.1 and two Language Teachers were posted in D.A.V. Higher Secondary School No.2. On bifurcation, the petitioner was not ready to join D.A.V. Higher Secondary School No.2 as a Language Teacher and wanted to get himself posted in D.A.V. Higher Senior Secondary School No.1 in view of personal interest. The Management agreed to retain the petitioner in School No.1 as TGT Teacher on the request of the petitioner. One Mr. Ved Prakash Singhal was transferred to D.A.V. Higher Secondary School No.2. Since the petitioner had requested to be retained in D.A.V. Higher Senior Secondary School No.1 as TGT, one Prem Singh Kasana, who was an Assistant Teacher till that time, was promoted to the post of Language Teacher in D.A.V. Higher Secondary School No.2 against the vacancy created on transfer of the petitioner and on subsequent adjustment against the post of TGT. Sh. Prem Singh Kasana the respondent No.5 was subsequently promoted to selection grade on May 25, 1974 with effect from September 5, 1971. The petitioner however was promoted to the post of PGT (Hindi) by an order of the Education Officer dated February 17, 1975. Subsequently, through an another

b)

order of Education Officer on March 17, 1975, the order promoting the petitioner to the post of PGT was kept in abeyance. Primarily being aggrieved by the aforesaid orders giving selection grade to the respondent No.5 Mr. Kasana and keeping in abeyance his order of promotion to PGT, the petition was filed. This Court in para 10 has held as under:-

"10. In order to resolve the issues raised in this writ petition, it would be appropriate to examine the legality and or validity of the order of promotion issued by the Education Officer on 17.2.1975 promoting the petitioner to the post of P.G.T. (Hindi), inasmuch as, the petitioner has relied on this order of promotion for his challenge to the subsequent action on the part of the respondents keeping the aforesaid order in abeyance. My attention has been drawn to the provisions of Rule 98 according to which, every appointment made by the Managing Committee of an aided School shall initially be provisional and shall require the approval of the Director. A careful reading of the aforesaid Rule 98 makes it explicit that all appointments of an aided School have to be made by the Managing Committee, but the same requires an approval, which is to be obtained from the Director. In the instant case, the order of promotion in respect of the petitioner was issued by the Education Officer which action in the light of the provisions of Rule 98 appears to be illegal and without jurisdiction. The Director can only give an approval to a proposal submitted by the Managing Committee in respect of an intending promotion, but no such promotion in respect of a Teacher of an aided School could be passed by the Director or any Officer subordinate to him of his own. The aforesaid finding has been arrived at by me on a careful consideration of the aforesaid provision of Rule 98 of the Rules. In this view of the matter, the order dated 17.2.1975 is illegal and void and has no force of law at all."

62

20. From the facts and conclusion arrived at by this Court, which have been noted above, it is clear that this Court had concluded rightly that in terms of Rule 98, every appointment made by the Management Committee shall be provisional subject to the approval of the Director. In other words, all appointments of an aided School are made by the Management Committee but the same only requires approval of the Director. It is in that background, this Court had said that no promotion order in respect of a Teacher of an aided School, could have been passed by the Director or any Officer subordinate to him of his own (Emphasis supplied). It is not such a case here. There was a difference of opinion amongst the Members of the Selection Committee, which was sent to the Director of Education respondent No.1 for a decision. Surely, while taking a decision in the facts, the respondent No.1 was within its right to approve/agree with the majority view of the Members of the Selection Committee, and direct the promotion of the respondent for certain justifiable reasons. The judgment as relied upon by Mr. Yadav is distinguishable. This submission also need to be rejected.

21. Insofar as the submission of Mr. Vinay Sabharwal that on a comparison of the ACR's of the petitioner and the respondent No.2, the petitioner being more meritorious, was, rightly appointed and the

63

'Average' ACR's, not being adverse, were not required to be communicated till April 13, 2010, when notification was issued by DoP&T, which was after the Selection Committee had met and the said instructions being prospective, is concerned, there is no dispute that the Supreme Court in the case of *Dev Dutt vs. Union of India (2008) 5 SCC* had conclusively held that any gradings which are below benchmark need to be communicated to the Officer concerned to enable him to make a representation. That be so, the Selection Committee, having met after the judgment of the Supreme Court in *Dev Dutt (supra)* and the judgment being binding on the authorities under Article 141 of the Constitution of India was required to be followed and the respondent No.3 School was required to communicate the 'Average' ACR's to the respondent No.2. Having not done, the said ACRs could not have been considered to the prejudice of the respondent No.2. On communication of the same, the respondent No.2 could have represented against the same to the authorities for upgradation. Be that as it may, the respondent No.1 had rightly noted in para 10 as under:-

"10. And Whereas, it is a settled law that DPC is the final authority to determine the fitness of candidates for promotion. DPC does not merely follow the gradings given by the School. It is rather, supposed to take an overall view of the performance of candidates to ascertain their eligibility for promotion. The dissenting

64

view of the Chairman and Vice-Principal only deals with the grading part of the ACRs based on boards results. No act or misconduct on the part of Sh. Hem Raj which calls for a lower ACR grading has been brought on record by the School. He was also not communicated any adverse remarks, resulting in 'Average' ACR gradings."

22. The above would make it clear that the DPC is within its right to not merely follow the gradings given in the ACRs, it can suppose to take an overall view of the performance of the candidates to ascertain his/her eligibility for promotion.

23. While approving/directing the promotion of the respondent No.2, the respondent No.1 has in paras 7 & 8 of the impugned order dated September 8, 2010 has noted as under:-

"7. At the time of the first DPC in 2007, Sh. Hem Raj had three 'Good' graded ACRs and two 'Average' graded ACRs during the relevant period. In the year 2002-2003, he was assessed as 'Good'. In 2003-2004 despite giving a result of about 80%, he was graded as 'Average'. In year 2004-2005 his result was 83.3% and 56.14% and he was graded as 'Good'. In the year 2005-2006, his result was 47% and 96.15% in X and XII classes respectively and was graded as 'Average'. In the year 2006-2007, his result was 80.7% in class X and 83.3% in class XII and he was graded as 'Good'. It is also pertinent to mention here that from the year 2006-2007, though he was a TGT, he was assigned to teach the senior secondary classes and he achieved good results in senior secondary classes. A perusal of record shows that there is discrepancy between the result and grading given to him. Though the result is not the only criteria, but certainly, it is one of the most important criterion for teachers. The bench mark for promotion from TGT to PGT is 'GOOD'.

8. After comparing the above results with the corresponding ACR grading in the respective years, it

65

appears that Sh. Hem Raj has not been meted out fair treatment in the sense that he was given below bench mark gradings even when his results were reasonably good. Thus he was denied the promotion, for which he was eligible in 2007 itself."

24. The above reveals, that the decision of the Director in favour of the respondent No.2 is primarily for the reason that he is senior to the petitioner and the gradings in his ACRs, does not reflect his overall performance in right perspective. If that be so, the authority having taken a decision which is plausible, surely this Court would not like to take a different view and justify the action of the School in promoting the petitioner.

25. Insofar as other judgments relied upon by Mr. Yadav are concerned, in *Sushma Banga (supra)*, this Court had held that when there is no difference of opinion amongst the Members of the Selection Committee for promotion to PGT, in such a situation, the approval of the Director in terms of Rule 98 was not required. Similarly, in *Santosh Kumari Thapa's* case, the Director of Education, after almost 13 months held as the plaintiff did not possess the requisite qualification, relying upon Rule 98 and noting that the Director had not intimated his disapproval to the appointment, held, the termination of the services of the plaintiff after expiry of her period of probation of one year was not in order. In view of my conclusion above, on Rule 98(4), this judgment would not be of

any help to the petitioner. Further the judgment of this Court in *Apinder Kaur (supra)*, is also not applicable. Further in *Amrik Singh (supra)*, the Supreme Court had held that even non promotion on the basis of single adverse remark, is not subject to judicial review. There is no dispute on the said proposition. It is for the authorities concerned, to take an overall view and give such a direction as deem fit. In this case, the Director is an Authority competent under the Rules, who has taken a decision to promote respondent No.2 and the said decision, being a plausible view, as held in paragraph 24 of the judgment, the judgment has no applicability to the facts of this case.

26. One of the submissions of Mr. Yadav, that the equity demands that the petitioner working as PGT (Maths), on her promotion for the last five years, should not be disturbed, suffice to state, that the continuance of the petitioner is on the basis of the protection granted by this Court on December 6, 2010 in W.P.(C) No.8138/2010. Hence, this submission of Mr. Yadav is without any merit.

27. Noting the facts, this Court is of the view that the challenge in these petitions to the order dated September 8, 2010 is without any merit. The same is dismissed.

67

CM Nos. 14590/2010, 512/2011 & 11450/2011 in W.P.(C)
7360/2010

CM No. 20972/2010 in W.P.(C) 8138/2010

28. In view of the order passed in the writ petition, the present applications are dismissed as infructuous.


(V.KAMESWAR RAO)
JUDGE

DECEMBER 22, 2015

ak