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

% *Date of Decision : September 08, 2015*

+ **LPA 468/2010**

STAFF OF JANTA SECONDARY SCHOOL Appellant

Represented by: Mr.V.K.Garg, Sr.Advocate instructed
by Dr.Ashwani Bhardwaj and
Ms.Noopur Dubey, Advocate

versus

DIRECTOR OF EDUCATION Respondent

Represented by: Mr.Satyakam, Advocate with
Mr.R.K.Gambhir, DEO, Zone X

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J. (Oral)

1. 20 employees of Janta Senior Secondary School Ghoga Delhi, which was a Government aided school, on being declared surplus were, albeit with the use of the word '*temporarily*', directed to work and discharge duties at a Government school and after three years were served with an order directing that they would be permanently absorbed in another Government aided school. Marching under the banner of the appellant No.1 these 20 employees filed a writ petition in which they pleaded in para 3.12 that when they were temporarily adjusted in a Government school there existed more than 5000 vacancies of teachers and other staff in Government schools, which averments have been admitted in the counter affidavit filed.

2. Interpreting Rule 47 of the Delhi School Education Rules, 1973 as

conferring a discretion on the administrator, the learned Single Judge has held that employees of a Government aided school do not have any right to seek absorption in a Government school and that it lies within the discretion of the administration to absorb them either in a Government school or a Government aided school.

3. The issue of absorption of the employees of the Janta Senior Secondary School, which was an aided school, as per the second order passed by the Director of Education after 3 years of their temporary attachment with a Government school impacts the seniority of the employees.

4. The two provisos and sub-Rule 1 of Rule 47 of the Delhi School Education Rules, 1973 reads as under:-

“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, may be absorbed as far as practicable, in such Government school or aided school as the Administrator may specify:

Provided that the absorption in Government service of any employee who has become surplus shall be subject to the availability of a vacancy and shall be subject further to the condition that the concerned employee possesses the requisite

qualifications for the post and has not been retrenched by the management of the aided school or any ground other than the ground of closure of the school or any class or classes of the school, or withdrawal of recognition or aid from the school:

Provided further that where any such surplus employee is absorbed in a Government school, he shall be treated as junior to all the persons of the same category employed in the Government Schools on the date immediately preceding the date on which he is so absorbed, and where such surplus employee is absorbed in an aided school, he shall rank as junior to all the persons of the same category employed in that school on the date immediately preceding the date on which he is so absorbed.”

and we find that not only the learned Single Judge but even a Division Bench of this Court has interpreted the rule as conferring a discretion in the administrator. The decision of the Division Bench is dated February 29, 2008 in W.P.(C) No.7579/2007 Chander Prabha Vs. Lt.Gov.Delhi & Ors.

5. The facts of Chander Prabha's case were that Chander Prabha was declared surplus as a TGT (General) in Sant Nirankari Senior Secondary School which was a Government aided school. She was sought to be adjusted in another school and questioned said adjustment pleading that she would lose her seniority because of the second proviso to sub-Rule 1 of Rule 47 of the Delhi School Education Rules, 1973. The Division Bench highlighted the expression ‘*may be absorbed*’ in sub-Rule 1 of Rule 47 to highlight that the absorption on being declared surplus in a Government aided school was discretionary. The Division Bench highlighted that the service law principle was that if a post was abolished on being declared surplus the incumbent would lose the job. The Division Bench held that Rule 47 was a benevolent provision and held that the rule was legal and

valid and thus Chander Prabha being dovetailed at the bottom of the seniority list in the school where she was absorbed was upheld.

6. Observations made by the Division Bench regarding the expression '*may be absorbed*' as conferring a discretion on the administrator have to be read in the textual setting of the said case.

7. A perusal of sub-Rule 1 of Rule 47 of the Delhi School Education Rules, 1973 would reveal that the use of the word '*may*' is in the context of a statutory duty unhedged by any condition upon the administrator not being imposed, and to make the legislative intent clear that the right of absorption of a surplus employee of a Government aided school to be absorbed in a Government school or a Government aided school the legislature had in mind availability of vacancy in another Government aided school or a Government school. It is in that context that the Division Bench has held that the power of the administrator is discretionary.

8. It is trite that where a discretion is vested for being exercised when facts exist warranting exercise of the discretion, non-exercise of the discretion would amount to a non-exercise of power and a mandamus would certainly lie to direct exercise of the power by the executive.

9. The respondent not having denied that when the 20 employees in question were declared surplus adequate vacancies existed in Government schools against which they could be absorbed, we see no escape from the conclusion that since facts warranting exercise of discretion by the administrator were existing, the discretion ought to have been exercised and the employees permanently absorbed in the Government school to which they were sent. After all, it cannot be ignored that with the right of being absorbed if a vacancy exists, is the right for seniority to be reckoned in the

school where absorption takes place by placing the employee at the bottom of the seniority list, and if an employee is adjusted temporarily in some school and then later on permanently absorbed in another, the employee loses on seniority because in the school where the employee is absorbed the placement would be at the bottom of the seniority list.

10. We note that the appellants had a stay before the learned Single Judge and as a result the employees continued to work in a Government school and had the benefit of the stay even in the appeal. We further note that of the 20 employees, 5 have superannuated, 1 has resigned and 3 have died.

11. We accordingly allow the appeal and set aside the impugned decision dated March 08, 2010. Writ petition filed by the appellant is disposed of directing that the 20 employees who marched under the banner of the appellant would be treated as permanently absorbed in the Government school where they were initially temporarily adjusted.

12. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

SEPTEMBER 08, 2015
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