

\$~5.

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **WRIT PETITION (CIVIL) NO. 2448/2016**

% Date of decision: 5th April, 2016

BHANWAR PAL Petitioner

Through Mr. Kartar Singh, Advocate.

versus

THE CHIEF SECRETARY & ANR. Respondents
Through Mr. Shadan Farasat, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE NAJMI WAZIRI

SANJIV KHANNA, J. (ORAL):

The petitioner-Bhanwar Pal, by way of this writ petition, partly impugns the order dated 27th January, 2014 passed in OA No. 2979/2012 and the order dated 18th January, 2016 in RA No. 78/2014 passed by the Central Administrative Tribunal, Principal Bench, New Delhi (Tribunal, for short). The operative portion of the impugned order dated 27th January, 2014, reads:-

“13. Therefore, since the respondents have acted bona fide during this whole period, following the judgment of the Hon’ble Delhi High Court in Govt. of NCT of Delhi & Ors. vs. Mithilesh Swami (supra), and the order of the Hon’ble High Court of Delhi in the matter of GNCTD vs. Ajit Kumar (supra), cited by the respondents, we allow the present third OA of the applicant in part, ordering that while for the period from 01.06.2010 to 08.12.2010, one day prior to the date his first OA No.1834/2010 had been allowed, the

applicant will be entitled only to the normal pension, but from 09.12.2010 to 16.02.2012, the date prior to the passing of the order of his re-engagement dated 17.02.2012, he would be eligible for 50% back wages, even though he was not re-engaged and did not do any teaching work in this period, as per the principle laid down by the Hon'ble Delhi High Court in Govt. of NCT of Delhi & Ors. vs. Mithilesh Swami (supra) in Para 15(iii) (c) (as reproduced above).”

2. The contention of the petitioner is that he should be granted full arrears of salary for the period 1st June, 2010 till 16th February, 2012, i.e., till he was re-engaged in service. He submits that other similarly situated persons have been paid full back wages from the date of retirement till they were re-appointed as Vice-Principals.

3. This writ petition arises from the second round of litigation. The petitioner along with three others, namely, T.P.S. Malik, Naresh Pal Dhaka and Rajesh Kumar, had filed OA No. 1834/2010 praying that they were entitled to continue as Principal/Vice-Principal and would retire on attaining the age of 62 years as per the Cabinet decision notified on 29th January, 2007. Allowing the said OA vide order dated 9th December, 2010, the Tribunal had passed the following directions:-

“2. In the circumstances, mentioned above, we issue same directions in this case as were issued by this Tribunal in OA No. 3702/2009 decided on 28.04.2009 in the matter of ***Giri Raj Sharma and Others versus Municipal Corporation of Delhi and Others***, which has been affirmed by the Division Bench of Hon'ble Delhi High Court in WP(C) No. 5808/2010 decided on 23.11.2010.”

Thus, OA No. 1834/2010 was allowed after referring to the decision in Writ Petition (C) No. 5808/2010 titled ***MCD versus Giri Raj Sharma and Others*** decided by the High Court on 23rd November, 2010. This decision in turn relies on an earlier decision dated 17th July, 2009 passed in LPA No. 415/2009 titled ***Sushma Nayar versus Managing Committee, Delhi Public School, Mathura Road and Others***. These two decisions hold that the Cabinet decision dated 29th January, 2007 applicable to teachers, etc. would encompass within its fold Vice-Principal and Principal as well. The Tribunal in their order dated 9th December, 2010 had referred to a contrary view of the tribunal in TA No. 574/2009 titled ***Sushma Bhatia versus New Delhi Municipal Council and Others***. This decision was overturned by a larger Bench of the Tribunal.

4. Contesting and challenging the order dated 9th December, 2010 passed in the OA No. 1834/2010, the respondents had filed Writ Petition (C) No. 2402/2011 titled ***Government of NCT of Delhi and Others versus T.P.S. Malik and Others***. In the said writ petition, vide order dated 30th May, 2011, interim stay was granted in favour of the respondents. However, the said writ petition was dismissed vide order dated 14th November, 2011 and the interim order was vacated. The aforesaid order reads as under:-

“ In view of our orders passed in WP (C) No.

4703/2011 titled Dharam Singh Vs. The Chief Secretary & Anr. decided on 8.7.2011 and RP No. 410/2011 in WP (C) No. 4703/2011 decided today, this writ petition challenging the impugned order of the Central Administrative Tribunal dated 9.12.2010 is dismissed leaving the parties to bear their own costs.

In view of interim order dated 30.05.2011, respondent No. 1 will get the benefit of the extended period of service as per the circular.”

A reading of the last two lines would indicate that the Division Bench, while passing the interim order, had observed that the respondent No. 1 would get the benefit of extended period of service under the circular. This order also refers to the earlier order dated 30th May, 2011, which records that even if superannuation takes place during the pendency of the petition, equities would be worked out at the time of final hearing. Thus, the Court, while granting the interim stay was duly conscious and concerned that the respondents to the said writ petition might suffer adverse monetary consequences as they were not being allowed to work and consequently were being deprived of their salary. It is, in this context, that the aforesaid observations were made in the order dated 14th November, 2011, while dismissing the writ petition filed by the respondents.

5. The learned counsel for the petitioner, in the aforesaid circumstances, submits that the Tribunal in OA No. 2979/2012 was not fair and just in restricting back wages to 50% for the period 9th

December, 2010 to 16th February, 2012 and not granting back wages for the period prior to 9th December, 2010.

6. The Tribunal in the impugned order has referred to the decision of the Delhi High Court in Writ Petition (C) No. 2677/2012 titled ***Government of NCT of Delhi and Others versus Mithilesh Swami***, decided on 8th April, 2013. This was again a case relating to the Cabinet decision dated 4th September, 2006 enhancing the age of superannuation of teachers in schools established by the Government of NCT of Delhi from 60 to 62 years. On the question of back wages, the Division Bench of this High Court had held:-

“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.”

It was clarified that the aforesaid circumstances were illustrative and not exhaustive. Further, the decision to deny back wages was not to be a mechanical exercise at the whims and fancies of the decision maker. Every relevant fact and circumstance, for and against the employer and the employee, had to be taken into consideration. However, where an employee was not at all fault and there were enough judicial verdicts on a matter of interpretation of policy, the persistent act of disobedience of the judicial verdicts by the employer would entitle the employee to full back wages. A judicial verdict denying full back wages would encourage useless litigation for the reason that if a dispute pertaining to a policy, which applied in *rem* stands adjudicated by a judicial fora and upheld by the Superior Courts, the same should be uniformly applied by the employer, especially when the employer was a State or instrumentality of the State. Applying the aforesaid principle to the factual matrix in ***Mithilesh Swami*** (supra), it was directed that full back

wages should be paid to the employee for he was prevented from working in spite of settled dictum. In *Mithilesh Swami* (supra), a specific reference was made to the decision in *Sushma Nayar* (supra), which it was observed, had settled the issue by decision dated 17th July, 2009 in LPA No. 415/2009. In the case of *Mithilesh Swami* (supra), the employee had retired on 30th April, 2011. The retirement date issue had been crystallised by then. The judgment dated 23rd November, 2010 in *Giri Raj Sharma and Others* (supra) reiterated the ratio and had held that the circular was equally applicable to Headmasters. *Sushma Nayar* (supra) was a case relating to Vice-Principals and Principals and it was held that as per definition of the term teacher according to Section 2(w) of the Delhi School Education Act, 1973, includes head of a school.

7. The learned counsel for the respondents has submitted that the petitioner was paid commuted value pension on retirement in the month of June, 2010. The first representation made by the petitioner for seeking re-employment was one day before his retirement on 29th May, 2010. The petitioner had sent a legal notice on 22nd May, 2010. He had filed OA No. 2979/2012 on 1st September, 2012.

8. The petitioner, as noted above, was treated as retired on 31st May, 2010. The decision in the case of *Sushma Nayar* (supra) was pronounced earlier on 17th July, 2009. He had sent legal notice on 22nd May, 2010. He had filed the first OA, along with TPS Malik and Rajesh

Kumar in 2010 itself. This OA was decided in favour of the petitioner and others on 9th December, 2010. Aggrieved, the respondents had filed W.P. (C) No. 2402/2011, ***Government of NCT of Delhi versus T.P. Malik and Others*** before the High Court. The interim orders and final order dismissing the writ petition have been noticed above. The petitioner has relied upon order dated 19th August, 2013 passed by the Deputy Director of Education, District South-West by which T.P.S. Malik was granted and paid back wages from 1st October, 2011 to 20th February, 2012. TPS Malik was re-employed on 21st February, 2012. This was in compliance of order passed by the Delhi High Court dated 22nd May, 2013. Thus, the petitioner though identically situated and also a co-petitioner with T.P.S. Malik has been partly denied back wages.

9. We are informed that the petitioner has been paid approximately Rs.80,700/- as guest teacher during the period August, 2010 to March, 2011. In these circumstances, the exact amount paid by the respondents to the petitioner as guest teacher would be deducted. The commuted value paid to the petitioner will be accounted for, dependent upon the percentage of pension accounted in the computed value of pension.

10. The present writ petition is accordingly allowed and it is directed that the petitioner is entitled to full back wages with effect from 1st June, 2010 till reinstatement on 16th February, 2012. However, the respondents would be entitled to make adjustments as indicated.

11. The aforesaid payment of back wages as directed, along with a calculation chart, will be paid within a period of two months from the date a copy of this order is received by the respondents. In case there is delay in payment beyond two months, the respondents will pay interest @ 12% per annum from 1st September, 2012, the date on which the petitioner had filed OA No. 2979/2012 before the Tribunal. There will be no order as to costs.

(SANJIV KHANNA)
JUDGE

(NAJMI WAZIRI)
JUDGE

APRIL 05, 2016
VKR

