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

+ **W.P.(C) 7561/2017**

ARCHANA SAINI

..... Petitioner

Through: Mr. L.S. Solanki, Adv.

versus

**THE MANAGING COMMITTEE, AIR FORCE SR. SEC. SCHOOL
& ANR**

..... Respondents

Through: Mr. Gursharan Singh, Adv. for R2
with Mr. Ashok Nagar, LA (DOE)
Zone-26.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER

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29.08.2017

CM. No. 31236/2017 (for exemption)

Exemption allowed subject to all just exceptions.

Application stands disposed of.

W.P.(C) 7561/2017

1. This is a second round of litigation by the petitioner inasmuch as the petitioner had earlier filed a writ petition being W.P.(C) 5228/2010, which was disposed of on February 21, 2017.

2. It is the case of the petitioner she was appointed as Lady Physical Education Teacher on July 18, 1999 on consolidated salary. She continued to work as such till April 30, 2005, when her services were terminated.

This termination became the subject matter of an Appeal before the Delhi School Tribunal, which dismissed the petition. Be that as it may, the writ petition W.P.(C) 5228/2010 was disposed of by this Court in terms of Para 6 of the order which is reproduced as under:

“6. In the present case, in the absence of recruitment of the petitioner having been done by following the due process of the recruitment under Rule 96, of whether ex post facto approval under Rule 98 of the Delhi School Education Rules is required, and especially when it is not even clear as to whether there was a vacancy in the sanctioned post to which petitioner was appointed and therefore in my opinion, this writ petition can be disposed of as per the following directions:-

Petitioner will get the benefit of the ratios of the judgments in the case of Hamdard Public School (supra) and Army Public School (supra) only if selection of the petitioner even as an ad hoc teacher with the respondent no.1/school was by following due process of law being Rule 96 of the Delhi School Education Rules, of a proper Selection Committee being duly constituted, sufficient number of candidates being called through advertisements, petitioner whether was having the necessary qualifications for being appointed to the post of Physical Education Teacher, etc etc. The Director of Education, and who would be the relevant authority to examine the aspects as mentioned in this para, should examine these aspects after hearing the petitioner as also the respondent no.1/school, and the Director of Education will thereafter pass a speaking order as to whether petitioner can get confirmation as per ratios of the judgments in the cases of Hamdard Public School (supra) and Army Public School (supra) provided of course the due process and requirements of the Delhi School Education Act & Rules, 1973 were followed at the time of recruitment of the petitioner to the post of Physical Education Teacher with the respondent no.1/school. Needful be done by the

Director of Education or his nominees within a period of three months from today.

3. It is pursuant to the said direction impugned order dated June 1, 2017 had been passed. On a reading of Para 6 of order dated February 21, 2017 of this Court, it is clear that the Court had directed the Director of Education inter-alia to consider the following aspects and the judgments of this Court in the case of *Hamdard Public School v. Directorate of Education and Anr. 202 (2013) DLT 111* and *Army Public School and anr. v. Narendra Singh Nain and Anr.* in W.P.(C) 439/2013 decided on August 30, 2013 and to pass a speaking order:-

- i) whether any advertisement was issued
- ii) whether sufficient number of candidates had applied against the advertisement.
- iii) whether necessary qualifications for being appointed to the post of Physical Education Teacher were fulfilled.

The court had also directed a personal hearing be granted to the petitioner.

4. It is conceded by the learned counsel for the petitioner that a personal hearing was granted to the petitioner by the Director of Education. The relevant Paras of the impugned order reads as under:

“WHEREAS Mrs. Archana Saini has submitted photocopies of her testimonials and submitted that she has worked in the School from 28th July, 1999 to 30-04-2005 and thus on this strength she should be regularized in the services of the School and,

WHEREAS Mrs. Kavita Menon. Head of the School / Respondent No.1 representing the School per-contra empathically submitted that the appointment of the Petitioner was made w.e.f 28th July, 1999 on contractual basis for 9-10 months in an academic year at consolidated / fixed salary up to 30-04-2005 as per Indian Air Force Education Code and not as per provisions of Delhi School Education Act and Rules, 1973 and thus the appointment of Petitioner may not be protected or confirmed under Delhi School Education Rules, 1973 and it was categorically stated by the Head of the School that neither any clearance for filling-up the said post was sought from the department, nor was any publicity thereof made in the Newspapers nor was this vacancy sponsored to the Employment Exchange in terms of the provisions of the Employment Exchange (Compulsory Notification of Vacancies) Act, 1959 nor was any interview held by the Staff Selection Committee in terms of the provisions of rule 96 of DSER, 1973 and further submitted that the procedure as deliberated by the Hon’ble High Court of Delhi in its Judgment dated 21-02-2017 was not followed at all at the time of appointment on 28-07-1999 as the appointment was not made in terms of rule 96 of DSER 1973 but was made in accordance with the Air Force Educational Code and,

WHEREAS, I find sufficient force in the submissions made by the Head of School and after having heard the rival contentions of the petitioner and Respondent no.1 / School vis-a-vis the provisions of the Delhi School Education Act & Rules, 1973 it is observed:-

i) That the appointment of the Petitioner namely Mrs. Archana Saini, as Lady Physical Education Teacher was made w.e.f 28-07-1999 as per Indian Air Force Education Code on contractual basis at a consolidated salary and thus such appointments, made under different rules / regulations, may not be protected or covered under Delhi School Education Act and Rules,

1973.

ii) That the appointment of the Petitioner was made without seeking any clearance for filling-up the said post from the Department of Education, nor was any publicity thereof made in the Newspapers, nor was this vacancy sponsored to the Employment Exchange in terms of the provisions of the Employment Exchange (Compulsory Notification of Vacancies) Act, 1959 nor was: any interview held by the Staff Selection Committee in terms of the provisions of Rule 96 of DSER, 1973 and thus by no stretch of imagination this appointment may be construed as appointment under Delhi School Education Rules, 1973 and no Grant-in-aid may be released in respect of such appointment.

iii) That the appointment made by the School on its own accord without any approval of the Director of Education may not be regularized in vie of the judgment of the Apex Court in *Surinder Prasad Tiwari v. U.P. Rajya Krishi Utpadan Mandi Parishad* wherein it was held that:

“In view of the clear and unambiguous constitutional scheme, the courts cannot countenance appointments to public office which have been made against working either as daily-wager, ad hoc employee, probationer, temporary or contractual employee, not appointed following the procedure laid down under Articles 14, 16 and 309 of the Constitution. In our constitutional scheme, there is no room for back door entry in the matter of public employment.

vi. That the provisions of Rule 75 of DSER 1973 clearly provide that **“the approved expenditure for recurring maintenance grant shall comprise salaries of the staff appointed with the approval of the Director of Education”** and since there was no approval for the appointment under reference, no expenditure on account of Grant-in-Aid to such appointment may be approved by the Directorate of Education.

v) That the Constitution Bench of Hon’ble Supreme Court vide its judgment dated 10-04-2006 in the case of *Secretary, State of*

Karnataka and Ors. v. Uma Devi in Civil Appeal 3595-3612 of 1999 has held that: -

“41. moreover, accepting an argument of this nature would mean that the State would be permitted to perpetuate an illegality in the matter of public employment and that would be a negation of the constitutional scheme adopted by us, the people of India. It is therefore not possible to accept the argument that there must be a direction to make permanent all the persons employed on daily wages. When the court is approached for relief by way of a writ, the court has necessarily to ask itself whether the person before it had any legal right to be enforced. Considered in the light of the very clear constitutional scheme, it cannot be said that the employees have been able to establish a legal right to be made permanent even though they have never been appointed in terms of the relevant rules or in adherence of Articles 14 and 16 of the Constitution.

47. in view of our conclusion on the questions referred to, no relief can be granted, that too to an indeterminate number of members of the association. These appointments or engagements were also made in the teeth of directions of the Government not to make such appointments and it is impermissible to recognize such appointments made in the teeth of directions issued by the Government in that regard. We have also held that they are not legally entitled to any such relief. Granting of the relief claimed would mean paying a premium for defiance and insubordination by those concerned who engaged these persons against the interdict in that behalf. Thus, on the whole, the appellants in these appeals are found to be not entitled to any relief. These appeals have, therefore, to be dismissed.

48. C.A. Nos. 3520-24 of 2002 have also to be allowed since the decision of the Zilla Parishads to make permanent the employees cannot be accepted as legal. Nor can the employees be directed to be treated as employees of the Government, in the circumstances. The direction of the High Court is found unsustainable.

In view of the law laid down by the Constitution Bench of the Apex Court, the appointment in question may not be regularized or confirmed by

vi) The submission of the petitioner that she has worked in the School w.e.f 28-7-1999 to 30-04-2005 and she is entitled to be regularized, even though she was well aware of the nature of the employment when she first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have a fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution. It is also made clear that merely because a temporary or ad-hoc employee is continued for long, he / she would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules, i.e., rule 96 of DSER, 1973.

vii) Any appointment thus, made without following the procedure envisaged under Rule 96 of DSER 1973 as observed by the Hon'ble High Court of Delhi in its order dated 21-02-2017, would be *ultravires* and may not be regularized.

In view of the facts and circumstances narrated hereinabove, it is amply clear that the appointment of Mrs. Archana Saini made by the School on its own accord as per the Indian Air Force Education Code may not be regularized or confirmed under Delhi School Education Act and Rules, 1973 and no Grant-in-Aid may be released towards such appointment in contravention of Rule 75 of DSER, 1973. However, the petitioner is free to approach the Governing Body / Society running the Air Force Sr. Sec. School for appropriate remedy, if available, under Indian Air Force Education Code where-under her appointment was sought to be made by the School.

5. From the reading of the above Paras of the impugned order, it is clear that the respondent no.1 while making appointment of the petitioner had not

issued any advertisement; no clearance for filling up of the post was sought from the department; the vacancy against which the petitioner was appointed was not sponsored by the Employment Exchange; the appointment was without following the procedure under Rule 96 of the Delhi School Education Acts and Rules, 1973. The impugned order refers to the judgment of the Supreme Court in the case of *Surinder Prasad Triwari v. U.P. Rajya Krishi Utpadan Mandi Prarishad Civil Appeal No. 3981/2006* wherein the Supreme Court has held that any appointment made without following the procedure would be illegal. A reference is also made to the judgment of the Supreme Court in the case of *Secretary, State of Karnataka v. Uma Devi 2006 4 SCC 1*.

6. On a specific query to the learned counsel for the petitioner whether any advertisement was issued before the petitioner was appointed, he sought time to take instructions. I declined the request as I find the query posed was also one of the aspect, directed to be looked into by the Director and it was expected of the counsel to discuss and take instructions on the same and also on other aspects before filing the petition. It must be inferred no advertisement was issued.

7. Noting the reasoned order passed by the Directorate of Education, the

same cannot be faulted. I do not see any reason to interfere with the same.

The petition is dismissed.

V. KAMESWAR RAO, J

AUGUST 29, 2017*/jg*