

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

Date of Order: May 17, 2018

+ **W.P.(C) 10900/2016 & CM 42705/2016**

MANAGEMENT OF JHABBAN LAL DAV SENIOR
SECONDARY PUBLIC SCHOOLPetitioner

Through: Mr. Anurag Zakhota, Advocate

versus

K.M. YADAV & ANR.Respondents

Through: Mr. Sanjeev Ralli and Ms. Nikita
Khanna, Advocates for respondent
No.1
Ms. Prabhsahay Kaur, Advocate
for respondent No.2

CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR

ORDER
(ORAL)

1. Impugned order of 23rd August, 2016 directs reinstatement of first respondent with consequential benefits. The facts emerging from the impugned order are as under:-

“The facts of the case in brief, as submitted by the Appellant in the appeal, are that he had joined Jhabban lal DAV Sr. Secondary Public School, J-Block, Paschim Vihar, New Delhi-110063 (hereinafter referred to as the Respondent School) in the year 1996 as TGT (Physical Education). In spite of the fact that

the Appellant was having vast experience as TGT (Physical Education), he was denied the promotion by the Respondent School, whereas another employee Ms. Savita Sharma who was junior to the Appellant promoted as PGT (Physical Education) in the year 2000. Selection Committee of the Respondent School arbitrarily overlooked the case of the Appellant and gave the undue favour to Ms. Savita Sharma.”

2. First Respondent herein was served with a Memorandum of 21st November, 2011 containing four articles of charge. It is matter of record that first respondent had sought Sudhir Nair, Ex. Senior Vice President of Tata Consultancy Services (TCS) as Defence Assistant. But the Inquiry Officer had refused to appoint him and had called upon first respondent to give a name of a working or a retired employee of DAV Organisation or belonging to State or Central Government as Defence Assistant.

3. First Respondent claims that he had not appointed any Defence Assistant as he did not have access to any such working or retired employee. Although, first respondent had participated in the departmental inquiry but his grievance is that right of representation by Defence Assistant of his choice has been denied to him and so, inquiry proceedings stand vitiated from its inception.

4. The Delhi School Tribunal in the impugned order has held that non-appointment of Sudhir Nair as Defence Assistant of first respondent was not proper. The Delhi School Tribunal (*hereinafter to be referred to*

as 'the Tribunal') has drawn adverse inference against petitioner on account of non-examination of Mr. C M Khanna and Mr. Sharma as witnesses to prove the charge of mis-behaviour leveled against first respondent. In respect of the second charge of respondent of not holding arrangement classes/sport classes, the finding returned in the impugned order is that to prove this charge, Smt. Savita Sabharwal alone had been examined and since she was party to framing of the charge sheet and articles of charge, therefore, she must be having natural bias against respondent and so, her evidence cannot be relied upon and thus her evidence before the inquiry officer should be ignored.

5. Regarding the third charge of refusal to receive letter of 22nd February, 2011, the Tribunal has found that no witness has been examined to prove this charge. In respect of the fourth charge of respondent abusing Ms. Neena Kapoor, the Tribunal has held that the evidence of this witness - *Ms. Neena Kapoor* is contradictory and has not relied upon it.

6. The challenge to impugned order of 23rd August, 2016 (Annexure A-1) by petitioner's counsel is on the ground that ample opportunity was granted to first respondent to have a Defence Assistant, who is either serving or retired employee of State or Central Government. Reliance is placed upon CCS (CCA) Rules, to submit that in Departmental Inquiry serving or retired employee from Central or State Government is to be appointed as Defence Assistant. Attention of this Court is drawn to Supreme Court's decision in *Crescent Dyes & Chemicals Ltd. Vs. Ram Naresh Tripathi*, (1993) 2 SCC 115; *S L Tagra Vs. New India Assurance*

Co. Ltd. & Ors. 1998 LLR 327 and *Bharat Petroleum Corporation Ltd. Vs. Maharashtra General Kamgar Union and Others*, 1999 SCC (L&S) 361 to submit that an employee does not have an absolute right of representation and this aspect is one of the elements of Principles of Natural Justice but a question of prejudice is required to be considered.

7. It is next submitted that first respondent has not shown as to what prejudice was caused to him by appointment of a serving or retired employee of DAV Organization or the State or Central Government. To submit so, reliance is placed by petitioner's counsel on the decision of a Coordinate Bench of this Court in *Parimal Kumar Dutta Vs. Apeejay School and Ors* 2010 SCC OnLine Del 1609.

8. Reliance is also placed upon the above-said decision by petitioner's counsel to submit that respondent had not raised any objection to the giving of evidence by Ms. Savita Sabharwal during the course of inquiry and so on this ground, it cannot be said that the inquiry stood vitiated as Smt. Savita Sabharwal was a teacher representative and in that capacity, she had participated in the meeting of the Disciplinary Committee and only she could have deposed in respect of the second charge. It is pointed out by petitioner's counsel that the other representative teacher was unwell, therefore, Smt. Savita Sabharwal representative teacher had deposed, but on this ground no prejudice has been caused to first respondent.

9. Regarding non-examination of Mr. C M Khanna and Mr. Sharma, it is submitted by petitioner's counsel that Mr. C M Khanna was the Manager of petitioner-School and Mr. Sharma was not an employee of

this school and so, in the face of the evidence of school Principal, it was not deemed appropriate to get these witnesses examined.

10. It is further submitted by petitioner's counsel that the fourth charge of petitioner abusing Ms. Neena Kapoor, stands conclusively proved from her evidence and the Tribunal has erred in vaguely labelling the deposition of Ms. Neena Kapoor as contradictory. So, it is submitted that there is no basis to conclude that the deposition of Ms. Neena Kapoor is contradictory.

11. Reliance is placed upon decisions in *State of Tamil Nadu Vs. S. Subramaniam*, AIR 1996 SC 1232 and *DTC Vs. Prem Singh*, 2015 V AD (DELHI) 566 to submit that the Tribunal has erred in re-appreciating the evidence on record. Thus, it is submitted by petitioner's counsel that the impugned order deserves to be set aside and the penalty of removal of first respondent from service ought to be restored.

12. On the other hand, learned counsel for first respondent supports the impugned order and submits that first respondent did not have any access to a serving or retired employee of DAV Organization or to a serving or retired Central or State Government employee and so, the option given to first respondent vide letter of 19th December, 2012 was of no consequence. It is next submitted that CCS (CCA) Rules have no application to the inquiry proceedings conducted under the Delhi School Education Act & Rules, 1973. Reliance is placed upon decision in *J K Aggarwal Vs. Haryana Seeds Development Corporation Ltd. And Others*, (1991) 2 SCC 283 to submit that in the matter of exercise of the discretion, one of the relevant factors is whether there is likelihood of the

combat being unequal entailing a miscarriage or failure of justice and a denial of a real and reasonable opportunity for defence by reasons of the appellant being pitted against a presenting officer who is trained in law.

13. It is pointed out by counsel for first respondent that the presenting officer was a retired Deputy Secretary (Inquiries), Department of Telecom and so, denial of Defence Assistant of first respondent's choice has certainly caused prejudice to him.

14. It is further submitted that the Tribunal has rightly ignored the evidence of Smt. Savita Sabharwal as she has a natural bias against first respondent because of her participation in the meeting of Disciplinary Committee and of her being party to the framing of charges against first respondent. It is next submitted that the deposition of Mr. C M Khanna and Mr. Sharma was essential to prove the first charge and in the absence of their evidence, the Tribunal has rightly drawn adverse inference against petitioner.

15. Learned counsel for first respondent submits that the evidence of Ms. Neena Kapoor stands contradicted by the evidence of Mr. Sudhir Nair who was present at the time of the alleged incident. It is pointed out by first respondent's counsel that as per the deposition of Mr. Sudhir Nair, there was no table in the room for playing table tennis and so, the version of Ms. Neena Kapoor becomes unacceptable on the face of it. It is pointed out from the letter of 10th August, 2011 of the School Principal that there was no table for playing table tennis as it was lying folded in the said room. Reliance is placed upon Supreme Court's decision in *B C Chaturvedi Vs. Union of India*, AIR 1996 SC 484 to submit that the power

of judicial review does not extend to appreciation of the evidence and to take a different view. Thus, dismissal of writ petition is sought by counsel for the first respondent.

16. Upon hearing and on perusal of impugned order, the material on record and the decisions cited, I find that this Court in exercise of jurisdiction under Articles 226/227 of *the Constitution of India* cannot venture into re-appreciation of evidence or interfere with the conclusion of the inquiry report, unless shown to be contrary to law. The reliability or adequacy of evidence is not required to be tested in exercise of judicial review. If the findings returned by the Inquiry Officer are based on some legal evidence, then such findings are not required to be interfered with, to correct an error of fact, unless it shocks the conscience of the Court. It has been so reiterated by Supreme Court in case of *Union of India and Others v. P. Gunasekaran*, (2015) 2 SCC 610.

17. In light of afore-referred legal position, I have tested the impugned order and thereupon, I find that first respondent had no absolute right to have Defence Assistant of his choice. The Inquiry Officer vide letter of 19th December, 2015 had given an option to first respondent to have a Defence Assistant, who is serving/retired official of DAV Organisation or Central/State Government. In response to aforesaid Communication, first respondent had insisted upon his being represented in the inquiry by Mr. Sudhir Nair, who is Ex-Senior Vice President of TCS. Since the Presenting Officer was a retired Deputy Secretary (Inquiries) from Department of Telecommunication, therefore, the Inquiry Officer ought to have permitted first respondent to be represented by Ex-Senior Vice

President of TCS. Pertinently, there is no reference to any CCS (CCA) Rules in the order vide which Inquiry Officer has refused to appoint Defence Assistant of the choice of first respondent.

18. In the considered opinion of this Court, there was an uneven contest, which has led to infliction of '*penalty of removal from service*' upon first respondent. There is a blatant violation of principles of natural justice, which has resulted in returning of finding of guilt against first respondent. The prejudice caused to first respondent is writ large on the face of it.

19. So far as findings in the impugned order on the charges framed is concerned, I find it to be futile to test the impugned order on the charges framed as first respondent was deprived of effective representation, which vitiates the inquiry proceedings. Impugned order is sustained on the sole ground that denial of a Defence Assistant to first respondent was wholly improper. In the facts and circumstances of this case, restriction of choice of a Defence Assistant to a serving/retired government servant or employee of DAV Organisation results in travesty of justice.

20. Consequentially, in view of gravity of the charges leveled against first respondent, it is deemed appropriate to direct a *de novo* inquiry into the charges leveled against first respondent. In the peculiarity of this case, impugned order directing reinstatement of first respondent with consequential benefits be not given effect to, for a period of six months from the day *de novo* inquiry commences. Let the *de novo* inquiry be conducted and concluded within a period of six months from the day it commences, failing which reinstatement of respondent No.1 with

consequential benefits or adequate compensation in lieu thereof, be given effect to.

21. With aforesaid directions, this petition and the application are disposed of.

Dasti.

(SUNIL GAUR)
JUDGE

MAY 17, 2018
p/s

