

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

% **Date of decision: 5th January, 2021.**

+ **LPA 482/2019**

RAVI NEGI Appellant

Through: Mr. Ashim Vachher, Adv.

Versus

**BALVANTRAY MEHTA VIDYA BHAWAN ANGURIDEVI
SHERSINGH MEMORIAL ACADEMY – SECOND
SHIFT & ORS.** Respondents

Through: Ms. Avnish Ahlawat, Ms. Tania
Ahlawat and Mr. Nitesh Kumar
Singh, Advs. For R-3.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

HON'BLE MR. JUSTICE SANJEEV NARULA

[VIA VIDEO CONFERENCING]

RAJIV SAHAI ENDLAW, J.

CM APPL. 154/2021 (of the appellant for early hearing)

1. Only the counsel for the respondent no.3 Directorate of Education (DoE) appears on advance notice.
2. Be that as it may, need is not felt to issue notice of this application to the other respondents.
3. For the reasons stated, the application is allowed and disposed of and the LPA is taken up for hearing today itself.

LPA 482/2019 & CM No.33095/2019 (for stay)

4. Though, the appeal was listed before this Court on a number of occasions but a perusal of the orders show that no notice of the appeal has been issued till now and only the counsel for the DoE has been appearing on advance notice. We have thus requested the counsel for the appellant to argue the appeal for admission.

5. The appeal impugns the order dated 1st July, 2019 of the Single Judge of dismissal of W.P.(C) No.6914/2019 preferred by the appellant, seeking direction to the respondent no.1 Balvantray Mehta Vidya Bhawan Anguridevi Shersingh Memorial Academy–Second Shift (School), an unaided recognised school and the respondent no.2 Servants of the People Society (Delhi) (Society) which has set up the respondent no.1 School, to (a) regularise the services of the appellant in the respondent no.1 School on the permanent post of Office Attendant, at par with similar employees working in the same post in Delhi Government Schools under the Delhi School Education Act, 1973; (b) fix the Grade Pay of the appellant in terms of the recommendations of the Seventh Pay Commission, with effect from the date of appointment of the appellant; and, (c) pay arrears of salary found due to the appellant with interest.

6. The writ petition came up before the Single Judge on 1st July, 2019, when finding that the respondent no.1 School had issued a Show Cause Notice dated 28th May, 2019 to the appellant and the appellant had also filed a reply thereto, and recording the statement of the counsel for the respondent no.1 School that a preliminary inquiry had been initiated and if required, a

regular departmental inquiry shall be conducted against the appellant, the petition was disposed of as premature.

7. The counsel for the appellant, on enquiry states that no further action was taken against the appellant by the respondent no.1 School pursuant to the said show cause notice and the preliminary inquiry stated to have been conducted.

8. The argument of the counsel for the appellant is, that (i) the appellant was appointed as Office Attendant in the respondent no.1 School, on contractual basis, with effect from 1st April, 2014 on a consolidated salary; (ii) the said contract of the appellant was renewed from time to time, last till 30th June, 2019, whereafter the Show Cause Notice dated 28th May, 2019 was issued to the appellant; (iii) there is no termination of the employment of the appellant and the appellant is merely prohibited from entering the school; and, attention is drawn to Rule 105 of the Delhi School Education Rules, 1973 and it is argued that thereunder the employment of the appellant in the respondent no.1 School, even if contractual, is deemed to have been confirmed after the expiry of two years; it is argued that the appellant worked in the respondent no.1 School contractually, for a period of five years and is deemed to be a permanent employee of the respondent no.1 School, under the statutory protection; reliance is placed on ***Army Public School Vs. Narendra Singh Nain*** 2013 SCC OnLine Del 3351 and which has been screen-shared during the hearing and it is stated that the appeal preferred thereagainst to the Division Bench was also dismissed; reference is also made to the judgments of this Court in ***Anita Soharu Guleria Vs. Director of Education*** 2015 SCC OnLine Del 7983, ***Renu Barrot Vs.***

Directorate of Education 2015 SCC OnLine Del 9203 and *Delhi Public School Vs. Manoj Bhandari* 2016 SCC OnLine Del 5910 and it is stated that *Army Public School* supra is followed therein.

9. We have perused Rule 105 of the Rules aforesaid and find, (i) the same to be titled 'Probation' and merely providing that every employee, on initial appointment, will be on probation for a period of one year which may be extended by the Appointing Authority with prior approval of the DoE and the services of an employee may be terminated without notice during the period of probation; (ii) however the said extension of period of probation shall be for not more than one year; (iii) that on expiry of the period of probation or extended period of probation, the employee shall be confirmed with effect from the date of expiry of the said period; and, (iv) that nothing in the said Rule shall apply to an employee who has been appointed to fill a temporary vacancy or any vacancy for a limited period.

10. Before proceeding further, we may record that before the Single Judge, as recorded in the impugned order dated 1st July, 2019, it was also the argument of the counsel for the respondent no.1 School, that there is no regular post of Office Attendant and the appellant had never been regularised and that the appellant had filed the writ petition, only to avoid the departmental action proposed to be taken against the appellant. However, the Single Judge, as aforesaid, did not go into the said aspect.

11. We have enquired from the counsel for the appellant, how Rule 105 of the Rules would have application to the present controversy. We have also enquired, whether there is any provision for appointment of employees

in unaided recognised schools governed by the provisions of the Delhi School Education Act, 1973 and the Rules aforesaid.

12. The counsel for the respondent no.3 DoE appearing on advance notice has drawn our attention to Rule 96 titled 'Recruitment' and which, *inter alia* provides that, (i) the recruitment of the employees of a recognised private schools shall be made on the recommendation of the Selection Committee; and, (ii) the Selection Committee for appointment of any employee other than the Head of the School or a teacher shall comprise of the Chairman of the Managing Committee or a member of the Managing Committee nominated by the Chairman, Head of the School and a nominee of the DoE.

13. We have enquired from the counsel for the appellant, whether the appointment of the appellant to the respondent no.1 School was in accordance with Rule 96 supra.

14. The counsel for the appellant states that he will have to obtain instructions and will file an affidavit.

15. We have however enquired, whether the appellant has pleaded that his appointment was by a Selection Committee of the School.

16. The answer is in the negative.

17. We have considered the contentions of the counsel for the appellant.

18. A literal reading of Rules 96 and 105 of the Rules does not show any legal right of the appellant to seek mandamus, as sought in the writ petition from which this appeal arises; without a legal right, no mandamus in enforcement thereof can be sought or granted.

19. The reference in Rule 105, to an employee, is to an employee recruited in accordance with Rule 96 and whose initial appointment was on probation. It is not the case of the appellant that the appointment of the appellant was in accordance with Rule 96 or that the initial appointment of the appellant was on probation. Without the appellant having been appointed in accordance with Rule 96, the question of application of Rule 105 to the appellant does not arise. Rule 105 deals with probation of only those employees who are appointed in accordance with Rule 96 and for them provides for the appointment to be on probation. The same has no application to an appointment made otherwise than in accordance with Rule 96 and rather expressly carves out an exemption therefor in sub-rule (3). A perusal of the letters issued by the respondent No.1 School to the appellant from time to time shows the same to be titled "Offer of Contractual Appointment" and expressly providing that the appointment was on "purely contractual basis against a temporary post of Office Attendant in the school" and to be on a consolidated salary and terminable either by the school or by the appellant by giving one month's notice or salary in lieu thereof. The appellant is found to have signed the said letters in token of acceptance of the terms and conditions contained therein. Moreover, Rule 105 nowhere provides for deemed confirmation after one year or after any other period, whatsoever may have been the mode of appointment or even if the appointment was contractual. Thus, the appellant cannot derive any benefit from Rule 105.

20. For the appellant to succeed in his argument of enjoying statutory protection, the appellant has to first show his appointment to be statutory and which the appellant has failed to aver or argue. Rather, the claim

appears to have been pursued without taking notice of Rule 96. The said Rule lays down the method of recruitment in a unaided recognised school and the principle, what has been prescribed to be done in a particular manner shall be done in that manner only and not otherwise, shall apply. Without the recruitment being in compliance of Rule 96, no statutory protection shall enure to the appointee and the appointee cannot take any advantage of an appointment which even if not to fill a temporary vacancy or any vacancy for a limited period, is contrary to the Rules governing appointment / recruitment. Such appointment/recruitment will be non-est.

21. As far as the dicta of a Single Judge of this Court in ***Army Public School*** supra and in all other judgments referred to, by the same Hon'ble Judge, relied upon by the counsel for the appellant are concerned, though undoubtedly the same, *inter alia* holds that all appointments to recognised unaided schools, even if contractual, have a statutory character owing to the Act and the Rules aforesaid but the counsel for the appellant admits that Rule 96 is not taken notice of in any of the said judgments. Moreover, the aforesaid observation of the Court, on which reliance is placed by the counsel for the appellant, is prefaced by a clear observation that the same was in the peculiar facts of that case and in view of the finding returned on the said facts, of the initial contractual appointment of the petitioner therein being a sham. In that case, though the appointment of the petitioner therein was initially contractual, but was subsequently regularised and the petitioner was on probation and though again on the expiry of the period of probation, a colour of contractual appointment was sought to be given but the petitioner therein had commenced challenge to the termination during the probation period and which was the cause of action for the writ petition. It is not the

case of the appellant herein that the appellant, at any time, was on probation. On the contrary, it was only the temporary contractual appointment of the appellant which was extended from time to time.

22. On a reading of the aforesaid judgment on screen we have also enquired from the counsel for the appellant, whether without returning a finding of the contractual appointment being a sham and a device for regular appointment, if appointments initially contractual, were to be treated as statutory, the same would not fall foul of the Constitution Bench dicta in *Secretary, State of Karnataka Vs. Umadevi* (2006) 4 SCC 1, which has expressly prohibited such conversion of employees, initially taken on contract, as regular employees and which mode of appointment was given the nomenclature of a "backdoor entry" in that case.

23. The counsel for the appellant contends that *Umadevi* supra would have no attraction as the appointment of the appellant was/is statutory.

24. We are unable to agree. The appointment of the appellant in the present case is clearly merely contractual one, not in compliance of the procedure prescribed in the Rules for appointment of an Office Attendant in an unaided recognised school and as long as the appointment is contractual, there can be no right of absorption.

25. The counsel for the appellant, on further enquiry, whether there is any specific plea in the petition or the appeal, of the appointment of the appellant as contractual being a sham or a device for a statutory appointment, fairly states that there is no such specific pleading. Even otherwise, we are of the opinion that it is only in rare facts, that in exercise of writ jurisdiction, a factual finding of a document being a sham and a device can be given. From

a reading of the facts in *Army Public School* supra, it is found that the documents in that case spoke for themselves and disclosed the contractual appointment to be a sham and in the light whereof the judgment was pronounced. It is not found to be so in the present case.

26. No merit is thus found in the appeal.

27. Dismissed.

RAJIV SAHAI ENDLAW, J.

SANJEEV NARULA, J.

JANUARY 5, 2021
'pp'



सत्यमेव जयते