



\$~2

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

%

Date of decision: 21 February 2022+ **W.P.(C) 4947/2015****SANJAY SINGH AND ORS. Petitioners**Through: **Mr. Anuj Aggarwal, Adv.**

versus

N.C.T. OF DELHI AND ORS. RespondentsThrough: **Mr. Anjum Javed, ASC (C), GNCTD
with Mr. Devendra Kumar, Adv. for
R-1 and 2.
Mr. Pramod Gupta, Adv. for R-3.****CORAM:****HON'BLE MR. JUSTICE YASHWANT VARMA****YASHWANT VARMA, J. (ORAL)**

1. The petitioners here were engaged on contractual basis in the third respondent Institution. They were engaged in the capacity of Bus Drivers (petitioner Nos. 1 to 3), Bus Conductors (petitioner No. 4) and Gardeners (petitioner No. 5). They are stated to have been appointed on a consolidated pay as per the particulars set forth in paragraph 3 of the writ petition. Undisputedly no appointment letters are stated to have been issued in their favour. The writ petition itself has been preferred seeking the following reliefs: -

“a) Issue a writ of Mandamus or any other appropriate writ or direction for the respondent to release the salaries/arrears of the petitioners from the date of their respective appointments as per pay scales granted to similarly placed employees of govt. schools.



b) Issue a writ or direction for the respondent to regularize the services of the petitioners from the date of their respective appointments and issue them letters of appointment in accordance to the rules under the Delhi School Education Act, 1973.

c) Directing the authorities concerned to keep a regular account of such deductions, furnish to each of the petitioners pass-books, etc. containing details of such deductions from his/her salary in the past and to give such details in future in accordance with the relevant rules.

d) Directing the respondents not to terminate the services of the petitioners at their whims and fancies and/or as punishment for the petitioners protesting against the illegal acts of respondent No. 3 under the protection of respondent No.1 & 2.

d) Directing the respondents to disclose their provident fund account Nos. and amounts deposited in the same till date and further direct the respondent No.3 to produce the salary register before this Hon'ble Court and/or direct respondent No.2 to take possession of the salary register and provident fund register maintained by respondent No. 3.”

2. The principal grievance which was raised was with respect to the claim for regularisation and for the payment of salaries and other benefits at par with other employees of aided and recognized institutions. Undisputedly it is the provisions of the **Delhi School Education Act, 1973**¹ which would govern. When the writ petition was initially entertained on 20 May 2015, a learned Judge of the Court proceeded to pass the following order: -

“1. Learned counsel for the petitioners argues that issue in the present case is fully covered in favour of the petitioners in terms of the judgment passed by this Court in the case of **Army Public School & Anr. Vs. Narendra Singh Nain & Anr.** in W.P.(C) No. 1439/2013 decided on 30.8.2013, and wherein it has been held that the contractual employees after the third year of service will stand regularized if their appointments were originally not for administrative exigency under Rule 105(3) of the Delhi School Education Act & Rules, 1973. **Narendra Singh Nain's** case (supra) has been thereafter

¹ the Act
W.P.(C) 4947/2015



followed in a series of judgments by this Court and those judgments are referred to in the judgment recently delivered by this Court in the case of **Renu Barrot Vs. Director of Education & Ors.** in W.P.(C) No.6180/2013 decided on 27.4.2015.

2. It is argued that the petitioners continue as contractual or *adhoc* employees of the respondent no.3/School till date.

3. In view of the arguments urged on behalf of the petitioners, till further orders unless varied by the Court, respondent no.3/School will not terminate the services of the petitioners.

4. Notices be issued to the respondents, on filing of process fee, by ordinary process as well as by registered AD post, returnable before the Registrar on 10th August, 2015.”

3. It appears that the Court took the view that the continued engagement of the petitioners in the Institution would be liable to be viewed as having been regularized in terms of Rule 105(3) of the **Delhi School Education Rules, 1973**². The view so taken at the interim stage rested on the decision rendered by the Court in **Army Public School** and a line of decisions rendered thereafter which had struck a similar position. Before this Court it is not disputed that the interpretation as placed by the Court in its previous judgments upon Rule 105(3) would no longer constitute good law in light of the decision of the Supreme Court in **Durgabai Deshmukh Memorial Sr. Sec. School Vs. J.A.J Vasu Sena**.³ The relevant paragraphs of the judgment of the Supreme Court in **Durgabai Deshmukh** are reproduced hereinbelow: -

“44. Recently, in *Lawrence School v. Jayanthi Raghu* [*Lawrence School v. Jayanthi Raghu*, (2012) 4 SCC 793 : (2012) 1 SCC (L&S) 798], a two-Judge Bench of this Court held that even where the relevant rule prescribes a maximum period of probation, the use of the words “if confirmed” denote a condition precedent and that there is no deemed

² Rules

³ (2019) 17 SCC 157
W.P.(C) 4947/2015



confirmation of service unless a specific order of confirmation is issued. The Court held thus : (SCC p. 804, para 38)

“38. Had the rule-making authority intended that there would be automatic confirmation, Rule 4.9 would have been couched in a different language. That being not so, the wider interpretation cannot be placed on the rule to infer that the probationer gets the status of a deemed confirmed employee after expiry of three years of probationary period as that would defeat the basic purpose and intent of the rule which clearly postulates “if confirmed”. *A confirmation, as is demonstrable from the language employed in the rule, does not occur with efflux of time. As it is hedged by a condition, an affirmative or positive act is the requisite by the employer. In our considered opinion, an order of confirmation is required to be passed.*”

(emphasis supplied)

45. It emerges from the consistent line of precedent of this Court that where the relevant rule or the appointment letter stipulates a condition precedent to the confirmation of service, there is no deemed confirmation of service merely because the services of a probationer are continued beyond the period of probation. It is only upon the issuance of an order of confirmation that the probationer is granted substantive appointment in that post. Rule 105(2) stipulates the satisfaction of the appointing authority as a condition precedent to the issuance of an order of confirmation. The argument advanced by the learned counsel for the first respondent that there is a deemed confirmation upon the continuation of service beyond the expiry of the period of probation is negated by the express language of Rule 105(2). In this view, the continuation of services beyond the period of probation will not entitle the probationer to a deemed confirmation of service. The High Court has erred in holding that there is a deemed confirmation where the services of a probationer are continued beyond the expiry of the probationary period.

49. In *Dharam Singh [State of Punjab v. Dharam Singh, AIR 1968 SC 1210]*, the Constitution Bench held that the continuation of the services of a probationer beyond the maximum period of probation would amount to a deemed confirmation of service *only in* the absence of a stipulation in the relevant rule requiring the probationer to pass a test or fulfil any other condition. In the present case, Rule 105(2) stipulates the satisfaction of the appointing authority as a condition precedent to the issuance of an order of confirmation. The High Court has thus failed to notice the distinguishing features which emerge from the judgment of this Court in *Dharam Singh [State of Punjab v. Dharam Singh, AIR 1968 SC 1210]*.

54. Rule 105(1) of the 1973 Rules, by stipulating a maximum permissible period of probation of two years, draws a balance between the interests of the appointing authority in extending the period of probation to ensure the quality of education and the interests of probationers in their



services not being extended on probation *ad nauseum*. The continuation of the services of a probationer beyond the period permissible under the 1973 Rules defeats the salutary purpose underlying the limit stipulated on the period of extension that may be effected in the probationary period. Upon the expiry of the period of probation, the appointing authority is required by law to either confirm the services of the probationer or terminate their services. The continuation of the services of a probationer by the appointing authority under Rule 105 of the 1973 Rules beyond the maximum permissible period of probation, constitutes a violation of law. Though as we have held, there is no provision for deemed confirmation, the conduct of the management may result in other consequences, including a decision in regard to whether the recognition of a school which consistently violates the law should be withdrawn.”

4. When the writ petition was taken up for consideration, one of the questions which was posed was with regard to its maintainability since the petitioners had failed to establish that the terms and conditions of their service would be governed by statutory rules and regulations. It is in the aforesaid backdrop that Mr. Gupta, learned counsel for the respondent Institution placed reliance upon the judgment rendered by two learned Judges of the Court in **Ravi Negi Vs. Balvantray Mehta Vidya Bhawan Anguridevi Shersingh Memorial Academy - Second Shift and Others**⁴. Mr. Gupta submitted that the principles laid down in this decision would clearly establish that the appointment of the petitioners made de hors the provisions of the Act and the Rules would thus result in them being treated as contractual employees and consequently the writ petition itself is liable to be dismissed on this score.

5. Insofar as the question of maintainability of the writ petition itself is concerned, Mr. Aggarwal, learned counsel for the petitioner submits that the definition of “*employee*” as contained in Section 2(h) of the Act would

⁴ 2021 SCC OnLine Del 3412
W.P.(C) 4947/2015



evidence that it applies to all categories of employees working in a recognized institution. According to Mr. Aggarwal, the definition clause does not make any distinction between a permanent, ad hoc or temporary employee or for that matter an employee engaged on contractual terms. The Court in this regard also bears in mind the stand taken by the State respondents in the short affidavit which has been filed on their behalf in these proceedings. It is significantly disclosed therein that the schools maintained by the Directorate of Education carry no corresponding posts of Drivers and Bus Conductors. In view of the aforesaid, they take the stand that the services of the petitioners are not governed by the provisions of the Act or the 1973 Rules framed in terms thereof.

6. It becomes pertinent to note that the petitioner has rested his case with respect to this issue solely on the provisions contained in Section 2(h) of the Act. However, as is asserted by the respondents, neither the Act nor the Rules contain any provision for appointment of Drivers and Conductors. This assertion is not questioned by learned counsel for the petitioner. Learned counsel has also been unable to establish that the appointment of the petitioners was made in accordance with the procedure prescribed under the Act or the Rules framed thereunder. The petitioners have thus failed to establish that their appointments stood imbued with any statutory flavour. While this may have constituted sufficient ground to question the maintainability of the writ petition initially, the Court notes that the present matter was entertained by the Court in 2015 and pleadings directed to be exchanged. The Court also bears in mind that learned counsels for respective parties have canvassed elaborate submissions dealing with the



merits of the dispute itself. It would thus appear to be inexpedient to non-suit the petitioners on the grounds as urged by the respondents and noticed above.

7. The petitioners at the outset claim a right to be regularized on the posts against which they were initially appointed. It is the contention of learned counsel for the petitioners that since they have continued for decades in the institution, they are liable to be duly regularized and absorbed in permanent service. Reliance in this regard was placed by learned counsel on a recent decision of the Supreme Court in **Neelima Srivastava Vs. The State of Uttar Pradesh**⁵. Mr. Aggarwal then submits that the decision of the Constitution Bench in **Secretary, State of Karnataka V. Uma Devi**⁶ has been duly explained by the Supreme Court in various decisions which have held that the judgment in **Uma Devi** cannot be read or construed as conferring a right on employers to continue the engagement of persons on ad hoc or temporary basis for years together. Insofar as the judgment of the Supreme Court in **Neelima Srivastava** is concerned, learned counsel has referred to the following passages from that decision: -

“22. Referring to the observations made in the case of Umadevi (3) paragraph 53 quoted herein above, this Court in the case of State of Karnataka v. M.L. Kesari has laid down the conditions to test when the appointment will be considered illegal and when it shall be considered to be irregular. It may be relevant to extract paragraph 7 from the said report, which reads as under:—

“It is evident from the above that there is an exception to the general principles against ‘regularization’ enunciated in Umadevi, if the following conditions are fulfilled:

⁵ 2021 SCC Online SC 610

⁶ (2006) 4 SCC 1

W.P.(C) 4947/2015



(i) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any court or tribunal. In other words, the State Government or its instrumentality should have employed the employee and continued him in service voluntarily and continuously for more than ten years.

(ii) The appointment of such employee should not be illegal, even if irregular. Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the person employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular.”

23. In the case of the appellant, it is undisputed that she was appointed by the Regional Inspectress of Girls Schools, who is the prescribed appointing authority under the Uttar Pradesh Subordinate Educational (Trained Graduates Grade) Service Rules, 1983. Equally undisputed is the fact that she was appointed on a sanctioned post and possessed all the necessary prescribed qualifications under 1983, Rules.”

Proceeding further in this respect, learned counsel has also placed reliance upon the decisions of the Supreme Court in **Narender Kumar Tiwari & Ors Vs. State of Jharkhand & Ors**⁷ and **Sheo Narain Nagar Vs. State of Uttar Pradesh**⁸. According to learned counsel, the principles laid down in Uma Devi were similarly explained in the aforementioned decisions.

8. Insofar as the claim for emoluments at par with regular employees is concerned, the petitioners rest their case on Section 10 of the Act on the basis of which, it is submitted that the said provision incorporates the legislative obligation and command for the respondent institution to place the petitioners in a scale of pay which is equivalent to that drawn by

⁷ (2018) 8 SCC 238

⁸ (2018) 13 SCC 432
W.P.(C) 4947/2015



similarly situate employees. In support of the aforesaid relief, the petitioners have also relied upon the pay slips of various employees engaged in other educational institutions and which have been collectively placed on the record as Annexure P-5 to the writ petition.

9. Appearing for the respondent Institution, Mr. Gupta, learned counsel contends that no norm or procedure as prescribed under the Act and the Rules was followed at the time of the initial engagement of the petitioners. It was submitted that none of the mandatory provisions which govern the issue of appointment of employees under the Act was adhered to at the time of the initial appointment of the petitioners. This is explained by the respondent Institution which takes the stand that since the Act itself does not make any provisions for appointment of drivers, conductors or gardeners, the respondent which is an unaided recognized institution was free to engage persons on contractual term to discharge the work attached to those posts. According to learned counsel, the terms and conditions of engagement of the petitioners would thus be liable to be tested purely on the basis of the contract of employment and the reliefs as claimed here are liable to be negated by the Court. It was further submitted that since the appointment of the petitioners was purely on the basis of a contract and since their terms and conditions of service are not governed by any statutory provisions, the question of regularization would not arise. The latter submission rests on the contention that since the initial appointments were made de hors the Act, they are liable to be treated as illegal and consequently the claim for regularization must be negated by this Court.



10. It was lastly submitted that a direction for regularization cannot be framed or issued by the Court in exercise of powers conferred by Article 226 of the Constitution unless there be a scheme for absorption which may be shown to apply or where a statutory provision exists which mandates the regularization or absorption of employees.

11. Refuting the submission addressed in the context of Section 10, Mr. Gupta points out that the said provision mandates the placement of employees of recognized private schools in a scale of pay which should not be less than that of employees holding positions of a corresponding status in schools run by the appropriate authority. According to Mr. Gupta, bearing in mind the disclosures made by the State respondents in their short affidavit filed from which it is evident that the post of drivers and bus conductors are not contemplated under the statutory scheme, the relief as claimed by the petitioners here is liable to be turned down. Turning then to the enclosures placed on the record and constituting Annexure P-5, Mr. Gupta highlighted the fact that all the pay slips related to employees engaged in private institutions. It was thus submitted that those pay slips cannot be viewed as being determinative of the claim of the petitioners as raised in the writ petition.

12. Considering the issue of placement in a particular or equivalent scale of pay, the Court must at the outset note that the petitioners have abjectly failed to place on the record or draw the attention of the Court to any material which may have proven that contractual employees engaged in any other recognized institution were drawing pay and emoluments in excess of what was granted to the petitioners by the respondent Institution here. It



becomes important to note that the question of infraction of Section 10 rests indubitably on the petitioners establishing that they have been discriminated and granted remuneration lower than that paid to employees engaged on corresponding posts. Significant is the disclosure which the State respondents have made in their affidavit where they specifically take the stand that the post of bus drivers and conductors are not even envisaged under the Act or the Rules. The aforesaid stand as taken by the respondent Nos. 1 & 2 in these proceedings has gone uncontroverted by the petitioners here. The pay slips which have been relied upon have been pointed out to be relating to employees of private institutions. More importantly, those salary slips are not established to be as relating to contractual employees. Since the petitioners have failed to lay any foundation which may have even prima facie indicated a violation of Section 10 of the Act, the claim for placement in a higher pay scale as well as the relief with regard to emoluments as sought in the writ petition deserves to be and is hereby rejected.

13. That then takes the Court to deal with the claim for regularization as raised by the petitioners. It becomes pertinent to note that the power of constitutional courts to direct regularization was explained in **Uma Devi** to be confined to that genre of appointments which could be viewed as “irregular” as distinct from “illegal” appointments. The category of irregular appointments was explained to be those where a minor infraction may have occurred in the appointment process. It stood confined to situations where appointments could not be said to suffer from a patent illegality. However, **Uma Devi** did not extend protection to appointments



which were per se illegal. The relief of regularisation, as the Constitution Bench explained, would not extend to appointments made de hors the statutory scheme or where they were shown to have been made without following a procedure prescribed by or consistent with law. In such situations, the Constitution Bench explained even long and uninterrupted continuance in service would not inure to the benefit of such employees and that Courts would be wholly unjustified in directing regularization in such cases.

14. In the facts of the present case, learned counsel for the petitioners has candidly admitted that no details with respect to the procedure adopted by the respondents while appointing the petitioners have been placed on the record. The writ petition lacks all material particulars in respect of this crucial issue. The petitioners have even on a prima facie basis failed to establish that a procedure even if it be rudimentary but yet in conformity with Article 14 of the Constitution, was followed. It must consequently be held that appointment of the petitioners was clearly illegal from its very inception.

15. Regard must also be had to the fact that the appointment of the petitioners is stated to have been made on posts which are not even contemplated under the Act and the Rules. A claim for regularisation would necessarily entail the Court considering the post against which a person may be directed to be absorbed. This would clearly be an impossibility in the facts of the present case where the petitioners are stated to have been contractually engaged against posts which are not envisaged under the statutory regime that applies. A direction to regularize in such a situation



would essentially amount to commanding the respondents to create a cadre or post which otherwise does not exist and which is not even envisaged under the Act.

16. Turning then to the decision in **Neelima Srivastava**, it becomes apposite to note that the appellant there came to be appointed in an intermediate institution against a leave vacancy. It is important to bear in mind that appointments by management against ad hoc vacancies which may arise in intermediate institutions are governed statutorily by provisions of the Intermediate Education Act, 1921, the Regulations framed as well as the various Removal of Difficulties Orders issued thereunder. As the facts in **Neelima Srivastava** would establish, the appointment of the appellant there stood duly approved by the competent statutory authority. Her appointment was made against a leave vacancy occurring against a post which was duly borne on the cadre. Her claim for regularization was liable to be considered in light of the statutory rules which were promulgated and were prevalent in the State of U.P. It was in the backdrop of the original appointment of the appellant not suffering from a fundamental or fatal shortcoming that the Supreme Court in paragraph 24 of the report observed that her initial appointment was liable to be construed as irregular and not illegal.

17. Similarly, the reliance placed by learned counsel on the decision in **Sheo Narain Nagar** is also misplaced. Both **Narender Kumar Tiwari** as also **Sheo Narain Nagar** were cases dealing with the claim of persons whose appointments were found to suffer from irregularities as opposed to being void ab initio. The observations as appearing in **Narender Kumar W.P.(C) 4947/2015**



Tiwari and **Sheo Narain Nagar** are thus liable to be understood and appreciated in the aforesaid backdrop. Those decisions, in any case, cannot come to the aid of the petitioners here who have failed to establish that their appointments were made in accordance with the statutory scheme comprised in the Act and the Rules.

18. Accordingly, and for all the aforesaid reasons, the writ petition fails and shall stand dismissed. Pending applications also stand disposed of.

YASHWANT VARMA, J

FEBRUARY 21, 2022

SU/neha



सत्यमेव जयते