



2023:DHC:7998



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

% **Date of order : 12th October, 2023**

+ **W.P.(C) 6126/2018 and CM APPL. No. 49887/2022**

DR. ALIYA RAJPUR Petitioner

Through: **Mr.____, Advocate,**
(Appearance not given)

versus

DIRECTOR OF EDUCATION AND ORS. Respondents

Through: **Mr.Naushad Ahmed Khan and**
Mr.Akshit Tyagi, Advocates for R-
1/DOE
Mr.K.V. Sriwas Narayanan, Advocate
for R-3

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

1. The petitioner *vide* the present petition under Article 226 of the Constitution of India seeks the following prayers:

“(a) pass a writ, order of directions in the nature of mandamus commanding the Respondent School to pay the Petitioner the proper pay scales of a full time Medical Officer as per provisions of Section 10 (1) of the Act R/w Rule 38 of the Rules as set out in para 20 of the petition/as per scales given

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*in the Delhi Gazette Notification for Medical officers;
(b) Pass a writ, order or direction in the nature of mandamus commanding the Respondent No.1 to take action against the Respondent School for violating the provisions of the Act & Rules which is a precondition for any recognized school to continue to be recognized under Rule 50 of the Rules;
Any other further orders as this Hon'ble Court may deem it fit and proper in the facts and circumstances of the case."*

2. The Brief Factual Matrix has been recapitulated hereinbelow-
- a) The petitioner was appointed by respondent no. 3 as medical officer *vide* appointment letter dated 5th July, 2004 and subsequently *vide* appointment letter dated 25th April 2007.
 - b) The petitioner was thereafter, confirmed as a medical officer of the school *vide* a confirmation letter dated 1st April 2010.
 - c) The petitioner then filed a representation to respondent no. 1 dated 7th March 2017 alleging exploitation by respondent no. 3 for the last 13 years as per principles laid down by the Coordinate Bench of this Court in ***Common Cause v. Govt. of NCT of Delhi & Anr. W.P. (C) 16778/2006***, dated 9th May, 2007.
 - d) There was no response to the petitioner's representation letter dated 7th March 2017 by the respondents and aggrieved by which the petitioner filed a writ petition bearing W.P.(C) no. 3315/2017 before the Coordinate Bench of this Court.



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- e) The Coordinate Bench of this Court disposed of the said writ petition *vide* order dated 8th August 2012 and directed the respondent no. 3 to provide requisite information to the respondent no. 1 for deciding the representation filed by the petitioner within 8 weeks thereafter. The Coordinate Bench also directed the respondent to communicate the result of the said representation to the petitioner in due time.
- f) Thereafter, the respondent no. 1 and 3 filed an application bearing CM No. 18308/2017 in the said writ seeking extension of time for compliance with the order dated 1st May, 2017. The Coordinate Bench of this Court *vide* order dated 29th May, 2017, allowed the said application and extended the duration for compliance with the order for a period of one week.
- g) The respondent no. 3 in compliance with the said order furnished necessary information to respondent no. 1 *vide* letter dated 5th June, 2017 and a copy of the same was sent to the petitioner.
- h) The respondent no. 1 did not reply to the petitioner's representation. Aggrieved by the said non-compliance of the order by the respondent no. 1, the petitioner filed a contempt petition bearing CCP no. 284/2018 before the Coordinate Bench of this Court on the grounds that the respondent no. 1 did not reply to representation dated 7th March, 2017.
- i) On the date of hearing, the respondent no. 1 appeared before the Coordinate Bench of this Court and handed over its reply to the said



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representation of the petitioner. Accordingly, the said contempt petition, was disposed of.

j) Aggrieved by the said reply dated 20th April 2018 (hereinafter ‘impugned reply’) to the petitioners’ representation, the petitioner filed the instant petition.

3. Learned counsel appearing on behalf of the petitioner submitted that the petitioner is a duly qualified doctor of Unani Medicine & Surgery and fulfils the essential qualification for appointment as a medical officer.

4. It is further submitted that the salary paid to petitioner’s counterparts are higher than the petitioner’s salary, hence, the petitioner has been treated unfairly by the respondents.

5. It is contended that the pay scale of the petitioner is in violation of the Delhi Health Services Rules notified on 31st December, 2012 *vide* notification F.No.6/59/2002/DISMH/Admn./449 in the Delhi Gazette.

6. It is submitted that as per Form 16 submitted by the respondent no. 3 to the Income Tax authorities for the assessment year 2013 to 2014, the petitioner was shown as a Medical Officer in the school.

7. It is further submitted that the petitioner is stated to be the Assistant Teacher of the respondent no. 3 as per its salary bill for the month of March 2017 and the respondent no. 3 has been exploiting the petitioner by treating her as an Assistant Teacher instead of a Medical Officer.

8. It is contended that on 20th March, 2017, an experience certificate was issued to the petitioner certifying that she was the Medical Officer of the respondent school since 2004 and was sincere and hardworking despite,



which the respondents have treated the petitioner unequally.

9. It is submitted that the petitioner being a medical officer has been wrongly treated as a teacher, therefore violating Rule 38 of The Delhi School Education Rules, 1973. Moreover, the petitioner has been forced to even give classes at the school/respondent no.3.

10. It is further submitted that the respondent no. 3 did not comply with the Rule 38 (5) of The Delhi School Education Rules, 1973, as per which it is mandatory that the details of the remuneration and other benefits should be fixed for the Medical Staff by Administrator of the school on advice of the Advisory Board of the school.

11. It is further submitted that the respondent no. 1 being a recognized school under the Delhi School Education Act and Rules, 1973 is bound by Section 4(1)(a) of the Delhi School Education Act and Rules, 1973 and therefore is obligated to pay salary and allowances to its employees regularly, however, the respondent no. 3 has continued to deprive the petitioner of her rightful salary, allowances and other prescribed benefits.

12. Learned counsel appearing on behalf of the petitioner submits that the respondent no. 1 is liable to be derecognized as a school for its aforesaid illegal and arbitrary actions.

13. Therefore, in view of the foregoing submissions, the petitioner seeks that the present petition may be allowed and the reliefs as prayed by the petitioner may be granted by this Court.

14. *Per Contra*, the learned counsels appearing on behalf of the respondents vehemently opposed the present writ petition and submitted that



the present petition is nothing but an abuse of the process of law.

15. Learned counsel appearing on behalf of the respondent no. 1 submits that respondent no. 3 is a private unaided school under the provision of Delhi School Education Act and Rules 1973 and is bound to follow the provision of the same. However, the respondent school is a recognized minority public school, therefore, the respondent no. 1 has a very limited role in the functioning of the respondent no. 3.

16. It is further submitted that the appointment of the petitioner as a medical officer was clearly erroneous since the pre-requisite for the position of a medical officer is that the candidate should hold an MBBS degree in accordance with the Medical Council of India Rules and Regulations. Therefore, the said appointment was declared *void ab-initio*.

17. It is contended that the respondent no. 1 never received the petitioner's representation dated 7th March, 2017 and as per Annexure P-11 annexed with the instant petition, there is no proof of receipt of the same to respondent no. 1.

18. It is submitted that respondent no.1 decided upon the representation made after giving due consideration to the submission of the petitioner and disposed of the same *vide* reply dated 20th April, 2018.

19. It is further submitted that there is no illegality in the action of the respondents. They have acted in accordance with the statutory rules and regulations in the impugned reply to the representation of the petitioner.

20. It is contended that there is no violation of legal right of the petitioner by the respondents' by passing the impugned reply to the representation.



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21. Learned counsel appearing on behalf of the respondent nos. 2 and 3 submitted that the appointment of the petitioner at the post of medical officer was inadvertent, since the post of medical officer requires a person holding an MBBS degree as per Medical Council of India Rules and Regulations. However, the petitioner is qualified to be only Unani Doctor, not an MBBS doctor which is a pre-requisite for the post of a medical officer. Therefore, the said appointment as a medical officer was not correct and is *void-ab-initio*.

22. It is further submitted that the petitioner was not a teacher in respondent's School and the petitioner was only asked to monitor the class in case of non-availability of a regular teacher.

23. It is contended that the petitioner's performance/services in the respondent No. 3 have not been satisfactory as a medical officer and despite, several warnings issued to her as not being sincere, responsible and regular with her work. Further, it came to the knowledge of the respondent no. 2 and 3, that the petitioner was prescribing allopathic medicine despite being a Unani graduate, which is grave misconduct and offence under the law.

24. Hence, in view of the foregoing submissions, the respondent seeks that this Court may be pleased to dismiss this petition thereby, upholding the impugned reply given by respondent no. 1 to the representation of the petitioner.

25. Heard learned counsel for the parties and perused the material on record including the pleadings, and judicial precedents cited.

26. It is the case of the petitioner that despite being appointed as a



medical officer at the respondent no. 3, she has not been given the requisite remuneration and perks associated with the said position which has resulted in violation of Section 10 of The Delhi School Education Act, 1973. It is further contended that the petitioner has been wrongly shown as an Assistant Teacher of the respondent no. 3 by way of Form- 16 submitted to Income Tax Department instead of Medical Officer.

27. Before delving into the merits of the case, this Court deems fit to enunciate the principle governing grant of writ of mandamus under Article 226 of the Constitution of India.

28. Mandamus is one of the prerogative writs issued by the High Court or the Supreme Court in the manner of command to any authority that falls under the definition of “State” as per Article 12 of the Constitution of India for the purpose of fulfilling their constitutional/ statutory/public duty. It is used as a last resort in cases where the Court is satisfied that without its intervention there will be denial to justice to the party invoking such writ.

29. The quintessential elements for issuing a writ of mandamus are firstly, the petitioner has claimed relief by invoking such writ has a legal right, secondly, the authority against whom the writ is seeking to be enforced has a legal duty towards such petitioner and has refused relief to the petitioner, thirdly, such relief is claimed with a *bona fide* intention and fourthly, the petitioner has no alternative remedy.

30. The Court has to be hyper-vigilant while issuing a writ of mandamus since the writ of mandamus is an extraordinary remedy to be invoked only upon special occasions and in exceptional circumstances. It is invoked to



supplement the deficiency in law, if any, and cannot be invoked as an appellate mechanism against the decision of any Court, Tribunal, or Authority which is exercising statutory power. The writ of mandamus is an invincible weapon in cases, where there is a failure of justice or exercise of power in an illegal way or arbitrary manner. The aforesaid principle has been reiterated by the Hon'ble Supreme Court in the judgment of ***Oriental Bank of Commerce v. Sunder Lal Jain, (2008) 2 SCC 280.***

31. For adjudicating the instant petition, this Court deems it fit to reproduce the impugned reply challenged by the petitioner in the instant petition.

32. The impugned reply to the representation of the petitioner has been reproduced as follows:

“The issues to be decided in this case are-

- i. Whether Directorate of Education has prescribed any Recruitment Rules for appointment of medical officer in the schools run by the Government or not?*
- ii. Whether, the provision of Rule 38 binds the private unaided recognized schools to appoint medical officer on regular basis and whether they are statutorily liable to pay salary and allowances as per section 10(1) of Delhi School Education Act & Rules, 1973 at par with the other employees of the schools, such as Teaching or Non-teaching, which are recruited by them in accordance with RR's to the respective post as notified by the department.*

*And whereas, **Section 10(1) of the Delhi School Education Act, 1973 states** that the scales of pay and allowances, medical facilities, pension, gratuity, provident fund and other prescribed benefits of the employees of recognized private school shall not*



be less than those of employees of the corresponding status in school run by the appropriate authority. Having gone through the submissions made by both the parties and the Rules positions, it is observed that the Department has not notified any detailed instructions with regards to the attendance, remuneration and other matters related to Medical Officers and other medical staff as mandated by sub rule 5 of Rule 38 of the Delhi School Education Rules, 1973. Further, the Directorate of Education also does not have any sanctioned post of medical Officers at present and consequently no recruitment rules have been notified nor any medical officer recruitment till date. Since no medical officers have been appointed by the Directorate of Education on regular or contract basis, no parity as envisaged under Section 10(1) can be provided to the petitioner.

And whereas, it is observed that as per the provisions of Rule 38(1), the medical officers can be appointed on both, part time as well as full time basis. From the petition filed by the petitioner it is seen that the petitioner is claiming to be eligible as per the recruitment rules for the post of Medical Officer (Unani/Ayurveda) which has been shown to be in the pay scale of Rs. 15600 - 39100 + GP 5400 (PB-3), Though there is nothing in the DSEAR, 1973 which states that a medical officer has to be necessarily MBBS however, it is seen that the Department had moved a proposal for creation of post of Medical Officers in the Department in which the Health Department had advised creation of posts of Medical Officer (Allopathy) and therefore the contention of the school that she is not qualified for appointment medical officer appears to hold ground. But it is a fact that it is the school itself that has confirmed the petitioner on the post of medical officer vide order date 01.04.2010.

And whereas, it is also observed that the school is Minority unaided school. As per provisions of Section 15 of the DSEAR, 1973, the terms and conditions of service of the employee,



including the scale of pay and other allowances to which the employee shall be entitled is determined as per the contract of service entered by the managing committee of the school with the employee, which in the instant case would be the letter dated 01.04.2010.

Now therefore, in view of the fact that there are no detailed instructions with regard to the attendance, remuneration and other matters related to medical officers, there are no corresponding post in the Directorate of Education and rule positions mentioned above it appears to be reasonable that the petitioner is paid salary on the basis of the terms and conditions of the contract vide letter dated 01.04.2010.

This order disposes of the representation of Dr. Alia Rajput in terms of direction dated 01.05.2017 in W.P.(C) No. 3315/2017 titled as Aliya Rajput v/s Director of Education and Ors. of the Hon'ble High Court of Delhi."

33. As per the impugned reply, the respondent no. 1 stated that there were no detailed instructions regarding the attendance, remuneration and other matters pertaining to Medical Officer in accordance with sub-clause 5 of Rule 38 of The Delhi School Education Rules 1973. Moreover, currently the respondent no. 1 does not prescribe any mandatory post for the position of a Medical Officer in a School including respondent no. 3. There are neither recruitment rules pertaining to the same nor anyone has been hired as to the said position.

34. Moreover, even as per Section 15 of The Delhi School Education Act 1973, the terms and conditions of service of the employee, including the pay and other allowances to which the employee shall be entitled is determined



as per the contract of service dated 1st April, 2010.

35. Upon perusal of the impugned reply in the instant petition, the Delhi School Education Act, 1973 does not cover within its ambit the appointment of Medical Officer and the conditions pertaining to the employment of Medical Officer. Therefore, the petitioner cannot seek parity with other employees who are governed by Section 10 of the Delhi School Education Act, 1973.

36. Hence, terms and conditions governing the employment of the petitioner i.e., the pay scale along with other benefits can be fixed only as per its service contract dated 1st April, 2010.

37. A prerogative writ, like, a Mandamus cannot be demanded *ex debito justitiae*, it may be issued by the Court's discretion when the same is necessary for dispensation of justice. In the present petition, the petitioner does not have a vested right of being governed as per the Delhi School Education Act, 1973 and claim benefits in accordance with the same.

38. In view of the aforesaid discussion, this Court cannot intervene by way of issuing a writ of mandamus for the purpose of directing the respondent no. 3 to pay the petitioner for the position of a Medical Officer.

39. Under Article 226 of the Constitution of India, the Courts shall not intervene with the working of the Executive of Legislature unless the same is causing illegal exercise of its power or there is a violation of legal rights of the party before the Court. In the instant petition, there is no illegality committed or wrongful discretion exercised by the respondent in exercise of their power and they are acting as per the Delhi School Education Act, 1973.



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40. In view of the discussion in the foregoing paragraphs, I do not find any merit in the instant petition and is liable to be dismissed.
41. Accordingly, the instant petition stands dismissed.
42. Pending applications, if any, also stand dismissed.
43. The order be uploaded on the website forthwith.

CHANDRA DHARI SINGH, J

OCTOBER 12, 2023
SV/DB/AV

Click here to check corrigendum, if any

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