



2024:DHC:979



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

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Judgment delivered on: 06.02.2024

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W.P. (C) 1210/2024 & CM APPL. 5043/2024 (DIRECTION)

MRS VIBHA SHARMA

..... Petitioner

versus

NEW DELHI MUNICIPAL COUNCIL AND ANR ...Respondent

Advocates who appeared in this case:

For the Petitioner:

Mr. Nagender Vashisht, Advocate.

For the Respondent:

Mr. R. K. Dhawan, Standing Counsel with
Ms. Deeksha L. Kakar, Ms. Akansha
Chaudhary, Ms. Nisha Dhawan, Mr. V. K.
Teng and Ms. Shivani Taneja, Advocates for
NDMC/R-1.Ms. Laavanya Kaushik for Ms. Avnish
Ahlawat, Advocate for R-2**CORAM:****HON'BLE MR. JUSTICE TUSHAR RAO GEDELA****JUDGMENT****JUSTICE TUSHAR RAO GEDELA, J. (ORAL)****[The proceeding has been conducted through Hybrid mode]**

1. With the consent of the learned counsel for the parties, the matter is taken up for final disposal.
2. This is a petition under Article 226 of the Constitution of India, 1950 seeking the following reliefs:-



(a) *To issue writ/ order or direction in the nature of mandamus thereby directing respondents to implement their assurance given by them before the Hon'ble High Court in WP (C) No. 4247/1998 dated 11.2.2005 and also Implement order dated 06.10.2005 passed by the Hon'ble Division Bench in the aforesaid LPA No.2005 /2005;*

(b) *Issue a writ/order or direction or direction in the nature of mandamus directing the respondents to give age relaxation as well as due weightage in the recruitment process vide Vacancy Notice/ Advertisement No. 8/2023.*

3. The case of the petitioner is that the petitioner had worked for more than 10 years as a Primary/Nursery/Balwari Teacher in various schools of the respondent No.1/NDMC from 1994 till 2005. It is further the case of the petitioner that the petitioner in 1998 had prayed for her regularization of her contractual employment by way of filing writ petition bearing No. W.P. (C) 4247/1998.

4. *Vide* the order dated 11.02.2005, the learned single Judge of this Court had dismissed the writ petition on accepting the assurance given by the learned counsel for the respondent as recorded in para 2 of the said judgment. The petitioner subsequently challenged the aforesaid judgment dated 11.02.2005 before the learned Division Bench of this Court in LPA No. 2002/2005 titled as *Vibha Sharma Vs N.D.M.C.*

5. The learned Division Bench by its order dated 06.10.2005 had dismissed the appeal, however had observed that in case any fresh selection is to be made by the DSSSB for appointment of Nursery Teacher and the appellant submits her application, she would not only be given age relaxation in terms of the observations made by the learned Single Judge but the respondent shall also give due



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weightage to the fact that the appellant has rendered service as a Balwari Teacher on contractual basis for the period of 10 years.

6. It is the case of the petitioner that during this entire period, the respondent No.1 had not initiated any recruitment process for the selection of Primary Teacher (Nursery) at all. The petitioner submits that it is for the first time on 22.12.2023 *vide* the advertisement No.08/2023, the respondent No.2 on the request of respondent No.1/NDMC as a user department had issued a notification calling for eligible candidates for the combined examination 2023 wherein the post of Assistant Teacher (Nursery) was also advertised.

7. Learned counsel appearing for the petitioner submits that the petitioner now being over aged, the online portal obviously did not accept her online application which is stated to close on 07.02.2024 by 11:59 pm.

8. Learned counsel appearing for the petitioner submits that the deprivation of the petitioner for being considered even for the purposes of sitting in the examination for recruitment to the regular post of Assistant Teacher (Nursery) would be violative of her fundamental rights as also the vested rights accrued to her by virtue of the orders passed by the learned Single Judge as also by the learned Division Bench on 11.02.2005 and 06.10.2005 respectively.

9. He submits that though the age relaxation has been given by the respondent to the contractual employees only to the maximum period of 5 years, the same would however not suffice in her



peculiar case.

10. He submits that it is not the fault of the petitioner if the respondent advertises after a passage of almost 20 years and as such, prays that that the petitioner be also permitted to participate in the said examination as a one time age relaxation. Learned counsel submits that the period from 2005 to till the date of notification be taken as relaxation in age and the petitioner be permitted to participate in the examination.

11. *Per contra*, Mr. Dhawan, learned counsel appearing for the respondent submits that no doubt that the petitioner was working as a contractual employee i.e. Balwari teacher from the year 1994 through till 2005, however, from 2005 till 2016 there is no information revealed by the petitioner as to what was the gainful employment she was engaged in. However, Mr. Dhawan submits that it was only sometimes in the month of August, 2016 that the petitioner was re-employed again on contractual basis and the still continues to be so.

12. Mr. Dhawan's other objection is that the age relaxation is a policy decision by the government and as such the Courts would be loathe in interfering in such policy decision since the user department and the government know the requirement for a particular post and as such what material was considered to decide the age relaxation being given in a particular notification is purely within the ambit of the government. The government, as the user body cannot be directed nor any mandamus can be issued in that



regard.

13. The other argument of learned counsel appearing for the respondent No.1/NDMC is that in such cases, particularly in the case where the learned Single Judge had dismissed the writ petition solely on the ground of assurance given by the learned counsel for the respondent No.1 is concerned, he submits that estoppel does not apply in favour of the assurance inasmuch as it is trite that there is no estoppel against Statute.

14. For the aforesaid objection, learned counsel relies upon the judgment of Supreme Court in *State of Uttar Pradesh and Another Vs. Uttar Pradesh Rajya Khanij Vikas Nigam Sangharsh Samiti And Others*; reported in (2008) 12 SCC 675, particularly to paras 43, 44 and 45 to submit that Supreme Court had categorically laid down the ratio that in cases where the counsel or even the party gives an undertaking or assurance to the Court, the same would not bind the department if the same is found to be contrary to the rules or not within the rules prescribed for such recruitment process.

15. That apart, learned counsel also brings attention of this Court to the fact that the petitioner as on date is more than 52 years of age and that there are at least 167 more contractual employees who seek age relaxation from upto one year or more which would entail opening of a Pandora's box in case this Court passes any such mandamus in favour of the petitioner. He also submits that out of 167 contractual employees 17 employees are those who are presently holding the post of Primary Teacher (Nursery) in similar



circumstances as the petitioner.

16. He lastly relies upon the judgment of learned Division Bench of this Court in **Pandu Ranga & Ors. Vs. Union of India & Ors in W.P. (C) 8066/2020** decided on **16.10.2020**, particularly to para 17 which according to Mr. Dhwan though is an obiter, would still be of essence. The said para is extracted hereunder:-

“17. A petitioner can file a writ petition asserting his own right and not making a negative claim. Even otherwise, question of discrimination arises only when the petitioner has a right and when the petitioner has no right, he/she cannot claim to have been discriminated. It is only when there is a right and that right is infringed by vesting the benefit in favour of another, that discrimination can be claimed.”

17. In view of the above, Mr. Dhawan, learned counsel appearing for the respondent No.1 submits that no such mandamus ought to be passed as sought for by the petitioner.

18. This Court has heard the arguments of learned counsel appearing for the petitioner as also learned counsel appearing for the respondent No.1 and has also perused the documents and judgments placed on record.

19. Undoubtedly the petitioner was employed with the respondent No.1 as a contractual /Balwari teacher from the year 1994 through till 2005. It is also undisputed that the petitioner has rejoined the services of the respondent No.1 as a contractual Nursery Teacher with effect from August, 2016 and she continues to be so even till date. The arguments of the learned counsel appearing for the petitioner that he has two judgments in his favour has to be examined by this Court. The



learned Single Judge in its order dated 11.02.2005 has noted in para 2 as under:-

“2. It appears that the NDMC has initiated steps to fill up the existing vacancies through the ageis of the Delhi Subordinate Services Selection Board (DSSSB) to whom it has sent its requisitions.

Learned counsel for the Respondents' have argued that the power to effect appointments vests with the DSSSB but this is devoid of any merit. There is a distinction between selection and appointment; while NDMC may have no role to play in the former, the DSSSB has no say in the latter. These petitions have been filed in the wake of regular recruitment through the DSSSB and the consequent anxiety that services of the Petitioners shall be brought to an end. Learned counsel for the NDMC have firstly stated that it is not proposing to terminate the services of the Petitioners before the expiry of their respective contract periods. Secondly; they state that the NDMC also, has no intention to replace the petitioners by other teachers who would be engaged on a contractual basis. Thirdly, they assure the Court that consequent on recruitment by means of the regular selection process through the DSSSB, in the event of the petitioners become surplus the policy of 'last come first go' shall definitely adhered to. Fourthly, learned counsel for the Respondents have also conceded that it would be legally impermissible to disqualify any of the Petitioners for regular selection on the ground of their having crossed the maximum age limit; if they choose to appear in the regular selection examinations, age relaxation shall be granted. These submissions have obviated any consideration of the Impact of Article 14 on the facts of the case.”

20. What is relevant for consideration would be the noting made by the learned Single Judge in para 2. According to the learned Single Judge, the assurance which was given by the respondent was with respect to the fact that in case there is a regular selection process



through the DSSSB and in the event of the petitioner becoming surplus, the policy of 'last come first go' shall definitely be adhered to'.

21. The other concession which was recorded by the learned Single Judge was that it would be legally impermissible for the respondent to disqualify any of the petitioners for regular selection on the ground of their having crossed the maximum age limit' if they choose to appear in the regular selection examination, age relaxation shall be granted.

22. Though the learned Single Judge had dismissed the writ petition, however, these observations were maintained. The petitioner had challenged the said judgment by way of an LPA No.2002/2005. Learned Division Bench vide the order dated 06.10.2005 after noting the fact which had arisen before the learned Single Judge had noted as under:-

“Although the appellant was initially appointed on casual basis but subsequently the said appointment was terminated and she was appointed on contract basis from time to time. The aforesaid appointments given on contract basis were accepted by the appellant without any demur or protest. The law in respect of a contract employee is well settled by several decisions of the Supreme Court. The appellant cannot claim any right to continue in the post after expiry of the contract period as the appellant was fully aware of the nature and the tenure of appointment and, therefore, upon expiry of the period of contract her service would be terminated. In this connection reference can be made to the decision of Dr.Chanchal Goyal v. State of Rajasthan reported in (2003) 3 SCC 485. The said decision has also been referred to by the learned Single Judge. The learned Single Judge has in his judgment extensively extracted passages from other judgments.



Having considered the findings and the conclusions arrived at by the learned Single Judge we find no ground to interfere with the conclusions arrived at as the said conclusions are based on the set tied legal position and are in consonance with the facts of the case. However, while dismissing the appeal and before parting, we would observe that in case any fresh selection is to be made by the Delhi Subordinate Services Selection Board (DSSSB) for appointment of Nursery Teacher and the appellant submits her application, she would not only be given age relaxation in terms of the observations made by the learned Single Judge, (which is not under challenge and has become final and binding) but the respondent shall also give due weightage to the fact that the respondent has rendered service as Balwari Teacher on contract basis for a period of about 10 years.

It is made clear that the observations made by the learned Single Judge directing for giving age relaxation and the observations made by us herein shall not be considered as precedence in any other matter.

In terms of the aforesaid observations and directions, the appeal stands dismissed. All the pending applications also stand disposed of.”

23. Perusal of the aforesaid would indicate that though the learned Division Bench had dismissed the appeal, however, had observed that in case any fresh selections were to be made by the DSSSB for appointment of Nursery Teacher and the appellant submits her application, she would not only be given age relaxation in terms of the observations made by the learned Single Judge, but the



respondent shall also give due weightage to the facts that the appellant had rendered service as a Balwari Teacher on contract basis for the period of 10 years.

24. It was very clearly observed by the learned Division Bench that the aforesaid observation made by the learned Single Judge as also by it, was not to be treated as precedent in any other matter. It is very clear to this Court that it was only in the peculiar facts which had arisen in the case of petitioner, that the learned Division Bench had directed the order passed by it not to be treated as precedent for other cases.

25. It is not disputed that the respondent/NDMC neither challenged the order passed by the learned Single Judge nor the judgment passed by the learned Division Bench dated 06.10.2005 and the same became final and binding upon the respondent No.1 to that extent.

26. The objection regarding the age relaxation being policy decision is no more *res integra* with catena of judgments by the Supreme Court and by the learned Division Bench of this Court. However, in view of the judgment passed by the learned Single Judge as also the learned Division Bench, the question of the petitioner being barred in law on the ground of public policy, cannot be countenanced by this Court. The reasons for the same are not far to see, in that, no order of a court can be construed to be only a paper decree without the same being implemented or being taken to its logical conclusion. Least of all, by the respondent No.1 which never challenged either the judgments' of learned Single Judge or the learned Division Bench on 06.10.2005. It



does not lie in the mouth of the respondent No.1 to apply principles of estoppel in the peculiar facts of this case.

27. The ratio in the judgment of Supreme Court in *State of Uttar Pradesh* (Supra) lays down the law with which this Court cannot quarrel, however, keeping in view the fact that in the present case, the respondents never challenged either of the orders of the learned Single Judge or the learned Division Bench and had let it become final and binding, cannot now use the same to deprive the petitioner from a legitimate consequence which accrued in her favour in the peculiar facts of her case.

28. So far as the argument of Mr. Dhawan in regard to the other contractual employees is concerned, this Court has already noted above, that the learned Division Bench had passed an order in the peculiar facts arising in the case of petitioner and has already categorically laid down that the said judgment would not be treated as precedent, would safeguard the respondent from other litigations, if any of the other contractual employees try to obtain any advantage on account of the aforesaid judgment of the learned Division Bench dated 06.10.2005.

29. This Court is conscious of the fact that the petitioner is aged more than 52 years as of now. It is admitted by Mr. Dhawan, learned counsel appearing for the respondent No.1, that from 2005 till the notification dated 22.12.2023 was issued by the respondent No.2 at the instance of respondent No.1, no notification calling for recruitment to the regular posts of Assistant Teacher (Nursery) was ever advertised.

30. This Court cannot countenance a situation where, for the delay



in issuing such notification, the person who had already obtained a valid judgment in her favour, can be deprived merely because the respondents had taken a substantial period for coming up with such advertisement.

31. It is not the case of the respondent No.1 that during the interregnum period, the schools of the respondent No.1 were shut down or that they were not employing persons as Assistant Teacher on contractual basis for the purposes of teaching students in their schools. It appears from the aforesaid submission that the need for the Assistant Teacher (Nursery) was perennial and continued right from 2005 till today. Having regard to the fact that the posts of Assistant Teacher (Nursery) were perennial in nature, there was no reason why the respondent did not advertise earlier. Though the aforesaid issue is not subject matter of writ petition however, this Court takes judicial notice of the aforesaid facts which fortifies the aforesaid conclusion.

32. In view of the above, the writ petition is allowed.

33. It is given to understand that the applications are only permitted online. In view of above, the respondent No.2/DSSSB is directed to accept the physical copy of the application of the petitioner as an exception and not as a precedent to any other case. The same be done on 07.02.2024, latest by 11:59 pm.

34. The physical form be processed according to the terms of the notification without objecting to the age bar, and 10 years benefit of the petitioner's experience as Balwari Teacher shall be given due weightage in terms of order of learned Division Bench dated 06.10.2005



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35. The application shall be accepted and in case every other requirement is fulfilled, the petitioner shall be permitted to participate in the examination for the aforesaid post as stipulated in the impugned notification dated 22.12.2023.

36. It is also made clear that the present order is passed only in the peculiar facts of this case and shall not be treated as precedent for any other case

37. The petition along with pending application is disposed of in the above terms.

38. A copy of this order be given *dasti* under the signatures of Court Master.

TUSHAR RAO GEDELA, J

FEBRUARY 06, 2024/ms