



2024:DHC:3589



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

% Judgment delivered on: 02.05.2024

+ W.P.(C) 12374/2021, CM APPL. 38907/2021, CM APPL. 4166/2022, CM APPL. 15045/2022, CM APPL. 21419/2022, CM APPL. 5073/2024 & CM APPL. 8315/2024

KANHAIYA MANJHI AND ORS Petitioner

versus

GOVT OF NCT OF DELHI AND ORS Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Rakesh Munjal, Senior Advocate with Ms. Sana Ansari and Ms. Ishita Mohanty, Advocates

For the Respondent : Ms. Hetu Arora Sethi, ASC GNCTD with Ms. Kavita Nailwal, Advocate for R-1.
Ms. Sriparna Chatterjee, ASC with Mr. Soumitra Chatterjee and Mr. Manish, Advocates for R-2 & 3/NDMC.
Mr. Pardeep Kumar, Advocate for R-4.

CORAM:
HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

JUDGMENT**TUSHAR RAO GEDELA, J. (ORAL)****(The proceeding has been conducted through Hybrid Mode)**

1. With the consent of parties, this petition has been taken up today



for disposal.

2. This is a writ petition under Article 226 of the Constitution of India, 1950 *inter alia* seeking the following prayers:-

“1. Directing the respondents that the petitioners be absorbed in New Delhi Municipal Council/ Government/aided schools and that the continuity of their service conditions and seniority be maintained as per the provisions of the Delhi School Education Act & Rules

2. Directing the respondents that the arrears of their salary be paid forthwith with interest

3. Direct that till the reliefs prayed for in (1) are granted and implemented, the respondents shall continue to pay the salary/retirement benefits to the petitioners

4. Issue a writ of mandamus directing respondents no.1 & 2 to implement office order being File NO.X-17011/229/2020-D.E.O.(B) dated 09.06.2021. Pay the revised salary to the petitioners with all arrears with interest @ 18% per annum from 1.1.2016 till date of actual payment.

5. To revise the salary in terms of 7th pay commission and office order dated 09.06.2021 and disburse the same in a time bound manner.

6. Cost of the present petition be awarded”

3. The petitioners were employees of respondent no.4/R.M. Arya Girls Primary School, which was operating under the control and management of Raghmal Arya Kanya Vidyalaya at 1, Doctors Lane, First Floor, Gole Market, New Delhi. The said school is stated to be recognized by the Assistant Superintendent for Female Education, Delhi Province in the year 1936. In the year 1951, respondent no.4/school was



allowed to run in two shifts *vide* letter No. 3684 dated 08.07.1951. The temporary recognition of the school was extended *vide* letter dated 11.07.1989 by the NDMC.

4. The NDMC by its letter dated 27.05.1991 granted permission to run the school as Government Aided School. Subsequent thereto, the respondent NDMC has been disbursing Grant-in-aid to the said school to the extent of 95%.

5. The petitioners were appointed on various posts between the year 1991 through till 2004 after they fulfilled the eligibility criteria and appointed through proper channel under the provisions of DSER, 1973. In the interregnum, for various reasons, the respondent no.4/school closed down, which was taken note of by the NDMC *vide* the letter dated 11.10.2021. It is also stated that *vide* the said letter dated 11.10.2021, the respondent-NDMC had adjusted the students of respondent no.4/school in various schools of the NDMC on their applying for the same. However, in respect of the absorption of the teaching and non-teaching staff, the respondent-NDMC had rejected the said proposal. The said school is stated to have been closed with effect from 30.06.2021.

6. The petitioners claim that till March, 2021, the petitioners were being paid salaries regularly, however, it was only by virtue of orders passed by this Court that the three months' salary till 30.06.2021 was paid by the NDMC directly to the petitioners.

7. The controversy, in the present case, arises from the declaration of the petitioners as surplus staff of respondent no.4. Rule 47 of the Delhi School Education Rules, 1973 (hereinafter referred to as "DSER")



is what would have to be considered by this Court while applying the same on the facts arising in the present case.

8. Mr. Rakesh Munjal, learned senior counsel appearing for the petitioners submits that the effect of Rule 47 cannot be considered in any manner, other than to say, that the moment the staff of a particular aided school, whether under NDMC or the MCD, are declared as surplus, such employees are to be adjusted by absorption in either a Government school run by the said authorities or in any other aided school run under the aegis of the said authorities. He submits that having not followed the provisions of law as stipulated, NDMC as also the MCD have violated the provisions.

9. Learned senior counsel drew attention of this to the CM APPL. 5073/2024, filed by the petitioners, particularly to page 8, which was the list of vacancies in the NDMC school, falling within its area. The said information is stated to have been obtained under the RTI Act, 2005. According to Mr. Munjal, the statistics show that as on 31.12.2022, the total vacancy position in the NDMC schools is 125, out of which 51 vacancies were available as on that date, under the Unreserved category.

10. Learned senior counsel also now draws attention of this Court to the written submissions filed on behalf of respondent no.1/GNCT of Delhi dated 07.10.2023, particularly to paras 1 to 3 wherein the respondent no.1 has stated that since the petitioners were appointed by respondent nos.2 and 3/NDMC under the provisions of Rule 47 DSER, 1973, the surplus employees are to be absorbed in Government schools or in the aided schools running under them.

11. According to learned senior counsel, para 3 of the written



submissions of respondent no.1 also would be relevant inasmuch as the respondent no.1/GNCT of Delhi has claimed that the approval for the closure of the school was granted by respondent nos.2 and 3/NDMC and the respondent no.1 was never communicated or consulted about the decision to close such school. Learned senior counsel seeks to suggest that the burden of absorbing the surplus teachers, who are the petitioners herein, is squarely upon the respondent nos.2 and 3/NDMC.

12. He submits that in view of the above, it is apparent that the respondent Nos.2 and 3/NDMC in compliance of Rule 47 of DSER, 1973 has no option other than to absorb the petitioners in any of the schools, either run by itself or any aided school, running under its aegis within its area.

13. *Per Contra*, Ms. Sriparna Chatterjee, learned ASC appearing for respondent/NDMC extensively referred to the affidavit dated 11.12.2023, particularly paras 4, 5, 6 and 9 to submit that as per the language employed in Rule 47 of DSER, 1973, the responsibility of the absorption of surplus employees is with the Administrator. She submits that the Administrator, on that point, can exercise jurisdiction over the schools run by the Government of NCT of Delhi and as such, the liability to absorb the petitioners does not lie with the respondent/NDMC.

14. The other argument of Ms. Chatterjee is in respect of Section 42 of the NDMC Act, 1994 which is in respect of Direct Recruitment to the category B and C posts. She submits that as per the Resolution of the Council, the direct recruitment for the category B & C posts is made through Delhi Subordinate Staff Selection Board (DSSSB) and there is



no other method of recruitment.

15. She submits that in such view of the matter, the prayer of absorption of the petitioners, by way of applying Rule 47, would be a lateral recruitment, which is not permitted under the NDMC Act.

16. She also submits that so far as the responsibility of NDMC is concerned, till such time the respondent no.4 was closed i.e. 30.06.2021, the respondent nos.2 and 3 fulfilled all its responsibilities by releasing grant-in-aid to the extent of 95%. She submits that subsequent thereto, once the school is closed, the liability of the NDMC also gets over.

17. Other limb of her argument is that is that the respondent/NDMC has no direct employer-employee relationship with the staff of an aided school and as such, the respondent/NDMC cannot be made liable for absorbing the surplus staff of an aided school. In any case, she also submits that there is only one primary school by the name Nirmal Primary School at Shahjahan Road which is the only aided school of NDMC and as per the information elicited from such school, there is no vacancy as on date for adjusting the petitioners.

18. On that basis, she submits that the petition be dismissed.

19. This Court has heard the arguments of Mr. Munjal, learned senior counsel as also Ms. Hetu Arora Sethi, learned ASC for respondent no.1, Ms. Chatterjee, learned ASC for respondent nos.2 and 3 and Mr. Pardeep Kumar, learned counsel for respondent no.4 and perused the documents on record.

20. At the outset, it would be apposite to extract Rule 47 of DSER, which is as under:-

“47. Absorption of surplus [employee] [Substituted by The



Delhi School Education (Amendment) Rules, 1990 (w.e.f. 23.2.1990).] etc.

(1) Where as a result of:-

(a) the closure of an aided school or any class or classes in any aided school; or

(b) withdrawal of recognition from an aided school; or

(c) withdrawal of aid from an aided school.

any student or employee becomes surplus, such student or employee, as the case may be, [may be absorbed] [Substituted by The Delhi School Education (Amendment) Rules, 1990 (w.e.f. 23.2.1990).] as far as practicable, in such Government school or aided school as the Administrator may specify :

Provided that the absorption in Government service of any employee who has become surplus shall be subject to the availability of a vacancy and shall be subject further to the condition that the concerned employee possesses the requisite qualifications for the post and has not been retrenched by the management of the aided school on any ground other than the ground of closure of the school or any class or classes of the school, or withdrawal of recognition or aid from the school:

Provided further that where any such surplus employee is absorbed in a Government school, he shall be treated as junior to all the persons of the same category employed in the Government Schools on the date immediately preceding the date on which he is so absorbed, and where such surplus employee is absorbed in an aided school, he shall rank as junior to all the persons of the same category employed in that school on the date immediately preceding the date on which he is so absorbed.

(2) Where any surplus [employee] [Substituted by The



Delhi School Education (Amendment) Rules, 1990 (w.e.f. 23.2.1990).] is absorbed under sub-rule (1):-

(a) the salary and other allowance last drawn by him at the school from which he has become surplus shall be protected;

(b) his provident fund account shall be transferred to the school in which he is so absorbed, and thereupon such provident fund shall be governed in accordance with the rules and regulations in force in that school in relation to provident fund; and

(c) the period of his qualifying service in the school in which he had worked before such absorption and any previous period of qualifying service, if any, in any recognised aided school in Delhi shall be taken into account for the purpose of computing his pension and other retirement benefits.

(3) Without prejudice to the provisions of sub-rules (1) and (2), where an [employee] [Substituted by The Delhi School Education (Amendment) Rules, 1990 (w.e.f. 23.2.1990).] becomes surplus by reason of the closure of any class or section thereof or the discontinuance of the teaching of any subject, such [employee] [Substituted by The Delhi School Education (Amendment) Rules, 1990 (w.e.f. 23.2.1990).] [may be absorbed] [Substituted by The Delhi School Education (Amendment) Rules, 1990 (w.e.f. 23.2.1990).] in the first instance, as far as practicable, in such Government or aided school as the Administrator may specify, and if the class or section which was closed is reopened by the former school or if any new class or section thereof is opened by such school or if the subject, the teaching of which was discontinued, is re-introduced by such school, or strength of the [staff] [Substituted by The Delhi School Education (Amendment) Rules, 1990 (w.e.f. 23.2.1990).] of the former school is increased, such [employee] [Substituted by The Delhi School Education



(Amendment) Rules, 1990 (w.e.f. 23.2.1990).] shall be reabsorbed in the former school; but if such re-absorption does not take place within a period of five years from the date of absorption of such [employee] [Substituted by The Delhi School Education (Amendment) Rules, 1990 (w.e.f. 23.2.1990).] in the Government or aided school, such [employee] [Substituted by The Delhi School Education (Amendment) Rules, 1990 (w.e.f. 23.2.1990).] shall be regularly absorbed in such Government or aided school, as the case may be.

(4) Re-absorption of a [employee] [Substituted by The Delhi School Education (Amendment) Rules, 1990 (w.e.f. 23.2.1990).] in a former school shall not affect his continuity of service or his seniority in relation to that school or his emoluments, provident fund, gratuity and other retirement benefits.

Explanation.- For the purposes of sub-rules (3) and (4), "former school" means (he school from which an [employee] [Substituted by The Delhi School Education (Amendment) Rules, 1990 (w.e.f. 23.2.1990).] had become surplus."

21. The language, as employed by the legislature in Rule 47, leaves no room for any doubt whatsoever that it is incumbent upon the authority under Rule 47, which sanctions and accords grant-in-aid to any aided school or runs any school by itself, that the employees or students who become surplus are to be absorbed. Though the limitation, if any, could be construed from the words used "*as far as practicable*". However, that could be in cases where, for the time being, there are no vacancies available. Otherwise, ordinarily the prescription should not disentitle the surplus staff from absorption in other schools.

22. The two provisos also propel this Court to consider that the choice



is not available with the authority to refuse such absorption provided the conditions in the provisos are not fulfilled. In fact the sub-Rule 2 of Rule 47 would propel this Court to conclude that the authorities in such peculiar circumstances have no choice other than to absorb the students or the surplus staff either in its own schools or those running under its aid.

23. The sub-Rule 2 of Rule 47, DSER stipulates that salaries and allowances are to be protected; provident fund is to be transferred to the school in which such staff is absorbed; the period of qualifying service in the school before such absorption and any previous period of qualifying service is to be taken into account for the purpose of computing the pension and other retiral benefits.

24. All the aforesaid provisions compel this Court to conclude that no choice is available with the authorities to refuse adjusting/absorbing the surplus staff, either in any school run by itself or those under its aid.

25. In view of the aforesaid discussion and analysis, this Court would now consider the facts which arise in the present case.

26. Undoubtedly, the respondent no.4 for whatever reason had closed w.e.f. 30.06.2021. The letter dated 11.10.2021 issued by the Deputy Education Officer (DEO) of the Education Department of the respondent nos.2 and 3/NDMC had by a direction adjusted/absorbed the students of the respondent no.4 in its own schools on the condition that the said students would apply for the same. It was only in respect of absorption of teaching and non-teaching staff that the said DEO rejected the proposal of the school.

27. The said letter by itself would indicate that Rule 47 DSER, 1973



was made applicable in respect of the students. The said order does not indicate as to on what ground, the teachers and other surplus employees of the respondent no.4/school are disentitled from the absorption that is available to them under Rule 47 of DSER, 1973. Thus no reasons are discernible from the said order and it is bereft of any reasons of refusal.

28. Having held so, now this Court would also deal with the arguments addressed by Ms. Chatterjee in respect of the stand taken by respondent nos.2 and 3/NDMC.

29. So far as the objection to the applicability of Rule 47 of DSER on the ground of the responsibility of absorption of surplus employees vesting in the Administrator is concerned, the same cannot be countenanced. This is for the reason that so far as the schools which are running under the area falling within the jurisdiction of NDMC are concerned, the grant-in aid is sanctioned by the NDMC itself. The number of sanctioned posts, the amount of grant-in-aid all are within the jurisdiction of the NDMC itself. That coupled with the letter dated 11.10.2021 indicate that such argument is not even available to it. On that, the said argument is rejected.

30. So far as the issue of employer-employee relationship not existing between the petitioners on one hand and the NDMC on the other is concerned, the same would be an argument in futility. This is for the reason that Rule 47 does not contain within itself any distinction which the respondent no.2 is trying to draw on such basis. The provision only stipulates the condition that the staff of any aided school once declared surplus, have the right to be absorbed subject to certain conditions. Thus for applicability of Rule 47, it is not necessary to have an employer-



employee relationship. On such strength of Rule 47, this Court rejects the said argument too.

31. Moreover, it is not the stand of respondent no.2/NDMC that the provisions of either DSEA or DSER are not applicable to it or to the schools run by it or the ones which are receiving the aid from it.

32. The last leg of the argument was in respect of Section 42 of the NDMC Act, 1994 to submit that so far as the direct recruitment is concerned, in the category B and C posts, the same are to be made by agencies, which are prescribed for it. According to the arguments, the recruitment for such posts, is ordinarily and regularly made through the DSSSB. It was submitted that since the petitioners are not selected through the DSSSB under Section 42 of the NDMC Act, 1994, the petitioners cannot be treated at par with the other teachers and staff, who are employed by such recruitment and are working in the schools run by the NDMC by itself.

33. The contention raised on this issue also cannot be appreciated for the simple reason that those are the cases where the issue of direct recruitment comes to play. In the present case, the issue is only in respect of the application of provisions of Rule 47 of DSER, which only talks about absorption/adjustment of surplus staff. That being the case, the objection raised is not applicable to the facts of the present case and is untenable.

34. On the aforesaid analysis, the objections raised by the respondent nos.2 and 3/NDMC are rejected.

35. The petitioners appear to have applied for a requisite information under the RTI Act, 2005 and obtained relevant information, which is



annexed to the CM APPL. 5073/2024, in regard to the vacancies which are available in the schools run by the NDMC. According to the information, as on 31.12.2022, the total available vacancies are 125 and 51 vacancies out of that were available under the Unreserved category.

36. Mr. Pardeep Kumar, learned counsel for respondent no.4 has drawn attention of this Court to the written submissions filed by the petitioners, particularly page 6, which is a letter emanating from respondent nos.2 and 3/NDMC disclosing the number of vacancies which were available as on 31.12.2022, as 54 posts.

37. After having considered the vacancy position and from the aforesaid analysis, this Court is of the considered opinion that respondent nos. 2 and 3/NDMC cannot wriggle out of its responsibility as contemplated and stipulated under Rule 47 of DSER, 1973.

38. It is also evident that there are clear vacancies available with the respondent nos.2 and 3/NDMC in the schools run by it. Rule 47 of DSER obligates the respondent nos.2 and 3/NDMC to absorb/adjust the petitioners in the schools either run by itself or those which are receiving grant-in-aid from it.

39. In that view of the matter, this Court is of the considered opinion that the petitioners are entitled to be absorbed in any of the schools where vacancies are available, run by the NDMC itself or any school which is being run under the grant-in-aid sanctioned by the NDMC. Ordered accordingly.

40. The petitioners also relies upon the judgment of learned Division Bench of this Court passed in LPA 441/2009 titled *Manju Tomar and Ors vs NCT and Ors and Batch* particularly para 20, which is the



penultimate paragraph. The same is extracted hereunder:-

“20 As stated hereinabove, after re-employment, the tenure, seniority, pay scale and perquisites of petitioner nos. 1 to 5 shall not be adversely affected just because of closure of Primary School. However, as during the period 2006-2009 petitioner nos. 1 to 5 have not worked, they would only be entitled to 50% of their pay and perquisites but this period will be counted for the purposes of their seniority and for computing their pensionary and other statutory benefits.”

41. Following the ratio laid down by the learned Division Bench of this Court in the case of **Manju Tomar** (supra), the similar directions are passed i.e. after absorption, the tenure, pay scale and perquisites of the petitioners shall not be adversely affected just because of closure of the primary school. The petitioners having not worked w.e.f. 01.07.2021 through till the date of absorption, they would be entitled only to 50% of their pay and perquisites, However the said period, in accordance with Rule 47 of DSER, would be counted for the purpose of calculating their pensionary and other statutory benefits.

42. The aforesaid process of absorption and payment of arrears, as directed above, shall be carried out within a period of ten weeks from today, failing which the arrears as directed above shall be paid with 6% interest per annum.

43. With the aforesaid observations, the present writ petition alongwith pending applications is allowed and disposed of with no order as to costs.

TUSHAR RAO GEDELA, J

MAY 2, 2024

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