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

% **Date of decision: 28th March, 2012**

\+ **LPA No. 414/2011**

SHASHI KOHLI
(DECEASED THROUGH LEGAL REPRESENTTIVES) ..... Appellant
Through: Ms. Indrani Ghosh with Ms. Tamali Wad, Advocates.

Versus

DIRECTOR OF EDUCATION & ANR. ..... Respondents
Through: Mr. S.Q. Kazmi, Advocate for R-1.
Mr. Sanjay Jain, Sr. Advocate with Mr. Puneet Mittal, Advocate for R-2.

AND

LPA No. 415/2011

CHANDER PRABHA SOOD ….. Appellant
Through: Ms. Indrani Ghosh with Ms. Tamali Wad, Advocates.

Versus

DIRECTOR OF EDUCATION & ANR. ….. Respondents
Through: Mr. S.Q. Kazmi, Advocate for R-1.
Mr. Sanjay Jain, Sr. Advocate with Mr. Puneet Mittal, Advocate for R-2.

CORAM :-
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. These intra court appeals impugn the separate but identical orders, both dated 29th April, 2011 of the same learned Single Judge dismissing WP(C) No. 4330/2010 and WP(C) No.2173/2010 respectively preferred by

the appellants. Notice of these appeals was issued; the appeals were admitted to hearing; the appellant in LPA 414/2011 died during the pendency of this appeal and her legal heirs were substituted. The same counsel represent the appellants and the contesting respondents in both the appeals and common arguments have been addressed. We have as such taken up these appeals together for disposal.

2. The appellants in both the appeals were employed as teacher in the respondent no.2 Delhi Public School, Mathura Road, New Delhi and on attaining the age of 60 years on 31st July, 2010 and 30th April, 2010 respectively, were retired from service. Their grievance was that though the notification dated 29th January, 2007 of the Directorate of Education of Government of National Capital Territory of Delhi allowed re-employment to all retiring teachers upto PGT level, till they attain the age of 62 years but they had not been granted the benefit of re-employment.

3. The learned Single Judge dismissed the writ petitions observing/holding -

i. that though the notification dated 29th January, 2007 allowed "automatic re-employment" but the same was "subject to…. fitness and vigilance clearance".

ii. that the instructions/guidelines for re-employment contained in the subsequent notification dated 28th February, 2007 made the retiring teachers eligible only for "consideration for re-employment against

clear vacancy" and permitted the schools to assess the professional fitness of the retiring teachers;

iii. that it was not as if the respondent no.2 school had not considered the appellants for re-employment;

iv. that the respondent no.2 school had constituted a Committee which had examined the relevant records of service including the Annual Confidential Reports of the previous five years of both the appellants but had found the appellants unfit for re-employment.

v. that re-employment could not be claimed as a matter of right;

vi. reliance was placed on ***Prof. P.S. Verma vs. Jamia Millia Islamia University*** 1996 III AD (Delhi) 33 and ***Dr. V.K. Agrawal vs. University of Delhi*** (2005) DLT 468 (DB) to hold that an employee only had a right to be considered for re-employment and the Court will not interfere in the decision of the empowered authority;

vii. that it was not the case of the appellants that the Committee which considered their case for re-employment was not validly constituted;

viii. it was however the case of the appellants that the then Principal of the school was inimical towards them since some teachers of the school including the appellants had made complaint of harassment against the said principal to the National Commission for Women -

the learned Single Judge however held that since the Principal was not the sole member of the committee which considered the case of the appellants for re-employment, animosity alleged qua the Principal had no relevance;

ix. that the report of the Committee which also comprised of the Chairman and the Vice Chairman of the school could not be rubbished on such grounds;

x. the judgment in ***Rattan Lal Sharma vs. Managing Committee, Dr. Hari Ram (Co Education) Higher Secondary School*** (1993) 4 SCC 10 cited by the appellants was distinguished by holding that in that case bias stood proved but which was not so in the present cases;

xi. that the adverse entries in the ACR of the appellants even though not communicated to the appellants could form the basis for denying the re-employment to the appellants;

xii. that the Committee constituted by the respondent no.2 school for assessing the professional fitness and suitability of the appellants for re-employment, besides ACR for the previous five years had also considered the other service record of the appellant which was far from commendatory and which showed that the appellants were not dynamic, were not keeping themselves updated with the

development in their respective subjects and that there were several complaints against them from students, teachers and parents;

xiii. that the very fact that notwithstanding the adverse ACR, the appellants had been given the financial upgradation was also held to be not relevant to the context;

xiv. that the school had a right to deny re-employment to a teacher whose overall performance as a teacher was not satisfactory.

4. The counsel for the appellants before us has contended that the documents produced by the respondent no.2 school before the learned Single Judge and on the basis whereof re-employment is stated to have been denied to the appellants, were not available to the appellants at the time of filing of the writ petitions. It is further argued that no opportunity was given to the appellants to show cause against the grounds on which re-employment has been denied to them, in violation of the principles of natural justice. It is further contended that only ACRs could have been seen while judging the suitability for re-employment and of the ACRs also, the ACRs containing adverse entries and not communicated to the appellants could not have formed the basis for denying re-employment. Attention is also invited to the communication dated 10th October, 2007 of the Society which has established the respondent no.2 school conveying the decision for re-employment upto to the age of 62 years and further providing that the same be treated notionally as extension of service. On the basis thereof it is argued that no such assessment could have been done.

5. The senior counsel for the respondent no.2 school has per contra invited attention to the counter affidavit filed in the writ petitions, where the school had also taken a plea that the applicability of the notification dated 29th January, 2007 (supra) was confined to Government and Government aided schools and not to unaided schools as the respondent no.2 school is; however the respondent no.2 school had of its own made a provision for re-employment subject to satisfaction by the Managing Committee of the school as to the medical fitness and performance. Attention is also invited to communication dated 29th January, 2007 of the Society which has established the respondent no.2 school, stating that "all teachers will remain in employment upto the age of 62 years unless found unsuitable on any ground". Attention is also invited to the Minutes of the Meeting held on 03.02.2010 of the Committee which assessed the suitability of the appellants, to demonstrate that other service records besides the ACRs were also perused and on the basis thereof decision of the appellants being unfit for re-employment was reached. The senior counsel for the respondent no.2 school has also invited attention to the plethora of Memoranda of misconduct issued to the appellants and complaints against the appellants from time to time. It is further argued that it is / was not denied by the appellants that their ACRs were given to them and thus the non communication of the adverse entries therein is irrelevant. It is further argued that it is highly unlikely that the appellants would not know of the said adverse entries spanning over several years.

6. The counsel for the appellants in rejoinder has contended that the Memoranda of misconduct relied upon by the respondent no.2 school are issued by the Principal of the school when as per the Delhi School Education Rules 1973 the same could have been issued by the Managing committee of the school only. It is thus argued that no credence could have been given thereto. It is re-agitated that the appellants have been victimized for having made a complaint against the Principal. It is further stated that the appellant in LPA 414/2011 having died and the appellant in other case being now past the age of 62 years also, the relief to which the appellants are now entitled to is monetary only.

7. The counsel for the appellants after the close of hearing has submitted copies of the following judgments –

i. ***Deepak Kumar vs. Union of India*** 2007 (93) DRJ 328 laying down that benefit of Assured Career Progress Scheme can be given only after following the usual norms of screening;

ii. ***Dev Dutt vs. Union of India*** (2008) 8 SCC 725 on the principles of natural justice requiring communication of adverse entries in the ACR and giving opportunity to represent thereagainst;

iii. ***Abhijit Ghosh Dastidar vs. Union of India*** (2009) 16 SCC 146 holding non communication of adverse entries to be violative of Article 14 of the Constitution of India and denial of promotion on the basis thereof as bad;

iv. ***M.J. Sivani vs. State of Karnataka*** (1995) 6 SCC 289 generally on the principles of natural justice;

v. ***Devendra Mishra vs. University of Delhi*** 2010 (167) DLT 259 but which was a case of enhancement of the age of retirement and not of re-employment;

vi. ***Indu Bhushan Dwivedi vs. State of Jharkhand*** AIR 2010 SCC 2472 laying down that in imposing of punishment pursuant to disciplinary inquiry, uncommunicated past adverse entries in service record cannot be considered;

vii. ***Sushma Nayar vs. Managing Committee, Delhi Public School Mathura Road*** 2009 VII AD (Delhi) 246 where the notification dated 29th January, 2007 was treated as applicable to the respondent no.2 school.

8. The counsel for the respondent no.2 school also after the close of hearing has submitted copies of the following judgments -

i. ***Prakash Chand Sharma vs. The Oil & Natural Gas Commission*** 1970 SLR (SC) 117 where in the absence of any plea of malafides and discrimination, the consideration of ACRs with respect to which no opportunity to make a representation had been given was held to be merely fortuitous;

ii. ***Madhu Rathour vs. V.C. Delhi University*** 2007 (93) DRJ 489 where the Division Bench of this Court had refused to interfere with

the decision on re-employment when the case had been looked into by the educationist/experts/eminent scholars;

iii. ***Dr. Krishan Kumar Singh vs. Union of India*** 79 (1999) DLT 332 laying down that re-employment / extension of service is not a matter of right;

iv. ***Dr. B.K. Bhattacharya vs. V.R. Mehta*** 84(2000) DLT 165 to the same effect;

v. ***Dr. K.S. Jawatkar vs. Jawaharlal Nehru University*** 108(2003) DLT 607 also to the effect that there is no right of re-employment.

9. A perusal of the Minutes of the Meeting held on 03.02.2010 of the Committed constituted to assess the cases of the appellants for re-employment shows that in the said meeting comprising of 3 other members besides the Principal of the school, the cases of two other teachers besides the appellants were also considered and of which one Mrs. Narinder Kaur Manku was found fit for re-employment and a male teacher Mr. U.S. Arora was also found to be unfit for re-employment just as the appellants were found unfit. The said Minutes further record that the Committee had examined "the relevant records of service including the ACR for the last five years of all eligible candidates".

10. The appellants have not raised any allegation of bias against the other three members comprising the said Committee. It is also not their case that the Principal against whom allegations of bias are made was in a position to

influence the other three members who even otherwise cannot be said to be in such a position so as to be under the influence of the Principal. It is also sufficiently borne out from the record that the complaints did exist as to the performance as teachers of both the appellants. As far as the allegation of vindictiveness against the Principal is concerned, the appellants have placed on record a complaint of being harassed by another teacher; insofar as the Principal was concerned what was stated was that the said other teacher had the support of the Principal; the complaint against the teacher also was only of changing the time table frequently. We are of the opinion that the same does not make out any case of bias of the Principal against the appellants. The Apex Court in ***M.V. Thimmaiah v. UPSC*** (2008) 2 SCC 119 has observed that people are prone to making allegations of bias and *mala fide* but the Courts owe a duty to scrutinize the allegations meticulously because the person making the allegation has a vested right.

11. We also tend to agree with the argument of the respondent no.2 school that it is highly unlikely that the appellants during their employment with the respondent no.2 school were not aware of their ACRs. The default if any, in expressly communicating the adverse entries cannot come in the way of the respondent no.2 school if, on the basis of other material and of which plethora is available, satisfied as to the unsuitability of the appellants for re-employment from so denying the re-employment. The Supreme Court recently in ***Rajendra Singh Verma V. Lt. Governor of NCT of Delhi*** (2011) 10 SCC 1, though in the context of compulsory retirement, rejected the challenge thereto on the plea that

the last adverse entry was communicated at about the same time when the order of compulsory retirement was communicated and no opportunity to represent there against, had been given. It was reiterated that since order of compulsory retirement (as also the decision not to re-employ) is not a punishment and does not have adverse effect, the principles of natural justice are not attracted. It was further reiterated that an uncommunicated adverse ACR on record can be taken into consideration and order of compulsory retirement cannot be set aside only for the reason that such uncommunicated adverse entry was taken into consideration. It was further held that all that is relevant is whether a *bonafide* decision is taken.

12. We are further of the view that as per the judgment of the Division Bench of this Court in ***Kathuria Public School vs. Director of Education*** 123 (2005) DLT 89 and which had not been interfered with in judgment dated 27th August, 2010 in O Ref. 1/2010 titled ***Delhi School Tribunal v. GNCTD,*** also, unnecessary interference with the management and functioning of unaided schools is not permissible. The notification aforesaid does not extend the age of retirement but merely allows the schools to re-employ the retiring teachers. The notification seek to grant a concession enabling the schools to so re- employ the teachers and cannot be treated as conferring any rights on the teachers to continue in employment till the age of 62 years. The schools cannot be compelled to retain the teachers who inspite of long span are found not to be the best in the field, for another two years. Rather the said notification ought to be read as an incentive to the teachers for improving their

performance if desirous of availing the extension so allowed to the schools. If the notification is read as conferring a right to the teachers, the same is likely to affect the standards of teaching in education and which we are not inclined to encourage. The benefit of the notification is intended for those who have the potential for continued useful service to the institution. Non grant of re-employment does not cast any stigma. The notification is not intended to force upon the educational institutions, teachers who are worthless and who have lost their utility and who are standing in the way of fresh blood being inducted into the institution.

We find that a Division Bench of this court in ***B.L. Kapur V. Madan Lal Khurana*** 47(1999) DLT 32 held that there is no right of re-employment to a retiring teacher.

Accordingly these appeals are dismissed. No order as to costs.

RAJIV SAHAI ENDLAW, J

ACTING CHIEF JUSTICE

MARCH 28, 2012
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