

(2008) 02 DEL CK 0236

In the Delhi High Court

Case No : WP (C) No. : 7579 of 2007 and 7581 of 2007, C.M.A. : 14423 of 2007
and C.M.A. No. : 14425/07

Smt. Chander Prabha

APPELLANT

Vs

LT. Governor (Administrator), Delhi and others

RESPONDENT

Date of Decision : 29-02-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 141, 16, 226, 32
Delhi School Education Act, 1973 — Section 2(d), 2(r)

Citation : (2008) 7 ILR Delhi 96 Supp

Hon'ble Judges : Vipin Sanghi, J;A.K. Sikri, J

Bench : Division Bench

Advocate : M.G. Kapoor, for the Appellant; Avnish Ahlawat, Advocate for
Respondents nos. 1 to 3 and Mr. R.K. Kapoor, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Sikri, J.—The petitioners, who are working as TGT (General) and Language Teacher (Hindi) respectively in Sant Nirankari Senior Secondary School, have been declared surplus in the said school. As a consequence, they are sought to be adjusted in another school and order to this effect was passed by the Directorate of Education. Normally, an employee, who is declared surplus, can be retrenched by the employer. However, there is a benevolent provision contained in the Delhi School Education Rules, namely, Rule 47, which provides that when a teacher is declared surplus in a particular school, he may be absorbed in some other school where there is a vacancy. Whereas, on the one hand, this provision saves the employment of the petitioners, at the same time the petitioners still feel aggrieved in view of the second proviso to sub-rule (1) of Rule 47 of Delhi School Education Rules (hereinafter referred to as the "Education Rules"), which takes away the seniority of such surplus teachers. It provides that when 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 school. It is because of this reason that in the present petition the petitioners,

apart from challenging the action of the respondents in declaring them as surplus, are also challenging the vires of Rule 47 of the said Rules. This matter has been listed before the Division Bench in view of the fact that the petitioners are challenging the vires of the aforesaid Rules. We had, therefore, heard the learned counsel for the parties on this aspect of the matter. In order to appreciate the controversy, it would be advisable to first reproduce this Rule in its entirety:-

47. Absorption of surplus [employees] 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 employees, as the case may be, [may be absorbed] 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] 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 recognized 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] becomes surplus by reason of the closure of any class or section thereof or the discontinuance of the teaching of any subject, such [employee] [may be absorbed] 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 reintroduced by such school, or strength of the [staff] of the former school is increased, such [employee] 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] in the Government or aided school, such [employee] shall be regularly absorbed in such Government or aided school, as the case may be.

(4) Re-absorption of an [employee] 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 purpose of sub-rules (3) and (4), "former school" means the school from which an [employee] had become surplus.

2. As already indicated above, but for Rule 47 a surplus employee would face termination, as in that case his/her services would be retrenched. It is the right given to an employer under the common law inasmuch as, an employer cannot be forced to keep an employee if there is no work for him as he is rendered surplus. Rule 47 is, thus, statutory provision which makes some inroads into this right of the employer and is, therefore, a benevolent provision. It is also clear from the aforesaid Rule that on an employee becoming surplus, even in an aided school, which would otherwise be a privately managed school, duty is cast on the Government to absorb him in a Government school or some other aided school. Power is given to the Administrator in this behalf to pass an appropriate order as to in which Government or aided school such a surplus employee can be adjusted. Sub-rule (1), however, does not cast any absolute authority upon the Government/Administrator to absorb such an employee in all circumstances, which is clear from the terminology used, namely, "may be absorbed as far as practicable". First proviso makes it manifest by stipulating the following conditions:-

- (a) The absorption is subject to availability of vacancy;
- (b) The concerned employee possesses the requisite qualification;
- (c) The concerned employee had not been retrenched on any ground other than the ground of closure of the school or any class or classes of school or withdrawal of recognition or aid from the school.

3. The second proviso, with which we are concerned, makes such an employee, who is absorbed in a Government school, to be treated as junior to all the

persons of the same category employed in Government schools on the date immediately preceding the date on which he is so absorbed. If the employee is absorbed in an aided school, then he is to rank as junior to all the persons of the same category employed in that school. There is a rationale behind this provision. Such an employee, who was rendered surplus in his school, when he is adjusted in some other school, cannot be allowed to steal a march over the existing employees of that school. We have to keep in mind that such employee has come to another school not by way of transfer or in public interest but after he was declared surplus and in normal circumstances he was to lose his employment and thus by providing him sheltered employment, his personal interest is safeguarded.

4. Notwithstanding the aforesaid position, learned counsel for the petitioner ventured to challenge the vires of the second proviso to Rule 47 on various grounds.

5. First submission was that the second proviso offends Articles 14 and 16 of the Constitution of India. This plea is predicated on varying treatments given to such an employee in the two types of schools-in Government schools on the one hand and aided school on the other. It was argued that when a surplus employee is absorbed in a Government school, he is to be treated as junior to all persons of the same category employed in all the Government schools and not only in that particular Government school where he is absorbed. On the other hand, when a surplus employee is absorbed in an aided school, he is to rank junior to all persons of the same category employed in that particular aided school only and not all aided schools. According to Mr. M.G. Kapoor, learned counsel for the petitioners, such a classification between Government schools and aided schools with different treatments is not permissible and violates Articles 14 and 16. He referred to the judgment of the Supreme Court in *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, wherein the Apex Court held:-

The true scope and ambit of Article 14 has been subject matter of numerous decisions...It is sufficient to state that the content and reach of Article 14 must not be confused with the doctrine of classification. Unfortunately, in the early stages of the evolution of our constitutional law, Article 14 came to be identified with the doctrine of classification because the view taken was that Article forbids discrimination and there would be no discrimination where classification making the differentia fulfils two conditions, namely,

(i) that the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and

(ii) that that differentia has a rational relation to the object sought to be achieved by the impugned legislative or executive action.

It was for the first time in *E.P. Royappa Vs. State of Tamil Nadu and Another*, that this Court laid bare a new dimension of Article 14 and pointed out that Article 14

has highly activist magnitude and it embodies a guarantee against arbitrariness..... From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies. One belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment.

6. The aforesaid argument, which appears to be attractive in first blush, loses its sheen when we probe into the rationale behind such a provision made in the second proviso to sub-rule (1) of Rule 47. Answer is simple: Insofar as the Government schools are concerned, there is one common seniority for all the employees in a particular category in all the Government schools and an employee of his category does not maintain his seniority in a particular Government school. The employees of Government schools can be transferred from one Government school to the other Government school as well. They are all employees under the same employer i.e. the Government. On the other hand, all aided schools have their individual and separate legal status independent from each other. They are all managed by separate private societies/bodies. Therefore, the employees of each school enjoy their seniority in their respective school only, without any connection with other aided schools. The definition of "aided school" is provided u/s 2(d) of Delhi School Education Act (hereinafter referred to as the "Education Act"), which is as under:-

2. Definitions-In this Act, unless the context otherwise requires:-

(a) xxxx

(b) xxxx

(c) xxxx

(d) "Aided School" means a recognized private school which is receiving aid in the form of maintenance grant from the Central Government, Administrator or a local authority or any other authority designated by the Central Government, Administrator or a local authority;

7. It is clear from the above that an aided school is privately managed, which is recognized by the Government and gets grant from the Government etc. It is because of the aid given to it that it becomes "Aided School". Otherwise it remains a private school. "Private school" is specifically defined in Section 2(r) of the Education Act in the following words:-

(r) "private school" means a school which is not run by the Central Government, Administrator, a local authority or any other authority designated or sponsored by the Central Government, Administrator or a local authority.

This provides complete answer to the argument of the petitioners and there is no question of any unreasonable classification. By very nature, Government schools are different from private schools and there is no question of any discrimination.

8. Learned counsel for the petitioners sought to urge that the Education Act was enacted to provide for better organization and development of school education in the Union Territory of Delhi, which is clear from its Preamble and, therefore, ideal position should be that all schools are treated as one class. According to him, it would be more appropriate to do so as all schools are ultimately under the control of the Directorate of Education. If this ideal position is achieved, it would not lead to the situation which has occurred in this case as the petitioners would be losing their entire service of more than 25 years, which also amounts to demoralizing the teachers.

9. If such an argument is accepted, it would mean that all the employees of the aided schools as well as the Government schools would have one employer and only then there can be common seniority. However, this would amount to encroachment upon the rights of private schools. Even otherwise, when there is no such scheme provided in the Education Act, whether such a situation would be ideal or not is not for the Court but the Legislature to decide. As of today, when private schools are having their own Scheme of Management and are differently managed than the Government schools, clubbing all these schools into one for the purpose of common seniority of all these employees etc. would not only be unfeasible but may create many other operational and functional difficulties. Even otherwise once we find that two types of schools, namely, Government schools and private schools fit into different classifications, which is proper and as per the law, the question of infraction of Articles 14 and 16 does not even arise.

10. May be, various provisions of the Education Act are aimed at better organization and development of school education; similar schemes of management; similar terms and conditions of employees; similar salaries; similar curriculum etc. Regulating the condition in this manner so as to attain uniformity in the educational standards is totally different from creating one body of all these schools. That cannot be a justification for creating all the schools as one class for the employees of these schools.

11. Another submission of the learned counsel for the petitioners was that though Rule 47 is viewed as "welfare measure", in fact it is in the nature of "punitive measure". This argument flows from the submission that "surplus" as given in Rule 47 is misconceived. Teacher or staff may be surplus in a particular school but not surplus when the requirement of teachers and staff for all the schools under the jurisdiction of the Director is assessed as a whole. If after such assessment also a teacher or staff is found surplus and is then absorbed such absorption would in true sense be an act of "welfare". However, if a teacher or staff found surplus in one school is picked up to make up the deficiency in another school under the jurisdiction of the Director, it needs to be considered

whether such filling up is an act of "welfare" or an administrative responsibility of the Director in furtherance of the "objective", namely, better organization and development of school education in the Union Territory of Delhi. It was sought to argue that in the present form, the Rule is more being abused as a punitive measure to remove teachers that are not desired by the Society running a school for some reason or the other. Such removal entails loss of seniority-as has been done in the present case. One of the petitioners having long service to her credit is the aspirant for the post of Vice Principal, her removal would entail loss of seniority thereby giving her aspirations as "go-bye".

12. We are not impressed with this submission as well, in view of our foregoing discussion. Merely because there is a possibility of abuse of a particular rule, as apprehended by the petitioners, a legislative provision cannot be declared as unconstitutional. The abuse of a particular provision would mean wrong or illegal exercise of power conferred by the said provision, in such a case, it is the exercise of power in a particular case which can be challenged and if such a plea is substantiated, such exercise of power can be quashed. By no means, the provision itself becomes unconstitutional thereby. In the present case also, the petitioners have alleged that they are not surplus. If it is so found, action of the respondents in declaring them surplus with direction to absorb them in another school can be set aside. That is a different matter altogether and has no bearing on the constitutionality of the provision.

13. Last contention of learned counsel for the petitioners, in so far as validity of second provision to sub-rule (1) of Rule 47 of the Educational Rules is concerned, was that the seniority earned by an employee cannot be taken away. In this behalf, learned counsel referred to the judgment of the Supreme Court in K. Madhavan and Another Vs. Union of India (UOI) and Others, , the Apex Court in Para 21 has stated:

21. We may examine the question from a different point of view. There is not much difference between deputation and transfer. Indeed, when a deputationist is permanently absorbed in the CBI, he is under the rules appointed on transfer. In other words, deputation may be regarded as a transfer from one government department to another. It will be against all rules of service jurisprudence, if a government servant holding a particular post is transferred to the same or equivalent post in another government department, the period of his service in the post before his transfer is not taken into consideration in computing his seniority in the transferred post. The transfer cannot wipe out his length of service in the post from which he has been transferred. It has been observed by this Court that it is a just and wholesome principle commonly applied where persons from different sources are drafted to serve in a new service that their pre-existing total length of service in the parent department should be respected and presented by taking the same into account in determining their ranking in the new service cadre.....

14. It was argued that in the aforesaid case the Apex Court gave credence to the

length of service for determining inter-se seniority and in fact, the Apex Court used "transfer", "absorption" and "deputation" in the same para. According to him, it needs to be considered whether the teacher transferred initially to another, school is not a deputationist in the new school for five years in view of Sub-Rule (3) of Rule 47 whereby he retains lien on the post in his old school. And after five years on absorption should he too be not governed by the principle of seniority laid down by the Apex Court in the aforesaid case.

15. It was also submitted that Rules are subordinate legislation. Law declared by the Apex Court is the law of the land under Article 141. Learned counsel also referred to another judgment in the case of *Joginder Nath and Others Vs. Union of India (UOI) and Others*, . Four petitioners in that case filed the petition under Article 32 of the Constitution challenging Rules 9(a) and 11 of the Delhi Judicial Service Rules, 1970 as ultra vires of Articles 14 and 16 of the Constitution and to declare Rule 8 of the Delhi Higher Judicial Service Rules, 1970 as void. All the four petitioners originally belonged to the Punjab Civil Service (Judicial). The petitioners, grievance was that Rule 11 of the Delhi Judicial Service Rules permitting the fixation of the seniority of the selected officers under Rule 9(a) on the basis of length of service was bad. The Apex Court in para 16 held: "Taking the length of service rendered by the candidates in their respective cadres for the purposes of fixation of seniority under Rule 11 of the Delhi Judicial Service Rules was justified, legal and valid. Had it been otherwise it would have been discriminatory." It was submitted that second proviso to Sub Rule (1) of Rule 47 postulates otherwise.

16. The aforesaid cases dealing with inter se seniority of persons in the same organization, though coming in that organization by way of transfer, absorption or deputation, would have no bearing in the present case. *K. Madhvan (supra)* was a case of transfer from one Government department to other in a routine manner. The situation, which crops up on the application of Rule 47 is that employee of one aided school is declared surplus in that school and he goes to another school under a different employer, namely, either in a Government school or another aided school. As far as sub-rule (3) of Rule 47 is concerned, that deals with altogether different situation. On that ground alone, second proviso to sub-rule (1) of Rule 47 cannot be held unconstitutional. In so far as the judgment in *Joginder Nath (supra)* is concerned, the validity of the rules was upheld by the Supreme Court and, therefore, that case provides no assistance to the petitioners either.

17. We may point out at this stage that learned counsel for the petitioners has referred to few more judgments. We shall now deal with those cases. In *Wing Commander J. Kumar Vs. Union of India (UOI) and Others*, , the appellant's contention, amongst others, that the seniority in DRDO where the appellant went on deputation and was finally absorbed should be determined from the date one joined DRDO and other deputationists who joined later and absorbed in DRDO should take seniority after him was rejected. The inter-se-seniority, it was held,

would be determined from the date of substantive rank of Major/Sqn Ldr(sic)dr" Thus, in this case the period of service rendered by an e(sic)yee in the same organization on deputation was not counted before he was finally absorbed. Obviously, such a case is not relevant in our context.

18. In *Shri Dhan Singh Vs. MCD and Others* and *Shri Stya Prakash Vs. MCD and Others*--(C.W. Nos. 4428 and 4437/2000) decided on 21-08-2001 the court dealt with a petition under Articles 14, 16 and 226 of the Constitution against the MCD in denying the benefit of past service for the purpose of promotion. The MCD had ignored the seniority of the petitioners from their initial appointment, at the time of promotion to Head Masters". It was again a case where service in the same organization was ignored and it was held that the same cannot be done. When an employee is working in the same organization whether his services should count from the date of initial appointment on ad hoc basis/other capacity or from the date he is made permanent would be consigned from different yardsticks altogether. It all depends on the rules applicable in a given case. Applying such yardsticks, it is impermissible to say that there cannot be provision like the second proviso to sub-rule (1) of Rule 47.

19. We, therefore, do not find any merit in the contention of the learned counsel for the petitioners that second proviso to sub-rule (1) of Rule 47 is ultra vires. This contention of the petitioners as well as prayer to this effect contained in para (ii) para 27 in the writ petitions is rejected.

20. Since these matters were posted before the Division Bench only because of the reason that vires of the said Rules were questioned and as this challenge of the petitioners fails, on the other questions, namely, whether the petitioners could be declared surplus or not, and whether order passed by the Director rejecting their representations is valid or not would be looked into by the learned Single Judge as per the roster. Matter be placed before the appropriate Bench on 07-04-2008 after obtaining orders of Hon"ble the Chief Justice. We, however, make it clear that the respondents shall not be bound by the understanding which was arrived at that the petitioners shall not be transferred till the judgment is given. We make it clear that it is open to the respondents to carry out the transfer orders, which shall be subject to the outcome of the writ petition. CM Appl. Nos. 14423/2007 and 14425/2007 for stay are accordingly dismissed.