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

% Judgment delivered on: 13.05.2024

\+ W.P.(C) 4217/2022

MANISHA SHARMA ..... Petitioner

versus

VIDYA BHAWAN GIRLS SENIOR SECONDARY SCHOOL & ANR. ..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Abhishek Kaushik and Ms. Swati Roy Prasad, Advocates

For the Respondents : Mrs. Avnish Ahlawat, Standing Counsel (GNCTD) with Mr. Nitesh Kumar Singh, Ms. Laavanya Kaushik, Ms. Aliza Alam and Mr. Mohnish Sehrawat, Advocates.

CORAM:
HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

JUDGMENT

TUSHAR RAO GEDELA, J. (ORAL)

[The proceeding has been conducted through Hybrid mode]

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

> "*a) Issue a writ of Certiorari thereby quashing the impugned orders dated 22.04.2019 (Annexure P- 1), order dated 18.09.2019 (Annexure P-2), order dated 10.01.2020 (Annexure P-3) and the order dated 22.09.2021 (Annexure P-4), passed by the Respondent Delhi School Education department in so far as it denies continuity of Service and full back wages to the petitioner; and*

b) Issue a writ of Mandamus, or any other appropriate direction thereby directing Respondent to forthwith direct grant of pay fixation by considering the case of the Petitioner as continuity of service and full back-wages from the date of suspension till the order of reinstatement in terms of rule 121 of 1973 Rules; and

c) Issue a writ of Mandamus, or any other appropriate direction thereby directing Respondent. not to disturb services of the petitioner and to let the petitioner complete his full tenure as per Act and Rules; and

d) Issue an appropriate writ of prohibition, prohibiting the respondent authorities to issue any other order/s and/or directions in respect of the petitioner without leave of the this Hon'ble Court; and

e) Rule NISI in terms of prayers (a) to (d) above."

2. It is the case of the petitioner that petitioner was appointed by the school respondent no.1 on 08.07.2008 on probation as TGT (English). On successfully completing her period of probation, the petitioner was confirmed as TGT (English) on 01.07.2009 *vide* order dated 30.09.2009 issued by the Competent Authority – respondent no.1. It is stated that due to the father-in-law of the petitioner becoming a witness in a CBI raid against the Head of School (HoS), the said HoS held a grudge which filtered across to the petitioner. It is submitted that sometime in the year 2013, the school was taken over by the Department of Education. After almost 6 years of her services in the year 2014, the same HoS malafidely and in pursuit to her malafide against the petitioner, filed a false complaint to the Deputy Director that at the time when the petitioner was appointed initially, she did not have the

requisite qualifications. As a consequence thereto, the Deputy Director directed the matter to be inquired into and put the salary of the petitioner on hold. On account of the aforesaid grievances, the petitioner had filed a writ petition before this Court and by the order dated 30.01.2014 this Court had directed the authority to adjudicate the show cause notice within a period of 8 weeks and in the meantime directed to release 50% of the salary including arrears. It is stated that though the salary was paid but instead of deciding the representation, charge memo was issued against the petitioner alleging that her appointment was illegal since she did not have requisite B.Ed. degree which is an essential qualification.

3. While the inquiry proceedings were pending due to certain irregularities in the said inquiry, the petitioner constrained to file a writ petition bearing W.P.(C) 6621/2016 seeking directions to quash the suspension order dated 16.06.2014, charge memo dated 08.04.2015 and the order dated 13.05.2016.

4. Consequent to the aforesaid proceedings, this Court had also granted the petitioner another opportunity to make a representation to the Competent Authority directing the Competent Authority to give personal hearing before the final order was passed.

5. It is stated that *vide* order dated 19.05.2016 of the DAC imposing penalty on the petitioner, the Competent Authority accorded its approval to the said decision, *vide* its order dated 05.08.2016. Though there are many irregularities against which the petitioner had come to this Court, however, in respect of the dispute raised in the present petition, the same would not be germane, hence not referred to. However, the relevant fact would be that by the order dated 31.10.2016, the authority had held that

the petitioner did not possess the requisite qualification for the post of TGT and consequent thereto, the order for dismissal from services was passed. Being aggrieved, the petitioner filed statutory appeal before the Delhi School Tribunal *vide* the Appeal No. 83/2016 dated 09.12.2016. By the order dated 28.07.2017, the DST had allowed the appeal and had directed that the order terminating the petitioner was illegal and that she should be reinstated with full back wages from the date of its order.

6. With regard to the grievance of the petitioner in respect of the back wages simultaneously the Tribunal had granted liberty to the petitioner to file an exhaustive representation to respondents no.1 and 2 within a period of four weeks under Rule 121 of DSER for payment of complete back wages. In compliance of the said order of the Tribunal, the petitioner had filed a representation under Rule 121 DSER of the DSER 1973. It is stated that since the respondents were not responding to the said representation, the petitioner was constrained to file an execution petition before the Tribunal.

7. It is stated that the order of the Tribunal was challenged by the Directorate of Education *vide* W.P.(C) 10521/2017 captioned as ***Directorate of Education vs. Manisha Sharma and Anr.*** which was dismissed *vide* the order of this Court dated 19.03.2018. It is stated that this Court had made a specific observation that the setting aside of the removal of the petitioner from the service has been rightly considered by the Tribunal and consequently dismissed the writ petition. The said dismissal by the learned Single Judge of this Court was taken up in appeal *vide* LPA No.406/2018 which too met the same fate and was dismissed *vide* the order dated 26.11.2018 of the learned Division Bench

of this Court.

8. Being aggrieved of the said dismissal the respondent – DOE chose to prefer a Special Leave Petition bearing SLP (C) No.11173/2019. *Vide the* order dated 16.04.2019, the SLP was dismissed with a specific direction that the order impugned therein should be complied within a period of six weeks. Consequently, by the first impugned order dated 22.04.2019, the petitioner was only reinstated however no back wages were granted. Since the respondent did not pay either the costs of Rs.33,000/- imposed or the back wages, the petitioner filed a contempt petition. It is submitted that before the contempt petition was taken up on 19.09.2019, on 18.09.2019, the second impugned order was passed by the Director of Education. Even in the said order the back wages were denied and only reinstatement was considered. The said order observed that since the petitioner did not work during the settlement period, on the principle of no work no pay, no back wages were payable.

9. Subsequently, by a corrigendum dated 02.01.2020, the back wages for the period from 28.07.2017 till 24.04.2019, on the date when the petitioner was reinstated were directed to be paid. So far as the period from 31.10.2016 through till 27.07.2017 i.e. from the date of removal from the service and the date of the order passed by the DST, on the same principle of no work no pay, the back wages were denied. The consequential benefits were also denied to the petitioner.

10. It is these four impugned orders dated 22.04.2019, 18.09.2019, 10.01.2020 and 22.09.2021 that the petitioner has challenged by the present writ petition.

11. Heard the learned counsel for the parties, perused the documents on record.

12. The case of the petitioner is that she was entitled for complete back wages right from the date of dismissal i.e. 31.10.2016 till 28.07.2017, that is the date of order of the DST apart from the consequential benefits otherwise entitled to, while reinstatement was ordered.

13. An employee's entitlement of back wages in situations like the present case is no more *res integra.* The law in this regard has been crystallised by the Hon'ble Supreme Court in ***Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (E.ED.) and Others*** reported in *(2013) 10 SCC 324* and the judgments passed by this Court in ***Hena Dutta vs. The Director of Education and Ors.*** in W.P. (C) (7356/2012) rendered on 27.03.2024 and ***Virendra Singh vs. The Manager Haryana Shakti Senior Secondary School & Ors.*** in W.P.(C) 7570/2020 rendered on 02.05.2024.

14. The relevant paras of the judgment of Hon'ble Supreme Court in ***Deepali Gundu Surwase*** (supra) is extracted hereunder:

> *"22. The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money…The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi-judicial body or court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the*

employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. The denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the employee concerned and rewarding the employer by relieving him of the obligation to pay back wages including the emolument."

15. Further the Hon'ble Supreme Court in para 38 held as under:-

"38.1. In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

38.2. The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

38.3. Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averment about its existence.

It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

38.4. The cases in which the Labour Court/Industrial Tribunal exercises power under Section 11-A of the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee/workman is consistent with the rules of natural justice and/or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages. However, if the Labour Court/Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.

38.5. The cases in which the competent court or tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimising the employee or workman, then the court or tribunal concerned will be fully justified in directing payment of full back wages. In such cases, the superior courts should not exercise power under Article 226 or 136 of the Constitution and interfere with the award passed by the Labour Court, etc. merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The courts must always keep in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and the sufferer is the employee/workman and there is no justification to give a premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.

38.6. In a number of cases, the superior courts have interfered with the award of the primary adjudicatory authority on the premise that finalisation of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer i.e. the employee or workman, who can ill-afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in Hindustan Tin Works (P) Ltd. v. Employees [Hindustan Tin Works (P) Ltd. v. Employees, (1979) 2 SCC 80: 1979 SCC (L&S) 53].”

16. It is apparent from the facts which arise that the DST had categorically found that the dismissal from service was illegal and on that basis the said dismissal was set aside. So much so that the DST was constrained to impose costs assessed at Rs.33,000/- in favour of the petitioner. The DST had also observed that the petitioner who was the appellant therein was entitled to full wages from the date of that order and she would also be entitled for all consequential benefits. The respondent unsuccessfully tried to assail the order of the DST by way of the writ petition filed before the learned Single Judge which was dismissed by the learned Single Judge on 19.03.2018 upholding the observations and the analysis drawn by the DST. The said judgment of

the learned Single Judge was tested further by the respondent before the learned Division Bench in LPA 406/2018 which by order dated 26.11.2018 too was dismissed. Not resting with the same, the respondent filed an Special Leave Petition bearing SLP 11173/2019 which too was dismissed on 16.04.2019 with a direction that the orders impugned therein should be complied within six weeks. It is apparent from the impugned order that the respondent did not comply with the same in time.

17. That apart, *vide* the subsequent impugned order dated 18.09.2019 the DDE has surpassed all limits of judicial propriety and discipline. In that the contents of para 8 of the order dated 18.09.2019 are say to the least contumacious, since the words which have been employed by the Deputy Director of Education appear to be over reaching the jurisdiction vested in the said authority. At this far point in time, this Court rests with such observation without dwelling further into the said matter. Suffice it to say that such language is not within the authority or jurisdiction of the Deputy Director. The principle of no work no pay as applied by the Deputy Director of Education has no legs to stand particularly in view of the ratio laid down by the Hon'ble Supreme Court in ***Deepali Gundu Surwase*** *(supra)* and the judgment of this Court in ***Hena Dutta*** *(supra)* and ***Virendra Singh*** *(supra)*.

18. Ordinarily, the principle of no work no pay is attracted to many such cases, however, an exception has been carved out by the Hon'ble Supreme Court in ***Deepali Gundu Surwase*** *(supra)* and other judgments of this Court. A distinction has been drawn in those cases where the orders of termination have been held to be illegal and simultaneously it

has been found that the terminated employee had shown his or her willingness to continue in services but was deprived by some reason or the other by the Authority. In such of those cases the employees have been held to be entitled to back wages. This particular issue in respect of the period of deprivation of rendering services has been considered by this Court in ***Hena Dutta*** *(supra)* and ***Virendra Singh*** *(supra)*. It appears that ratio laid down by this Court in those judgments are squarely applicable to the present case. The relevant paras of ***Hena Dutta*** (*supra*) are extracted hereunder:

> *"25. It is trite principle that where a person has not worked, such person may not be entitled to any arrears of salary and other emoluments, however, in case where a person is deprived or prevented from rendering services, that period surely creates an entitlement to the person for arrears of pay and other emoluments.*
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> *26. This Court finds support in the aforesaid principle based on the judgment of the Supreme Court in* ***Commr., Karnataka Housing Board v. C. Muddaiah*** *reported in* ***(2007) 7 SCC 689*** *wherein it is held as under:-*
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> > *"34. We are conscious and mindful that even in absence of statutory provision, normal rule is "no work no pay". In appropriate cases, however, a court of law may, nay must, take into account all the facts in their entirety and pass an appropriate order in consonance with law. The court, in a given case, may hold that the person was willing to work but was illegally and unlawfully not allowed to do so. The court may in the circumstances, direct the authority to grant him all benefits considering "as if he had worked". It, therefore, cannot be contended as an absolute proposition of law that no direction of payment of*

consequential benefits can be granted by a court of law and if such directions are issued by a court, the authority can ignore them even if they had been finally confirmed by the Apex Court of the country (as has been done in the present case). The bald contention of the appellant Board, therefore, has no substance and must be rejected."

19. Once having been directed to reinstate the services of the petitioner by the Tribunal *vide* the order dated 28.07.2017, not complying with the same on 22.04.2019, even on the basis that respondent had a right to challenge, did not disentitle the petitioner from having been actually reinstated since no favourable orders of stay or other restraint orders were at all obtained by the respondent in the interregnum in any of the aforesaid proceedings. Since there was no restraint on the orders of the Tribunal dated 28.07.2017, there was no reason why the respondent was not under an obligation to reinstate the services of the petitioner. Simultaneously there was no reason disentitling the petitioner from rendering the services during this period.

20. The result would be that the petitioner was deprived of her legitimate right of rendering services. Once it is held that the petitioner was deprived of rendering services, the question of the petitioner being disentitled to pay, salary and other allowances also does not appear to be tenable to this Court.

21. Following the ratio laid down by the Hon'ble Supreme Court in ***Deepali Gundu Surwase*** *(supra)* and the judgment of this Court in ***Hena Dutta*** *(supra)* and ***Virendra Singh*** *(supra),* this Court allows the petition of the petitioner. Consequently, the impugned orders dated

22.04.2019, 18.09.2019 and 22.09.2021 are quashed and set aside.

22. So far as the order dated 10.01.2020 is concerned, only in respect of the disentitlement of the petitioner for back wages for the period from 31.10.2016 till 20.07.2017, it stands quashed.

23. As a consequence, the petitioner would be entitled to all the benefits and full back wages from the date of termination i.e. 31.10.2016 through till the date of the passing of the order by the DST order, i.e., 28.07.2017. All consequential benefits shall also flow to the petitioner.

24. The respondents are directed to work out the calculations and details of payments to be made and accordingly the complete the process within a period of six weeks from today. Payment of arrears be made within two weeks thereafter failing which the petitioner shall be entitled to interest @ 6% per annum till the date of payment.

25. With the aforesaid observation, the petition is disposed of with no order as to costs.

TUSHAR RAO GEDELA, J

MAY 13, 2024/ns