

(2013) 12 DEL CK 0176

In the Delhi High Court

Case No : Writ Petition (C) No. 4777 of 2013

Durga Bisht

APPELLANT

Vs

Directorate of Education and Others

RESPONDENT

Date of Decision : 17-12-2013

Acts Referred:

Constitution of India, 1950 — Article 21A, 30, 41, 45
Delhi School Education Act, 1973 — Section 11, 15

Citation : (2013) 12 DEL CK 0176

Hon'ble Judges : Valmiki J. Mehta, J

Bench : Single Bench

Advocate : M.A. Niyazi, for the Appellant; Kartik Jindal, Advocate for Respondent No. 1 and Ms. Saahila Lamba, Advocate for Respondent Nos. 2 and 3, for the Respondent

Final Decision : Allowed

Judgement

Valmiki J. Mehta, J.

W.P.(C) No. 4777/2013 and C.M. No. 10864/2013

1. In spite of repeated opportunities, respondent nos. 2 and 3 have not filed the counter-affidavit. In my opinion, this is a deliberate ploy to adjourn the case and which becomes clear from the speaking order dated 29.7.2013 by which interim order has been passed in favour of the petitioner. The right to file counter-affidavit is therefore closed. Respondent no. 1 has already filed its counter-affidavit. Respondent no. 4 is served but did not appear. Accordingly, let the petitioner argue the case. Counsel for the petitioner has argued. On 29.7.2013, the following order was passed

1. This writ petition is filed by a teacher Smt. Durga Bisht, who is working as a TGT (Fine Arts) with the respondent no. 3-Army Public School.

2. The contention of the petitioner is that the higher post of PGT (Fine Arts) is a post in the school which is to be filled in including by promotion. It is the

contention of the petitioner that without proper selection, a candidate who is favorite of the management, has been quietly selected to the post of PGT (Fine Arts) though actual appointment is yet to take place. It is contended that if the respondent no. 3 is allowed to do so then this will cause prejudice and harm to the petitioner.

3. A reference to the requisite qualifications filed at page 41 (Annexure A-6) shows that the post of PGT (Fine Arts) is a selection post of which 25% has to be filled in by direct recruitment and 75% by promotion. Therefore, the selection through direct recruitment is permissible, provided of course, a Rota Quota system or the roster point system for distributing the post or posts between promotees and direct recruits is maintained.

4. Counsel appears for the respondent no. 3 on advance copy having been supplied. Learned senior counsel for the respondent no. 3 very emphatically argues the following points:-

(i) The post in question is a selection post, and the requirement of this post for selection has been met because the respondent no. 3-school issued an advertisement way back on 15.9.2012 in Hindustan Times, but the petitioner did not participate in the selection/appointment process.

(ii) Petitioner has approached the Court with delay because the appointment process is more or less completed and at this late stage when the petitioner otherwise had notice, in view of the advertisement, to participate in the process, interim orders should not be granted in favour of the petitioner.

(iii) Petitioner has not come to the Court with clean hands because false allegations have been made against the Principal of respondent no. 3.

5. At the initial stage, after some arguments were made by respondent no. 3, I was inclined to agree with the arguments urged on behalf of the respondent no. 3, however, a careful reading of the advertisement shows that the advertisement is not for a specific post of PGT (Fine Arts) at the respondent no. 3-school but a general advertisement for all Army Public School. Not only that the advertisement is for various posts of PGT, TGT only as contractual posts i.e. it cannot be argued with any substance by the respondent no. 3 that really the advertisement pertains to a post of PGT (Fine Arts), of the respondent no. 3, and that too as a regular appointment as against a contractual appointment which is the subject matter of the advertisement.

6. In my opinion, prima facie, the advertisement in question appears to be an act to not only deprive the petitioner, but to overreach the relevant rules and regulations not only of the respondent no. 3, but also of the Director of Education. Recruitment through advertisement such as the one in question dated 15.9.2012 needs to be very thoroughly and microscopically examined by the respondent no. 1/Director of Education as to whether really the advertisement does or does not amount probably a misrepresentation at the minimum and

fraud at the worst upon eligible candidates, if the respondent no. 3's case is that actually regular appointments were to be made pursuant to the advertisement.

7. Therefore, I reject the argument that the post in question of PGT(Fine Arts) which is sought to be filled was validly advertised by means of the advertisement dated 15.9.2012 and is otherwise being validly filled in.

8. So far as the argument of delay is concerned, once again this argument is inextricably linked to the advertisement dated 15.9.2012. Since the advertisement dated 15.9.2012 in no way dealt with the subject post of PGT (Fine Arts) which is a regular recruitment/appointment to a regular post in term of recruitment rules for the post of PGT (Fine Arts) and the advertisement was a general advertisement for all Army Public Schools and that too only for contractual posts, I do not think that there is any delay whatsoever in the petitioner approaching the Court.

9. So far as the aspect of alleged false facts stated by the petitioner having approached the Principal of the respondent no. 3 is concerned, in my opinion, even if it is true that some false facts are stated, yet, I do not think that can otherwise affect the entitlement of the petitioner to the post in question. Minor averments made as pleadings in the cause of action seeking appointment of the petitioner, who is otherwise entitled to be appointed to the post of PGT (Fine Arts), in my opinion, cannot be such to deprive the petitioner of the appointment as claimed in the petition.

10. The aforesaid observations are limited to grant of only ex parte interim orders at this stage, and all the aspects of this writ petition will be appropriately decided at the disposal of the interim application or the writ petition itself.

11. In view of the above, till further orders unless varied by the Court, respondent no. 3 is restrained from filling in the post of PGT(Fine Arts) in the respondent no. 3.

12. Copy of this order be given to the counsel for Director of Education who will ensure that the same is brought to the notice of the Director of Education and who is required to look into the aforesaid aspects and give appropriate response in the counter-affidavit to be filled in by the respondent no. 1.

13. Notice. Counsel for respondents accept notice. Counter-affidavits be filed within a period of four weeks. Rejoinder-affidavits be filed within four weeks thereafter.

14. List on 10th October, 2013.

2. No doubt, the aforesaid observations were prima facie, however, by not filing of the counter-affidavit by respondent nos. 2 and 3, these averments become correct for deciding this writ petition. Therefore, adopting the reasoning given in the order dated 29.7.2013, petitioner will be entitled to the reliefs as claimed in this writ petition.

3. There is another reason why the reliefs claimed in this writ petition have to be granted. This is because of Rule 105(3) of the Delhi School Education Rules, 1973 which states that the permanent appointments in schools can only be avoided if there is a temporary vacancy or vacancies for a limited period. The spirit of this provision is contained in ratio of the judgment of the Supreme Court in the case of Management Committee of Montfort Senior Secondary School Vs. Shri Vijay Kumar and Others, and para 10 of which reads as under:-

10. In St. Xaviers" case (supra) the following observation was made, which was noted in Frank Anthony"s case (supra):

A regulation which is designed to prevent mal-administration of an educational institution cannot be said to offend clause (1) of Article 30. At the same time it has to be ensured that under the power of making regulation nothing is done as would detract from the character of the institution as a minority educational institution or which would impinge upon the rights of the minorities to establish and administer educational institutions of their choice. The right conferred by Article 30 is intended to be real and effective and not a mere pious and abstract sentiment; it is a promise of reality and not a teasing illusion. Such a right cannot be allowed to be whittled down by any measure masquerading as a regulation. As observed by this Court in the case of Rev. Sidhajibjai Sabhai (supra), regulations which may lawfully be imposed either by legislative or executive action as a condition of receiving grant or of recognition must be directed to making the institution while retaining its character as minority institution as an educational institution. Such regulation must satisfy a dual test the test of reasonableness, and the test that it is regulative of the educational character of the institution and is conclusive to making the institution an effective vehicle of education for the minority or other persons who resort to it.

The effect of the decision in Frank Anthony"s case (supra) is that the statutory rights and privileges of Chapter IV have been extended to the employees covered by Chapter V and, therefore, the contractual rights have to be judged in the background of statutory rights. In view of what has been stated in Frank Anthony"s case (supra) the very nature of employment has undergone a transformation and services of the employees in minorities un-aided schools governed under Chapter V are no longer contractual in nature but they are statutory. The qualifications, leaves, salaries, age of retirement, pension, dismissal, removal, reduction in rank, suspension and other conditions of service are to be governed exclusively under the statutory regime provided in Chapter IV. The Tribunal constituted u/s 11 is the forum provided for enforcing some of these rights....

(underlining added)

4. A reading of the aforesaid para of the judgment of the Supreme Court in the case of Management Committee of Montfort Senior Secondary School (supra) shows that all employees of a school are entitled to statutory protection of their

services. Any action of the school in Delhi to avoid giving regular appointments is therefore hit by the provision of Rule 105(3) and the ratio of the judgment of the Supreme Court in the case of Management Committee of Montfort Senior Secondary School (supra) as stated above.

5. I have had an occasion to examine this aspect in the case of Army Public School and Anr. Vs. Narendra Singh Nain and Anr. in W.P.(C) No. 1439/2013 decided on 30.8.2013. In this judgment, I have held that unless there exists necessary administrative exigencies, employees who have been appointed by the schools will be treated as permanent employees. Relevant paras of this judgment read as under:-

3. On the basis of the admitted facts: in the form of various appointment letters and the termination letters which have been issued by the petitioner-school as detailed above; the provision of Rule 105 of the Delhi School Education Act & Rules, 1973; the judgment delivered by me in the case of Hamdard Public School Vs. Directorate of Education and Anr. in W.P.(C) No. 8652/2011 decided on 25.7.2013 interpreting Rule 105; and, the judgment of the Supreme Court in the case of Management Committee of Montfort Senior Secondary School Vs. Shri Vijay Kumar and Others, read with Division Bench judgment of this Court in the case of Social Jurist, a Civil Rights Group Vs. GNCT and Others, , the issues which arise, and on which counsel for the parties have been heard, are first as to whether the respondent No. 1 at all can be said to only be a contractual employee in terms of the first contractual appointment letter dated 3.12.2007 or whether the employment of respondent No. 1 since inception in the peculiar facts of this case would have a statutory favour in view of the provisions of the Delhi School Education Act and Rules, 1973, and secondly as to whether the actions of the petitioner-school amount to over-reach the provision of Rule 105 and is, therefore, against the ratio not only of the categorical language of Rule 105 but also the ratio of the judgment passed by me in the case of Hamdard Public School Vs. Directorate of Education and Anr. (supra). The following issues are, therefore, crystallized for decision by this Court:

(i) Should the respondent No. 1's services in the facts of this case be not taken as having statutory protection in terms of the Delhi School Education Act and Rules, 1973 since the original date of the contractual appointment in terms of letter dated 3.12.2007. Related with this issue would be whether the respondent No. 1 is estopped from challenging the nature of appointment as contractual inasmuch as respondent No. 1 thereafter accepted services first as a probationer and thereafter again on contractual basis.

(ii) Whether all the appointment letters, whether giving contractual appointment or as appointment on probation, have to be read in their substance and not in form whereby actually the respondent No. 1 should be treated as on probation either from 28.11.2007 or in any case from 1.4.2008 and since there is no mention of termination on account of unsatisfactory services in the termination letter dated 10.6.2010, and none exist as stated in the letter dated 21.3.2010,

therefore, respondent No. 1 would have confirmation of employment on account of language of Rule 105 and the judgment in the case of Hamdard Public School Vs. Directorate of Education and Anr. (supra).

4. So far as the first issue is concerned, as to whether the respondent No. 1's services originally w.e.f. 28.11.2007 are contractual in nature or statutory in character, it would be necessary at this stage to refer to the relevant para 10 of the Supreme Court judgment in the case of Management Committee of Montfort Senior Secondary School Vs. Sh. Vijay Kumar and Ors. (supra), but, before I do so I must hasten to add that the observations which are being made by me in this judgment as regards the first issue is because of the facts of this case whereby I am not treating the first appointment as contractual in nature in spite of the letter dated 3.12.2007 so specifying because I hold this letter, and also subsequent probationary/contractual appointment letters, to be a sham and given only for denying regular employment to respondent No. 1 as LDC. The repeated appointments and terminations, have persuaded me to hold that the petitioner's-school's actions are a fraud upon the requirement to normally not to appoint an employee on contract basis. Accordingly, in a case where on account of genuine exigencies a contractual appointment is required (like when a regular employee suddenly leaves etc.) then such employment will be treated as adhoc/temporary/contractual and not a statutory one having protection of the Act & Rules. With this preface let us reproduce para 10 of Montfort Senior Secondary School's case (supra) and which reads as under:-

10. In St. Xaviers" case (supra) the following observation was made, which was noted in Frank Anthony's case (supra):

A regulation which is designed to prevent mal-administration of an educational institution cannot be said to offend clause (1) of Article 30. At the same time it has to be ensured that under the power of making regulation nothing is done as would detract from the character of the institution as a minority educational institution or which would impinge upon the rights of the minorities to establish and administer educational institutions of their choice. The right conferred by Article 30 is intended to be real and effective and not a mere pious and abstract sentiment; it is a promise of reality and not a teasing illusion. Such a right cannot be allowed to be whittled down by any measure masquerading as a regulation. As observed by this Court in the case of Rev. Sidhajibjai Sabhai (supra), regulations which may lawfully be imposed either by legislative or executive action as a condition of receiving grant or of recognition must be directed to making the institution while retaining its character as minority institution as an educational institution. Such regulation must satisfy a dual test the test of reasonableness, and the test that it is regulative of the educational character of the institution and is conclusive to making the institution an effective vehicle of education for the minority or other persons who resort to it.

The effect of the decision in Frank Anthony's case (supra) is that the statutory rights and privileges of Chapter IV have been extended to the employees covered

by Chapter V and, therefore, the contractual rights have to be judged in the background of statutory rights. In view of what has been stated in Frank Anthony's case (supra) the very nature of employment has undergone a transformation and services of the employees in minorities un-aided schools governed under Chapter V are no longer contractual in nature but they are statutory. The qualifications, leaves, salaries, age of retirement, pension, dismissal, removal, reduction in rank, suspension and other conditions of service are to be governed exclusively under the statutory regime provided in Chapter IV. The Tribunal constituted u/s 11 is the forum provided for enforcing some of these rights....

5. A reference to aforesaid para shows that the Supreme Court in Management Committee of Montfort Senior Secondary School Vs. Sh. Vijay Kumar and Ors. (supra) has laid down the ratio that the very nature of employment of the employees of a school are that they are no longer contractual in nature but statutory. This observation was made by the Supreme Court in spite of the fact that the minority schools had entitlement under the provisions of Section 15 and Rule 130 of the Delhi School Education Act and Rules, 1973 to have a contract of services for its employees. It be noted that so far as the non-minority schools are concerned there is no provision in the Delhi School Education Act and Rules, 1973 to have a contractual appointment. Therefore, once if minority schools' employees cannot have contractual employment and they have to be treated as statutory employees, then a fortiori non-minority schools whose employees cannot be engaged in employment on contractual basis, such employees in non-minority school would surely have statutory protection of their services. In Management Committee of Montfort Senior Secondary School Vs. Sh. Vijay Kumar and Ors. (supra) the Hon"ble Supreme Court has made it clear in the aforesaid paragraph 10 that the qualifications, leaves, salaries, age of retirement etc, removal and other conditions of services are to be governed "exclusively" under the statutory regime provided under the Delhi School Education Act and Rules, 1973. Once that is so, then, as per Rules 118 to 120 of the Delhi School Education Rules, 1973 the services of an employee can only be terminated on account of misconduct and that too after following the requirement of holding of a detailed enquiry and passing of the order by the Disciplinary Authority. Therefore, in view of the categorical ratio of the judgment of the Supreme Court in the case of Management Committee of Montfort Senior Secondary School Vs. Sh. Vijay Kumar and Ors. (supra) and in view of the facts of this case the respondent No. 1's services from the inception cannot be taken as only contractual in nature and would be statutory in nature. Once the services are statutory in nature, and admittedly the respondent No. 1 has not been removed by following the provisions of conducting an enquiry and passing of an order by the Disciplinary Authority as required under the Rules 118 to 120 of the Delhi School Education Rules, 1973, the respondent No. 1's services cannot be said to have been legally terminated. Respondent No. 1, therefore, continues to be in services.

6. To distinguish the applicability of the Supreme Court in the case of Management Committee of Montfort Senior Secondary School vs. Sh. Vijay Kumar and Ors. (supra), learned counsel for the petitioner has urged the following two arguments:

(i) Respondent No. 1 is estopped from questioning his first appointment as contractual, thereafter appointment on probation and his termination during the probation period and thereafter again a fresh contractual appointment and finally his termination as per the last contract dated 8.4.2010. It is argued that respondent No. 1 having acted upon the aforesaid sequence of events comprised in different appointments cannot now contend that the ratio of the judgment in Management Committee of Montfort Senior Secondary School vs. Sh. Vijay Kumar and Ors. (supra) should come to his aid.

(ii) It is argued that the judgment in Management Committee of Montfort Senior Secondary School vs. Sh. Vijay Kumar and Ors. (supra) was intended only to apply to minority schools and ratio of the said judgment cannot be read to apply to non-minority schools.

7. So far as the second arguments urged on behalf of the petitioner-school to distinguish the applicability of the ratio in the case of Management Committee of Montfort Senior Secondary School vs. Sh. Vijay Kumar and Ors. (supra), I have already dealt with this aspect above by holding, and the same is reiterated herein, that, if for minority schools, there cannot be contractual appointments, and which in fact was so envisaged under the relevant provisions of the Delhi School Education Act and Rules, 1973, then, surely and indubitably, so far as non-minority schools are concerned, and who do not have provisions even in terms of Delhi School Education Act and Rules, 1973 for making contractual appointments, the ratio of Management Committee of Montfort Senior Secondary School vs. Sh. Vijay Kumar and Ors. (supra) would squarely apply and the employees of the non-minority schools will be treated not as contractual employees of the schools but statutory employees having statutory protection in terms of the relevant provisions of the Delhi School Education Act and Rules, 1973.

8. So far as the first argument of estoppel is concerned, that argument is attractive only at the first blush, however, this argument overlooks the elementary principle that there is no estoppel against law. Of course, there may be estoppel against law where the provisions of law are only for private individual interest and not meant to be in public interest, however, considering that statutory protection is given to the employees of a school and which results in stability to the education system, the same therefore cannot be held to be as not in public interest, more so after amending of the Constitution by introduction of Article 21A by which right to education has been made as a fundamental right for children from the ages of 6 to 14 years. Also one cannot ignore the fact that right to education otherwise also is an important part of Directive Principles of State Policy vide Article 41 and Article 45 of the Constitution, and thus subject of

education itself has been treated by the Supreme Court as a public function and consequently, writ petitions lie against even private educational institutions. Reference need in this regard be only made to the Constitution Bench judgment of the Supreme Court in the case of Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc., and which clearly holds that the subject of education is a public function, and hence writ petitions are maintainable even against private educational institutions.

6. Therefore, any endeavour by the respondent nos. 2 and 3 to again appoint contractual teachers in terms of the subject advertisement dated 15.9.2012 is illegal.

7. In view of the aforesaid discussion, it is clear that respondent nos. 2 and 3 must resort to process of appointments of PGT (Fine Arts) by means of promotion from the teachers in the respondent no. 3/school. Accordingly, let the respondent no. 3/school constitute a necessary Departmental Promotion Committee (DPC) in terms of relevant rules of the respondent no. 3 as also the relevant directions/circulars of the Director of Education. This DPC be held by the respondent no. 3 within a period of two months from today. Petitioner will be considered for promotion to the post of PGT (Fine Arts) by this DPC. Writ petition is accordingly allowed and disposed of in terms of aforesaid observations, leaving the parties to bear their own costs.