
(2011) 08 DEL CK 0207

In the Delhi High Court

Case No : Writ Petition (C) 3964 of 2011 and CM APPLs 8235-36 of 2011

Mount ABU Education Society

APPELLANT

Vs

Anshu Sharma and Another

RESPONDENT

Date of Decision : 29-08-2011

Acts Referred:

Constitution of India, 1950 — Article 226, 227, 30
Delhi School Education Act, 1973 — Section 3(3), 8(2)
Delhi School Education Rules, 1973 — Rule 14A, 46, 47, 47(3)

Citation : (2011) 7 AD 353 : (2011) 183 DLT 184

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : V.K. Rao and Anil Sehgal, for the Appellant; Anjana Gosain and Koplín Kaur for R-2, Pramod Gupta and Ankit Lamba for R-1, for the Respondent

Final Decision : Allowed

Judgement

S. Muralidhar, J.—The Petitioner, Mount Abu Education Society ("Society"), has filed this writ petition challenging an order dated 8th March 2011 passed by the Delhi School Tribunal ("Tribunal") allowing Appeal No. 46 of 2005 filed by Respondent No. 1, Smt. Anshu Sharma, holding that the termination of her services by the Petitioner was illegal and she was entitled to reinstatement with full back wages and other allowances.

2. While directing notice to issue on 1st June 2011, this Court placed on record a statement made on behalf of Respondent No. 1 that No. coercive action would be taken in terms of the impugned order of the Tribunal.

3. Respondent No. 1 was appointed as a Trained Graduate Teacher ["TGT"] (Hindi) in Mount Abu Public School ["School"] run by the Petitioner Society on 1st October 1994 on temporary basis in the pay scale of Rs. 1400-2600. In April 1996, she was promoted as a Post Graduate Teacher ["PGT"] (Hindi) to conduct classes at the senior secondary level, i.e., Classes XI and XII. It is stated that since 2000-2001, No. student in Classes XI and XII opted for Hindi as a subject.

Accordingly, it was decided that there was No. requirement of a PGT (Hindi). The matter was placed before the Managing Committee ["MC"] which was attended by the representative of the Director of Education ["DoE"], Respondent No. 2 herein, on 30th November 2005. Para 3 of the minutes of the said meeting reads as under:

3. The case of Mrs. Anshu Sharma, PGT (Hindi) was reviewed thoroughly and discussed at large. After going through the judgment of Hon"ble Delhi High Court in an exactly identical case the management concluded to dispense away with the services of Mrs. Anshu Sharma has been working with the school as PGT (Hindi). That there is No. student of Class XI and XII taking Hindi subject for the last five years. The post of PGT (Hindi) does not exists due to non-availability of students.

Resolved that the services of Mrs. Anshu Sharma may be dispensed with immediate effect. She may be paid the amount in lieu of notice as per her terms and conditions of employment.

Keeping in view the judgment of the Division Bench of Hon"ble High Court in the Managing Committee of Geeta Bal Bharti Senior School School v. Director of Education in CWP No. 3883 of 2005, No. formal approval is required.

4. On the basis of the above decision of the MC, a communication dated 15th December 2005 was sent to Respondent No. 1 stating as under:

You have been working with the School as PGT (Hindi). Due to non-availability of the students taking Hindi subject in XI and XII standard since 2001, there is No. requirement of PGT (Hindi) in the School. Therefore, the requirement of having a PGT (Hindi) No. longer exist. You being the only PGT (Hindi) working in the School, it has been decided to dispense with your services with immediate effect by paying you one month notice pay in lieu of notice, as per contract of employment.

You may contact the Accounts Department for your full and final settlement of account on any working day.

5. Aggrieved by the said order, Respondent No. 1 filed Appeal No. 46 of 2005 before the Tribunal on 19th December 2005. Inter alia, it was contended that Respondent No. 1 was the senior most teacher and on the basis of the "last come, first go" principle, her services could not have been terminated. Secondly, it was stated that in terms of DoE's instruction dated 25th March 1991, where the Delhi School Education Act, 1973 ("DSEA") and Delhi School Education Rules 1973 ("DSER") were silent, the service conditions and terms of employment of teachers of an unaided public school would be the same as applicable to teachers of government schools. Thirdly, in terms of the letter of appointment dated 1st October 1994, three months' salary in lieu of notice had to be given whereas the School had only given one month's salary. Fourthly, in terms of Rule 47 DSER, where an employee became surplus by reason of closure of a class or a section

or on account of discontinuance of the teaching of any subject, such employee had to be absorbed in the first instance as far as practicable in such School. Fifthly, Respondent No. 1 was a confirmed employee and her services could not be terminated by merely giving one month's salary in lieu of notice. Alternately, under Fundamental Rule ("FR") 14-A, which applied to the Petitioner's employees, the lien of an employee on a post could not be terminated under any circumstance even with the consent of such employee, if the result would leave her without a lien or a suspended lien upon a permanent post. Even if the School did not require the services of a PGT (Hindi), it did not give the School the right to dispense with the services of Respondent No. 1 as she was a confirmed Hindi teacher and her lien in the post of TGT (Hindi) survived. Lastly, it was submitted that by terminating her services, the School had foreclosed the opportunity of the students to opt for Hindi as a subject for Classes XI and XII in future.

6. In reply to the said appeal, the Petitioner Society maintained that the appointment of Respondent No. 1 was purely contractual and could be terminated in the manner in which it was done. It is stated that there was No. requirement of the services of PGT (Hindi) teacher and therefore the services of Respondent No. 1 were dispensed with. It is submitted that Rule 47 DSER would only apply to a government aided school. Respondent No. 1 was also offered to two months' salary in addition to one month's salary already given to her.

7. Referring to Rule 46 DSER, the Tribunal held that the prior approval of the DoE was required for foreclosing the Hindi subject for Classes XI and XII. Referring to Section 3(3) DSEA, it was held that closure of a subject would amount to closure of a class. It was then held that there were two other branches of the School at Sectors 5 and 18, Rohini, Delhi and the School "fell in grave error when it did not grant an opportunity to the Appellant to be absorbed in its other branches." Further, since Respondent No. 1 was the senior most Hindi teacher in all the three schools of the Society and since the School was constrained to dispense with the services of one of the Hindi teachers, it should have followed the principle of "last come, first go".

8. Mr. V.K. Rao, learned Senior counsel appearing for the Petitioner Society submitted that the Tribunal gravely erred in holding that the prior approval of the DoE is required for discontinuance of Hindi as a subject for Classes XI and XII. He relied upon the decision dated 27th November 2003 of this Court in W.P. (C) No. 1938 of 2003 (Smt. Savita Gemini v. Govt. of NCT of Delhi) wherein it was held that since No. student in Classes XI and XII of the school in question in that case had opted for Hindi, there was No. requirement for having a PGT (Hindi) and the said teacher had become surplus. It is submitted that the Tribunal erred in holding the said decision to be per incuriam. Mr. Rao relied upon the decision in Kathuria Public School v. Director of Education 123 (2005) DLT 89 (DB) which held that the requirement of obtaining prior approval of the DoE u/s 8(2) DSEA for the dismissal or removal of an employee would not apply to an unaided recognised non-minority school. This Court had in coming to the above

conclusion relied on the decision of the Supreme Court in T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others, As regards Rule 46, it is submitted that it pertained only to the extreme eventuality of an entire recognized school or an existing class being closed down. It was submitted that the reliance by the Tribunal on the decision of this Court in Vaishali International School Teachers Welfare Association Vs. All India Siddharth Int. Educational Society and Others, was misplaced. Classes XI and XII had continued as before, and only Hindi as a subject was No. longer being offered. As a corollary, the PGT (Hindi) post became surplus and the services of Respondent No. 1 had to be dispensed with. The School management had waited for four long years and during that period, Respondent No. 1 taught as TGT (Hindi) even while drawing pay as PGT (Hindi). Drawing a comparison with Rule 47, Mr. Rao pointed out that the rule maker had deliberately left out the contingency of discontinuance of a subject from the ambit of Rule 46. Reliance is placed on the decision in Neharika Tyagi and Others Vs. Army Public School and Others, where it was held that the discontinuance of a subject (French) did not mean closure of an existing class. It is submitted that Rule 47 had No. application to private recognized unaided schools and it only applied to aided institutions. There was No. vacancy of PGT (Hindi) existing at present. Mr. Rao submitted that Respondent No. 1 insisted on the protection of her pay as PGT (Hindi) even while offering to work as TGT (Hindi). This was unacceptable to the School, and another teacher had to be taken against the post of TGT (Hindi). Consequently, even the post of TGT (Hindi) was at present not vacant. Mr. Rao however stated, on instructions, that as and when a vacancy in the post of TGT (Hindi) arose, Respondent No. 1 would be offered the post.

9. Mr. Pramod Gupta, learned Counsel for Respondent No. 1 on the other hand submitted that closure of Hindi as a subject tantamounted to closure of a class. It was submitted that Rule 46 DSER had a social objective in addition to being a safeguard for the employees and students and therefore, the discontinuance of Hindi as a subject by the School for Classes XI and XII without the prior approval of the DoE was illegal. It is submitted that the Petitioner's three representations dated 8th December, 12th December and 16th December 2005 were not replied by the School. Even if there was No. requirement of a PGT (Hindi), the Petitioner's lien on the post of TGT (Hindi) could not be taken away. The MC in its meeting held on 30th November 2005, did not consider this aspect at all. It was submitted that the findings of fact recorded by the Tribunal would usually not call for interference by this Court in exercise of its powers under Articles 226 and 227 of the Constitution. Reliance is placed on the decision of the Supreme Court in Indian Overseas Bank Vs. I.O.B. Staff Canteen Workers' Union and Another,

10. The principal issue in the present case is whether the discontinuance of Hindi as a subject for Classes XI and XII by the School required the prior approval of the DoE in terms of Rule 46 DSER. Section 3(3) DSEA is also relevant in this context. It reads as under:

3. (3) On and from the commencement of this Act and subject to the provisions of Clause (1) of Article 30 of the Constitution, the establishment of a new school or the opening of a higher class or the closing down of an existing class in any existing school in Delhi shall be subject to the provisions of this Act and the rules made thereunder and any school or higher class established or opened than in accordance with the provisions of this Act shall not be recognised by the appropriate authority.

11. It is not possible to agree with the conclusion of the Tribunal in the instant case that the words "the closing down of any existing class in any existing school" occurring in Section 3(3) DSEA includes discontinuance of a subject in a class. In fact in *Neharika Tyagi v. Army Public School*, it was held by this Court that the closure of a subject did not amount to closure of a class itself. This Court does not appreciate the reasoning of the Tribunal in distinguishing the judgment in *Neharika Tyagi*. The only factual difference was that the said decision dealt with discontinuance of French as a subject whereas in the present case the subject in question is Hindi. Even otherwise the plain meaning of the words used in Section 3(3) DSEA does not permit expanding the scope of the words "existing class" to include an existing subject. This Court cannot possibly read into a statutory provision words that do not occur and which if inserted would have a different connotation. If the wording of Rules 46 and 47 DSER is examined this distinction becomes clearer.

12. Rules 46 and 47 DSER read as under:

46. Closing down of a school or any class in a school - No. managing committee shall close down a recognised school, not being an unaided minority school, or an existing class in such school without giving full justification and without the prior approval of the Director, who shall, before giving an approval, consult the Advisory Board.

47. Absorption of surplus (employee) 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 surplus, such student or employee, 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 of 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 provided 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) 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 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.

13. Rule 46 applies to all recognized schools. It states that "no managing committee shall close down a recognized school, not being an aided minority school, or an existing class in such school" without prior approval of the DOE. Clearly, what is contemplated in the above provision is the closure of either the entire school or a class in a school. The decision in Vaishali International School Teachers Welfare Association dealt with a closure of the entire School. No parallel can be drawn with the present case which concerns discontinuance of Hindi as a subject for Classes XI and XII. The plea of Respondent No. 1 that Rule 46 DSER applies in the present case, and therefore the prior permission of the

DoE was mandatory for such discontinuance, is therefore rejected.

14. As regards Rule 47 DSER, it applies only to aided schools. Rule 47 (3) contemplates a teacher being rendered surplus even on account of the discontinuance of a subject in a school. However, such contingency is not envisaged in Rule 47. It is not possible to accept the submission of learned Counsel for Respondent No. 1 that the wording of Rule 47 which is in the context of an aided school should be used as an "external aid" to the interpretation of the words "existing class" occurring in Rule 46. A conscious distinction has been made by the rule maker between the situation occurring in an aided school to which Rule 47, DSER applies and that in an unaided recognised school covered by Rule 46 DSER. As far as Rule 46 is concerned, prior approval of the DoE is required only where the School itself or an entire class in a School closed.

15. It is also not possible to accept the contention of Respondent No. 1 that even after her promotion as PGT (Hindi) she retained a lien on the post of TGT (Hindi). The promotion to a higher post necessarily implies extinction of lien in the lower post. Further, the fact that Respondent No. 1 had insisted on being paid her salary as PGT (Hindi) while agreeing to work as TGT (Hindi) is evidenced by the letters dated 8th December, 12th December and 16th December 2005. In her letter dated 8th December 2005, Respondent No. 1 stated as under:

In view of what has been stated above, I would request the school management not to initiate any action for dispensing my services as I am ready discharging the duties and functions of TGT (Hindi) and am teaching students up to the secondary level and my pay and allowances as TGT (Hindi) are protected as per government guidelines and rules and instructions issued by Directorate of Education from time to time.

16. Again in the letters dated 12th and 10th December 2005 she insisted on the protection of her pay as a PGT (Hindi). Obviously, when there was No. post of PGT (Hindi) in existence, the question of protecting her pay in that post did not arise.

17. There is already an incumbent working as TGT (Hindi) and therefore, there is No. vacant post against which Respondent No. 1 can be accommodated. However, this Court has placed on record the statement made on behalf of the Petitioner that as and when the post of TGT (Hindi) falls vacant, Respondent No. 1 will be considered for appointment to such post.

18. For all the aforementioned reasons, this Court sets aside the impugned order dated 8th March 2011 of the Tribunal in Appeal No. 46 of 2005 and dismisses the said appeal of Respondent No. 1.

19. The writ petition is allowed and the pending application is disposed of with No. orders as to costs.