

(2018) 11 DEL CK 0203

In the Delhi High Court

Case No : Writ Petitions (Civil) No.12377 Of 2018

Salwan Public School

APPELLANT

Vs

Director Of Education And Anr

RESPONDENT

Date of Decision : 19-11-2018

Acts Referred:

Delhi School Education Act, 1973 — Section 8(2)
Delhi School Education Rule, 1973 — Rule 13, 21, 105, 118, 119, 120
Constitution of India, 1950 — Article 14, 21A

Citation : (2018) 11 DEL CK 0203

Hon'ble Judges : Suresh Kumar Kait, J

Bench : Single Bench

Advocate : Vinay Sabharwal, N.K. Singh, Avnish Ahlawat, Nikhil Ranjan

Final Decision : Dismissed

Judgement

SI. No.,Office Order Dated,Period of Appointment

- 1., "July 23, 2012", 20.07.2012 to 31.03.2013
- 2., "April 2, 2013", 01.04.2013 to 15.05.2013
- 3., "July 9, 2013", 01.07.2013 to 21.07.2013
- 4., "September 3, 2013", 01.08.2013 to 31.10.2013
- 5., "December 5, 2013", 06.11.2013 to 31.03.2014
- 6., "April 2, 2014", 01.04.2014 to 17.05.2014
- 7., "July 14, 2014", 01.07.2014 to 31.03.2015
- 8., "April 4, 2015", 01.04.2015 to 31.03.2016
- 9., "April 6, 2016", 01.04.2016 to 21.05.2016
- 10., "June 29, 2016", 01.06.2016 to 31.07.2016

applicable in the case in hand, as the appointment of respondent No. 2 was on contract basis on consolidated salary. Once again on 29.06.2016, the",,,

post was advertised in naukri.com. A meeting of the Selection Committee for recommending the appointment to this post was held on 16.07.2016.,,,

Since, the suitable candidate was found and appointed, no fresh contractual appointment was given to the respondent No. 2 and his last tenure of",,,

appointment expired on the close of 31.07.2016.,,,

11. I note that it was observed in the impugned order by the Tribunal that the respondent No. 2 was appointed on contract basis by the school for,,

different periods, however, whether to renew the contract or not was the sole discretion of the school management and the Director of Education had",,,

no role in it. However, the Tribunal found the argument of the petitioner baseless that the term of contract of respondent No. 2 had expired by efflux",,,

of time because as per letter dated 29.06.2016, the contract of respondent No. 2 was allegedly expired on 31.07.2016. The Tribunal opined that the",,,

petitioner-school appointed the respondent No. 2 knowing fully well about his age in the year 2012. His contract was extended from time to time by,,

the Managing Committee. Since then, the respondent No. 2 had worked in the petitioner school uninterruptedly till the year 2016. In these",,,

circumstances, it was clear that the respondent No. 2 had been appointed by the Managing Committee knowing about his age, qualification and",,,

experience and the School was estoppel from his own act and conduct from claiming that the respondent No. 2 was overage.,,,

12. Provisions of Delhi School Education Act & Rules, 1973 are enacted to protect the interest of the employees of the schools. Giving repeated",,,

employments by calling the same, only contractual/fixed term appointment/purely temporary, cannot be treated as contractual/fixed term appointments",,,

as the same will violate the provisions of Delhi School Education Act & Rules, 1973. Artificial gaps created in the service of the respondent No. 2 by",,,

appointing him again and again since long under the garb of fixed terms employment, is a sham and artificial action to deprive the respondent No. 2 of",,,

his regular employment and violative of the statutory mandate.,,,

13. It was vehemently argued by the learned counsel for respondent No. 2 that his case fell within the ratio of the landmark judgments of the High,,

Court passed on the issue of removing of a long serving contractual employee

and not making the employee's service permanent/regular. It was,,
no longer res integra in view of the judgments delivered by the High Court in the
case of Hamdard Public School v. Directorate of Education and Anr.,,
202 (2013) DLT 111 and three connected cases with the lead case of Army Public
School and Anr. v. Narendra Nain and Anr. in W.P.(C) 1439/2013,,
decided on 30.08.2013, and it was observed therein:",,,
â??I have already stated that once the ratio of the judgment in the case of
Hamdard Public School Vs. Directorate of Education and Anr. (supra),,
applies, then, Courts have to very carefully examine the termination of the
services order when an employee continues in the employment of a school",,
around a period of three years. To determine the period of three years, it is not
the form of appointment letters which matter, but what matter is the",,
substance thereof. Unless the substance and not form is taken, the intent and
purpose of Rule 105 as required by the legislature would stand",,
frustrated. It was not the object of Rule 105 that an employee gets appointment
under different heads either of contractual employment or,,
probationary employment or part-time employment at the convenience of the
school which can then take up a defence that the employee is not in,,
effect in continuous employment of the school although in reality the
employment is continuous but merely in different forms simply to suit the,,
convenience of the school. I have, therefore, no hesitation in holding that I have
to take the employment of the respondent no.1 as continuous either",,
from 28.11.2007, or at least from 1.4.2008, and when so taken, it is quite clear
that different designations of employment have been used to deny",,
permanency of employment to the respondent no.1, so that, at the whims and
fancies of the school services can be terminated and an employee of a",,
school who is rightly entitled to the mandatory emoluments and protection of
services in terms of Delhi School Education Act and Rules, 1973 is",,
denied such benefits. I cannot give imprimatur of the Court to such sham actions
of a school which are intended to frustrate the intention of the,,
legislature and give uncertainty in employment to the employees of a school. Let
me at this stage reproduce the relevant para of the judgment,,
delivered by me in the case of Hamdard Public School Vs. Directorate of
Education and Anr. (supra) and this para 11 reads as under:,,
11. Now that takes us to the most vexed question as to what should be a

reasonable period. We will have to keep in mind Article 21A of the",,,
 Constitution for this purpose. To understand the issue of what should be a
 reasonable period qua Rule 105 as regards a teacher, let us start with two",,,
 extreme examples. One extreme example is that probation period cannot be
 extended at all for the third year and the other extreme example is that,,
 the probation period can be kept on extending by the management even till the
 age of superannuation. Obviously, both these extreme situations cannot",,,
 decide what is a reasonable period. In many statutory rules and rules of many
 organizations , there is provided a three year period of probation like in",,,
 the case of Lawrence School (supra). Therefore, probation period undoubtedly
 can be of 3 years under Rule 105 because as already stated there is no",,,
 outer limit of probation period provided. The question is that for how long
 beyond the third year can a period of probation continue. In my opinion,",,
 reasonable period will have to be dependent on the facts of each case including
 as to what is the post or nature of employment in question, what are",,,
 the terms and conditions agreed to at the time of original appointment and
 subject of course to the same being in accordance with Delhi School,,
 Education Act and Rules, 1973.",,
 The nature of job or duties to be performed by the teacher will also have to be
 kept in mind. It will also have to be kept in mind whether the teacher,,
 will be overage for similar employment if he/she is not confirmed. Keeping in
 mind all the relevant facts, probation period, except in exceptional cases,",,
 so far as a teacher is concerned, should not continue beyond a period of 5 years
 from the first date of appointment. Even a period of 4/5 years has to",,,
 be really in a very grave and exceptional case depending on the facts of that
 case. However, I do not express myself finally with respect to what",,,
 should be a reasonable period between 3 to 5 years because Courts will
 necessarily examine that aspect in the facts and circumstances of each,,
 individual case. I am making these specific observations with respect to the
 maximum period of probation being ordinarily only of 5 years because in,,
 the absence of fixing an outer limit by the statute viz Rule 105, the entire
 purpose of a probation period and a probationary teacher being confirmed",,,
 would be defeated by the machinations of the management of the schools in
 certain cases thus affecting education and bringing in of Article 21A in,,
 the Constitution. Therefore, I hold that the Rule 105 must be so interpreted that

the reasonable period therein should ordinarily be around three years",,,
 should not extend beyond five years in most of the cases, and, in the rarest or rare cases, one more year upto 6 years may be considered. However",,,
 again at the cost of repetition it is stated that six years period is being observed only as a most grave and rarest of rare circumstance in a case, and",,,
 ordinarily, a probation period qua a teacher should not extend beyond/around three years which is a reasonable period, and as per the facts and",,,
 circumstances of certain case, andÂ whichÂ issues/decisionsÂ areÂ ofÂ courseÂ justiciableÂ before Courts the probation period can go up to",,,
 5/6 years as stated above."",,,

14. TheÂ judgmentÂ discussedÂ aboveÂ hasÂ beenÂ upheldÂ byÂ thisÂ courtÂ in W.P.(C) 9187/2015 titled as Sardar Patel Public Senior,,
 Secondary School v. Chandra Rani & Ors. And LPA 710/2016 titled as Delhi Public School & anr. v. Manoj Bhandari & Anr.,,

15. It is argued on behalf of the petitioner that the respondent No. 2 was appointed against a temporary post on contractual basis, hence he could not",,,
 be regularized. But, the settled law is that the temporary vacancy meant for a short period which could be against any temporary work or due to leave",,,
 of some employee for a fixed period. The very fact that the school continued the employment of respondent No. 2 for about 4 years showed that his,,
 appointment was against the post of a permanent nature.,,

16. Once the services are statutory in nature and the respondent No. 2 had not been removed by following the provisions of conducting an inquiry and,,
 passing an order by the Disciplinary Authority as required under Rule 118-120 of Delhi School Education Act & Rules, 1973, the service of",,,
 respondent No. 2 has not been legally terminated. The order of Supreme Court dated 13.04.2016 passed in Civil Appeal No. 1020/2011 titled Raj,,
 Kumar v. Director of Education & Ors., is relevant wherein, it was observed as under:",,,

â??The Division Bench of the Delhi High Court, thus, erred in striking down Section 8(2) of the DSE Act in the case of Kathuria Public School",,,
 (supra) by placing reliance on the decision of this Court in the case of TMA Pai (supra), as the subject matter in controversy therein was not the",,,
 security of tenure of the employees of a school, rather, the question was the right of educational institutions to function unfettered. While the",,,

functioning of both aided and unaided educational institutions must be free from unnecessary governmental interference, the same needs to be",,,

reconciled with the conditions of employment of the employees of these institutions and provision of adequate precautions to safeguard their interests.,,,

Section 8(2) of the DSE Act is one such precautionary safeguard which needs to be followed to ensure that employees of educational institutions do,,

not suffer unfair treatment at the hands of the management. The Division Bench of the Delhi High Court, while striking down Section 8(2) of the DSE",,,

Act in the case of Kathuria Public School (supra) has not correctly applied the law laid down in the case of Katra Educational Society (supra),",,,

wherein a Constitution Bench of this Court, with reference to provision similar to Section 8(2) of the DSE Act and keeping in view the object of",,,

regulation of an aided or unaided recognised school, has held that the regulation of the service conditions of the employees of private recognized",,,

schools is required to be controlled by educational authorities and the state legislature is empowered to legislate such provision in the DSE Act. The,,

Division Bench wrongly relied upon that part of the judgment in the case of Katra Education Society (supra) which dealt with Article 14 of the,,

Constitution and aided and unaided educational institutions, which had no bearing on the fact situation therein. Further, the reliance placed upon the",,,

decision of this Court in the case of Frank Anthony Public School Employees Association v. Union Of India & Ors.[11] is also misplaced as the,,

institution under consideration in that case was a religious minority institution. The reliance placed by the learned counsel appearing on behalf of the,,

respondents on the case of TMA Pai (supra) is also misplaced as the same has no bearing on the facts of the instant case, for the reasons discussed",,,

supra. The reliance placed upon the decision of the Delhi High Court in the case of Kathuria Public School (supra) is also misplaced as the same has,,

been passed without appreciating the true purport of the Constitution Bench decision in the case of Katra Education Society (supra). Therefore, the",,,

decision in the case of Kathuria Public School (supra), striking down Section 8(2) of the DSE Act, is bad in law.",,,

17. Section 8 (2) of Delhi School Education Act & Rules, 1973 reads as under:",,,

â??Section 8(2)-Subject to any rule that may be made in this behalf, no employee of a recognized private school shall be dismissed, removed or",,,

reduced in rank nor shall his service be otherwise terminated except with the prior approval of the Director.â??,,

18. Respondent No. 2 was appointed in the year 2012 and continued till 2016. The petitioner-school was well aware on the date of appointment about,,

the age, qualification and another eligibility. It is not the case of the petitioner that respondent No. 2 was appointed for a period of two months, three",,,

months and six months on temporary arrangements. He continued for about four years, however, by giving artificial breaks to respondent No. 2,",,

against the settled law, as discussed above, it cannot be accepted that he was not continued in a post which was not available with the petitioner-"",

school.,,,

19. In view of the above discussion and settled law, I find no illegality or perversity in the order passed by the Tribunal on 05.10.2018.",,

20. Finding no merit in the present writ petition, the same is accordingly dismissed, with no order as to costs.",,