

(2013) 09 DEL CK 0422

In the Delhi High Court

Case No : Writ Petition (C) No. 11484 of 2009

Smt. Satya Chhikara

APPELLANT

Vs

The Managing Committee Army Public School and Another

RESPONDENT

Date of Decision : 03-09-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 7
Constitution of India, 1950 — Article 21A, 226, 30, 41, 45
Delhi School Education Act, 1973 — Section 11, 15

Citation : (2013) 09 DEL CK 0422

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : S.C. Singhal, for the Appellant; Asha Jain Madan, for R-1 and Mr. Anuj Tyagi, for Mr. Sachin Chopra, for R-2, for the Respondent

Final Decision : Allowed

Judgement

Valmiki J Mehta, J.—I would have ordinarily transferred this writ petition to the Delhi School Tribunal for decision inasmuch as the orders terminating services passed by the school have to be decided by the Delhi School Tribunal, however, considering that this writ petition is four years old; was admitted to hearing way back on 30.11.2010; early hearing was declined on 9.4.2013; and the fact that I have already held the main issue in this writ petition against the present respondent no. 1-school as per judgment dated 30.8.2013 in W.P. (C) 1439/2013, I am therefore exercising my extraordinary jurisdiction under Article 226 of the Constitution of India to hear and decide this case. The facts of the case are that petitioner was appointed in terms of a regular selection process. That regular selection process was initiated in terms of advertisement dated 16.10.2006 issued by the Army Welfare Education Society, which runs the respondent no. 1-school. Petitioner was given the call letter for interview on 9.2.2007 and thereafter a contractual appointment as a Primary Teacher (PRT) was given of one year from 2.4.2007 to 31.3.2008 in terms of the letter dated 2.4.2007 of the respondent no. 1-school. Though the contract specified

appointment of one year, however, the performance was to be reviewed after completion of three years in terms of para 4 of the appointment letter dated 2.4.2007. Petitioner's services were given an artificial break and the petitioner was again appointed as a Primary Guest Teacher for the period from 8.4.2008 to 17.5.2008 in terms of the letter dated 17.4.2008 of the respondent no. 1-school. Petitioner's services were thereafter further extended in terms of the letter of the respondent no. 1-school dated 7.7.2008 for the period from 1.7.2008 till 20.5.2009. Petitioner's services were ultimately terminated by the respondent no. 1-school by the letter dated 5.2.2009 stating that original appointment of the petitioner was contractual only to meet the temporary need of the school due to the non-availability of qualified teachers of respective subjects. The period of completion of contractual appointment from 20.5.2009 was brought forward to 28.3.2009.

2. I have had an occasion to consider a nearly identical issue in the judgment in the case titled as Army Public School & Anr. Vs. Narendra Singh Nain & Anr. in WPC 1439/2013 decided on 30.8.2013 wherein I have held that appointments, termination of appointments, and then again re-employments to the same post when are made by the same school, such actions would violate the intent and spirit of the provisions of statutory employment under the Delhi School Education Act and Rules, 1973 read with the judgment of the Supreme Court in the case of Management Committee of Montfort Senior Secondary School Vs. Shri Vijay Kumar and Others, and which require a regular appointment having statutory protection. Relevant paras of this judgment, and which is against the same respondent no. 1-school in his case, read as under:-

2. The facts of the case are that respondent No. 1 was firstly appointed as Lower Division Clerk (LDC) on contractual basis by the petitioner-school for a period of one year in terms of letter dated 3.12.2007. After the contractual period came to an end, respondent No. 1 was immediately re-appointed as LDC, however on probation, in terms of the appointment letter dated 30.5.2008. The period of probation was one year from 1.4.2008. As per the appointment letter the respondent No. 1 was to continue in probation till the services were confirmed in writing by the Managing Committee of the petitioner-school. The period of probation of the petitioner was extended by the petitioner-school for one more year from 1.4.2009 (i.e. till 31.3.2010) by the letter dated 31.3.2009. Respondent No. 1's services were terminated by a letter dated 21.3.2010 observing that as per the performance reports and advisories given during the extended period of probation, the respondent No. 1's services were to stand terminated w.e.f. 29.3.2010. Respondent No. 1 was however immediately again appointed on 8.4.2010 as a part-time Admission Clerk for one year w.e.f. 3.4.2010. Respondent No. 1 had however in the meanwhile challenged the order of the petitioner-school terminating his services vide letter dated 21.3.2010 before DST, and consequently when the notice of the appeal filed before the DST reached the petitioner-school, it is contended by the respondent No. 1 that immediately thereafter on 10.6.2010, the petitioner-school terminated the

contractual appointment given by the letter dated 8.4.2010 by simply stating that the petitioner school no longer requires the services of the respondent No. 1.

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 overreach 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.

3. The facts of the case are strikingly similar to the facts in the case of Army Public School (supra) in WPC 1439/2013 inasmuch as again the same very respondent-school has been giving appointments, terminating them, and again re-appointing the employee at the same post viz. a primary teacher in this case. Clearly therefore, the appointments and terminations when seen in a sequence have to be held as a sham action and the object of the illegal action of the respondent no. 1 is to deny the statutory benefits of statutory employment and monetary emoluments which are payable to regular employees of a school. The termination letter dated 5.2.2009 in the present case reads as under:-

Tele 26153558

E Mail

Tele Fax-26153559

1105/APS SV

Army Public School

Shankar Vihar

Delhi Cantt-10

05 Feb 2009

Mrs. Satya Chhikara, PRT

REVIEW OF APPOINTMENT PERIOD FOR THE POST OF TGT/PRT GUEST TEACHER

Dear Sir/Madam

1. Kindly refer to your appointment letter No. 1105/APS SV dated 07 Jul 2008 for the post of TGT/PRT Guest Teacher at a consolidated salary for the period from 01 July 2008 to 20 May 2009.

2. These appointments were made against the vacancies created to meet the temporary need of the school due to the non availability of qualified experienced teachers of respective subjects. These temporary vacancies exist only upto 28 Mar 2009 as they are likely to be filled up from CBE-09 qualified teachers w.e.f. 01 Apr 2009 as regular posts. Therefore, your appointment for the said post/period may please be treated from 01 Jul 2008 to 28 Mar 2009 and our letter quoted in Para 1 above be amended accordingly.

Yours sincerely,

(Sanjeev Relia)

Colonel

Director School

4. It was sought to be argued by the school that the facts of the present case fall

in the exception which is carved out in the judgment in the case of Management Committee of Montfort Senior Secondary School (*supra*) which allows contractual appointments in case of administrative exigencies. It is argued that there were non-availability of qualified experienced teachers of respective subjects as stated in the termination letter dated 5.2.2009 issued by the respondent no. 1-school to the petitioner, and accordingly thus it be held that respondent-school was justified in giving contractual appointment to the petitioner.

5. In my opinion, the language of the letter of termination dated 5.2.2009 itself shows the categorical malafides of respondent no. 1-school, cases of many of whose employees are coming up for hearing before this Court, and the impugned actions show that respondent no. 1-Army Public School seems to be acting in a world of its own wherein the Army Public School feels that it is beyond the purview of the provisions of the Delhi School Education Act and Rules, 1973. I have already commented upon the general letter dated 30.3.2009 which was issued by the respondent no. 1-school in WPC 1439/2009, and when we read the letter dated 5.2.2009 issued to the petitioner in the present case, one is left in no manner of doubt as to the autocratic attitude adopted by the respondent no. 1-school because appointment of the petitioner is only of a primary teacher and therefore I fail to understand that how it can be said that petitioner was appointed because experienced teachers in respective subjects were not available, inasmuch as surely for a primary teacher, I do not think that there are respective subjects in which specialization is required. In any case, I really find it too farfetched argument that normally primary teachers would not have been available for employment for as many as 3 years, and for which period the petitioner was given the chain of appointments and cancellations. Therefore, I do not find that the present case in any manner be distinguished for not applying the ratio in the case of Army Public School (*supra*) in WPC 1439/2013.

6. Learned counsel for respondent no. 1 sought to argue that petitioner's services cannot be regularized in terms of the prayers made in this writ petition, and more so because petitioner is not qualified for appointment inasmuch the petitioner is over aged. Reliance in support of this argument is placed upon the judgment of the Supreme Court in the case of A. Umarani Vs. Registrar, Cooperative Societies and Others, which holds that once essential qualifications are lacking, there cannot be regularization of employees. In my opinion, the argument which is raised and the judgment cited on behalf of respondent no. 1 cannot have application to the facts of the present case because the only issue with respect to disqualification of the petitioner is the petitioner being over-aged and the Director of Education vide its letter dated 30.6.2009 has already granted age relaxation to the petitioner. No doubt, this letter dated 30.6.2009 was issued after termination of services of the petitioner, the same cannot make any difference because once the petitioner is treated to have been illegally removed from services, petitioner will naturally get the benefit of the letter of the Director of Education dated 30.6.2009 relaxing the age requirement so far as the petitioner is concerned.

7. It was finally argued on behalf of respondent no. 1 that the petitioner's prayer for regularization cannot be granted as no such prayer clause is there in the writ petition, and therefore even if it is argued this Court cannot hold that petitioner's services are statutory in character in terms of the ratio in Army Public School (supra) in WPC 1439/2013. Again this argument of the respondent no. 1-school is without any merit because once the facts entitling a person to the relief are made out, Courts are sufficiently empowered under principles akin to Order 7 Rule 7 CPC to mould the reliefs and grant such reliefs as the facts of the case require. Ultimately, the issue is that whether petitioner's services have been legally terminated or not, and once I have held that petitioner's services have not been legally terminated, surely, natural consequence and the relief which can be granted to the petitioner is that petitioner's services would not stand terminated and wordings of the prayer clause can never be a handicap for the Courts to do substantial justice as per the facts of each particular case.

8. In view of the above, the writ petition is allowed and the impugned order of termination dated 5.2.2009 is quashed.

9. The only issue which remains is of the salary to be paid to the petitioner for the period from the date of her termination of services in terms of the letter dated 5.2.2009 till today. Counsel for the petitioner agrees that the petitioner will claim this relief by making representation to the school in terms of Rule 121 of the Delhi School Education Act and Rules, 1973. This representation be made within a period of two weeks from today and decided by the respondent no. 1 within a period of four weeks by passing of a speaking order and also after hearing the petitioner or her representative. Petitioner or her representative will be entitled to show the case law for entitlement of the petitioner to the back wages. Accordingly, the writ petition is allowed and disposed of including by directing the respondent no. 1 to comply with the provision of Rule 121 of the Delhi School Education Act and Rules, 1973. Respondent no. 1-school will now issue a letter to the petitioner as also her counsel so that the petitioner can join the school within a period of two weeks from passing of the present judgment.