

(2013) 09 DEL CK 0134

In the Delhi High Court

Case No : Writ Petition (C) No. 3061 of 2011

Sonia Mehta

APPELLANT

Vs

Dayanand Model School and Others

RESPONDENT

Date of Decision : 06-09-2013

Acts Referred:

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

Citation : (2013) 09 DEL CK 0134

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : R.N. Pareek, for the Appellant;

Final Decision : Allowed

Judgement

Valmiki J Mehta, J.—Petitioner by this writ petition prays for regularization of her appointment with the respondent No. 1-school. Petitioner also claims consequential payments with respect to salaries and other benefits which are awarded to teachers in a school. I have recently decided two cases and ratios of which cases will squarely apply to the facts of the present case also. First case which will apply is of Hamdard Public School Vs. Directorate of Education and Anr. in W.P.(C) No. 8652/2011 decided on 25.7.2013 wherein I have said that ordinarily a teacher would be confirmed after a period of three years in probation unless there are valid reasons and which are justiciable before Court. The second case is 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 wherein I have held that in the guise of giving and continuing of contractual employment by reemployment/reappointment, a teacher cannot be deprived of the benefits of Delhi School Education Act and Rules, 1973 and such a teacher will be taken to be a regular/confirmed teacher and not one only on contractual employment. I would reproduce the ratios of these judgments subsequently, however, let me first state the facts of the present case.

2. Petitioner was appointed as a Music Teacher on consolidated salary of Rs. 6,000/- per month plus EPF benefits for the first time vide appointment letter dated 28.6.2005. The appointment letter stated that petitioner will be on probation for one year with further extension of one year. Petitioner's employment continued thereafter without any specific period. Petitioner on account of being denied regular salary which is paid to an employee/teacher made various representations for claiming benefits which are equivalent to salaries etc payable to teachers in schools of Government. The Director of Education also vide its order dated 14.12.2009 issued the show cause notice as to why school was not complying with the provisions of Delhi School Education Act and Rules, 1973. Petitioner was issued a letter dated 8.1.2010 stating that she was offered contractual employment which she refused and therefore she was given a show cause notice as to why her services should not be terminated. Having failed to get regular employment at regular pay scale from the respondent No. 1, the petitioner has filed the present writ petition.

3. A reference to the counter-affidavit of respondent Nos. 1 to 3 shows that basically what the school contends is that petitioner with open eyes accepted contractual employment at a consolidated salary and therefore she cannot claim an entitlement of a regular teacher. The principle of estoppel is also sought to be pressed against the petitioner. It is stated that the petitioner cannot seek regularization because she has not been appointed against a substantive post and nor is there any vacancy because the subject of Music and Dance is not a regular subject in the school.

4. In my opinion, the defences which have been raised by the school are without merits. Firstly, as per the judgment passed by me in the case of Hamdard Public School (supra) petitioner actually after the completion of her period of probation will stand regularized inasmuch as petitioner's employment in the school has continued right from 1.7.2005 till the year 2010. I do not find any valid reason for the school not to confirm the petitioner as a regular employee in view of the judgment in the case of Hamdard Public School (supra) because the teacher cannot remain on ad hoc or contractual or non-regular basis for years and years after her first date of appointment. Para 11 of the judgment in the case of Hamdard Public School (supra) is relevant and the same 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, and which issues/decisions are of course justiciable before Courts the probation period can go up to 5/6 years as stated above.

5. Therefore, applying the ratio of the case of Hamdard Public School (supra) I hold that petitioner's services are deemed to have been confirmed as a regular teacher on completion of three years i.e. w.e.f. 30.6.2008.

6. The petitioner, even independent of the ratio laid down in the case of Hamdard Public School (supra) with respect to Rule 105, is entitled to regular services as a teacher in the school, as giving of repeated employments by calling them only contractual, petitioner cannot be treated as a contractual employee, as the same will violate the provisions of Delhi School Education Act and Rules, 1973 and the judgment of the Supreme Court in the case of Management Committee of Montfort Senior Secondary School Vs. Shri Vijay Kumar and Others, . All these aspects have been considered by me in detail in the case of Army Public School (supra) and paras 3 to 8 of which judgment are relevant and the same 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.

5. 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.

6. 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.

7. 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.

7. Therefore, on applying the ratio of the judgment in the case of Army Public

School (supra) petitioner will have to be treated as regular employee in the facts of the present case, if not from her original date of appointment, then, definitely w.e.f. 1.7.2008 and I hold accordingly.

8. Having held that petitioner is deemed to be regularized w.e.f. 1.7.2008 on both counts of successful completion of probation period and that repeated contractual appointment is a sham action and violative of the statutory mandate to give a regular employment as required by law, the issue then arises is that what are the relief's which are to be granted to the petitioner. No doubt, the consequences of regularization would be that all arrears, which would be payable as if the petitioner is regular employee/teacher of the school, would have to be granted, however, considering that the petitioner has filed the writ petition only in April, 2011 and that the petitioner has also got certain consolidated salary for her services rendered with the respondent No. 1-school, it would be sufficient to direct in the facts of the present case that petitioner will get monetary emoluments equal to that and as payable to a regular teacher in the government schools run by the Director of Education/GNCTD from three years prior to filing of the petition on 18.4.2011. In view of the above, writ petition is allowed and it is directed that petitioner will be treated as a regular teacher/employee of the respondent No. 1-school w.e.f. 1.7.2008 and will be entitled to all the consequential monetary benefits of a regular teacher w.e.f. three years prior to filing of petition on 18.4.2011. Payment now to be made will be subject to the adjustment of the amounts already paid by the respondent no. 1-school to the petitioner. Respondent No. 1-school is directed to make payment due to the petitioner in terms of the present judgment within three months from today. In case the payment is not made within three months from today, thereafter the petitioner will be entitled to interest on the unpaid amounts @ 6% per annum simple on the unpaid amounts. Parties are left to bear their own costs.