

(2017) 04 DEL CK 0067

In the Delhi High Court

Case No : 1264 of 2016

ST. THOMAS SCHOOL

APPELLANT

Vs

MANISH KAUSHIK & ANR

RESPONDENT

Date of Decision : 13-04-2017

Acts Referred:

Constitution of India, Article 226, Article 227 - Power of High Courts to Issue certain writs - Power of superintendence over all courts by the High Court
Delhi School Educ

Citation : (2017) 04 DEL CK 0067

Hon'ble Judges : Valmiki J.Mehta

Bench : SINGLE BENCH

Advocate : Rakesh K. Khanna, Pramod Gupta, Kashivi Dutta, A.K. Singh, Rizwan, S.K. Tripathi

Judgement

1. By this writ petition under Article 226 & Article 227 of the Constitution of India, the petitioner impugns the judgment of the Delhi School Tribunal (DST) dated 10.12.2015 by which the DST has allowed the appeal filed under Section 8(3) of the Delhi School Education Act, 1973 and has directed reinstatement of the respondent no. 1 in this writ petition to the services with the petitioner/school. Respondent no. 1 in this writ petition was the appellant before the DST.

2. The facts of the case are that admittedly the respondent no. 1 was appointed by the petitioner/school in terms of the letter dated 4.4.2011. This letter of appointment of the respondent no. 1 reads as under:- "ST. THOMAS SCHOOL

GOYALA VIHAR, NEAR SECTOR-19, DWARKA NEW

DELHI-110071

Ref: No. STTHMS/18/2011

DATED 04 APRIL 2011

To,

Sh MANISH KAUSHIK

S/o Sh SUGREEV KAUSHIK

VDP, DHANSA NEW DELHI -110073

SUB :- APPOINTMENT LETTER

Madam/Sir,

This is with reference to your interview for the post of PET in this school, I am pleased to inform you that you have been selected for the post in the pay scale of Rs. 12540 + 4660. The appointment will be governed by DSER and rules 1973 framed there under. Further, you are informed that your appointment will be on probation period for one year and thereafter on being satisfied, the Managing Committee will review your work for regularization of your service.

You are required to join by 04-4-2011 (forenoon) along with your acceptance in writing.

ST. THOMAS SCHOOL

S/d

MANAGER

S/d

(m. kaushik)

ST. THOMAS SCHOOL

DIVYA GAUTAM

GOYLA VIHAR, NEAR SEC -19

DWARKA, NEW DELHI-71"

(emphasis added)

3. A reading of the aforesaid letter shows that respondent no. 1 was appointed on probation for one year and only on the petitioner/school being satisfied would the respondent no. 1 be granted regularization.

4. The case of the petitioner before the DST was that respondent no.1's services were not satisfactory and respondent no. 1 was issued various memorandums with respect to his deficiencies in work and such memorandums are dated 21.1.2014, 7.2.2014 and 24.2.2014. These memorandums read as under:-

1. Memorandum dated 21.1.2014

"ST.THOMAS" SCHOOL

(Senior Secondary Recognised& Affiliated to CBSE)

Goyala Vihar, Near Sec-19, Dwarka New Delhi-110071

8826479990, 91, 92

info@stthomasdwarka.com

www.stthomasdwarka.com

No.STS/Memo/01

21st January, 2014

To

Mr. Manish Kaushik

TGT/PET

Vill & P.O. Dhansa

New Delhi-110073

MEMORANDUM

It has been noticed that you are not attentive to your duties in the school. It has been observed that: 1. You are very casual to discipline and discipline not looked after properly in the school.

2. You have been coming late to the school very often.

3. When asked verbally, your behavior to the authorities is irresponsible.

4. Work entrusted to you was not done in time.

5. You were entrusted the job of finding suitable person for preparation of cricket ground pitch job but there was no response from your side.

You are hereby directed to explain your position in writing in this regard. In view of the above you are submit your reply to the undersigned within 2 days.

Sd/-

Mrs. K. Sudha

Principal

St. Thomas School

Goyala Vihar, New Delhi-110071"

2. Memorandum dated 7.2.2014

"ST.THOMAS" SCHOOL

(Senior Secondary Recognised& Affiliated to CBSE)

Goyala Vihar, Near Sec-19, Dwarka New Delhi-110071

8826479990, 91, 92

info@stthomasdwarka.com

www.stthomasdwarka.com

Reminder-1

Ref:-STS/Memo/02 7th February, 2014

To

Mr. Manish Kaushik

TGT/PET

Vill & P.O. Dhansa

New Delhi-110073

MEMORANDUM

Please refer our earlier Memorandum No STS/Memo/01 dated 21st January 2014. You have not submitted reply to the same. You are again advised to reply in 5 days, failing which the management will presume that you have nothing to say in this regard.

It has been noticed that you are not attentive to your duties in the school. It has been observed that:

1. You are very casual to discipline and discipline not looked after properly in the school.
2. You have been coming late to the school very often.
3. When asked verbally, your behavior to the authorities is irresponsible.
4. Work entrusted to you was not done in time.
5. You were entrusted the job of finding suitable person for preparation of cricket ground pitch job but there was no response from your side.

You are hereby directed to explain your position in writing in this regard. In view of the above you are to submit your reply to the undersigned within 5 days.

Sd/-

Mrs. K. Sudha

Principal

St. Thomas School

Goyala Vihar, New Delhi-110071"

3. Memorandum dated 24.2.2014

"ST.THOMAS" SCHOOL

(Senior Secondary Recognised & Affiliated to CBSE)

Goyala Vihar, Near Sec-19, Dwarka New Delhi-110071

8826479990, 91, 92

info@stthomasdwarka.com

www.stthomasdwarka.com

Reminder-II

Ref:-STS/Memo/03

24th February, 2014

To

Mr. Manish Kaushik

TGT/PET

Vill & P.O.

Dhansa New Delhi-110073

MEMORANDUM

Please refer to earlier Memorandum No STS/Memo/01 dated 21st January 2014 and STS/Memo/02 dated 7th Feb 2014.

You have not yet submitted reply to the same. You are again advised to reply in 5 days, failing which the management will presume that you have nothing to say in this regard.

It has been noticed that you are not attentive to your duties in the school. It has been observed that:

1. You are very casual to discipline and discipline not looked after properly in the school.
2. You have been coming late to the school very often.
3. When asked verbally, your behavior to the authorities is irresponsible.
4. Work entrusted to you was not done in time.
5. You were entrusted the job of finding suitable person for preparation of cricket ground pitch job but there was no response from your side.

You are hereby directed to explain your position in writing in this regard within 7 days failing which the management will take action as deemed suitable.

Sd/-

Mrs. K. Sudha

Principal

St. Thomas School

Goyala Vihar, New Delhi-110071"

5. The common case of the parties thereafter is that respondent no.1's services were terminated with effect from 5.3.2014 and respondent no. 1 received on 18.3.2014 one month's salary along with experience certificate from the petitioner/school at the time of termination of his services.

6. Learned Senior Counsel for the petitioner has rightly argued that DST has allowed the appeal of the respondent no. 1 without applying the ratio of the judgment passed by this Court in the case of Hamdard Public School Vs. Directorate of Education and Anr., 202 (2013) DLT 111. All that I can say is that I am indeed surprised as to how the Tribunal which is bound by law laid down as per the judgments of this Court can by crafted language avoid direct reference to the direct paras of the ratio of the judgment in the case of Hamdard Public School (supra). The DST has only given lip sympathy by making a cursory reference to the judgment of the Hamdard Public School (supra) without citing the relevant paras of the judgment in the case of Hamdard Public School (supra). The relevant paras of the judgment in the case of Hamdard Public School (supra) are paras 2, 3, 8, 9, 10 and 11, and the same read as under:- 2. This issue of whether the period of probation can only be a maximum period of two years i.e one year with extension of one year, and that whether after two years, there is an automatic confirmation of an employee is indeed a vexed question so far as the Delhi School Education Act and Rules, 1973 are concerned. There is no judgment either of a learned Single Judge of this Court or a Division Bench of this Court or of the Supreme Court interpreting Rule 105. There is no interpretation of Rule 105 in the sense as to whether the period of probation can only be of two years or if it statutorily is stated to be two years, can it not be extended beyond two years inasmuch as the language does not provide for deemed confirmation or automatic confirmation. Let me therefore at the outset reproduce the relevant Rule 105, of the Delhi School Education Act and Rules, 1973, and which reads as under:-

"105. Probation.-(1) Every employee shall, on initial appointment, be on probation for a period of one year which may be extended by the appointing authority [with the prior approval of the Director] and the services of an employee may be terminated without notice during the period of probation if the work and conduct of the employee, during the said period, is not, in the opinion of the appointing authority, satisfactory:

Provided that the provisions of this sub-rule relating to the prior approval of the Director in regard to the extension of the period of probation by another year,

shall not apply in the case of an employee of a minority school:

Provided further that no termination from the service of an employee on probation shall be made by a school, other than a minority school, except with the previous approval of the Director.

(2) If the work and conduct of an employee during the period of probation is found to be satisfactory, he shall be on the expiry of the period of probation or the extended period of probation, as the case may be, confirmed with effect from the date of expiry of the said period.

(3) Nothing in this rule shall apply to an employee who has been appointed to fill a temporary vacancy or any vacancy for a limited period."

3. Sub- Rule 1 of Rule 105 provides the original period of probation as one year, and which can be extended by the appointing authority. What is the period for which probation can be extended is however not provided in Sub-Rule1. Sub-Rule 1 further provides that services of an employee can be terminated without notice during the period of probation if the work and conduct of the employee is not satisfactory. First Proviso to the Sub-Rule 1 states that the requirement of the provision of Sub-Rule 1 of seeking approval of the Director of Education with regard to extension of period of probation by another year shall not apply in case of an employee of a minority school. The first proviso is therefore really limited for getting permission of the Director of Education for extension of the probation period "by another year". It be noted that the expression is not "only another year" or "only another one year" or "a maximum period of another year" or "maximum period of another one year" etc. etc. The expression only uses "another year" without specifying an outer limit of the probation period. Also, even if in some manner of interpretation we take the expression "another year" to mean that there can only be one additional year of probation after the original one year of probation, even then, there is nothing found in the first proviso providing for automatic or deemed confirmation. As already stated above, first proviso only functions in a limited field qua getting permission of Director of Education. Neither the main body of Sub-Rule 1, nor the first proviso, provides for a maximum period of probation, and also they do not provide for automatic or deemed confirmation. The following conclusions therefore in my opinion can safely be drawn from reading of Sub-Rule 1 of Rule 105 alongwith its first Proviso.

(i) Sub-Rule 1 prescribes an initial probation period of one year, however, there is no maximum period of probation which is prescribed in this Sub-Rule.

(ii) Services of an employee can be terminated during the probation period (and which maximum probation period is not prescribed), if the work and conduct of the employee is not satisfactory.

(iii) Neither Sub-Rule 1 nor the first proviso provides for automatic or deemed confirmation on the expiry of the period of probation.

(iv) The first proviso only uses the expression "by another year" and not "by

another one year" or "by another one year only" or "maximum by another year" i.e in the first proviso there is no outer limit of probationary period prescribed like there is none in the body of the main Sub-Rule 1.

(v) The first proviso can in a way be said to only deal with a minority school not requiring permission of the Director of Education, and the same does not concern other schools in Delhi.

I must hasten to add that in terms of the judgments which have been passed by Division Benches of this Court in the cases of Kathuria Public School v. Director of Education, 123 (2005) DLT 89 (DB) and Delhi Public School & Anr. v. Shalu Mahendroo & Ors. (2013) 196 DLT 147 (DB), in spite of certain provisions requiring prior approval of Director of Education with respect to certain acts and actions of the school, it has been held that with respect to unaided schools, no prior permission is required of the Director of Education. I am of course not touching on those aspects because such aspects are governed by the ratios of the judgments in the cases of Kathuria Public School (supra) and Delhi Public School (supra).

(vi) Neither the main Sub-Rule 1 and nor the first proviso to Sub-Rule 1 in any manner specifically and categorically not only does not provide for a maximum period of probation but they also do not provide for deemed or automatic confirmation.

XXXX XXXX XXXX

8. The question as to whether Rule 105 of the Act provides a maximum period of probation, has been answered above that Sub-Rule 1 of Rule 105 does not provide a maximum period of probation, and, its first proviso also does not in any manner contain any outer period of limitation. However, merely because there is no outer period prescribed for confirming a probationer will not mean that there will be no outer limit for confirming a teacher or for terminating of the services of a teacher in a probationary period, the period will have to be a reasonable period vide Sharda Devi (supra).

9. At this stage, before proceeding further, it would be useful to refer to a very recent judgment of the Supreme Court in the case of Head Master, Lawrence School, Lovedale Vs. Jayanthi Raghu and Anr. (2012) 4 SCC 793. In this judgment, the Supreme Court speaking through Hon"ble Mr. Justice Dipak Misra has held that if in the relevant rule even if a maximum period of probation is provided yet, if the self same rule uses the expression "if confirmed", there is no automatic or deemed confirmation after the maximum period of probation, and there would be required a specific order of confirmation of an employee. The relevant paras of this judgment are as under:-

25. It is apt to note here that the Learned Counsel for both the sides have heavily relied on the decision in High Court of Madhya Pradesh thru. Registrar and Ors. v. Satya Narayan Jhavar (2001) 7 SCC 161: AIR 2001 SC 3234. In the

said case, the three-Judge Bench was considering the effect and impact of Rule 24 of the Madhya Pradesh Judicial Service (Classification, Recruitment and Conditions of Services) Rules, 1955.

26. It may be mentioned that the decision rendered in *Dayaram Dayal v. State of M.P.*: AIR 1997 SC 3269, which was also a case under Rule 24 of the said Rules, was referred to the larger Bench. In *Dayaram Dayal (supra)*, it had been held that if no order for confirmation was passed within the maximum period of probation, the probationer judicial officer could be deemed to have been confirmed after expiry of four years period of probation.

27. After referring to the decisions in *Dharam Singh (supra)*, *Sukhbans Singh (supra)* and *Shamsher Singh (supra)* and other authorities, the three-Judge Bench expressed thus:

"11. The question of deemed confirmation in service Jurisprudence, which is upon language of the relevant service rules, has been subject matter of consideration before this Court times without number in various decisions and there are three lines of cases on this point. One line of cases is where in the service rules or the letter of appointment a period of probation is specified and power to extend the same is also conferred upon the authority without prescribing any maximum period of probation and if the officer is continued beyond the prescribed or extended period, he cannot be deemed to be confirmed. In such cases there is no bar against termination at any point of time after expiry of the period of probation. Other line of cases is that where while there is a provision in the rules for initial probation and extension thereof, a maximum period for such extension is also provided beyond which it is not permissible to extend probation. The inference in such cases is that officer concerned is deemed to have been confirmed upon expiry of the maximum period of probation in case before its expiry order of termination has not been passed. The last line of cases is where though under the rules maximum period of probation is prescribed, but the same require a specific act on the part of the employer by issuing an order of confirmation and of passing a test for the purposes of confirmation. In such cases, even if the maximum period of probation has expired and neither any order of confirmation has been passed nor the person concerned has passed the requisite test, he cannot be deemed to have been confirmed merely because the said period has expired."(emphasis supplied)

28. After so stating, it was further clarified as follows:

"37. Ordinarily a deemed confirmation of a probationer arises when the letter of appointment so stipulates or the Rules governing service condition so indicate. In the absence of such term in the letter of appointment or in the relevant Rules, it can be inferred on the basis of the relevant Rules by implication, as was the case in *Dharam Singh (supra)*. But it cannot be said that merely because a maximum period of probation has been provided in Service Rules, continuance of the

probationer thereafter would ipso facto must be held to be a deemed confirmation which would certainly run contrary to Seven Judge Bench judgment of this Court in the case of Shamsher Singh (supra) and Constitution Bench decisions in the cases of Sukhbans Singh (supra), G.S. Ramaswamy (supra) and Akbar Ali Khan (supra)."

29. Regard being had to the aforesaid principles, the present Rule has to be scanned and interpreted. The submission of Mr. Viswanathan, learned senior Counsel for the Appellant, is that the case at hand comes within the third category of cases as enumerated in para-11 of Satya Narayan Jhaver (supra). That apart, it is urged, the concept of deemed confirmation, ipso facto, would not get attracted as there is neither any restriction nor any prohibition in extending the period of probation. On the contrary, the words "if confirmed" require further action to be taken by the employer in the matter of confirmation.

30. On a perusal of Rule 4.9 of the Rules, it is absolutely plain that there is no prohibition as was the rule position in Dharam Singh (supra). Similarly, in Om Prakash Maurya (supra), there was a restriction under the Regulations to extend the period of probation. That apart, in the rules under consideration, the said cases did not stipulate that something else was required to be done by the employer and, therefore, it was held that the concept of deemed confirmation got attracted.

31. Having so observed, we are only required to analyse what the words "if confirmed" in their contextual use would convey. The Division Bench of the High Court has associated the said words with the entitlement of the age of superannuation. In our considered opinion, the interpretation placed by the High Court is unacceptable. The words have to be understood in the context they are used. Rule 4.9 has to be read as a whole to understand the purport and what the Rule conveys and means.

37. Bearing in mind the aforesaid conceptual meaning, when the language employed under Rule 4.9 is scrutinised, it can safely be concluded that the entitlement to continue till the age of superannuation, i.e., 55 years, is not absolute. The power and right to remove is not obliterated. The status of confirmation has to be earned and conferred.

38. Had the rule making authority intended that there would be automatic confirmation, Rule 4.9 would have been couched in a different language. That being not so, the wider interpretation cannot be placed on the Rule to infer that the probationer gets the status of a deemed confirmed employee after expiry of three years of probationary period as - that would defeat the basic purpose and intent of the Rule which clearly postulates "if confirmed". A confirmation, as is demonstrable from the language employed in the Rule, does not occur with efflux of time. As it is hedged by a condition, an affirmative or positive act is the requisite by the employer. In our considered opinion, an order of confirmation is required to be passed.

39. The Division Bench has clearly flawed by associating the words "if confirmed" with the entitlement of the age of superannuation without appreciating that the use of the said words as a fundamental qualifier negatives deemed confirmation. Thus, the irresistible conclusion is that the present case would squarely fall in the last line of cases as has been enumerated in paragraph 11 of Satya Narayan Jhaver (*supra*) and, therefore, the principle of deemed confirmation is not attracted."(Underlining added)

10. The Hon'ble Supreme Court in the case of Lawrence School (*supra*) has also referred to its various earlier judgments including Constitution Bench judgments on the aspect of maximum period of probation of automatic/ deemed confirmation as to whether an order is required for confirmation or not where/ when such order is required and so on. On these issues and with reference to the relevant Rule 4.9, it has been held in Lawrence School's case (*supra*) that although the relevant rule specifically provided for a maximum period of probation only of two years, yet, since the expression used in the rule was "if confirmed", there is no automatic or deemed confirmation of an employee merely because maximum two years period of probation is completed. Of course, what should then be a maximum period of probation does not seem to find mention, however in my opinion, this aspect will stand covered by the ratio of the judgment in the case of Sharda Devi (*supra*) which requires that where no period is provided by the statute, the period can only be a reasonable period.

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."

7. (i) In the present case, it is seen that no doubt the contract of employment of the respondent no. 1 with the petitioner states that period of probation will not exceed two years, however, the Terms and Conditions of employment of the petitioner in para 1 clearly provides that the respondent no. 1 will continue to be on probation till respondent no. 1's services are confirmed in writing by the Managing Committee. This para 1 reads as under:- "1. Initially, you will be on probation for a period of one year from the date of joining. The said period of probation is further liable to be extended for one year solely at the direction of the Managing Committee. During or at the expiry of the said period of probation or the extended period of probation, the Managing Committee shall have the right to terminate your services without any notice or without assigning any reason. You will continue to be on the probation till your services are confirmed in writing by the Managing Committee."(emphasis added)

(ii) This was the specific language which was also in issue in Hamdard Public School (supra) and by referring to the judgment of the Supreme Court in Head Master, Lawrence School, Lovedale Vs. Jayanthi Raghu and Anr. (2012) 4 SCC 793 this Court held that even if there is a maximum period of probation but once there is required a specific order of confirmation in writing, and which was required in this case also, there can be no deemed confirmation of an employee/probationer in the services.

8. As per the ratio of the judgment in the case of Hamdard Public School (supra) the maximum period of probation can be three years and in gravest of grave cases can go upto six years, and in the present case it is seen that the respondent no. 1 has not crossed even the initial period of three years for

deemed confirmation of probationary services i.e there cannot be deemed confirmation of services on account of respondent no.1 not completing three years of service as a probationer. Petitioner was appointed on 4.4.2011 and he was terminated on 5.3.2014, inasmuch as, respondent no.1's case before the DST was that on 5.3.2014 the petitioner/school prevented him from working. At best termination of the respondent no. 1 would be from 18.3.2014, inasmuch as, respondent no. 1 in his appeal before the DST pleaded that on 18.3.2014 petitioner/school compelled him to accept one month's salary along with experience certificate, and hence services as a probationer of the respondent no.1 is below three years.

9. I may note that as per the Terms and Conditions of services of the respondent no. 1 with the petitioner/school, and as stated in para 1 of the contract of services, during the probationary period a probationer can be terminated without assigning any reason. It is seen that the petitioner/school was not satisfied with the services of the respondent no. 1. Whether or not a probationary employee's services are satisfactory or not, it is for the employer to decide the same, and this Court cannot substitute its view for that of the employer with respect to satisfactory services or otherwise of employee with the employer.

10. In view of the above discussion, it is found that respondent no. 1 cannot argue that he was deemed to be confirmed in services with the petitioner/school, and accordingly termination of respondent no. 1 by the petitioner/school is valid in accordance with the ratio in the case of the Hamdard Public School (supra).

11. In view of the above discussion this writ petition is allowed. The impugned order of the DST dated 10.12.2015 is set aside. The order of termination of services of the respondent no. 1 from the petitioner/school is declared as valid. Parties are left to bear their own costs.