

(2013) 12 DEL CK 0199

In the Delhi High Court

Case No : Writ Petition (C) No. 5964 of 2010

Tejbeer Singh

APPELLANT

Vs

Directorate of Education and Others

RESPONDENT

Date of Decision : 18-12-2013

Acts Referred:

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

Citation : (2013) 12 DEL CK 0199

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : M.A. Niyazi, Ms. Anamika Ghai Niyazi and Mr. Manish Kumar, for the Appellant; Purnima Maheshwari, Advocate for Respondent Nos. 1 and 2, Mr. C.V. Jose, UDC for Respondent Nos. 3 and 4, for the Respondent

Final Decision : Allowed

Judgement

Valmiki J Mehta, J.

W.P. (C) No. 5964/2010 and C.M. No. 11742/2010 (stay)

1. In spite of repeated opportunities, respondent Nos. 3 and 4 have not filed counter-affidavit in this petition of the year 2010. Last opportunity granted vide order dated 11.10.2013 has not been utilized. Right of the respondent Nos. 3 and 4 to file counter-affidavit is therefore closed. It is possible that counter-affidavit is not being filed inasmuch as the issue in the present case could be covered by the judgments delivered by me in the cases of Hamdard Public School Vs. Directorate of Education and Anr. in W.P. (C) No. 8652/2011 decided on 25.7.2013 and Army Public School and Anr. Vs. Narendra Singh Nain and Anr. in W.P. (C) No. 1439/2013 decided on 30.8.2013. By this writ petition, petitioner who is working with the respondent No. 4-school as a Bio-tech Lab Attendant, seeks confirmation of his services with the respondent No. 4-school.

2. The facts of the case are that the petitioner was initially appointed for a

contractual term from 4.8.2006 to 31.7.2007 by a letter dated 3.8.2006 of the respondent No. 4-school. Petitioner was given another term based appointment letter dated 19.7.2007 of the respondent No. 4-school from 3.8.2007 to 31.7.2008. Petitioner thereafter was appointed on probation vide letter dated 30.7.2008 of the respondent No. 4-school for a period of one year. The probationary period of the petitioner was extended for another year from 7.8.2009 to 6.8.2010 by a letter dated 24.7.2009. Since the respondent No. 4-school was threatening to terminate the petitioner's services, petitioner approached this Court by means of this writ petition which is filed in September, 2010.

3. A resume of the aforesaid facts show three important aspects:-

(i) The original appointment of the petitioner was contractual, however, contractual appointment cannot be a matter of routine and the same can only be because of certain administrative exigencies as is specified under Rule 105(3) of the Delhi School Education Rules, 1973.

(ii) Petitioner was appointed on probation for one year in terms of the letter dated 30.7.2008 and which period was extended upto 6.8.2010, however, in this period there is no letter of termination of services of the petitioner on the ground that the probationary services of the petitioner are not satisfactory.

(iii) There are no allegations against the petitioner or any memos issued to him with respect to any unsatisfactory services.

4. The writ petition in the present case has to be allowed in view of the ratios of the judgments in the cases of Hamdard Public School (supra) and Army Public School (supra). Applying the ratios of these cases since the respondent No. 4-school has failed to show any administrative exigency or any temporary need for giving contractual appointment, appointment of the petitioner since inception will have to be treated as regular appointment and in any case permanent appointment on completion of contractual period which can be treated as the first probationary period inasmuch as there is nothing on record with respect to petitioner's services not being satisfactory. In the case of Army Public School (supra) I have referred to the judgment of the Supreme Court in the case of Management Committee of Montfort Senior Secondary School Vs. Shri Vijay Kumar and Others, to hold the proposition that teachers and employees of the schools in Delhi have statutory protection with respect to their services and such statutory protection therefore cannot be wished away by giving contractual appointment which is not justified as per any administrative exigency. Paras 3 to 8 of the judgment in the case of Army Public School (supra) 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 fortiorily 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.

5. The petitioner is to be taken as confirmed in his services even assuming he was appointed on probation in terms of the letter dated 30.7.2008 of the respondent No. 4-school inasmuch as there is nothing put on record with respect to the unsatisfactory services of the petitioner in probationary period and once the services of the petitioner are satisfactory, there is no ground to terminate the services of the petitioner. The ordinary period of three years for confirmation

after probation in terms of ratio of Hamdard Public School's case (supra), taking first contractual period as a probationary period, has come to an end in around August 2009 and from that period petitioner can be taken as being confirmed. Petitioner however will be deemed to be confirmed in services and w.e.f. 7.8.2010, at the end of the probationary period even as per the school. It is relevant to note that in the appointment letter dated 30.7.2008, there is no mention of the fact that there would not be confirmation unless a specific order of confirmation is passed. Once that is so on completion of the probationary period in the facts of this particular case petitioner would stand confirmed inasmuch as neither there is found any lack of satisfactory services of the petitioner in the probationary period and nor have petitioner's services been terminated on completion of probationary period by an order which states that petitioner had not performed satisfactory services and which is substantiated by the record of the respondent No. 4-school. Besides the fact that ratios of the cases of Hamdard Public School (supra) and Army Public School (supra) will apply, equally the ratio of the judgment delivered by this Court in the case of The Managing Committee Mount Sr. Mary's School Vs. Nirvikalp Mudgal in W.P. (C) No. 7375/2012 decided on 3.10.2013 will also apply because unless and until there is a specific order supported by record with respect to unsatisfactory services of a probationary officer, there is no reason to hold that the services of the probationary officer should not be treated as satisfactory in the probation period.

6. I may also state that respondent Nos. 3 and 4 were directed by different orders of the Court to produce the service record of the petitioner but the same has not been done and therefore it would be clear that there is no lack of satisfactory services on behalf of the petitioner with the respondent No. 4-school. In view of the above, writ petition is allowed. Petitioner will be treated as being confirmed in services w.e.f. 7.8.2010. All consequential benefits of confirmation of the petitioner as an employee of the respondent No. 4-school w.e.f. 7.8.2010 will also be available to the petitioner as applicable under the Delhi School Education Act and Rules, 1973. Parties are left to bear their own costs.