
(2013) 07 DEL CK 0286

In the Delhi High Court

Case No : Writ Petition (C) 6414 of 2012 and CM 17074 of 2012

The School Management ITL Public School

APPELLANT

Vs

Jai Prakash and Another

RESPONDENT

Date of Decision : 30-07-2013

Acts Referred:

Constitution of India, 1950 — Article 21A, 45

Land Acquisition Act, 1894 — Section 12(2), 18, 30

Citation : (2013) 8 AD 377 : (2013) 202 DLT 138

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Shobha and Ms. Jyoti Rana, for the Appellant; Bandana Shukla, Advocate for Ms. Ruchi Sindhwani, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Valmiki J Mehta, J.—This writ petition impugns the order of the Delhi School Tribunal dated 27.8.2012 whereby the Tribunal set aside the order of the Management/communication of the petitioner-school dated 16.6.2009 stating that the probation period will not stand extended and the services of the respondent No. 1, as a probationer in the petitioner-school will stand terminated.

Respondent No. 1 was appointed as a probationary teacher with the petitioner-school by letter dated 20.06.2007. Petitioner was appointed as a Physical Education Teacher. Para 1 of the appointment letter dated 20.06.2007 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 discretion 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.

2. In the present case, the respondent No. 1 has been terminated on a date which is co-terminus with the ending of the period of probation. A reference to the last line of para 1 of the appointment letter dated 20.06.2007 shows that there was to be no automatic confirmation of the services of the respondent No. 1 and his services were required to be confirmed in writing.

3. I have recently had an occasion to consider the interpretation of Rule 105 of the Delhi School Education Act and Rules, 1973 in W.P.(C) 8652/2011 titled as Hamdard Public School vs. Directorate of Education and Anr. decided on 25.07.2013 wherein I have held that there is no maximum period of probation which is prescribed under Rule 105 and there is no deemed confirmation as the language of the said Rule does not provide for deemed confirmation or automatic confirmation. I have held that terms of appointment would be relevant to decide the period of probation and the issue of deemed confirmation. I have held that probationary period should ordinarily be around three years, and which can be extended for grave and valid reasons upto five years, and which reasons should be justifiable before the Court. I have also held that in the rarest of rare case the probation period can be extended upto six years.

4. The relevant observations in the said judgment are contained in paras 2 to 13 of the said judgment and which 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-Rule 1. 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.

4. Once a relevant rule or provision of law does not provide for any specific period, then, the issue which arises is that can a teacher be continued indefinitely and interminably by simply extending the probation period and which can be the case of a school either on the basis of the aforesaid Rule 105 or on the basis of an appointment letter which does not provide for a maximum period of probation. Before I refer to the relevant observations of the Supreme Court as to what should be taken as the maximum period of probation when the statute does not provide for any specific period, at this stage, it will be relevant to refer to the terms of appointment of the respondent no. 2. These terms of appointment of respondent no. 2 are as under:-

BY Registered post

HAMDARD PUBLIC SCHOOL

Ref: 1B/03/2003/-

Date: 01.1.2003

To

Mrs. Soma Pani Chattopadhyay

Subject: Memorandum of Appointment

Dear Sir/Madam,

1. You have been selected for the post of PRT (Comp. SC), with the scale of: 4500-125-7000, plus usual allowances as per the Delhi Administration Rules. House Rent will be admissible only if you are not provided accommodation by the School.

2. Perks

- a) Transport facility on existing routes.
- b) Free tuition fee for two children.

4. The terms and conditions of service are attached at Appendix-A to this letter. In case the terms and conditions are acceptable to you please return the duplicate copy of this offer of appointment after affixing your signature on the same in token of your acceptances by 06.1.2003 and present yourself for duty on 06.1.2003. In case NO reply is received from you by 06.1.2003 it will be assumed that you are not interested in the post.

Yours faithfully,

(Saiyid Hamid)

Secretary

HES

TERMS AND CONDITIONS OF SERVICE

1. Terms of Engagement

- a) Initially the Employee is engaged on a one year probation beginning from the date of joining the Hamdard Public School, which may be extended further by the Management for another one year.
- b) One successful completion of the probationary period the Employee may be confirmed in writing, if found suitable. Unless and until the confirmation is given in writing by a specific order, the Employee will be deemed to continue on probation notwithstanding the expiry of the probationary period.
- c) One month's notice on either side or salary in lieu thereof would be the condition for leaving/termination of service during the probationary period. The Management may terminate the Employee's service without assigning any reason during this period.
- d) One having completed the probationary period and after confirmation, three months' notice on either side or three months' salary in lieu thereof for the purpose of leaving of termination of service. However, the discretionary power not to allow an Employee to leave the school during an academic year rests with the Management of the School.

5. I am giving these aforesaid terms of employment, and they will be touched upon subsequently, because in my opinion, once a statute does not provide for an outer limit, then, the period of probation will have to be dealt with in terms of the appointment letter, of course, subject to the condition that the period in the appointment letter of probation also cannot violate the intent/purpose/heart/spirit/soul of Sub-Rule 1 of Rule 105.

6. If a statutory provision does not provide a specific period, then, the issue is what should be the maximum period of probation. Can it be an indefinitely long period and can it even continue till the age of superannuation of an employee. In my opinion the maximum period of probation in terms of Rule 105 will have to be such, and interpretation must so be given to Sub-Rule 1 of Rule 105, that extension of period of probation can only be for a maximum of a particular reasonable period i.e. either within that reasonable period the employee is confirmed or there is a specific order which is passed for the employee's termination failing which there shall be deemed confirmation. In my opinion, if within a reasonable period, there is no confirmation order, keeping the spirit and intent behind the object of probation itself and more particularly of Sub-Rule 1 of Rule 105, a reasonable period would be only that maximum period in which an employee should be allowed to continue on probation and after which even if there is no confirmation order or in the alternative a removal order, there should then be a deemed confirmation. Education is an important directive principle of State policy (Article 45 of Constitution of India) and which has now been raised to the status of a fundamental right as per Article 21A (brought in by Eighty Sixth Amendment Act 2002 to the Constitution) so far as education in schools is concerned for the children from six to fourteen years. In accordance with ethos of Article 21A unless teachers and employees of school have certainty about their jobs education itself will be affected. Therefore, let us see whether we can read in a reasonable period in the provision of Rule 105, and if so what should be that reasonable period.

7. The Supreme Court in the case of Sharda Devi Vs. State of Bihar and Another, while referring to Section 30 of the Land Acquisition Act, 1894 and in contrast to Section 18 of the same Act, held that merely because there is no limitation prescribed for a reference u/s 30, yet, the power has to be exercised in a reasonable period in view of the fact that no period is prescribed. The relevant observations of the Supreme Court are contained in para 25 which reads as under:-

25. Keeping in view the principles laid down by this Court in Dr. G.H. Grant's case (supra) and analyzing in-depth the provisions of the Act the difference between reference u/s 18 and the one u/s 30 can be summarized and set out as under:-

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By reference to limitation

Under Section 18 the written application requiring the matter to be referred by the Collector for the determination of the Court shall be filed within six weeks from the date of the Collector's award if the person making it was present or represented before the Collector at the time when he made his award or within six weeks of the notice from the Collector u/s 12(2) or within six months from the date of the Collector's award, whichever period shall first expire. There is no

such limitation prescribed u/s 30 of the Act. The Collector may at any time, not bound by the period of limitation, exercise his power to make the reference. The expression "the person present or represented" before the Collector at the time when he made his award would include within its meaning a person who shall be deemed to be present or represented before the Collector at the time when the award is made. No one can extend the period of limitation by taking advantage of his own wrong. Though no limitation is provided for making a reference u/s 30 of the Act, needless to say where no period of limitation for exercise of any statutory power is prescribed the power can nevertheless be exercised only within a reasonable period; what is a reasonable period in a given case shall depend on the facts and circumstances of each case.

(underlining added)

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 Another, 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. High Court of Madhya Pradesh thru. Registrar and Others Vs. Satya Narayan Jhavar, 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 Vs. State of M.P. and another [OVERRULED], 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.

12. Coming now to the facts of the present case, I have already reproduced the appointment letter above, and which not only does not contain a maximum period, but the same also requires a confirmation order. Since Rule 105 does not contain a maximum period of probation, and having held that the same can ordinarily be of three years, it cannot be said that probation period could not have been for a third year in this case. Respondent no. 2 was terminated by non-stigmatic order of termination in the third year of appointment i.e. in the third year of probation. Once I have held that in many organizations even three years of period of probation is provided, I do not think that in the facts of the present case, the petitioner-school was in any manner acting illegally in continuing the probationary period to the third year. As already stated the letter of appointment of the respondent no. 2 specifically states that respondent no. 2's probationary period will come to an end successfully only by a specific order of confirmation. Since the termination of the respondent no. 2 is by a non-stigmatic order dated 1.10.2005, within the third year of probation, I am of the opinion that the services of respondent no. 2 were validly terminated during the period of probation. I may note that there is no challenge before me on behalf of the respondent no. 2, and nor was there such a challenge by the respondent no. 2 before the Tribunal, that the order of termination is not non-stigmatic. It is also not the case that the school-management has illegally, arbitrarily, vexatiously and malafidely not considered the respondent no. 2 for confirmation in spite of satisfactory work.

13. In view of the above, the writ petition is allowed and the impugned order of the Delhi School Tribunal dated 29.9.2011 is set aside.

5. The facts of the present case are very similar to the facts of Hamdard Public School (supra) inasmuch as there is a requirement of an order of confirmation of the services of the probationer to be passed in writing. There is no such confirmation order. Therefore, I do not find any illegality in the action of the petitioner-school in terminating the services of the respondent No. 1 at the end of the probationary period. In view of the above, writ petition is allowed. The impugned order of the Delhi School Tribunal dated 27.08.2012 is set aside. The services of the respondent No. 1 will be taken to have been terminated from the

petitioner-school in terms of the letter dated 16.06.2009. Parties are left to bear their own costs.