

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 4164/2002**

% **Date of decision: 2nd June, 2010**

SMT. LEELA SHARMA **..... PETITIONER**
Through: Mr. Vinay Kumar Garg & Ms.
Seema Bhatt, Advocates

Versus

GOVT. OF NCT OF DELHI & ORS. **..... RESPONDENTS**
Through: Mr. Aditya Madan, Advocate for
Respondent No.1.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may
be allowed to see the judgment? yes
2. To be referred to the reporter or not? yes
3. Whether the judgment should be reported
in the Digest? yes

RAJIV SAHAI ENDLAW, J.

1. This writ petition *inter alia* raises the following questions for
adjudication:

- (i) Whether a teacher in a recognized unaided private school can
be compulsorily retired under Fundamental Rule 56(j) and not
by way of penalty.
- (ii) If that be so, where does the remedy, if any, of the said teacher
lie, before the Tribunal constituted under the Delhi School

Education Act, 1973 or by way of a writ petition under Article 226 of the Constitution of India or otherwise.

2. The petitioner was employed as a Trained Graduate Teacher (TGT) in East Point School, Vasundhara Enclave, Delhi-110 096, the Chairman of whose Managing Committee and Principal are respondents 2 & 3 respectively. It is the case of the petitioner that she had joined the respondent School, then also recognized under the School Act, w.e.f. 1st January, 1988 and on the terms and conditions contained in the appointment letter dated 15th July, 1988; that she was confirmed to the regular post as TGT w.e.f. 1st August, 1989; that with effect from 1st April, 1990, the respondent School implemented the regular scales of pay and allowances as mandated by the School Act; that she had an excellent track record in the respondent School. The petitioner is aggrieved by the letter dated 30th March, 2002 of the respondent school intimating the petitioner that the Managing Committee / Norms Committee of the school in their meeting on 27th March, 2002 had reviewed the cases of teachers above 50 years of age and had resolved, in the interest of the School, to give premature retirement to the petitioner. The petitioner was given three months' notice beginning from 1st April, 2002. It was also stated in the said letter that the said action was in accordance with the Fundamental Rule 56. The petitioner protested against the said letter and sought various particulars from the respondent School. It was *inter alia* the contention of the

petitioner that the Fundamental Rule 56 did not apply to unaided recognized private schools governed by the School Act. The respondent School ultimately vide its letter dated 9th May, 2002 informed the petitioner that the Fundamental Rule 56 was applicable to the School in accordance with the Circular dated 25th March, 1991 of the Department of Education (DOE) (respondent no.1). The petitioner thereafter filed the present writ petition. This Court issued notice of the writ petition only after the petitioner had placed on record a typed copy of the Circular dated 25th March, 1991 (supra) of the DOE.

3. It is *inter alia* the case of the petitioner in the writ petition:

- (i) That under the School Act and the Rules framed thereunder, an order of compulsory retirement cannot be passed against an employee of a recognized school, except by way of punishment after compliance with the procedure laid down in Rule 120.
- (ii) Fundamental Rule 56(j) has no applicability to the employees of a recognized school. The Circular dated 25th March, 1991 has been wrongly interpreted by the respondent School; that the said Circular is an administrative order / instruction and cannot supplant but can only supplement the statutory rules. It

is further contended that the Circular does not empower the schools to compulsorily retire a teacher.

- (iii) That no order bringing the services of the petitioner to an end could be passed except with the prior approval of the DOE.
- (iv) That even if the Fundamental Rule 56(j) is held to be applicable, there was no material for the respondent School to come to the conclusion that it is in public interest to so prematurely retire the petitioner. It is stated that the petitioner has never been informed of any adverse entry in her record.

The petitioner thus seeks setting aside of her compulsory retirement and reinstatement in service with all consequential benefits.

4. The respondent School filed the counter affidavit averring:

- (i) That the writ petition is not maintainable against it; no relief against the DOE has been claimed in the writ petition.
- (ii) That the adjudication entails disputed question of law and fact and for which reason also the writ is not an appropriate remedy.
- (iii) That the petitioner has available to her the remedy of approaching the Tribunal constituted under the School Act and

ought not to be allowed to bypass that remedy under the School Act and invoke the extraordinary writ jurisdiction of this Court.

(iv) That the petitioner has not approached the Court with clean hands. It is pleaded that at the time of appointment of the petitioner, the respondent School was not a recognized school and for this reason only at the time of the petitioner joining the respondent School the terms and conditions of the service were not as required under the School Act and Rules; that the petitioner was over age (45 years as against the requirement of 30 years) at the time of joining the employment; that on the respondent School gaining recognition, the DOE had been objecting to the employment of the petitioner in the respondent School for the reason of her being over age at the time of appointment; that it was for this reason only that the petitioner was compulsorily retired. It is further pleaded that the petitioner prior to the order of compulsory retirement had complained to the DOE against the respondent School and the DOE had appointed an investigation officer who did not find any merit in the complaints of the petitioner.

(v) That the order of compulsory retirement of the petitioner had thus been taken under duress or pressure and / or at the instance and / or direction of the DOE. It is pleaded that it is a term of recognition that

only trained, qualified and eligible staff will be employed by the respondent School. Reliance is placed on a letter dated 1st January, 2002 of the DOE to the respondent School to remove the discrepancy *inter alia* of the petitioner being over age at the time of appointment.

(vi) That the petitioner is due to retire on attaining the age of superannuation by the end of April, 2003 and thus no useful purpose would be served in entertaining this writ petition.

(vii) It is asserted that Fundamental Rule 56 applies to the School in accordance with the Circular dated 25th March, 1991 (*supra*).

5. The DOE has also filed a short affidavit stating that the respondent School never approached the DOE for awarding / imposition of any penalty on the petitioner on account of her performance and that the action of the respondent School management of terminating the services of the petitioner without obtaining the approval of the DOE is contrary to law. It is however admitted that as per the inquiry report of the investigation officer appointed, the petitioner was over age at the time of appointment.

6. The counsel for the respondent School on 5th July, 2004 informed this Court that since the petitioner had attained the age of superannuation in April, 2003, the relief of reinstatement had become infructuous. Objection was also raised to the maintainability of the writ petition for the reason of

efficacious alternative remedy being available to the petitioner. Rule was issued in the petition on 8th October, 2004 and the writ petition ordered to be heard in due course. The petitioner, in February, 2009, applied for early hearing and notice of which application was served on the respondent School but none has appeared for the respondent School thereafter. On 7th May, 2010, the matter was directed to be listed with notation in the cause list of notice of default to the counsel for the respondent School. However, thereafter also none appeared for the respondent School. On 26th May, 2010 after hearing the counsels, it was found that the DOE in its counter affidavit has not taken any stand on the applicability of Fundamental Rule 56 to unaided recognized private schools. The counsel for the DOE was directed to take instructions. However, no instructions have been forthcoming and the counsels have been heard.

7. The counsel for the petitioner has contended that though the petitioner, after approximately one year of the impugned order of compulsory retirement, attained the age of superannuation and is not entitled to the relief of reinstatement but if succeeds, would be entitled to monetary relief against the respondent School.

8. In so far as the plea of the petitioner of the action of the respondent School being contrary to law for the reason of the approval of the DOE having not been taken, a Division Bench of this Court has since, in ***Kathuria Public School Vs. Director of Education*** 123 (2005) DLT 89

held that Section 8(2)&(4) of the School Act requiring prior approval of the DOE before dismissal, removal or reduction in rank of any employee of a School does not apply to the unaided recognized private schools, as the respondent School herein is. The said ground thus no longer survives.

Re: The Applicability of Fundamental Rule 56(j)

9. The counsel for the petitioner has urged that Rule 110 of the School Rules protects the tenure of service of an employee of a recognized school till the age of 58 years. Reference in this regard is made to *K. Krishnamacharyulu Vs. Sri Venkateswara Hindu College of Engineering* (1997) 3 SCC 571 to contend that an interest having been created by the Government in an institution to impart education, which is a fundamental right of the citizens, the teachers who impart education get an element of public interest in the performance of their duties - as a consequence, the element of public interest requires regulation of the conditions of service of those employees on par with the Government employees. The Supreme Court in the said judgment, for the said reason, held the remedy of writ petition under Article 226 of the Constitution of India to be available to teachers of educational institutions. It is further contended that the School Act and the Rules are a complete code in so far as terms and conditions of service of employees of the Schools are concerned and the same do not provide for compulsory / pre-mature retirement other than as a major penalty. It is contended that this Court in *Delhi Abhibhavak Mahasangh*

Vs. Govt. of NCT of Delhi MANU/DE/0858/2009 has held the School Act and the Rules to be a complete code. Though I do not find the said judgment to be holding so, but I find that in *Modern School Vs. Union of India* AIR 2004 SC 2236 the minority view holds that “The said Act and the Rules framed thereunder provide for a complete code not only as regard regulation of education but also organization and development thereof.” Attention is then invited to Rules 122 & 123 in Chapter IX of the School Rules and it is urged that the same do not provide for pre-mature retirement. It is the contention of the counsel for the petitioner that there is no other power in the Schools to curtail the tenure of service of the employees of the recognized schools till the attainment of the age of 58 years as laid down in Rule 110. On enquiry, it is informed that for this reason, the remedy of compulsory / pre-mature retirement under Fundamental Rule 56 is not available to the Government with respect to schools run / managed by it also. With respect to the Circular dated 25th March, 1991, it is stated that though Rule 43 empowers the Administrator to issue instructions relating to any matter not covered by the Rules, if in the interest of school education in Delhi, but the said instructions cannot be contrary to or add to the Rules and can only be supplementary thereto. It is further urged that the said Circular dated 25th March, 1991 in any case does not make the provisions of Fundamental Rule 56(j) applicable to recognized schools. As aforesaid, the petitioner has only filed a typed copy of the said Circular. The relevant part thereof is as under:

“ 3. In the matter of discipline / leave: There is a provision in the Delhi School Education Act and Rules, 1973 and rules made thereunder, the applicability of rules governing Government employees will be applicable to the employees of aided / unaided schools where the Act and Rules made thereunder is silent.”

10. There appear to be some typographical mistakes in the typed copy of the Circular as filed before this Court. Unfortunately, the DOE has not filed any other copy of the Circular. As aforesaid, DOE has also not taken any stand on whether the provision of compulsory retirement is available in recognized schools or not.

11. The concept of compulsory retirement came into force to remove a public servant whose services are no longer useful to the general administration or in public interest; if it is felt that for better administration, for augmenting efficiency it is necessary to chop off the deadwood. The order of compulsory retirement has to be made having regard to the entire service record of the officer. Even un-communicated entries in the confidential record can be taken into consideration. The order of compulsory retirement is not to be treated as a punishment and carries no stigma. However, it has been held that the order of compulsory retirement shall not be passed as a shortcut to avoid departmental enquiry when such course is more desirable. The rule of compulsory retirement has been held to hold the balance between the rights of the individual Government servant and the interest of the public. The rule is intended to enable the

Government to energise its machinery and to make it efficient by compulsorily retiring those who, in its opinion, should not be there in public interest. Fundamental Rule 56(j) has been held to confer absolute right to retire any Government servant on his attaining the age of 55 years if the authority is of the opinion that it is in the public interest to do so. The Supreme Court in *Bishwanath Prasad Singh Vs. State of Bihar* MANU/SC/0826/2000 held that the object of such compulsory retirement is to weed out the worthless who have lost their utility by their insensitive, unintelligent or dubious conduct impeding the flow and promoting stagnation. It was held that the country needs speed, sensitivity, probity, non-irritative public relation and enthusiastic creativity which can be achieved by eliminating the deadwood, the paper-logged and callous.

12. It is thus clear that an order of compulsory retirement is an important tool to keep any organization vibrant and to prevent its clogging and decay by the sheer weight of long standing employees who have ceased to be the dynamos to propel the organization further and for achieving its goals. The same enables the employer to, after the employee has worked for a certain number of years and / or has attained a certain age but before the age of superannuation, remove him. It is often found that certain employees after putting in considerable number of years of service lose their sheen and no longer remain productive. Their continuance in service is of no use to the organization.

13. In my opinion the objective of compulsory retirement is laudable. During the hearing, it was put to the counsel for the petitioner as to whether, considering the importance of the Schools, is it not desirable to have the concept of compulsory retirement in Schools. The importance of the Schools cannot be undermined; they play a vital role in shaping the future/next generation and hence the destiny of the community and the country. The onus of so shaping and igniting the minds rests in the hands of teaching faculty of the school. Often it is found and is human nature that persons who have the requisite qualification and validly join the noble profession of teaching, either fail to perform or though successful performers initially, over the years lose the zeal to so shape the destiny of children they are dealing with. Should the schools be forced to continue such persons, just to protect the tenure of service of the said persons and that too at the cost of the future citizens? The answer necessarily has to be in the negative.

14. The counsel for the petitioner, though not able to seriously controvert the need for compulsory retirement in schools, contended that there can be no compulsory / pre-mature retirement when a power in that regard does not exist / vest in the School. It is urged that when the School Act or the Rules have not provided for the same, this Court cannot vest such power in the Schools and which would fall within the domain of legislation and which is not permitted. Attention is also invited to the

Fundamental Rule 2 making the same applicable only to government servants whose pay is debitable to civil estimates or to those to whom the same are, by general or special order, declared as applicable. It is contended that the teachers of a private unaided recognized school are not government servants and there is no declaration making the Fundamental Rules applicable to them.

15. In my considered view, there is a basic fallacy in the aforesaid argument. The teachers of the Schools cannot, on the one hand urge that there is an element of public interest in their employment which makes the writ remedy under Article 226 available to them and on the other hand contend that they are not public servants. The Supreme court, as aforesaid in support of the maintainability of writ remedy to teachers of recognized schools has held that an interest has been created by the Government in the schools imparting education which is a fundamental right of citizens. There is thus essentially an element of public interest in teaching and the concept of compulsory retirement (which hereinabove has been found to be in public interest) as in the Fundamental Rules, can be extended to the teachers of recognized schools also. The public interest in imparting education in the school requires vesting of powers in the recognized schools to compulsorily / pre-maturely retire teachers who fail to ignite the minds of the students and fail to inculcate in them the inquisitiveness and knowledge. The Supreme Court in *UOI Vs. Col. J.N. Sinha* AIR 1971 SC

40 held that “there is no denying the fact that in all organizations and more so in government organization there is a good deal of deadwood and it is in public interest to chop off the same”.

16. My research however does show that in i) *UOI Vs. Lt. Col. Komal Charan* AIR 1992 SC 1479, the Fundamental Rules were held not applicable to N.C.C. and ii) *Jai Prakash Wadhwa Vs. Lt. Governor, Delhi Administration* (1997) 11 SCC 174 the Fundamental Rules were held not applicable to MCD, for the reason of employees being not Government Servants and there being no specific or special order / notification extending the Fundamental Rules to such persons.

17. The provision for removal of employees of the recognized schools prior to the age of superannuation does exist in the School Rules, though on the ground of misconduct etc. Even though compulsory retirement under Fundamental Rule 56(j) is not by way of penalty, the Constitution Bench in *Shyam Lal Vs. The State of Uttar Pradesh* AIR 1954 SC 369 has held that the power of compulsory retirement may be used when the authority exercising the power cannot substantiate the misconduct which may be the real cause for taking the action. It is thus not as if compulsory retirement is a concept totally alien to the Rules. Once a recognized school is entitled under the Rules to remove an employee prior to the age prescribed for superannuation, on the grounds of misconduct, it defies logic as to why the power of compulsory retirement is not to be read therein. After all,

compulsory retirement is provided as a penalty under the Rules. The reasons for removal on the ground of misconduct or by way of compulsory retirement are inter linked as aforesaid. The only difference is that while in the case of removal by compulsory retirement on the ground of misconduct, there is an established positive act constituting misconduct but a case of compulsory retirement simplicitor may be a case of severe inaction, lethargy, failure to perform duties or to do the same efficiently. It is common knowledge that such inefficiency is difficult to prove. A person may attend the work diligently without performing any work. In a school it would amount to the children admitted therein returning to their homes without learning, seeking which they had come to the school. Thus, I do not find the concept of compulsory retirement to be such which cannot be read into the Rules and / or vesting which power in the school would tantamount to this Court legislating.

18. A Bench of four judges of the Supreme Court in *State of Haryana Vs. Inder Prakash Anand* AIR 1976 SC 1841 held that curtailment of age of superannuation is a matter pertaining to disciplinary control as well as administrative control and that “Disciplinary control means not merely jurisdiction to award punishment for misconduct. It also embraces the power to determine whether the record of a member of the service is satisfactory or not so as to entitle him to continue in service for the full term till he attains the age of superannuation.” It would thus be seen that

compulsory/premature retirement is a facet of the disciplinary control and it cannot be said that the School while having disciplinary control over teachers has no power to compulsorily retire.

19. The explanation to School Rule 117 qua “Penalties & disciplinary authority” is found relevant in the context and is as under:-

- “Explanation – The following shall not amount to a penalty within the meaning of this rule, namely:
- (a) stoppage at the efficiency bar on the ground of unfitness to cross her bar;
 - (b) retirement of the employee in accordance with the provisions relating to superannuation or retirement;
 - (c)
 - (d)”

Clause (b) supra providing for retirement in accordance with provisions relating to superannuation or retirement can only be in reference to premature/compulsory retirement as otherwise there was no need to explain that retirement on attaining the age of superannuation will not amount to penalty. It thus cannot be said that the School Rules do not envisage compulsory/premature retirement.

20. The counsel for the petitioner has on his own fairly drawn attention to the power to issue instructions. The Circular dated 25th March, 1991 clearly provides that the “rules governing Government employees will be applicable to employees of aided/unaided schools where the Act and Rules made thereunder is silent”. The counsel for the petitioner has contended

that it has been so provided in the Circular under the head of Discipline / Leave only and thus the applicability of the rules governing Government employees is in the matter of Discipline / Leave. Though the heading of different paragraphs in the Circular cannot change the meaning of the paragraph but even if it was to be so, the rule qua compulsory retirement applicable to the Government employee is concerning discipline only.

21. The view which has been taken is also not found to be prejudicial to the employees of the school. The right of the employer of compulsory retirement is a limited right available after an employee has remained an employee for certain years of service and has attained a certain age. The chances of the same being prejudicial to the employee are remote. An employee by that age is normally expected to have discharged his basic family obligations and is in a position to look for alternative works. The prejudice even if any suffered by the employee as a result of such compulsory / pre-mature retirement has to be weighed against the impact / effect of continuing with such an employee. The benefits of compulsory retirement far outweigh the loss and prejudice, if any, to the employee.

22. I, therefore, conclude that the power of compulsory retirement as provided in accordance with Fundamental Rule 56(j) vests in recognized schools under the School Act and Rules.

23. I must however record that the Bombay High Court in *Smt. Sukanya Apte Vs. State of Maharashtra* MANU/MH/0089/2007 has held to the contrary. However for the reasons aforesaid I am unable to concur.

Re: The Remedy of the Petitioner

24. It is not as if no remedy whatsoever is available to a teacher who has been wrongly compulsorily retired by the school. The Supreme Court in *Baldev Raj Chadha Vs. Union of India* (1980) 4 SCC 321 has held that judicial review of the *bona fide* of the action of compulsory retirement is permissible. It is thus not as if by vesting the power of compulsory retirement (other than by way of penalty) in the schools will give a tool in the hands of the school to victimize the teachers. It would still be open to the teacher to contend before the Tribunal and / or before this Court that the order of compulsory retirement is for extraneous reasons and upon the same being found such order would be set aside.

25. Section 8(3) of the School Act provides that any employee of a recognized private school who is dismissed, removed, or reduced in rank may appeal against such order to the Tribunal constituted under the School Act. Compulsory / pre-mature retirement results in removal from service. On a plain reading thereof the remedy of approaching the Tribunal would be available to an employee compulsorily retired not by way of penalty under the School Act but for the reason of it being so in public interest.

The counsel for the petitioner however contends that the scheme of approaching the Tribunal is when dismissal or removal is by way of penalty only and not otherwise. Relying on *State of Gujarat Vs. Umedbhai M. Patel* (2001) 3 SCC 314, *K. Krishnamacharyulu* (supra) and *Baikuntha Nath Das Vs. Chief District Medical Officer* AIR 1992 SC 1020, it is contended that compulsory retirement as meted out to the petitioner is not a penalty and thus the remedy of appeal before the School Tribunal is not available to the petitioner. Reference in this regard is also made to *Principal Vs. Presiding Officer* [1978] 2 SCR 507 to contend that for the reason of absence of the expression “otherwise terminated” in Section 8(3) of the School Act the remedy under the Tribunal is available only when dismissal or removal is by way of penalty and not otherwise. Reliance in this regard is also placed on Rule 120(3) providing that an employee of a recognized private school who is aggrieved by any order imposing on him the penalty of compulsory retirement or any major penalty may prefer an appeal to the Tribunal.

26. However the judgment in *Principal Vs. Presiding Officer* (supra) was considered by the Supreme Court in the subsequent judgment in *Shashi Gaur Vs. NCT of Delhi* (2001) 10 SCC 445 to consider whether it would be appropriate to give narrow construction to Section 8(3), thereby taking the teachers whose services were terminated not by way of dismissal, removal or reduction in rank but otherwise, out of the purview of

the Tribunal constituted under Section 11 of the School Act. The Supreme Court held that the Tribunal has been constituted to confer a remedy to the teachers who are often taken out of service by the caprices and whims of the management of the private institutions; if an appeal to the Tribunal is not provided to such an employee, then he has to knock the doors of the Court under Article 226 of the Constitution which is a discretionary one. The remedy provided of an appeal to the Tribunal was held to be a more efficacious remedy to an employee whose services stand terminated after serving the institution for a number of years. The Supreme court thus held that appeal under Section 8(3) is maintainable not only against the order of dismissal, removal or reduction in rank but also against termination otherwise except where the service itself comes to an end by efflux of time.

27. In view of the aforesaid unambiguous position of law enunciated by the Supreme Court, there is no manner of doubt that the remedy of appeal before the School Tribunal is available to the petitioner.

28. Though this petition has remained pending in this Court for the last about eight years but it is still felt that the petitioner be relegated to the Tribunal only for the reasons:

- (i) That the claims of the petitioner now are only monetary and which can also be adjudicated by the Tribunal.

- (ii) Some disputed questions of law and fact would be involved in adjudication and which can also be adjudicated by the Tribunal rather than this Court; the petitioner chose not to file any rejoinder to the counter affidavit of the respondent school.

Moreover, the petitioner has herself to blame for having chosen the wrong forum.

29. For the reasons aforesaid, the appropriate remedy of the petitioner is before the Tribunal constituted under the School Act. However, the School Act provides for limitation for preferring an appeal and which has since expired. The fact remains that the notice to show cause was issued by this Court and Rule was also issued in this petition. It is thus felt that if the petitioner prefers an appeal before the Tribunal within forty five days of today, the same would be considered on merits by the Tribunal notwithstanding having been filed beyond the period prescribed for preferring the appeal.

30. The writ petition is thus dismissed. Rule issued earlier is discharged. The parties are left to bear their own costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

2nd June, 2010
gSr