

\$-12

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

% *Date of Decision : 17th May, 2012*

+ **W.P.(C) No. 2354/2010 & CM No. 4720/2010**

APEEJAY SCHOOL & ANR. Petitioner
Through : Mr. H L Tiku, Sr. Adv. with
Ms. Yashmeet Kaur, Adv.

Versus

GOVT.OF NCT OF DELHI & ANR Respondents
Through:Ms. Anjana Gosain, Adv. for R-1
Mr. C S Parashar, Adv. for R-2

CORAM:

HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J. (Oral)

1. The instant petition being filed while challenging the impugned order dated 2nd February, 2010 by which the services of the respondent no.2 has been regularized as a Group-D employee with effect from 1st February, 1997 when the appointment letter was issued to him. Consequential benefits have also been directed to be released in his favour and directed to be released within one month of the issuance of the order.

2. Mr. H L Tiku, learned Senior Advocate, appearing on behalf of the petitioner has submitted that vide communication dated 19th August, 1992, the petitioner's School requested the Chairman/Apeejay Education Society, for sanctioning the following posts in the school:-

<u>“POST</u>	<u>NUMBER</u>
<i>Receptionist cum Typist</i>	<i>One</i>
<i>Driver</i>	<i>One</i>
<i>Peon</i>	<i>One</i>

Submitted for Chairman’s kind approval & sanction.”

3. Learned counsel further submitted that the respondent no. 2 has been posted on the post of peon in the category of Group –D employee. He was appointed as a regular worker vide order dated 1st February, 1997 with immediate effect.

4. Learned Senior counsel submits that the sanctioned post with the school was one post of peon and the same was filled up by one Tihuli Ram with effect from 1st October, 1992 vide letter issued by the Principal. Thereafter, vide letter dated 30th September, 1993, under the signatures of the President/Principal, he was appointed as a peon and nature of appointment was on probation basis for a period of one year with effect from 1st October, 1993 extendable from time to time up to a maximum period of two years as per the discretion of the Management.

5. Mr. Tiku, has further pointed out that respondent no. 2 initially was appointed as a casual labourer and thereafter, regularized by the communication dated 1st February, 1997 with immediate effect, and this fact is specifically mentioned that his regular services was to be under the Industrial Disputes Act, 1964.

6. The respondent no. 2 made representation for the first time vide representation dated 9th February, 2009 and submitted therein that he

was working in the petitioner's school from the last 16 years, but has not been made permanent. He approached to make his job permanent.

7. Learned counsel has submitted that the period of the respondent no.2 would be maximum with effect from 9th February, 2002 , but the case of the petitioner is that in pursuance of his representation, he was made permanent vide communication dated 6th May, 2010 with effect from 1st April, 2010.

8. The Director of Education after going through the case recorded it in its impugned order dated 2nd February, 2010 on the basis of the documents in support of his claim, which reads as under :-

“Appointment Letter issued by the Principal of Apeejay School, Pitampura (vide Ref. No. APJ/PP/97/App. dated 1st February, 1997) in Shri Harender Kumar stating therein as under :

“It has been considered to appoint you as regular worker under Industrial Disputes Act, 1964 on the following terms and conditions.

Your appointment as a regular worker shall take effect from 1st February, 1997.

Receipts of Employees' Provident Fund containing details of the contributions made by the employee and employer beginning with the year 1997-98.

An office order (no. APJ/PP/Loan/94 dated 21.11.94) sanctioning a loan of ₹. 613/- to Shri Harender Kumar which was scheduled to be recovered from his salary from the month of November, 1994.

Copies of attendance registers of various years.

Copies of representations-including the one forwarded by Chief Minister Office vide ref. no. CMR/05/3260 dated 14th

November, 2005 to the Principal of Apeejay School – which he has allegedly given to the school authorities for regularization of his services.’’

9. The petitioner filed petition before this Court vide WP (C) No.10304/2009 and the same was disposed of vide order dated 22nd July, 2009 with directions to the respondent no.1/Director of Education to treat the legal notice as a representation and to effectively deal with it by passing a speaking order and also to hear the respondent no.2 herein.

10. It is further directed that it would be done within three months. Thereafter, the petitioner moved an application vide CM No. 162/2010 in WP (C) No.10304/2009, whereby the aforesaid application was disposed of by passing the order, which reads as under :-

“Since no communication or letter has been placed on record by the applicant respondent no.2 to satisfy this court that the Principal of the respondent no.2 in fact had visited the office of the Director of Education and sought personal hearing in the matter or sought to place certain documents in support of their case. it is, therefore, quite evident that the respondent no.2 applicant did not come forward to give its response despite being called upon to do so vide communication dated 29.9.2009 issued by the respondent no.1. However, since the respondent no.1/Director of Education has yet not finally decided the representation of the petitioner, therefore, it is directed that the respondent no. 1 may give hearing to the respondent no.2 on 18th January, 2009 at 11.00 a.m. and if any documents are required to be filled by the respondent no.2, the same shall also be placed before the Director of Education.”

11. He submits, the nature of job of the petitioner was of a miscellaneous unskilled jobs like watering plants, helping in white-

washing, shifting furniture, dusting and cleaning, for some time as a conductor, peon, messenger etc. Therefore, neither there was a permanent post against his appointment nor his appointment was permanent in nature. His post was not sanctioned and till date, against the said post, no one was appointed thereafter. Finally, the petitioner was made permanent with effect from 1st April, 2010.

12. Mr. Tiku, learned Senior Advocate has relied upon a case of *State of Haryana and Others v. Charanjeet Singh and Others* reported in 2006 SCC (L&S) 1804 (three Judges) held as under :-

“One other fact which must be noted is that Civil Appeals Nos. 6648 of 2002, 6647 of 2002, 6572 of 2002 and 6570 of 2002 do not deal with casual or daily rated workers. These are cases of persons employed on contract. To such persons the principles of equal pay for equal work has no application. The Full Bench Judgment dealt only with daily rated and casual workers. Where a person is employed under a contract, it is the contract which will govern the terms and conditions of service. In the case of State of Haryana vs. Surinder Kumar & Ors., reported in (1997) 3 SCC 633, the footing that their posts were interchangeable. It was held that these persons had no right to the regular posts until they are duly selected and appointed. It was held that they were not entitled to the same pay as regular employees by claiming that they are discharging same duties. It was held that the very object of selection is to test eligibility and then to make appointment in accordance with rules. It was held that the respondents had not been recruited in accordance with the rules prescribed for recruitment.”

13. Learned counsel has further relied upon a case of *Secretary, State of Karnataka & Others v. Umadevi (2) and Others*, reported in (2006) 4 SCC 1, the Constitution Bench of 5 Judges of Hon’ble

Supreme Court of India has laid down the law in this regard. The relevant extracts of the same is as under:

“While directing that appointments, temporary or casual, be regularized or made permanent, courts are swayed by the fact that the concerned person has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with eyes open. It may be true that he is not in a position to bargain- not at arms length – since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. It if the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succor to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term, The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the

procedure established, for making regular appointments to available posts in the services of the state. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution of India.”

14. He also relied upon the case of *Hindustan Petroleum Corpn Ltd. V Ashok Ranghba Ambre* reported in JT 2008 (1) SC 378, it was held :

In the case on hand, according to the appellant-Corporation, the workman was appointed on a purely ad hoc and temporary basis, without following due process of law. His name was never sponsored by the Employment Exchange nor an advertisement was issued for the purpose of filling the post to which the writ petitioner was appointed. Cases of other similarly situated persons were not considered and the appointment was not legal and lawful. In industrial adjudication, an order of termination was quashed as it was not in accordance with law. But that did not mean that the workman had substantive right to hold the post. The High Court was, therefore, wrong in directing the Corporation to make the writ petitioner permanent and to extend him all benefits on that basis from 1992. The said direction, therefore, has to go.

For the foregoing reasons, the appeal is allowed by setting aside the direction issued by the High Court ordering the appellant-Corporation to make the writ-petitioner (respondent-herein) permanent employee of the Corporation and to grant all benefits on that basis with effect from the date of filing of writ petition.”

15. He further relied upon in *Municipal Corporation of Delhi v*

Gauri Shankar & Ors. reported in 81 (1999) Delhi Law Times, 535, reads as under :-

“From the aforesaid reasoning given by the IT, it would be seen that the Tribunal has been influenced by the following factors :

“The contention of the management that workman was not appointed against a permanent and regular post and he was appointed only as a daily wager is not accepted on the ground that management has not provided the complete date as to the number of post/jobs vacant with it when the workman was employed. It is observed that management should have also brought on record the material regarding creation of post or availability of the vacant post due to retirement etc.

Since workman is continuously working with the management for a number of years it clearly shows that he had been working in a permanent and regular nature of job and at least there was no likelihood of the said job being abolished.

As the post against which workman was employed continued for years together, there was no reason for not considering the same as permanent post. If the said person is not employed, on a regular basis on the said post whereas others are so appointed the same is in contravention of Article 14 and 16 of the Constitution of India.”

Employing a person as a daily/casual/muster roll is an unfair labour practice.

It has been held in many cases that any person working in a position for more than 240 days has to be treated as person regularly employed.

I am afraid that none of the aforesaid reasons are tenable in law to give direction to regularize the workman from initial date of engagement. No doubt

when there is regular work available, the management should not resort to appointment of person on casual basis and thereafter continue to employ workers on casual basis for a long period for filling up the posts. However, after a person is appointed on casual basis and continues on casual basis for a long period, it does not follow there from that there was a substantive post available or the said person has been working against a permanent post merely because the management did not produce complete data as to number of posts available at the time of appointment of respondent no.1, the Tribunal could not draw the presumption that respondent no.1 was working against permanent post. What could only be inferred that he is needed for the work which he was doing but it cannot lead us to the conclusion that he was appointed against a permanent post. Permanent post would come into existence only when it is created by Competent Authority or held by regular incumbent is vacated by him on retirement, resignation, death etc. The very fact that there is scheme of regularization as per which such casual workers are to be regularized as per their seniority as and when post becomes available and the workman was regularized on its turn on 1.4.1989, it could be reasonably inferred that he was not engaged against permanent or substantive post.

The quarrel is not above his regularization since he is already regularized by the petitioner itself w.e.f. 1st April, 1989. The question to be determined is as to whether it can be treated that he is regularly appointed from the date of his initial employment ie., 25th October, 1983. My answer to this question is in the negative. It may be stated that even if it is presumed that keeping an employee on casual/daily/muster roll for a long period amounted to unfair labour practice and also denying the said employee wages which are given to the regular workman, this is totally different aspect. In fact, in this award itself, applying the principle of equal pay for equal work, workman is given the wages which re paid

to regular employees even from the date prior to his regularization by the management i.e, for the period from 25th October, 1983 to 1st April, 1989. Since notice in this petition was issued on limited aspect and the amount already stands paid to the workman, therefore, I am not commenting on this aspect. Fact remains that respondent/workman has been paid same wages as are paid to regular workman. However, the controversy is about the regularization of the workman from the date of his initial appointment. If the reasoning of the IT is accepted and the relief granted by the I.T. is to be sustained, the effect of that would be : (a) presumption that there was a permanent post as on 25th October, 1983; (b) presumption that respondent no.1/workman applied for the said post and was duly selected by a properly constituted Selection Committee in accordance with recruitment rules.

Both these presumptions cannot be drawn. Admittedly, respondent/workman was engaged on casual basis and it is nobody's case that any post was advertised and applications call for or workman along with others was considered and duly selected.

As far as permanent absorption of the daily wage/casual employees is concerned, the same can be granted only if there are sanctioned posts available for being filled up and in fact in most of the decisions of the Supreme Court on regularization, the Supreme Court had directed the employer in those cases to frame policy for regularizing the daily wage/casual employees. It would be appropriate to quote the directions by the Supreme Court given in Dhirender Chamoli case (Supra).

“We therefore, allow writ petition and make rule absolute and direct the Central Government to accord to these persons who are employed by the Nehru Yuvak Kendras and who are concededly performing the same duties as class IV employees, except regularization

which cannot be done since there are no sanctioned posts. But we hope and trust that posts will be sanctioned by the Central Government in the different Nehru Yuvak Kendras, so that these persons can be regularized.”

16. He submits, in *Smt. Darshna and Others V Delhi Police Public School* reported in 2002 II AD (DELHI) 138, it was held :-

Counsel appearing for the petitioners also submitted that the respondent no.1/School is a recognized School by the Director of Education and, therefore, the provisions of Chapter VIII and Rule 105 of the Delhi School Education Rules apply to each of the employee of the Schools howsoever appointed and for whatsoever time period, which according to the counsel is clear from the expressions used in the said Rule 105, particularly the words “every employee”. It was submitted by the counsel that since the petitioners have been working continuously for a long period of time without any break and in permanent post, they should be deemed to be confirmed in their post and, therefore, they should be paid regular pay scales as is being paid to every confirmed employee.

Rule 105 of the Delhi School Education Rules to which reference was made, by the counsel appearing for the petitioners deals with the right to regularization on the expiry of the first year of appointment or in case prior approval of the Director is obtained by the School for extension of probation, upon expiry of the extended period of probation. It was submitted on behalf of the petitioners that since the respondent no .1/School never sought permission from the Director of Education for extension of probation in respect of any of the petitioners, consequently by operation of Rule 105, on the expiry of one year from the respective date of appointment each of the petitioners stood automatically and statutorily confirmed in their respective posts. I am, however, unable to accept the aforesaid contentions as the petitioners were not appointed in accordance with the recruitment

procedure prescribed under the Act and the rules framed there under. They were appointed on part-time and ad hoc basis and no approval was also taken from the competent authority at the time of their appointment. They continued to work in the same capacity and, therefore, it cannot be said that the said appointments were made in accordance with the provisions of the Act and the rules and therefore, on expiry of one year period they should be deemed to be confirmed. The said appointment was de hors the rules and, therefore, the petitioners cannot be treated as confirmed and regular employees. While coming to the aforesaid conclusion, I draw support from the decision of the Supreme Court in High Court of Madhya Pradesh thru. Registrar and Others vs Satya Narayan Jhavar, reported in 2001 AIR SCW 3112. In the said decision, it was held that continuation of probation on expiry of maximum period of probation cannot and would not amount to deemed confirmation. In the said case, the Supreme Court has negated the concept of confirmation by implication. In this connection, reference may be made to the decision of the supreme court in Union of India and Others v Bishamber Dutt reported in (1996) 11 supreme court cases 341. In the said decision, the supreme court had held that unless the employees are appointed on regular basis, according to the rules, after consideration of the claims on merits, there is no question of regularization of the services. It was further held that persons appointed as part-time employees de hors the rules even though might be working regularly for a long time would not be entitled to regularization, as appointment on regular basis after selection, according to rules, is a condition precedent.”

During the course of arguments, counsel appearing for the respondents no.1 and 2 fairly stated that two of the petitioners could be regularized by the respondents as there are vacancies immediately available. Counsel also fairly stated that two other petitioners could be concluded as part-time employees for the present. During the course of arguments, counsel also stated that at present the respondent no. 1 school has no further vacant posts apart from the aforesaid vacancies and that in case in future if there be any further vacancy, they

would consider the case of the petitioners alone for their absorption.

I accept the aforesaid statement of the counsel appearing for the respondents no.1 and 2 and in terms thereof, I direct that the two petitioners according to their seniority position shall be absorbed and their services shall be regularized by the respondent no.1/School and they shall be paid a regular pay scale as is being paid to other similarly situated employees of the School from the date of their regularization. It is also directed that the next two persons according to their seniority position and who are petitioners herein would also continue to work as part-time employees so long regular vacancies are not available for them and as and when regular vacancies are available, they shall be regularized as against such posts.

17. He referred the case of *Apeejay School V Darbari Lal & Others* reported in 170 (2010) Delhi Law Times 608, wherein it was held :-

Submission of Mr. Arun Birbal, Advocate/Co-Amicus Curiae:

Attention at the outset is invited to the recent judgment dated 26th April, 2010 in CM (M) No. 43/2009 titled Sardar Patel Vidyalaya v G P Srivastava (of the same Judge who had pronounced the judgment in Management of Mahavir Senior Model School (Supra) laying down that the Labour Court has no jurisdiction over matters covered by Section 8 of the School Act.

To hold the workman employed in a school to be outside the ambit of the ID Act would have the effect of divesting such workman of the benefits of several beneficial provisions in the I D Act viz Section 25F etc. and of which there is no equivalent in the School Act.

That there is no repugnancy between the two Acts and the two work in their respective spheres, that the two legislations have been enacted in exercise of powers under

different entries in the VIIth Schedule of the Constitution.

That the position is otherwise than as contended by the other two Counsels. It is the ID Act which is the special legislation and the School Act is the general legislation. The Supreme Court has held the workman form the rigorous of CPC. Attention is invited to Section 11 (6) of the School Act making the provisions of the CPC applicable to the appeals before the School Tribunal.

While the School Tribunal is governed by the provisions of the Limitation Act, the Industrial Adjudicator is not.

The Industrial Adjudicator, the sake of expediency is empowered to hold the inquiry into the alleged act of misconduct itself while the School Tribunal is not and upon finding the preceding domestic enquiry to be bad will have to necessarily remand the matter.

That Section 8(3) of the School Act only prescribes the remedy of appeal to the Tribunal against the actions of dismissal, removal or reduction in rank, all the other disputes between the employees and the management of the school will have to necessarily go to the Industrial Adjudicator under the ID Act and thus it is not as if the jurisdiction of the Industrial Adjudicator has been completely taken away.

That Parliament cannot be held to have intended to divest the workman employed in the school of the benefits of the ID Act without having expressly said so till now.

\

That the two remedies are not in derogation to each other and have to be construed harmoniously. The workman has a right to elect either of the two remedies. Attention is invited to the Management of M/s,. Shafiq Memorial Higher Secondary School v Padam Kant Saxena, 94 (2001) DLT 261 where the award of the Industrial Adjudicator was set aside though not on the ground of ID Act being not applicable but on the ground that the award was inconsistent with the provisions of the School Act which was applicable to the

employer in that case.

Attention is invited to Prabhu Dayal Public School v Prahlad , WP (C) NO. 3260/1996 decided on 29th July, 2008 where it was held that I D Act and the School Act operate in their own spheres and in case of overlapping, subject to the rule of repugnancy and subject to the rule that the special Act overrides the general Act, every attempt has to be made to give effect to the statutory provisions of the two enactments, in that case, it was held that the School Tribunal ought to have decided in accordance with the principles of the ID Act.

It is contended that the Single Judge who has delivered seemingly conflicting judgments in Management of Mahavir Senior Model School (Supra) and Sardar Patel Vidyalaya (Supra), changed his view in Sardar Patel Vidyalaya only for the reason for the judgment of the Division Bench of this Court in Sonica Jaggi v Lieutemant Governor, LPA no. 196/2008 decided on 14th August, 2008. Attention was invited to the judgment in Sonica Jaggi (Supra) which was a case of a teacher and for the relief of fixation of her salary. It was contended that the observations in Sonica Jaggi owing whereto the Single Judge has changed his view in Sardar Patel Vidyalaya are in the said context and not in the context of the I D Act.

Attention is also invited to the Constitution Bench judgment in Bangalore Water Supply and Sewerage Board (Supra) to contend that the Constitution Bench has expressly held a school to be an industry and the provisions of the ID Act to be applicable thereto. It is contended that in view of the clear observations of the Constitution Bench of the Supreme Court in the said judgment that the provisions of the ID Act are applicable to schools, this Court ought not to hold that the provision of the ID Act are not applicable to employees of a school for the reason of the provisions aforesaid of the School Act.

It is further contended that the beneficial provisions of the I D Act are enforceable by the authorities constituted

under the said Act only and the benefit of the said provisions cannot be given by the other for (a). Reliance in this regard is placed on Chief Engineer, Hydel Project v Ravinder Nath, AIR 2008 SC 1315. The same judgment is also relied upon to contend that there is nothing wrong in two remedies being available and is being left to the aggrieved workman to choose his remedy by election.

Reliance is also placed on Chandrakant Tukaram Nikam V Municipal Corporation of Ahmedabad, I (2002) SLT 697 = AIR 2002 SC 997 where the policy of law underlying the ID Act and other enactments concerning the workmen was emphasized. It was held that the Courts and Tribunals created by the ID Act are not shackled by the procedural laws nor is their award and because of their informality, the workmen and their representatives can themselves prosecute or defend their cases; these forums are empowered to grant such relief as they think just and appropriate and which powers are not available to the other Fora. It is contended that the School Tribunal where the provisions of the CPC are applicable and where representation through lawyers is not prohibited cannot be a substitute for the foras constituted under the ID Act.

Reference is also made to Management Committee of Montfort Senior Secondary School (Supra) reiterating that as a general principle, where two remedies are available under the law, one of them should not be taken as operating in derogation of the other.

The learned Amicus Curiae has also drawn attention to Agra District Cooperative Bank Ltd V Labour Court, U P V (2001) SLT 133= AIR 2001 SC 2396 holding that when a question of employment arises, certainly it cannot be said that the doors of the Labour Court are shut because of the provisions of arbitration in the Co-operative Societies Act. It was further held that if parties avail of a remedy in one of the jurisdictions, that proceeding must be pursued to its logical end and should not be given up in the middle to start another proceeding under another enactment. The Amicus Curiae however hastened to inform that the Supreme Court in

Ghaziabad Zila Sahkari Bank Ltd., v Addl. Labour Commissioner, AIR 2007 SC (Suppl.) 425 has taken a contrary view.

It was further submitted that the view of the Punjab and Haryana High Court as well as of the Gujarat High Court also is that the remedy of School Tribunal does not deprive the workman employed in the school of the remedy under the ID Act . Reference in this regard is made to Hindu Kanya Mahavidalaya v the Presiding Officer, Labour Court, Gurdaspur, CW (P) 6495/1987 of the High Court of Chandigarh, decided on 2nd July, 2009 and to Arjunbhai Amritbani Naik V State of Gujarat, (2000) 4 Gujarat Law Reporter 239. It is further informed that there is a conflict of opinion on this point in the Bombay High Court and the matter has been referred to the Full Bench of that High Court. Reliance is placed on Satyawadi v Sow. Aruna, 2000 (3) Bom., CR 12 laying down that the non teaching employees of a school have the dual remedy of the School Tribunal and the ID Act and the teaching staff has the remedy only before the School Tribunal and on Adarsha Shikshan Sanstha vs Jaiprakash Ramvilas Lohia, WP© no. 4756/1996 of the Aurangabad Bench of the High Court at Bombay decided on 14th October, 2009 holding that in view of the special legislation covering employees of private school, the remedy is to approach the School Tribunal and not the Labour Court.

To meet the argument that the remedy under the ID Act is an uncertain remedy requiring a reference to be made, it is contended that at least in so far as Delhi is concerned, as per the local amendment the dispute can be raised directly before the Industrial Adjudicator even without the reference through the process of the conciliator and the appropriate government.

Submissions in Rejoinder of Mr H L Tikku, Sr. Advocate for the Petitioner :

Once a person decides to work for a school, he should be deemed to have given up his rights/remedies under the ID Act.

That the labour issues relating to schools are to be guided by the provisions of the School Act only.

Section 8(3) of the School Act has been held in para 41 of Kathuria Public School (supra) to have wider ramifications than of merely dealing with termination.

The rules under the School Act make special provisions with respect to the employer of the schools. Attention in this regard is invited to Rule 47. On enquiry, as to what is the corresponding provision in the School Act to Section 35F of the ID Act, protect in the rights of a workman who has worked for 240 days in a preceding year, the senior counsel for the petitioners contends that the benefit of the said provision can be given by the School Tribunal also. It is further contended that section 8 (3) and (4) of the School Act, by requiring the school to obtain the approval of the Directorate of Education before taking any action of dismissal/removal/reduction in rank or suspension of an employee, provide an additional protection to the workman and owing whereto the workman/employees of the school do not require the protection under the ID Act.

In view of the afore said, I conclude that there is no express bar in the School Act to the jurisdiction of the Industrial Adjudicator under the ID Act.

That takes me to the next question, as to whether the jurisdiction of the Industrial Adjudicator under the ID Act.

That takes me to the next question, as to whether the jurisdiction of the Industrial Adjudicator under the I D Act can be said to be impliedly barred by the School Act. The strongest argument of the Senior Counsel for the petitioner, in the opinion of this Court, is of the Legislature itself by the amendment of 1982 (though not enforced as yet) having

intended to exclude the schools from the ambit of the I D Act. However the fact remains that for whatsoever reason, the said amendment has not been brought into force as yet. The question which arises is, whether in spite of the amendment having not been brought into force, the Court can interpret the existing provisions in the Statute in the spirit of the proposed amendment. That would further amount to this Court bringing into force the amendment which the Legislature/Executive in its wisdom has not chosen to bring into force for the last over quarter of a century.”

The judgment cited by the Senior Counsel for the petitioner on this aspect are mostly where a remedy of a writ petition has been held to be barred owing to the existence of an alternative remedy. However, a writ remedy is essentially a discretionary remedy and which discretion is not exercised where an alternate efficacious remedy is available. The said principle though not applicable, even if applied, in view of the finding above that the remedy before the school tribunal is not an equally efficacious to the remedy before the Industrial Adjudicator, would not apply. Else it is also not a situation where there is any inconsistency or remedy under one law has to necessarily give way to the other. When as per the two statutes, the benefit of both can be availed of, there is no reason for the court to intervene and hold that benefit of only one is available. The Division Bench of this Court in Ankur Exports Pvt Ltd v MRTTP Commission, MANU/DE/0726/2010 has dealt with this aspect and also of when election is required to be made.”

I, therefore, hold that the jurisdiction of the Industrial Adjudicator under the ID Act is not barred in relation to disputes raised by workmen employed in the Schools and covered by the School Act, Resultantly, no error can be found in the order of the Labour Court rejecting the preliminary objection raised by the petitioner. Though the institution of the present petition has considerably delayed the decision on the industrial reference but the respondents 1, 2 and 3 having chosen not to contest, the petition is dismissed with no order as to costs.

18. On the other hand, Mr. C S Parashar, learned counsel for the respondents submitted that it was not the fault of the respondent no. 2, if the school did not constitute the Selection Committee. School, since it was the private one, unaided, but recognized, there was no question of sanction of any post for the purpose and the appointment of the respondent no.2 is to be dealt as per Rule 96 of the Delhi School Education Rules. Vide the impugned order, the Director of Education has only given the effect to their own appointment letter dated 1st February, 1997.

19. Learned counsel further submits that the respondent no.2 has been used by the petitioners as a multi-facet by taking all type of work and he continued to be with the petitioner without any break for around 17 years since 1993. Though, initially, no appointment letter was given. Therefore, the Director of Education did not give the effect, with effect from 1993, but with effect from 1st February, 1997, vide which his casual services were regularized.

20. Even otherwise, the Act was also meant for the welfare of the employees and the respondent no.2 falls under the definition of 2 (h) of Delhi School Education Act. By keeping him in job and not regularizing the respondent no.2, he has been deprived of the full salary, scale and other benefits. He is protected under section 10 of the Delhi School Education Act.

21. Learned counsel appearing on behalf of the respondent no.2 further submits that the judgments cited by learned counsel appearing on behalf of the petitioner has no relevance as all the judgments referred are not related to the private institutions, but of the

government institutions. His appointment is under Rule 96 (3) (a)(i). Even in the rejoinder, Mr. Tiku, learned Senior Advocate has submitted undisputedly that Rule 96 and Section 10 of the Delhi School Education Act, is applicable. However, he submitted that his appointment is under the Industrial Disputes Act and the Director of Education had no jurisdiction to pass the impugned order. Therefore, the respondent no. 2 should have been approached to the Industrial Tribunal.

22. It is further asserted by him that the petitioner made him realized that he was to abide by the terms and conditions and Rules of the institution also, as enforced from time to time. By regularizing him vide order dated 1st February, 1997, he was made to understand that his regularization was under the Industrial Disputes Act, 1964, makes no difference.

23. I have heard learned counsel for the parties.

24. I have noted that before the Director of Education, the respondent no.2 relied upon the documents as mentioned above. The Director of Education recorded in its impugned order that on a close perusal of the appointment letter, it is revealed that services of the respondent no.2 were regularized with effect from 1st February, 1997. The Employees' Provident Fund receipts beginning with the year 1997-98 further strengthens this conclusion. The letter dated 21st November, 1994 sanctioning the employee a loan of ₹613/- and that too deducted from his salary further goes to prove that the employee was on the roll of institution even in 1994 also. The respondents no.2 has been working in the school for the last 17 years itself proves that there was a genuine requirement for his services in

the institutions. Having served the institution for such a long period, and having given to the institution one's prime time of his youth, the employee could not be kept working under the tag of a casual worker.

25. Though, Mr. Tiku, learned Senior Advocate has referred the mentioned paragraph from the order of the Director of Education wherein he has gone sentimental/emotional, which is not at all permissible under the law.

26. But, I am of the opinion that the Director of Education only mentioned i.e, the respondent no.2 has been exploited by the petitioner School by not regularizing him and not paying the salary entitled to him. In my considered opinion, the Director of Education has rightly granted the relief with effect from 1st February, 1997.

27. I find no discrepancy in the order passed by him. Therefore, I find no merit in the petition.

28. Accordingly, the instant writ petition and application stand disposed of.

29. No order as to costs.

SURESH KAIT, J

MAY 17, 2012

p