

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

+ W.P.(C) No. 7375/2012 & CM 18898/2012 (Stay)

% **3rd October, 2013**

THE MANAGING COMMITTEE MOUNT SR. MARY'S SCHOOL

.....Petitioner

Through: Mr. R.Balasubramanian, Advocate.

VERSUS

NIRVIKALP MUDGAL

..... Respondent

Through: Respondent in person.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J (ORAL)

1. By this writ petition, the petitioner-school, and which is an unaided minority school, impugns the order of the Delhi School Tribunal dated 28.9.2012. The Tribunal by the impugned judgment quashed the order of the petitioner-school dated 19.5.2010 whereby services of the respondent-respondent were terminated. Respondent was appointed on 3.5.2007 for one year w.e.f 2.7.2007. Probation period was extended till 30.6.2007. Probation was further extended till 30.6.2010. Respondent's services were terminated vide letter dated 19.5.2010 of the petitioner-school.

2. Before me, the following grounds have been urged by the petitioner for setting aside impugned judgment:-

(i) The provision of Rule 105 which falls in Chapter-VIII of the Delhi School Education Rules, 1973 will not apply to the petitioner because petitioner is an unaided minority school.

(ii) There is no deemed confirmation of services in terms of Rule 105 because neither the language of Rule 105 so provides and also because the appointment letter of the petitioner specifically states that there would be no deemed confirmation.

(iii) Respondent's services were not satisfactory and respondent was communicated this aspect during the probation period and therefore, petitioner-school is justified in terminating the services of the respondent.

3. So far as the argument that provision of Rule 105 of Delhi School Education Rules, 1973 does not apply to unaided minority school, this issue is no longer *res integra* and has been directly pronounced upon by the Supreme Court in the case of ***Management Committee of Montfort Senior Secondary School Vs. Sh. Vijay Kumar and Ors., (2005) 7 SCC 472*** and which holds that employees/teachers even of minority unaided schools will

have complete statutory protection and all statutory rights under all the provisions of Delhi School Education Act and Rules, 1973. Para 10 of the judgment in the case of *Management Committee of Montfort Senior Secondary School (supra)* is relevant and the same reads as under:-

“10. In St. Xaviers' case (supra) the following observation was made, which was noted in Frank Anthony's case (supra):

"A regulation which is designed to prevent mal-administration of an educational institution cannot be said to offend clause (1) of Article 30. At the same time it has to be ensured that under the power of making regulation nothing is done as would detract from the character of the institution as a minority educational institution or which would impinge upon the rights of the minorities to establish and administer educational institutions of their choice. The right conferred by Article 30 is intended to be real and effective and not a mere pious and abstract sentiment; it is a promise of reality and not a teasing illusion. Such a right cannot be allowed to be whittled down by any measure masquerading as a regulation. As observed by this Court in the case of Rev. Sidhajibhai Sabhai (supra), regulations which may lawfully be imposed either by legislative or executive action as a condition of receiving grant or of recognition must be directed to making the institution while retaining its character as minority institution as an educational institution. Such regulation must satisfy a dual test the test of reasonableness, and the test that it is regulative of the educational character of the institution and is conclusive to making the institution an effective vehicle of education for the minority or other persons who resort to it."

The effect of the decision in Frank Anthony's case (supra) is that the statutory rights and privileges of Chapter IV have been extended to the employees covered by Chapter V and, therefore, the contractual rights have to be judged in the background of statutory rights. In view of what has been stated in Frank Anthony's case (supra) the very nature of employment has undergone a transformation and services of the employees in minorities un-aided schools governed under Chapter

V are no longer contractual in nature but they are statutory. The qualifications, leaves, salaries, age of retirement, pension, **dismissal, removal,** reduction in rank, suspension and **other conditions of service** are to be **governed exclusively under the statutory regime provided in Chapter IV.** The Tribunal constituted under Section 11 is the forum provided for enforcing some of these rights.....”

(underlining added)

4. Counsel for the petitioner sought to argue that as per Rule 96, the provisions of Chapter-9 of the Act and the other relevant rules will not apply to the petitioner-school because the petitioner is a minority unaided school. However, I need not at all go into this aspect because in spite of the fact that the statutory provisions which are quoted on behalf of the petitioner before me, the Supreme Court in the case of *Management Committee of Montfort Senior Secondary School (supra)* has categorically held that the services of teachers in minority unaided schools also are governed by the complete statutory regime provided under the Delhi School Education Act & Rules, 1973. As already stated, the complete scheme which is applicable applies to service conditions, tenure, pay-scales, termination, removal etc etc and as so stated in para 10 in *Management Committee of Montfort Senior Secondary School (supra)* reproduced above. I therefore reject the argument that petitioner-school is not bound by the provision of Rule 105 because the petitioner is a minority unaided school.

5(i). The second argument which is urged before me is that there is no deemed confirmation of an employee because such a provision for deemed confirmation does not exist in Rule 105 and in fact the contract of services of the respondent with the petitioner-school states in so many words that employee will not be confirmed unless a confirmation order is passed.

(ii) Even this argument urged by on behalf of the petitioner is mis-conceived and I have dealt with this issue in detail in a judgment in the case of *Hamdard Public School Vs. Director of Education* in W.P.(C) 8652/2011 decided on 25.7.2013. In this judgment I have held that an employee of a school should ordinarily be taken to be confirmed in services on a period of 3 years of service expiring. Of course, probationary employee can be terminated within the period of 3 years provided the same is in accordance with and on complying with the requirement of Rule 105. I have further held that probationary period can be extended from 3 to 5 years and subject to a maximum of 6 years in rarest of rare cases on reasons which are justiciable in courts. Paras 3,6,10 and 11 of the said judgment are relevant and they read as under:-.

“3. Sub- Rule 1 of Rule 105 provides the original period of probation as one year, and which can be extended by the appointing authority. What is the period for which probation can be extended is however not provided in Sub-Rule1. Sub- Rule 1 further provides that

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

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

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

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

(iv) The first proviso only uses the expression “by another year” and not “by another one year” or “by another one year only” or “maximum by another year” i.e in the first proviso there is no outer limit of probationary period prescribed like there is none in the body of the main Sub-Rule 1.

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

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

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

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.

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.” (underlining added)

6. In the present case, the issue which is argued before me will not be that of deemed confirmation because of no order having been passed of termination of services within the period of 3 years as per the ratio in the case of ***Hamdard Public School (supra)***, but the issue actually is whether the impugned order dated 19.5.2010 passed by the petitioner-school satisfies the requirement of Rule 105. This letter of termination of services of the respondent dated 19.5.2010 reads as under:-

“MOUNT ST. MARY’S SCHOOL
75, Parade Road, Delhi Cantt.

New Delhi-110010
Phones: 25692002, 25699308
Fax: 25695353

No.A.421/01/2010-11
May 19,2010
Mr. Nirvikalp Mudgil
TGT Hindi

Dear Sir

The Management Committee of the School appointed you on probation for one year. The probation was further extended from 01.07.2009 and to continue till 30.06.2010. The Managing Committee does not wish to extend your probation further nor require your services any more. Your probationary services, therefore, shall stand terminated with effect from 30.06.2010.

You are requested to handover all papers and documents of the school in your possession and collect your dues.

Yours truly

(Bro Dominic Jacob)
PRINCIPAL”

7. When we refer to the Rule 105 it is found that only if the service of the probationer is not satisfactory in the probation period, then the services of the probationary employee can be terminated. This aspect of satisfactory services is found both in sub Rule 1 of Rule 105 and also sub-Rule 2. However, when we refer to the impugned letter of termination of services dated 19.5.2010, there is not even a whisper in this letter that the

services of respondent have been terminated on account of the fact that respondent's services during the probationary period were not satisfactory. All that is written in this letter is that the management committee of the petitioner does not want to extend the probation period and respondent's services are not required. This language in my opinion flies in the face of the mandatory requirement of Rule 105 that termination of a probationer can only be when the services given in the probationary period are not satisfactory. Therefore, I hold that the letter dated 19.5.2010 is not in accordance with the requirement of Rule 105 that the services have to be stated and found to be not satisfactory, and therefore the termination letter clearly therefore falls foul of Rule 105 and thus cannot be a valid basis to hold entitlement of the petitioner to terminate the services of the respondent.

8. Counsel for the petitioner sought to argue before me by placing reliance upon para-4 of the writ petition that respondent's services were not satisfactory, however, this argument in my opinion is without any substance whatsoever because of various reasons. Firstly deficiencies in the termination letter cannot be made up by means of re-thinking on behalf of the petitioner-school by pleading later unsatisfactory services of the respondent. If petitioner-school was really not satisfied with the services of

the probationer-respondent, then surely it would have stated so in the letter of termination dated 19.5.2010 and which admittedly has not been done. Secondly, I find the averments made in para 4 of the writ petition wholly vague inasmuch as there is no reference to any date of the alleged letter which is served upon the respondent with respect to unsatisfactory services. Thirdly, not only are the pleadings vague but also no alleged letter written to the respondent of the services not being satisfactory has been filed with the writ petition. Fourthly, I may note that it is possible that at some stage in the probationary period service of an employee/teacher may not be satisfactory but that does not mean that on the end of the probation period the services are as a whole not satisfactory for confirmation to be denied at the end of probationary period.

The conclusion with respect to non-satisfactory services have to be specifically stated in the letter of termination of services, including preferably by reference to whatever material exists with the school to contend that services are not satisfactory. Of course, it depends on facts of each case to determine the satisfactory nature otherwise of service of an employee, however, in the facts of the present case, in the aforesaid facts of totally vague pleadings, not mentioning of any specific letter in para-4, and

most importantly no mentioning of any specific letter or issues of non-satisfactory services of the respondent in the letter terminating services of the respondent, I am bound to hold that the order of termination of services is illegal in view of the requirement of Rule 105 of the Delhi School Education Act and Rules, 1973.

9. The only other argument of interpretation of Rule 105 of there not being deemed confirmation of services will merge into the discussion which I have given above and once it is found that there is no letter of termination of services of respondent specifying the non-satisfactory nature of services, therefore, in accordance with the ratio of *Hamdard Public School (supra)* and para 11 thereof, respondent will be deemed to be confirmed in services as a period of about 3 years stands completed by the respondent with the petitioner-school especially because the period from May 2010 till 30.6.2010 is the summer vacation period in schools.

10. No other argument is urged before me on the behalf of the petitioner.

11. In view of the above, the writ petition is dismissed, leaving the parties to bear their own costs.

OCTOBER 3, 2013
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VALMIKI J. MEHTA, J.