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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P. (C) 6780/2015

28th November, 2016

THE PRINCIPAL ST. MARYS SCHOOL & ANR. Petitioners

Through: Mr. Shubham Singh and Mr. Romy
Chacko, Advocates.

versus

RAJENDRA PRATAP SINGH & ORS. Respondents

Through: Mr. Anuj Aggarwal, ASC for
GNCTD with Ms. Niti Jain, Adv.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This writ petition under Article 226 and Article 227 of the Constitution of India filed by the petitioners/school impugns the judgment of the Delhi School Tribunal (hereinafter referred to as 'DST') dated 12.5.2015. DST by its judgment dated 12.5.2015 has accepted the appeal filed by the respondent no.1/employee before the DST and the DST has set aside the order of termination of the services of the respondent no.1 by the letter dated 5.4.2013. The issue in this present writ petition is with respect to whether the respondent no.1 is deemed to be confirmed in the services

with the petitioners/school on completion of three years period of probation and hence his services could not be terminated by the letter dated 5.4.2013.

2. The issue as regards the period of probation and whether confirmation is automatic on completion of period of two years of probation under Rule 105 of the Delhi School Education Rules, 1973 or when can the probationary employees services be taken as confirmed on completing a particular number of years of service has been the subject matter of the decision of this Court in the case of ***Hamdard Public School Vs. Directorate of Education and Anr. 202 (2013) DLT 111***. In this judgment it has been held that an employee of a school is deemed to be confirmed in services ordinarily after a period of three years of service. The period beyond three years and up to six years can be extended only if there are grave and exceptional circumstances to extend the period of probation beyond three years. Therefore, ordinarily an employee of a school has been held deemed to be confirmed after completion of probationary services of three years. The relevant paras of the judgment in ***Hamdard Public School's*** case (*supra*) are paras 10 and 11, and the rationale for why the period of deemed confirmation is upon completion of probationary period of three years and as to whether there is no deemed confirmation on completion of two years period as specified under Rule 105 of Delhi School

Education Rules, is a subject matter of discussion in the earlier paras 2 to 9 of the said judgment, and therefore all the relevant paras 2 to 11 are reproduced as under:-

“2. This issue of whether the period of probation can only be a maximum period of two years i.e one year with extension of one year, and that whether after two years, there is an automatic confirmation of an employee is indeed a vexed question so far as the Delhi School Education Act and Rules, 1973 are concerned. There is no judgment either of a learned Single Judge of this Court or a Division Bench of this Court or of the Supreme Court interpreting Rule 105. There is no interpretation of Rule 105 in the sense as to whether the period of probation can only be of two years or if it statutorily is stated to be two years, can it not be extended beyond two years inasmuch as the language does not provide for deemed confirmation or automatic confirmation. Let me therefore at the outset reproduce the relevant Rule 105, of the Delhi School Education Act and Rules, 1973, and which reads as under:-

“105. Probation.-(1) Every employee shall, on initial appointment, be on probation for a period of one year which may be extended by the appointing authority [with the prior approval of the Director] and the services of an employee may be terminated without notice during the period of probation if the work and conduct of the employee, during the said period, is not, in the opinion of the appointing authority, satisfactory:

[Provided that the provisions of this sub-rule relating to the prior approval of the Director in regard to the extension of the period of probation by another year, shall not apply in the case of an employee of a minority school:

Provided further that no termination from the service of an employee on probation shall be made by a school, other than a minority school, except with the previous approval of the Director.]

(2) If the work and conduct of an employee during the period of probation is found to be satisfactory, he shall be on the expiry of the period of probation or the extended period of probation, as the case may be, confirmed with effect from the date of expiry of the said period.

(3) Nothing in this rule shall apply to an employee who has been appointed to fill a temporary vacancy or any vacancy for a limited period.”

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

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

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

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

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

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

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

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

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

BY Registered post

HAMDARD PUBLIC SCHOOL

Ref: 1B/03/2003/-

Date: 01.1.2003

To

Mrs. SOMA PANI CHATTOPADHYAY

Subject: MEMORANDUM OF APPOINTMENT

Dear Sir/Madam,

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

2. Perks

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

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

Yours faithfully,

(SAIYID HAMID)

SECRETARY

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TERMS AND CONDITIONS OF SERVICE

1. Terms of Engagement

a) Initially the Employee is engaged on a one year probation beginning from the date of joining the Hamdard Public School, which may be extended further by the Management for another one year.

b) One successful completion of the probationary period the Employee may be confirmed in writing, if found suitable. Unless and until the confirmation is given in writing by a specific order, the

Employee will be deemed to continue on probation notwithstanding the expiry of the probationary period.

c) One month's notice on either side or salary in lieu thereof would be the condition for leaving/termination of service during the probationary period. The Management may terminate the Employee's service without assigning any reason during this period.

d) One having completed the probationary period and after confirmation, three months' notice on either side or three months' salary in lieu thereof for the purpose of leaving of termination of service. However, the discretionary power not to allow an Employee to leave the school during an academic year rests with the Management of the School."

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

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

ethos of Article 21A unless teachers and employees of school have certainty about their jobs education itself will be affected. Therefore, let us see whether we can read in a reasonable period in the provision of Rule 105, and if so what should be that reasonable period.

7. The Supreme Court in the case of *Sharda Devi Vs. State of Bihar & Anr. (2003) 3 SCC 128*, while referring to Section 30 of the Land Acquisition Act, 1894 and in contrast to Section 18 of the same Act, held that merely because there is no limitation prescribed for a reference under Section 30, yet, the power has to be exercised in a reasonable period in view of the fact that no period is prescribed. The relevant observations of the Supreme Court are contained in para 25 which reads as under:-

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

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By reference to limitation

Under Section 18 the written application requiring the matter to be referred by the Collector for the determination of the Court shall be filed within six weeks from the date of the Collector's award if the person making it was present or represented before the Collector at the time when he made his award or within six weeks of the notice from the Collector under Section 12(2) or within six months from the date of the Collector's award, whichever period shall first expire. There is no such limitation prescribed under Section 30 of the Act. The Collector may at any time, not bound by the period of limitation, exercise his power to make the reference. The expression 'the person present or represented' before the Collector at the time when he made his award would include within its meaning a person who shall be deemed to be present or represented before the Collector at the time when the award is made. No one can extend the period of limitation by taking advantage of his own wrong. Though no limitation is provided for making a reference under Section 30 of the Act, needless to say where no period of limitation for exercise of any statutory power is prescribed the power can nevertheless be exercised only within a reasonable period; what is a reasonable period in a given case

shall depend on the facts and circumstances of each case.”
(underlining added)

8. The question as to whether Rule 105 of the Act provides a maximum period of probation, has been answered above that Sub-Rule 1 of Rule 105 does not provide a maximum period of probation, and, its first proviso also does not in any manner contain any outer period of limitation. However, merely because there is no outer period prescribed for confirming a probationer will not mean that there will be no outer limit for confirming a teacher or for terminating of the services of a teacher in a probationary period, the period will have to be a reasonable period vide *Sharda Devi (supra)*.

9. At this stage, before proceeding further, it would be useful to refer to a very recent judgment of the Supreme Court in the case of *Head Master, Lawrence School, Lovedale Vs. Jayanthi Raghu and Anr. (2012) 4 SCC 793*. In this judgment, the Supreme Court speaking through Hon'ble Mr. Justice Dipak Misra has held that if in the relevant rule even if a maximum period of probation is provided yet, if the self same rule uses the expression 'if confirmed', there is no automatic or deemed confirmation after the maximum period of probation, and there would be required a specific order of confirmation of an employee. The relevant paras of this judgment are as under:-

“25. It is apt to note here that the Learned Counsel for both the sides have heavily relied on the decision in High Court of *Madhya Pradesh thru. Registrar and Ors. v. Satya Narayan Jhavar* (2001) 7 SCC 161: AIR 2001 SC 3234. In the said case, the three-Judge Bench was considering the effect and impact of Rule 24 of the Madhya Pradesh Judicial Service (Classification, Recruitment and Conditions of Services) Rules, 1955.

26. It may be mentioned that the decision rendered in *Dayaram Dayal v. State of M.P.*: AIR 1997 SC 3269, which was also a case under Rule 24 of the said Rules, was referred to the larger Bench. In *Dayaram Dayal (supra)*, it had been held that if no order for confirmation was passed within the maximum period of probation, the probationer judicial officer could be deemed to have been confirmed after expiry of four years period of probation.

27. After referring to the decisions in Dharam Singh (supra), Sukhbans Singh (supra) and Shamsher Singh (supra) and other authorities, the three-Judge Bench expressed thus:

“11. The question of deemed confirmation in service Jurisprudence, which is upon language of the relevant service rules, has been subject matter of consideration before this Court times without number in various decisions and there are three lines of cases on this point. One line of cases is where in the service rules or the letter of appointment a period of probation is specified and power to extend the same is also conferred upon the authority without prescribing any maximum period of probation and if the officer is continued beyond the prescribed or extended period, he cannot be deemed to be confirmed. In such cases there is no bar against termination at any point of time after expiry of the period of probation. Other line of cases is that where while there is a provision in the rules for initial probation and extension thereof, a maximum period for such extension is also provided beyond which it is not permissible to extend probation. The inference in such cases is that officer concerned is deemed to have been confirmed upon expiry of the maximum period of probation in case before its expiry order of termination has not been passed. *The last line of cases is where though under the rules maximum period of probation is prescribed, but the same require a specific act on the part of the employer by issuing an order of confirmation and of passing a test for the purposes of confirmation. In such cases, even if the maximum period of probation has expired and neither any order of confirmation has been passed nor the person concerned has passed the requisite test, he cannot be deemed to have been confirmed merely because the said period has expired.*”(emphasis supplied)

28. After so stating, it was further clarified as follows:

“37. Ordinarily a deemed confirmation of a probationer arises when the letter of appointment so stipulates or the Rules governing service condition so indicate. In the absence of such term in the letter of appointment or in the relevant Rules, it can be inferred on the basis of the relevant Rules by implication, as was the case in Dharam Singh (supra). But it cannot be said that merely because a maximum period of probation has been

provided in Service Rules, continuance of the probationer thereafter would ipso facto must be held to be a deemed confirmation which would certainly run contrary to Seven Judge Bench judgment of this Court in the case of Shamsheer Singh (supra) and Constitution Bench decisions in the cases of Sukhbans Singh (supra), G.S. Ramaswamy (supra) and Akbar Ali Khan (supra).”

29. Regard being had to the aforesaid principles, the present Rule has to be scanned and interpreted. The submission of Mr. Viswanathan, learned senior Counsel for the Appellant, is that the case at hand comes within the third category of cases as enumerated in para-11 of Satya Narayan Jhaver (supra). That apart, it is urged, the concept of deemed confirmation, ipso facto, would not get attracted as there is neither any restriction nor any prohibition in extending the period of probation. On the contrary, the words "if confirmed" require further action to be taken by the employer in the matter of confirmation.

30. On a perusal of Rule 4.9 of the Rules, it is absolutely plain that there is no prohibition as was the rule position in Dharam Singh (supra). Similarly, in Om Prakash Maurya (supra), there was a restriction under the Regulations to extend the period of probation. That apart, in the rules under consideration, the said cases did not stipulate that something else was required to be done by the employer and, therefore, it was held that the concept of deemed confirmation got attracted.

31. Having so observed, we are only required to analyse what the words "if confirmed" in their contextual use would convey. The Division Bench of the High Court has associated the said words with the entitlement of the age of superannuation. In our considered opinion, the interpretation placed by the High Court is unacceptable. The words have to be understood in the context they are used. Rule 4.9 has to be read as a whole to understand the purport and what the Rule conveys and means.

37. Bearing in mind the aforesaid conceptual meaning, when the language employed under Rule 4.9 is scrutinised, it can safely be concluded that the entitlement to continue till the age of superannuation, i.e., 55 years, is not absolute. The power and right to

remove is not obliterated. The status of confirmation has to be earned and conferred.

38. Had the rule making authority intended that there would be automatic confirmation, Rule 4.9 would have been couched in a different language. That being not so, the wider interpretation cannot be placed on the Rule to infer that the probationer gets the status of a deemed confirmed employee after expiry of three years of probationary period as - that would defeat the basic purpose and intent of the Rule which clearly postulates "if confirmed". A confirmation, as is demonstrable from the language employed in the Rule, does not occur with efflux of time. As it is hedged by a condition, an affirmative or positive act is the requisite by the employer. In our considered opinion, an order of confirmation is required to be passed.

39. The Division Bench has clearly flawed by associating the words 'if confirmed' with the entitlement of the age of superannuation without appreciating that the use of the said words as a fundamental qualifier negatives deemed confirmation. Thus, the irresistible conclusion is that the present case would squarely fall in the last line of cases as has been enumerated in paragraph 11 of Satya Narayan Jhaver (*supra*) and, therefore, the principle of deemed confirmation is not attracted.” (Underlining added)

10. The Hon'ble Supreme Court in the case of ***Lawrence School (supra)*** has also referred to its various earlier judgments including Constitution Bench judgments on the aspect of maximum period of probation of automatic/deemed confirmation as to whether an order is required for confirmation or not where/when such order is required and so on. On these issues and with reference to the relevant Rule 4.9, it has been held in ***Lawrence School's case (supra)*** that although the relevant rule specifically provided for a maximum period of probation only of two years, yet, since the expression used in the rule was 'if confirmed', there is no automatic or deemed confirmation of an employee merely because maximum two years period of probation is completed. Of course, what should then be a maximum period of probation does not seem to find mention, however in my opinion, this aspect will stand covered by the ratio of the judgment in the case of ***Sharda Devi (supra)*** which requires that where no period is provided by the statute, the period can only be a reasonable period.

11. Now that takes us to the most vexed question as to what should be a reasonable period. We will have to keep in mind Article 21A of the Constitution for this purpose. To understand the issue of what should be a reasonable period qua Rule 105 as regards a teacher, let us start with two extreme examples. One extreme example is that probation period cannot be extended at all for the third year and the other extreme example is that the probation period can be kept on extending by the management even till the age of superannuation. Obviously, both these extreme situations cannot decide what is a reasonable period. In many statutory rules and rules of many organizations, there is provided a three year period of probation like in the case of *Lawrence School (supra)*. Therefore, probation period undoubtedly can be of 3 years under Rule 105 because as already stated there is no outer limit of probation period provided. The question is that for how long beyond the third year can a period of probation continue. In my opinion, reasonable period will have to be dependent on the facts of each case including as to what is the post or nature of employment in question, what are the terms and conditions agreed to at the time of original appointment and subject of course to the same being in accordance with Delhi School Education Act and Rules, 1973. The nature of job or duties to be performed by the teacher will also have to be kept in mind. It will also have to be kept in mind whether the teacher will be overage for similar employment if he/she is not confirmed. Keeping in mind all the relevant facts, probation period, except in exceptional cases, so far as a teacher is concerned, should not continue beyond a period of 5 years from the first date of appointment. Even a period of 4/5 years has to be really in a very grave and exceptional case depending on the facts of that case. However, I do not express myself finally with respect to what should be a reasonable period between 3 to 5 years because Courts will necessarily examine that aspect in the facts and circumstances of each individual case. I am making these specific observations with respect to the maximum period of probation being ordinarily only of 5 years because in the absence of fixing an outer limit by the statute viz Rule 105, the entire purpose of a probation period and a probationary teacher being confirmed would be defeated by the machinations of the management of the schools in certain cases thus affecting education and bringing in of Article 21A in the Constitution. Therefore, I hold that the Rule 105 must be so interpreted that the reasonable period therein should ordinarily be around three years, should not extend beyond five years in most of the cases, and, in the rarest or rare cases, one more year upto 6 years may be considered. However again at the cost of repetition it is stated that six years period is being observed only as a most grave and rarest of rare circumstance in a case, and ordinarily, a probation period qua a teacher should

not extend beyond/around three years which is a reasonable period, and as per the facts and circumstances of certain case, and which issues/decisions are of course justiciable before Courts the probation period can go up to 5/6 years as stated above.”

3. The aforesaid ratio of the judgment of this Court in the case of ***Hamdard Public School (supra)*** is on the basis that if there is no period provided by Statute, then, there should be a reasonable period in view of the ratio of the judgment of the Supreme Court in the case of ***Sharda Devi Vs. State of Bihar & Another, (2003) 3 SCC 128.***

4. The facts of the present case shows that the respondent no.1 was firstly appointed as a teacher (P.G.T Mathematics) on 1.4.2009 and his services were finally terminated by the letter dated 5.4.2013. Respondent no.1 had therefore worked for over four years when his services were terminated i.e for a period of more than the three year period as stated in the case of ***Hamdard Public School (supra)***. Once an employee has worked for more than three years on probation such a probationary officer can continue for probation after the three years period of probation only if grave and exceptional circumstances are found to exist or other valid grounds exist for continuation of probation. The petitioners/school therefore had to demonstrate before this Court facts and circumstances of the present case which gave valid reasons for continuing of the probation of the respondent no.1 beyond a period of three years.

5. A reference to the record, as also the arguments urged on behalf of the petitioners, shows that the petitioners/school rely only upon certain memos issued in the year 2010 and February, 2011 to argue that the services of the respondent no.1 were not satisfactory. In my opinion, the documents being relied upon by the petitioners are not such documents which furnish grave and exceptional circumstances for the employee not to have been deemed confirmation in the school after a period of three years. It was perfectly open for the petitioners/school to terminate the employment of the respondent no.1 on completion of three years period of probation on the ground that the services of respondent no.1 are not satisfactory as found in the first three years of an employment as a probationer, but to direct continuation of probationary employment only on normal grounds of non-satisfactory services are not such grave and exceptional circumstances for the petitioners/school to continue the employment of the respondent no.1 as a probationer beyond three years and thereafter terminate the services of the respondent no.1 after four years of service on 5.4.2013. To allow normal grounds of non-satisfactory services beyond the period of three years as a ground not to take deemed confirmation of an employee of a school after three years period of probation would be to violate the spirit of ratio in the case of *Hamdard Public School (supra)* and therefore it is held that respondent no.1 in the present case is to be taken deemed to be confirmed in

services with the petitioners/school w.e.f. 1.4.2012, and hence the order of termination of services dated 5.4.2013 has been rightly quashed by the DST whereby respondent no.1 has been reinstated in his services with the petitioners/school.

6. In view of the above, there is no merit in this petition, and the same is therefore dismissed, leaving the parties to bear their own costs.

NOVEMBER 28, 2016
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VALMIKI J. MEHTA, J

