

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

+ **W.P.(C) No.9187/2015**

% **8th November, 2016**

DELHI PUBLIC SCHOOL AND ANR. Petitioners

Through: Mr. Puneet Mittal, Advocate with
Ms. Vasudha Bajaj, Advocate.

versus

MANOJ BHANDARI AND ANR. Respondents

Through: Mr. S.P. Gautam, Advocate for
respondent No.1.
Mr. Peeyoosh Kalra, ASC with Mr.
Shiva Sharma, Advocate and Ms.
Sona Babbar, Advocate for
respondent No.2.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

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

VALMIKI J. MEHTA, J (ORAL)

1. This writ petition under Articles 226 and 227 of the Constitution of India is filed by the petitioners/Delhi Public School impugning the Order of the Delhi School Tribunal (DST) dated 21.8.2015 by which the DST accepted the appeal filed by the respondent no.1/Sh. Manoj Bhandari and ordered that the termination of services of the respondent no.1 by the petitioners was illegal and accordingly the Letter of

Termination dated 27.3.2015 issued by the petitioners was set aside with further directions to the petitioners to reinstate the respondent no.1 with all consequential benefits.

2. The issue in the present case of disentitlement of a school in Delhi to remove a long serving contractual employee and not making the employee's services as permanent/regular is no longer *res integra* in view of two Judgments delivered by this Court in the cases of ***Hamdard Public School Vs. Directorate of Education and Anr. 202 (2013) DLT 111*** and three connected cases with the lead case being ***Army Public School and Anr. Vs. Narendra Singh Nain and Anr.*** in W.P.(C) No.1439/2013 decided on 30.8.2013. These judgments hold that such an employee stands deemed regularized in service.

3. In the judgment in the case of ***Hamdard Public School (supra)***, this Court after extensively referring to the provisions of the Delhi School Education Act & Rules, 1973 (hereinafter referred to as 'the Act') and the judgments of the Supreme Court, held that a school in Delhi cannot indeterminably continue an employee on its rolls as a probationer and the employment must be regularized to a permanent/regular employment after ordinarily three years of services as a probationer. The period of three years can be extended at best up to six years only in grave and exceptional

circumstances as observed in the case of *Hamdard Public School (supra)*.

As per the ratio of the judgment in the case of *Hamdard Public School (supra)*, an employee is deemed to become permanent in his service ordinarily after completion of three years period of probation even if no formal letter is issued by the school regularizing the employment into a permanent one.

4. In the case of *Army Public School (supra)*, the ratio of the judgment in the case of *Hamdard Public School (supra)* was extended to give benefit of regular employment to contractual employees who were indeterminably continued by the school in Delhi without making the contractual employment permanent. The relevant paras of the judgment in the case of *Army Public School (supra)* are paras 3 to 8 and which paras read as under:-

“3. On the basis of the admitted facts: in the form of various appointment letters and the termination letters which have been issued by the petitioner-school as detailed above; the provision of Rule 105 of the Delhi School Education Act & Rules, 1973; the judgment delivered by me in the case of *Hamdard Public School Vs. Directorate of Education and Anr.* in W.P.(C) No.8652/2011 decided on 25.7.2013 interpreting Rule 105; and, the judgment of the Supreme Court in the case of *Management Committee of Montfort Senior Secondary School Vs. Sh. Vijay Kumar and Ors.*, (2005) 7 SCC 472 read with Division Bench judgment of this Court in the case of *Social Jurist, a Civil Rights Group Vs. GNCT & Ors.* 147 (2008) DLT 729, the issues which arise, and on which counsel for the parties have been heard, are first as to whether the respondent No.1 at all can be said to only be a contractual employee in terms of the first contractual appointment letter dated 3.12.2007 or whether the employment of respondent No.1 since inception in the peculiar facts of this case would have a statutory favour in view of the provisions of the Delhi School Education Act and Rules, 1973, and secondly as to whether the

actions of the petitioner-school amount to over-reach the provision of Rule 105 and is, therefore, against the ratio not only of the categorical language of Rule 105 but also the ratio of the judgment passed by me in the case of **Hamdard Public School Vs. Directorate of Education and Anr.** (supra). The following issues are, therefore, crystallized for decision by this Court:

(i) Should the respondent No.1's services in the facts of this case be not taken as having statutory protection in terms of the Delhi School Education Act and Rules, 1973 since the original date of the contractual appointment in terms of letter dated 3.12.2007. Related with this issue would be whether the respondent No.1 is estopped from challenging the nature of appointment as contractual inasmuch as respondent No.1 thereafter accepted services first as a probationer and thereafter again on contractual basis.

(ii) Whether all the appointment letters, whether giving contractual appointment or as appointment on probation, have to be read in their substance and not in form whereby actually the respondent No.1 should be treated as on probation either from 28.11.2007 or in any case from 1.4.2008 and since there is no mention of termination on account of unsatisfactory services in the termination letter dated 10.6.2010, and none exist as stated in the letter dated 21.3.2010, therefore, respondent No.1 would have confirmation of employment on account of language of Rule 105 and the judgment in the case of **Hamdard Public School Vs. Directorate of Education and Anr.** (supra).

4. So far as the first issue is concerned, as to whether the respondent No.1's services originally w.e.f 28.11.2007 are contractual in nature or statutory in character, it would be necessary at this stage to refer to the relevant para 10 of the Supreme Court judgment in the case of **Management Committee of Montfort Senior Secondary School Vs. Sh. Vijay Kumar and Ors.** (supra), but, before I do so I must hasten to add that the observations which are being made by me in this judgment as regards the first issue is because of the facts of this case whereby I am not treating the first appointment as contractual in nature in spite of the letter dated 3.12.2007 so specifying because I hold this letter, and also subsequent probationary/contractual appointment letters, to be a sham and given only for denying regular employment to respondent No.1 as LDC. The repeated appointments and terminations, have persuaded me to hold that the petitioner's-school's actions are a fraud upon the requirement to normally not to appoint an employee on contract basis. Accordingly, in a case where on account of genuine exigencies a contractual appointment is required (like when a regular employee suddenly leaves etc.) then such employment will be treated as adhoc/temporary/contractual and not a statutory one having protection of the Act & Rules. With this preface let us reproduce para 10 of **Montfort Senior Secondary School's case (supra)** and which 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.....”

5. A reference to aforesaid para shows that the Supreme Court in **Management Committee of Montfort Senior Secondary School Vs. Sh. Vijay Kumar and Ors.** (supra) has laid down the ratio that the very nature of employment of the employees of a school are that they are no longer contractual in nature but statutory. This observation was made by the Supreme Court in spite of the fact that the minority schools had entitlement under the provisions of Section 15 and Rule 130 of the Delhi School Education Act and Rules, 1973 to have a contract of services for its employees. It be noted that so far as the non-minority schools are concerned there is no provision in the Delhi School Education Act and Rules, 1973 to have a contractual appointment. Therefore, once if minority schools’ employees cannot have contractual employment and they have to be treated as statutory employees, then a

fortiorily non-minority schools whose employees cannot be engaged in employment on contractual basis, such employees in non-minority school would surely have statutory protection of their services. In ***Management Committee of Montfort Senior Secondary School Vs. Sh. Vijay Kumar and Ors.*** (supra) the Hon'ble Supreme Court has made it clear in the aforesaid paragraph 10 that the qualifications, leaves, salaries, age of retirement etc, removal and other conditions of services are to be governed "exclusively" under the statutory regime provided under the Delhi School Education Act and Rules, 1973. Once that is so, then, as per Rules 118 to 120 of the Delhi School Education Rules, 1973 the services of an employee can only be terminated on account of misconduct and that too after following the requirement of holding of a detailed enquiry and passing of the order by the Disciplinary Authority. Therefore, in view of the categorical ratio of the judgment of the Supreme Court in the case of ***Management Committee of Montfort Senior Secondary School Vs. Sh. Vijay Kumar and Ors.*** (supra) and in view of the facts of this case the respondent No. 1's services from the inception cannot be taken as only contractual in nature and would be statutory in nature. Once the services are statutory in nature, and admittedly the respondent No. 1 has not been removed by following the provisions of conducting an enquiry and passing of an order by the Disciplinary Authority as required under the Rules 118 to 120 of the Delhi School Education Rules, 1973, the respondent No. 1's services cannot be said to have been legally terminated. Respondent No. 1, therefore, continues to be in services.

6. To distinguish the applicability of the Supreme Court in the case of ***Management Committee of Montfort Senior Secondary School vs. Sh. Vijay Kumar and Ors.*** (supra), learned counsel for the petitioner has urged the following two arguments:

(i) Respondent No.1 is estopped from questioning his first appointment as contractual, thereafter appointment on probation and his termination during the probation period and thereafter again a fresh contractual appointment and finally his termination as per the last contract dated 8.4.2010. It is argued that respondent No.1 having acted upon the aforesaid sequence of events comprised in different appointments cannot now contend that the ratio of the judgment in ***Management Committee of Montfort Senior Secondary School vs. Sh. Vijay Kumar and Ors.*** (supra) should come to his aid.

(ii) It is argued that the judgment in ***Management Committee of Montfort Senior Secondary School vs. Sh. Vijay Kumar and Ors.*** (supra) was intended only to apply to minority schools and ratio of the said judgment cannot be read to apply to non-minority schools.

7. So far as the second arguments urged on behalf of the petitioner-school to distinguish the applicability of the ratio in the case of ***Management Committee of Montfort Senior Secondary School vs. Sh. Vijay Kumar and Ors.*** (supra), I have already dealt with this aspect above by holding, and the same is reiterated herein, that, if for minority schools, there cannot be contractual

appointments, and which in fact was so envisaged under the relevant provisions of the Delhi School Education Act and Rules, 1973, then, surely and indubitably, so far as non-minority schools are concerned, and who do not have provisions even in terms of Delhi School Education Act and Rules, 1973 for making contractual appointments, the ratio of ***Management Committee of Montfort Senior Secondary School vs. Sh. Vijay Kumar and Ors. (supra)*** would squarely apply and the employees of the non-minority schools will be treated not as contractual employees of the schools but statutory employees having statutory protection in terms of the relevant provisions of the Delhi School Education Act and Rules, 1973.

8. So far as the first argument of estoppel is concerned, that argument is attractive only at the first blush, however, this argument overlooks the elementary principle that there is no estoppel against law. Of course, there may be estoppel against law where the provisions of law are only for private individual interest and not meant to be in public interest, however, considering that statutory protection is given to the employees of a school and which results in stability to the education system, the same therefore cannot be held to be as not in public interest, more so after amending of the Constitution by introduction of Article 21A by which right to education has been made as a fundamental right for children from the ages of 6 to 14 years. Also one cannot ignore the fact that right to education otherwise also is an important part of Directive Principles of State Policy vide Article 41 and Article 45 of the Constitution, and thus subject of education itself has been treated by the Supreme Court as a public function and consequently, writ petitions lie against even private educational institutions. Reference need in this regard be only made to the Constitution Bench judgment of the Supreme Court in the case of ***Unni Krishnan J.P. & Ors. etc. etc. Vs. State of A.P. & Ors. etc. etc. 1993(1) SCC 645*** and which clearly holds that the subject of education is a public function, and hence writ petitions are maintainable even against private educational institutions.” (emphasis is mine)

5. The judgment delivered by this Court in the case of ***Army Public School (supra)*** was followed in other cases of Army Public School and a Division Bench of this Court as per its Judgment dated 29.10.2015 in bunch of LPAs with lead LPA being 223/2015 titled as ***Army Welfare Education Society & Anr. Vs. Manju Nautiyal & Anr.*** has affirmed the principles of law contained in the judgments in the cases of Army Public

School holding that the schools in Delhi have to follow the provisions of the Act and employees cannot be oppressed by continuing their employment for contractual periods. The relevant paras of the judgment of the Division Bench of this Court in the case of *Army Welfare Education Society & Anr. Vs. Manju Nautiyal & Anr. (supra)* are paras 14 and 16, and which observes that short term tenure appointment cannot be used as a tool of oppression. These paras 14 and 16 read as under:-

“14. The argument of the appellants can only be accepted to the extent that they have a right to prescribe the mode and manner of selection of their employees and to constitute Selection Committees, but the Managing Committee would be obliged to follow the Delhi School Education Rules, 1973. Sub-Rule 6 of Rule 96 of the Delhi School Education Rules, 1973 protects the independence of the private schools by prescribing that the Selection Committees shall regulate their own procedures while effecting selections. But that does not mean that the Managing Committee of the two schools established by the first appellant can violate such Rules which are intended to enhance the quality of education in schools. The Delhi School Education Act, 1973 protects not only the tenure of appointment by making it co-terminus with the attainment of the age of superannuation of employees of recognized private schools with reference to the post held by them and equivalence being with employees of government schools. The Act and the Rules recognize the right of the private schools to select suitable candidates, but confer rights upon the candidates : if probation is successfully cleared, to be made permanent. The security of tenure of employees in schools serves the purpose of enhancing the quality of education because the permanent employee has to achieve benchmarks to earn further promotion. It also acts as a bulwark against harassment of the employee at the hands of the Managing Committees of schools. Rule 105 of the Delhi School Education Rules, 1973 clearly envisages regular appointments, albeit on a probation for an initial period to be resorted to and as per sub-Rule 3 temporary or short term vacancies can be filled up, but limited to the duration of the limited period by resorting to tenure appointments. The exception to the Rule i.e. of a tenure appointment is clearly linked to the vacancy being for a short term and cannot be used as a tool of oppression. Regretfully we note that large number of cases are being filed in this Court where teachers are being exploited. In spite of vacant posts being available contract appointment is being resorted to and this results in deterioration in the quality of education being imparted in Delhi.

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16. To put the law in its correct perspective we hold that recognized private schools in Delhi cannot resort to temporary, tenure or contractual appointments save and except where a vacancy is available for a limited duration. To give some examples. A teacher has proceeded on child care leave for a period of one year. The lien being retained to the post, a short term vacancy for one year ensues and can be filled up for said period. A teacher, on being unwell, applies for and is sanctioned medical leave for three months. The lien being retained to the post, a short term vacancy for three months ensues and can be filled up for said period. A teacher may suddenly resign. The process to fill up the vacancy is likely to consume say 6 months. Teaching would suffer if no teacher is available immediately. It would be a situation of a short term vacancy pending regular selection and it would be permissible to recruit a teacher without following the process of selection and limiting the tenure till when a regular teacher is appointed. But where a vacancy exists it would be a fraud on the statute to resort to short term tenure appointment and that too endlessly.”

(underlining added)

6. The facts of the present case show that the respondent no.1 was appointed for the first time by the petitioners/school vide Letter of Appointment dated 27.12.2005 for a period from 10.1.2006 to 31.3.2006. Thereafter, over a dozen letters were issued for different periods continuing the ‘temporary appointment’ of the respondent no.1 as a Physical Fitness Instructor with the last Letter of Appointment being dated 18.11.2014 for the period from 30.9.2014 till 27.12.2014. Respondent no.1 thereafter was terminated from his services with the petitioners vide Letter dated 27.3.2015 leading the present litigation.

7(i) I put a specific query to counsel for the petitioners-school as to whether the post in question is a cadre post as per the recruitment rules applicable to schools in Delhi issued by the Directorate of Education under

the Act and to which counsel for the petitioners admits that really the post is an ex-cadre post because the appointment of the respondent no.1 was as Physical Fitness Instructor for a Gym which was opened by the petitioners-school. In other words what is found is that the respondent no.1 was not appointed to the regular cadre post of a Physical Fitness Instructor in the school and it cannot be that the respondent no.1 has to therefore possess the qualifications required of a Physical Fitness Instructor. No qualifications were prescribed for the post to which respondent no.1 was appointed which by nomenclature was called a post of 'Physical Fitness Instructor' but really the same was not the post of Physical Fitness Instructor under the recruitment rules of such post issued by the Directorate of Education. Respondent no.1 therefore being not a 'Physical Fitness Instructor' is paid a consolidated salary of an ex-cadre post.

(ii) I then put another direct query to counsel for the petitioners as to what was the stand of the petitioners in their counter-affidavit before the DST as to how the post in question was a cadre post with the specific qualifications required for that post, and which qualifications of a cadre post the respondent no.1 did not meet and hence he cannot be regularized as argued by the petitioners, and to reply to which query counsel for the petitioners has gone through the counter-affidavit filed before the DST, and

then he states that in the counter-affidavit of the petitioners herein before the DST it is not stated by the present petitioners as to what were the qualifications for appointment required for the post of Physical Fitness Instructor and thus how the respondent no.1 fails to meet the qualifications for such post and hence cannot be regularized as he is not appropriately qualified. Obviously, this is so because the post in question is an ex-cadre post of the petitioners-school which is an unaided school. Therefore, the ratios of the judgments of this Court in the cases of ***Hamdard Public School (supra)*** and ***Army Public School (supra)*** categorically and directly apply to the facts of the present case because the spirit of the ratios of the judgments in the cases of ***Hamdard Public School (supra)*** and ***Army Public School (supra)*** was that unaided schools in Delhi cannot perpetuate fraud on the provisions of the Act which allow only probationary employment or temporary employment for certain maximum period and whereafter an employee must necessarily be regularized for a permanent post. Also, the object of the provisions of the Act is not to keep an employee “hanging” so to say that he is neither in permanent employment nor in probationary employment for a certain maximum period, but that an employee should be denied all regular benefits payable to a permanent employee simply by time and again renewing a contractual employment of an employee. The observations made in this judgment are as regards schools which are

unaided schools in Delhi i.e those schools which do not get monetary aid from the Government of NCT of Delhi/Director of Education.

8(i) Learned counsel for the petitioners sought to place reliance upon a judgment of this Court passed in two connected cases with lead case being ***Abhinav Chaudhary & Ors. Vs. Delhi Technological University and Anr.*** in W.P.(C) No.3512/2014 decided on 20.1.2015, however, I fail to understand as to how this judgment in the case of ***Abhinav Chaudhary & Ors. (supra)*** can at all apply to the facts of the present case because the judgment in the case of ***Abhinav Chaudhary & Ors. (supra)*** is not under the Act and was a judgment pertaining to employment under the Govt. of NCT of Delhi.

(ii) Learned counsel for the petitioners also sought to place reliance upon a judgment of a learned Single Judge of this Court in the case of ***Smt. Veena Gupta W/o Shri Lalit Gupta Vs. Director of Education, Lt. Governor through Chief Secretary, Delhi Administration and Managing Committee through Manager, Lady Irwin Senior Sec. School 147(2008) DLT 626*** to argue that a person who is appointed on *ad hoc* basis cannot be regularized in the post. However, I note that the decisions which have been passed by this Court in the cases of ***Hamdard Public School (supra)*** and ***Army Public School (supra)*** squarely deal with the issue as to for what

period can the probation of a probationary employee continue or till what extent a contractual appointment can continue indeterminably, and this Court pronouncing on such an issue therefore held in the cases of ***Hamdard Public School (supra)*** and ***Army Public School (supra)*** that continuing of contractual employment indeterminably is a fraud upon the provisions of the Act which requires employees not to be left in lurch and schools not to give appropriate monetary benefits to their employees. The judgment in the case of ***Smt. Veena Gupta W/o Shri Lalit Gupta (supra)*** therefore does not apply to the facts of the present case more so after the ratios of the judgments of this Court in the cases of ***Hamdard Public School (supra)*** and ***Army Public School (supra)***, and which ratios squarely apply to the facts of the present case.

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

NOVEMBER 08, 2016
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VALMIKI J. MEHTA, J