

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

+ **W.P.(C) No. 10398/2004 & W.P.(C) No. 10400/2004**

% **17th January, 2017**

W.P.(C) No. 10398/2004

SHRI SHIV SHARMA

..... Petitioner

Through: Mr. Aditya Vikram, Advocate

versus

GOVT. OF N.C.T. OF DELHI & ANR

..... Respondents

Through: Mr. Naushad Ahmed Khan, ASC,
Advocate for respondent no.1 (DOE).

Ms. Bhanita Patowary, Advocate for
respondent no. 2.

W.P.(C) No. 10400/2004

SHRI MUKESH KUMAR SHARMA

..... Petitioner

Through: Mr. Abhijeet Rastogi, Mr.
Vishesh Issar, Advocates.

versus

GOVT. OF N.C.T. OF DELHI & ANR

..... Respondents

Through: Mr. Naushad Ahmed Khan, ASC with
Ms. Hancy Wadhwa, Advocate for
respondent Nos.1 and 2.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

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

VALMIKI J. MEHTA, J (ORAL)

W.P.(C) No. 10398/2004

1. This writ petition is filed under Article 226 of the Constitution

of India by the petitioner/Sh. Shiv Sharma seeking relief of being regularized to the post of Physical Education Teacher (PET), in the respondent no.2/Air Force Senior Secondary School. The case of the petitioner is that he was appointed in August, 1993 with the respondent no. 2/school as a Physical Education Teacher (PET) on *ad hoc* basis and the petitioner was paid a consolidated amount by the respondent no. 2/school. In July, 1995 the petitioner was put in the pay scale of Rs. 850/- and which pay scale kept on increasing from time to time. Petitioner claims benefit of the ratios of the judgments delivered by this Court in the cases of ***Hamdard Public School Vs. Directorate of Education and Anr. 202 (2013) DLT 111*** and ***Army Public School and Anr. Vs. Narendra Singh Nain and Anr.*** in W.P.(C) No.1439/2013 decided on 30.8.2013 and ratios of which judgments holds that schools cannot commit fraud on statutory protection given to a post in a school in Delhi and which appointment has statutory favour in terms of the judgment of the Supreme Court in the case of ***Management Committee of Montfort Senior Secondary School Vs. Vijay Kumar and Others, (2005) 7 SCC 472.*** Accordingly, it is argued that since in terms of ratios of the judgments of this Court in the cases of ***Hamdard Public School (supra)*** and ***Army Public School (supra)*** when the petitioner completed

three years of service after his first joining with the respondent no. 2/school, petitioner should be then regularized in the post of PET.

2. The relevant observations of this Court are given in paras 3 to 8 in the case of *Army Public School (supra)*, and these paras 3 to 8 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. Sidhajibai 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)

3. 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 Delhi School Education Act, 1973 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 (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)

4. On behalf of the respondent no. 1/Directorate of Education it is argued that the appointment of the petitioner to the respondent no. 2/school which is an aided school is illegal because appointment of the petitioner was done without obtaining the approval of the Directorate of Education, i.e the respondent no. 1/Directorate of Education seeks dismissal of the writ petition on account of the non-compliance of the Rule 96(3)(b)(iv) of the Delhi School Education Rules which provides for nominees on the selection committee appointing persons as employees to an aided school. Respondent no. 1/Directorate of Education argues that since respondent no. 2/school is an aided school i.e aid to the extent of 95% is given by the respondent no. 1/Directorate of Education to the respondent no. 2/school, any appointment made by the respondent no. 2/school of the petitioner cannot entitle petitioner to get confirmed/regularized on account of violation of the aforesaid applicable Rule. I may note that respondent no. 1/Directorate of Education however does not dispute that there was a sanctioned post of PET in the respondent no. 2/school when the petitioner was appointed, there was

vacancy in the post and that petitioner otherwise satisfies the criteria for being appointed as a PET in the respondent no. 2/school.

5. On behalf of the respondent no. 2/school, the writ petition is sought to be got dismissed by relying upon the Air Force Education Code which is attached to the counter affidavit of the respondent no. 2/school and it is claimed that respondent no. 2/school is governed for appointments by this Air Force Education Code as per which since petitioner is only an *ad hoc* employee and hence the petitioner cannot be regularized to the post of PET with the respondent no. 2/school.

6. At this stage it would be relevant to refer to Rule 98 of the Delhi School Education Rules inasmuch as Proviso to Rule 98(2) talks of *ex-post facto* approval in case of violation of Rule 96(3)(b)(iv) of the Delhi School Education Rules. Rule 98 of the Delhi School Education Rules reads as under:-

“98. Appointing authority (1) The appointment of every employee of a school shall be made by its managing committee.

(2) Every appointment made by the managing committee of an aided school shall, initially, be provisional and shall require the approval of the Director:

Provided that the approval of the Director will be required only where Director's nominee was not present in the Selection Committee/DPC or in case there is difference of opinion among the members of the Selection Committee:

Provided further that the provision of this sub-rule shall not apply to a minority aided school.

(3) The particulars of every appointment made by the managing committee of an aided school shall be communicated by such committee to the Director (either by registered post acknowledgment due or by messenger who will obtain an acknowledgment of the receipt thereof), within seven days from the date on which the appointment is made.

(4) The Director shall be deemed to have approved an appointment made by the managing committee of an aided school if within fifteen days from the date on which the particulars of the appointment are communicated to him under sub-rule (3), he does not intimate to the managing committee his disapproval of the appointment, and the person so appointed shall be entitled for his salary and allowance from the date of his appointment.

(5) Where any appointment made by the managing committee of an aided school is not approved by the Director, such appointment may (pending the regular appointment to the post) be continued on an *ad hoc* basis for a period not exceeding three months and the salary and allowances of the person so continued on an *ad hoc* basis shall qualify for the computation of the aid to be given to such school.”

7. A reading of the Proviso of Rule 98(2) shows that when the Director's nominee is not present in the Selection Committee then appointment made by the Managing Committee will be provisional and subject to approval i.e requiring approval of the Directorate of Education. Therefore, it is not as if the confirmation of the petitioner in the services with the respondent no. 2/school as PET will be void *ab initio* inasmuch as there is a provision of *ex-post facto* approval as per Rule 98(2) proviso.

8. In my opinion, therefore, though the ratios of the judgments of this Court in the cases of ***Hamdard Public School (supra)*** and ***Army Public School (supra)*** will squarely apply for regularization of the petitioner from a period of three years after the petitioner was appointed to the respondent

no. 2/school, inasmuch as there is no dispute that there is a sanctioned post of PET, there was a vacancy in such sanctioned post and that the petitioner was in fact appointed by the Managing Committee of the respondent no. 2/school, however, the confirmation of the petitioner to the service as a PET of the respondent no. 2/school after three years of his appointment is subject to the orders of the approval which the respondent no.1/Directorate of Education will give in terms of Rule 98(2) proviso of the Delhi School Education Rules. Respondent no.1/Directorate of Education will therefore now act in accordance with Rule 98(2) proviso and pass an appropriate order with respect to confirmation of the petitioner as a PET with the respondent no. 2/school, and with effect from which date, keeping in view the ratios of the judgments of this Court in the cases of *Hamdard Public School (supra)* and *Army Public School (supra)*.

9. The argument urged on behalf of the respondent no. 2/school that the respondent no. 2/school acted in accordance with the Air Force Education Code is an argument of no substance inasmuch as admittedly the respondent no. 2/school is functioning under the Delhi School Education Act and Rules, 1973, and once that is so, the Delhi School Education Act and Rules will prevail over the so called Air Force Education Code which is relied upon by the respondent no. 2/school.

10. In view of the above, this writ petition is allowed and disposed of by holding that petitioner should be confirmed to the post of PET with the respondent no. 2/school in terms of the ratios of the judgments of this Court in the cases of ***Hamdard Public School (supra)*** and ***Army Public School (supra)***, but that would be on the Directorate of Education giving *ex-post facto* approval to the appointment of the petitioner in terms of the ratios of the judgments in the cases of ***Hamdard Public School (supra)*** and ***Army Public School (supra)***. Let the respondent no.1/Directorate of Education accordingly pass an appropriate speaking order with regard to confirmation of the petitioner in the respondent no. 2/school in terms of the present judgment after hearing the petitioner as also the respondent no. 2/school herein and such process be completed by the Directorate of Education or its nominee within a period of three months from today. Petitioner in accordance with the order of the respondent no.1/Directorate of Education will be entitled to all consequential monetary benefits pursuant to the petitioner being confirmed subject to the *ex-post facto* approval from the respondent no. 1/Directorate of Education. The Directorate of Education will also be entitled to examine the eligibility of the petitioner for being appointed as a PET in a school in Delhi being the respondent no. 2/school and it is only if the petitioner satisfies the eligibility criteria for being

appointed as a PET in the respondent no. 2/school, and with effect from which date, that the Directorate of Education will pass an appropriate order with respect to confirmation of the petitioner as a PET in the respondent no. 2/school and the date of such confirmation/regularization.

11. Writ petition is accordingly allowed to the extent as stated above, leaving the parties to bear their own costs.

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12. In this case, petitioner was appointed as Trained Graduate Teacher (Maths) with respondent no. 2/school on 20.8.1998. This writ petition will also stand disposed of in terms of the discussion, reasoning and operative portion given while disposing of W.P.(C) No. 10398/2004, leaving the parties to bear their own costs.

JANUARY 17, 2017
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VALMIKI J. MEHTA, J