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

Date of decision: 19th November, 2018

+ W.P.(C) 12377/2018

SALWAN PUBLIC SCHOOL Petitioner

Through : Mr. Vinay Sabharwal, Advocate.

versus

DIRECTOR OF EDUCATION AND ANR..... Respondents

Through : Mr. N.K. Singh, Advocate for R1 for
Ms.Avnish Ahlawat, Standing
Counsel for GNCTD (Services).
Mr. Nikhil Ranjan, Advocate for R2.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT
JUDGMENT (ORAL)

1. Vide the present writ petition, the petitioner has challenged the order dated 05.10.2018 passed by the Delhi School Tribunal in Appeal No. 76/2016 tilted ***Surendra Kumar Jha v. Salwan Public School & Others***, whereby, while allowing the appeal, the respondent Nos. 1 to 3 (therein) were directed to reinstate the respondent No. 2 (herein) within a period of four weeks. The respondent No. 2 shall be entitled for all the consequential benefits. He shall also be entitled for full back wages from the date of the order onwards. With respect to back wages, in view of Rule 21 of Delhi School Education Act and Rules, 1973, the respondent No. 2 herein was directed to make exhaustive representation to the respondents No. 1 to 3

therein within a period of four weeks from the date of the order, as to how and in what manner, the respondent No. 2 would be entitled to complete wages. The respondents No. 1 to 3 therein were directed to decide the representation given by the respondent No. 2 herein within four weeks of receiving the same by way of a speaking order and to communicate the order along with a copy of the same to the respondent No. 2 herein.

2. Learned counsel appearing on behalf of the petitioner submits that the petitioner-school had advertised for the post of Lab Assistant in terms of advertisement dated 13.06.2012. In pursuance to the said advertisement, the respondent No. 2/Mr.Surendra Kumar Jha had applied on 20.06.2012. The said respondent was interviewed on 14.07.2012. During the course of his interview, all the documents of respondents No. 2 were scrutinized by the petitioner-school and after due scrutinization of the documents, he was appointed as Lab Assistant on fixed tenure and contractual basis from time to time, till such time a suitable candidate was found for regular employment.

3. Learned counsel further submits that the admitted case of the respondent No. 2 is that he remained on the rolls of petitioner as under:-

Sl. No.	Office Order Dated	Period of Appointment
1.	July 23, 2012	20.07.2012 to 31.03.2013
2.	April 2, 2013	01.04.2013 to 15.05.2013
3.	July 9, 2013	01.07.2013 to 21.07.2013
4.	September 3, 2013	01.08.2013 to 31.10.2013
5.	December 5, 2013	06.11.2013 to 31.03.2014

6.	April 2, 2014	01.04.2014 to 17.05.2014
7.	July 14, 2014	01.07.2014 to 31.03.2015
8.	April 4, 2015	01.04.2015 to 31.03.2016
9.	April 6, 2016	01.04.2016 to 21.05.2016
10.	June 29, 2016	01.06.2016 to 31.07.2016

4. Learned counsel submits that the respondent No. 2 was appointed on contract basis and for the time being on a different spell of time by different orders issued by the petitioner. Therefore, the respondent No. 2 cannot ask for regularization since he was on the contract basis and the said contract has been expired by efflux of time. He submits that if an employee is appointed on contract basis, then he cannot claim regularization at par with other employees, who were appointed against the vacant post likely to be regularized.

5. Learned counsel for the petitioner has relied upon a case of *Army Welfare Education Society & Anr. V. Manju Nautiyal & Anr. 2015 (153) DRJ 202 (DB)* and case of *Anil Lamba and others v. Govt. Of NCT & Ors.* decided in *W.P.(C) 1958/2017* vide order dated 06.03.2017.

6. Thus, the learned counsel for the petitioner submits that the order dated 05.10.2018 passed by the Tribunal is illegal and perverse and therefore, deserves to be set aside by allowing the writ petition.

7. The case of the respondent No. 2 before the Tribunal was that he was appointed as a Lab Assistant (Chemistry) on contractual basis for a limited

period vide letter dated 23.07.2012 as per the advertisement dated 13.06.2012. His contract was extended from time to time till 31.07.2016. It was argued before the Tribunal that the respondent No. 2 be treated as a regular/permanent employee after completion of three years from the date of his appointment in view of several judgments passed by this court and 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 Act and Rules, 1973, the service of an employee can only be terminated on account of misconduct and that too after following the requirement of holding a detailed inquiry. It was further argued that his termination order was illegal because before terminating him, prior approval from the Directorate of Education was not taken.

8. On the other hand, learned counsel for the petitioner argued that the Tribunal did not have the jurisdiction to decide the appeal filed by respondent No. 2 who could not claim automatic regularization of his service. He was appointed for a fixed tenure on contract basis. His contract was extended till the the qualified person is found. Respondent No. 2 was overage at the time of his appointment which was beyond the maximum age limit as provided by Directorate of Education under Rule 13 of Delhi School Education Act and Rules, 1973.

9. Learned counsel for the petitioner submits that a post of Lab Assistant (Chemistry) fell vacant upon superannuation of Mr.Gulshan, Lab Assistant in February, 2011. The post was advertised on 13.06.2012 in the newspaper. Two applications were received. The meeting of the Selection Committee

was held on 14.07.2012, the respondent No. 2 was the only candidate, who appeared for the interview. The Selection Committee members suggested that as per the Recruitment Rules, the age limit for direct recruitment for the post of Lab Assistant was 18-25 years but the age of respondent No. 2, at the time of interview and before joining was 34 years and as such, it was recommended that the respondent No. 2 should not be appointed on contract to fill the vacancy on temporary basis.

10. It was further argued that the question of approval i.e. Section 8(2) of the Delhi School Education Act and Rules, 1973 read with Rule 105 is not applicable in the case in hand, as the appointment of respondent No. 2 was on contract basis on consolidated salary. Once again on 29.06.2016, the post was advertised in naukri.com. A meeting of the Selection Committee for recommending the appointment to this post was held on 16.07.2016. Since, the suitable candidate was found and appointed, no fresh contractual appointment was given to the respondent No. 2 and his last tenure of appointment expired on the close of 31.07.2016.

11. I note that it was observed in the impugned order by the Tribunal that the respondent No. 2 was appointed on contract basis by the school for different periods, however, whether to renew the contract or not was the sole discretion of the school management and the Director of Education had no role in it. However, the Tribunal found the argument of the petitioner baseless that the term of contract of respondent No. 2 had expired by efflux of time because as per letter dated 29.06.2016, the contract of respondent No. 2 was allegedly expired on 31.07.2016. The Tribunal opined that the

petitioner-school appointed the respondent No. 2 knowing fully well about his age in the year 2012. His contract was extended from time to time by the Managing Committee. Since then, the respondent No. 2 had worked in the petitioner school uninterruptedly till the year 2016. In these circumstances, it was clear that the respondent No. 2 had been appointed by the Managing Committee knowing about his age, qualification and experience and the School was estoppel from his own act and conduct from claiming that the respondent No. 2 was overage.

12. Provisions of Delhi School Education Act & Rules, 1973 are enacted to protect the interest of the employees of the schools. Giving repeated employments by calling the same, only contractual/fixed term appointment/purely temporary, cannot be treated as contractual/fixed term appointments as the same will violate the provisions of Delhi School Education Act & Rules, 1973. Artificial gaps created in the service of the respondent No. 2 by appointing him again and again since long under the garb of fixed terms employment, is a sham and artificial action to deprive the respondent No. 2 of his regular employment and violative of the statutory mandate.

13. It was vehemently argued by the learned counsel for respondent No. 2 that his case fell within the ratio of the landmark judgments of the High Court passed on the issue of removing of a long serving contractual employee and not making the employee's service permanent/regular. It was no longer *res integra* in view of the judgments delivered by the High Court in the case of ***Hamdard Public School v. Directorate of Education and***

Anr. 202 (2013) DLT 111 and three connected cases with the lead case of *Army Public School and Anr. v. Narendra Nain and Anr. in W.P.(C) 1439/2013* decided on 30.08.2013, and it was observed therein:

“I have already stated that once the ratio of the judgment in the case of Hamdard Public School Vs. Directorate of Education and Anr. (supra) applies, then, Courts have to very carefully examine the termination of the services order when an employee continues in the employment of a school around a period of three years. To determine the period of three years, it is not the form of appointment letters which matter, but what matter is the substance thereof. Unless the substance and not form is taken, the intent and purpose of Rule 105 as required by the legislature would stand frustrated. It was not the object of Rule 105 that an employee gets appointment under different heads either of contractual employment or probationary employment or part-time employment at the convenience of the school which can then take up a defence that the employee is not in effect in continuous employment of the school although in reality the employment is continuous but merely in different forms simply to suit the convenience of the school. I have, therefore, no hesitation in holding that I have to take the employment of the respondent no.1 as continuous either from 28.11.2007, or at least from 1.4.2008, and when so taken, it is quite clear that different designations of employment have been used to deny permanency of employment to the respondent no.1, so that, at the whims and fancies of the school services can be terminated and an employee of a school who is rightly entitled to the mandatory emoluments and protection of services in terms of Delhi School Education Act and Rules, 1973 is denied such benefits. I cannot give

imprimatur of the Court to such sham actions of a school which are intended to frustrate the intention of the legislature and give uncertainty in employment to the employees of a school. Let me at this stage reproduce the relevant para of the judgment delivered by me in the case of Hamdard Public School Vs. Directorate of Education and Anr. (supra) and this para 11 reads as under:

"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."

14. The judgment discussed above has been upheld by this court in ***W.P.(C) 9187/2015 titled as Sardar Patel Public Senior Secondary School v. Chandra Rani & Ors. And LPA 710/2016 titled as Delhi Public School & anr. v. Manoj Bhandari & Anr.***

15. It is argued on behalf of the petitioner that the respondent No. 2 was appointed against a temporary post on contractual basis, hence he could not be regularized. But, the settled law is that the temporary vacancy meant for a short period which could be against any temporary work or due to leave of some employee for a fixed period. The very fact that the school continued the employment of respondent No. 2 for about 4 years showed that his appointment was against the post of a permanent nature.

16. Once the services are statutory in nature and the respondent No. 2 had not been removed by following the provisions of conducting an inquiry and passing an order by the Disciplinary Authority as required under Rule 118-120 of Delhi School Education Act & Rules, 1973, the service of respondent No. 2 has not been legally terminated. The order of Supreme Court dated 13.04.2016 passed in ***Civil Appeal No. 1020/2011 titled Raj Kumar v. Director of Education & Ors.***, is relevant wherein, it was observed as under:

"The Division Bench of the Delhi High Court, thus, erred in striking down Section 8(2) of the DSE Act in

the case of Kathuria Public School (supra) by placing reliance on the decision of this Court in the case of TMA Pai (supra), as the subject matter in controversy therein was not the security of tenure of the employees of a school, rather, the question was the right of educational institutions to function unfettered. While the functioning of both aided and unaided educational institutions must be free from unnecessary governmental interference, the same needs to be reconciled with the conditions of employment of the employees of these institutions and provision of adequate precautions to safeguard their interests. Section 8(2) of the DSE Act is one such precautionary safeguard which needs to be followed to ensure that employees of educational institutions do not suffer unfair treatment at the hands of the management. The Division Bench of the Delhi High Court, while striking down Section 8(2) of the DSE Act in the case of Kathuria Public School (supra) has not correctly applied the law laid down in the case of Katra Educational Society (supra), wherein a Constitution Bench of this Court, with reference to provision similar to Section 8(2) of the DSE Act and keeping in view the object of regulation of an aided or unaided recognised school, has held that the regulation of the service conditions of the employees

of private recognized schools is required to be controlled by educational authorities and the state legislature is empowered to legislate such provision in the DSE Act. The Division Bench wrongly relied upon that part of the judgment in the case of Katra Education Society (supra) which dealt with Article 14 of the Constitution and aided and unaided educational institutions, which had no bearing on the fact situation therein. Further, the reliance placed upon the decision of this Court in the case of Frank Anthony Public School Employees Association v. Union Of India & Ors.[11] is also misplaced as the institution under consideration in that case was a religious minority institution. The reliance placed by the learned counsel appearing on behalf of the respondents on the case of TMA Pai (supra) is also misplaced as the same has no bearing on the facts of the instant case, for the reasons discussed supra. The reliance placed upon the decision of the Delhi High Court in the case of Kathuria Public School (supra) is also misplaced as the same has been passed without appreciating the true purport of the Constitution Bench decision in the case of Katra Education Society (supra). Therefore, the decision in the case of Kathuria Public School (supra), striking down Section 8(2) of the DSE Act, is bad in law.

17. Section 8 (2) of Delhi School Education Act & Rules, 1973 reads as under:

“Section 8(2)-Subject to any rule that may be made in this behalf, no employee of a recognized private school shall be dismissed, removed or reduced in rank nor shall his service be otherwise terminated except with the prior approval of the Director.”

18. Respondent No. 2 was appointed in the year 2012 and continued till 2016. The petitioner-school was well aware on the date of appointment about the age, qualification and another eligibility. It is not the case of the petitioner that respondent No. 2 was appointed for a period of two months, three months and six months on temporary arrangements. He continued for about four years, however, by giving artificial breaks to respondent No. 2, against the settled law, as discussed above, it cannot be accepted that he was not continued in a post which was not available with the petitioner-school.

19. In view of the above discussion and settled law, I find no illegality or perversity in the order passed by the Tribunal on 05.10.2018.

20. Finding no merit in the present writ petition, the same is accordingly dismissed, with no order as to costs.

SURESH KUMAR KAIT, J

NOVEMBER 19, 2018

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