BEFORE SHRI DILBAG SINGH PUNIA, PRESIDING OFFICER
DELHI SCHOOL TRIBUNAL
LUCKNOW ROAD, TIMAR PUR, DELHI-110054

Date of Institution: 04.08.2021
Date of Disposal : 10.01.2022

APPEAL NO. 37/2021

IN THE MATTER OF:

Mrs. Santosh
(Aged about 57 years),
W/o Sh. Sat Pal
R/o A-1/213, Sultan Puri,
Delhi-110086,

... Appellant

(Through: **Mr. Anuj Aggarwal, Advocate)**

VERSUS

1. **Modern Child Public Sr. Sec. School (Regd.)**
Through its Manager
Punjabi Basti, Nangloi,
Delhi-110041

(Through: **Mrs. Anjali Gupta, Advocate)**

2. **Director of Education,**
Directorate of Education,
Government of NCT of Delhi,
Old Secretariat, Civil Lines
Delhi-110054

... Respondents

(Through: **Mr. Dhiraj Madan , Advocate)**

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JUDGEMENT

Appellant has challenged the order dated 02.7.2021 vide which she was terminated. Facts as per contents of appeal are that appellant was appointed in 1990; is a confirmed/permanent employee of Modern Child Public Sr. Sec. School, Nangloi(Schooi, in short) and has unblemished/interrupted record of service

2. It is stated that on 16.3.2021 appellant applied for 30 days leave which was sanctioned by the then Principal Smt. Sudesh. That on 16.4.2021, appellant reported for duty after availing of leave, but she was not allowed to join. That thereafter she was going regularly but was not permitted to mark her attendance.

3. It is stated that on 02.7.2021 appellant was allowed to resume her duty but on the very same day in the evening she was verbally terminated by way of refusal for duty.

4. It is stated that a representation was made by the appellant on 27.7.2021 to the school and DOE, reply of which has not been received. That further a legal notice/e-mail was sent on 2.8.2021 by her to school authorities, but of no avail.

5. In the grounds of appeal, it is submitted that prior approval of DOE as per section 8(2) has not been taken. Reliance on ***Delhi Transport Corporation(DTC) Vs. Raj Pal***, decided on 5.2.2016 bearing LPA No. 75/2016 reported in MANU/DE/0971/2016 has been placed to assert that refusal to duty amounts to termination of services and order of refusal is in violation of rule 118, 120 and 123 of Delhi School Education Act & Rules, 1973 (DSEAR, in short).

6. It is asserted that prior to refusal of duty no Disciplinary Authority was constituted, no inquiry was conducted, no show cause notice was given, no chargesheet was given and provisions of DSEAR ,Industrial Disputes Act, 1947 and constitution were not followed.

7. Section 25(F) of Industrial Disputes Act, 1947(I.D. Act, in short) has been relied to assert that non giving of notice/ non offering of retrenchment compensation is illegal which makes the termination void. Reliance is placed on ***Anoop Sharma v/s. Exec. Engineer, Public Health Divn.,No.1, Panipat(Hry), 2010(5) SCC 497, MANU/SC/0281/2010, 2010(125) FLRT629,*** and ***Raj Kumar V/s. DOE {(2016) 6 SCC 541 }*** to manifest violation of section 25(F). Violation of Section 25(B) has also been asserted and it is stated that juniors to appellant have been retained and principle of *'last come, first go'* has not been followed. Violation of section 25(H) of ID Act has been asserted on the ground that respondent school has engaged fresh hands for performing the duties of appellant.

8. Section 25(B), 25(H) and 25(F) of I.D. Act, 1947 are reproduced as under :-

25B. Definition of continuous service.- For the purposes of this Chapter,-- (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer- (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than- (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and (ii) two hundred and forty days, in any other case; (b) for a period of six months, if the workman, during a period of six calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than- (i) ninety-five days, in the case of a workman employed below ground in a mine; and (ii) one hundred and twenty days, in any other case.

Explanation.- For the purpose of clause (2), the number of days on which a workman has actually worked under an employer shall include the days on which- (i) he has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946), or under this Act or under any other law applicable to the industrial establishment; (ii) he has been on leave with full wages, earned in the previous year; (iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and 1 Substituted by Act 48 of 1954. 2 Substituted by Act 36 of 1964.

*"25H. **Re-employment of retrenched workmen.-** Where any workmen are retrenched and the employer proposes to take into his employment any persons, he shall, in such manner as may be prescribed, give an opportunity 2[to the retrenched workmen who are citizens of India to offer themselves for reemployment, and such retrenched workmen] who offer themselves for reemployment shall have preference over other persons"*

*25F. **Conditions precedent to retrenchment of workmen.-** No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice: 1 (b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay 2[for every completed year of continuous service] or any part thereof in excess of six months; and (c) notice in the prescribed manner is served on the appropriate Government 3[or such authority as may be specified by the appropriate Government by notification in the Official Gazette.]*

9. It is stated that termination is also in violation of Rule 77 of Industrial Dispute (Central Rules, 1957) as no seniority list was displayed/shown by the school before termination. That act of the school comes under violation of schedule of ID Act as school has adopted the '*unfair labour practice*' of workman as temporary by depriving the benefits of a regular employee. Rule 77 of I.D. Act is reproduced as under:-

"77. **Maintenance of seniority list of workmen**:-The employer shall prepare a list of all workmen in the particular category from which

retrenchment is contemplated to be arranged according to the seniority of their service in that category and cause a copy thereof to be pasted on a notice board in a conspicuous place in the premises of the industrial establishment at least seven days before the actual date of retrenchment."

10. It is stated that appellant is unemployed since the date of her termination; and has not been in a position to secure any employment despite her best efforts and is entitled to reinstatement with full back wages.

11. Respondent school in its counter affidavit has taken the preliminary objections of appellant being an irregular employee who is habitual of taking 4-5 days leave(s) on an average, every month. That warnings of the school given to the appellant in this regard have made no impact. Attendance Register/attendance record has been relied as **Annexure R-1**, (which is for the period Dec., 2018 to June, 2021).

12. Assertions of the appeal have been controverted and it is stated that appellant was appointed as a 'non-teaching' staff on adhoc/temporary post of Sweeper on 01.1.1999 and not in 1990 as claimed by appellant. It is controverted that appellant had applied for 30 days leave on 16.3.2021 and therefore, no question of sanctioning of leave arose. It is asserted that appellant has not placed on record any such proof about sanctioning of leave; has reported for duty during 16.3.2021 to 16.4.2021; was on leave for 4 days as evidenced from attendance register (for the period March, 2021 to April, 2021) and had reported for duty on 22/3 to 24/3, 30/3, 10/4, 13/4, 17/4 and 19/4/2021. Attendance record has again been relied to show that appellant had frequently remained absent during 17.4.2021 to 02.7.2021 (lockdown was during 20.4.2021 to 31.5.2021).

13. It is asserted that act of the school of '*refusal of duty*' is justified and is not a violation of rule 123 and 124 of DSEAR.

14. In the reply to grounds, assertions detailed hereinbefore have been re-asserted. It is asserted that school is in process of obtaining approval from DOE, R2 for termination of services of appellant (internal page 5 and running page 64 of the paper book).

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15. It is stated that school due to absence of appellant, school was constrained to avail the services of another employee and had to issue a memo vide letter bearing No. MCPS/5095/88/2021 dated 03.8.2021. That school had sought explanation concerning unauthorised absence and Show Cause Notice has not been replied to. Show Cause Notice is annexed as **Annexure R-3,** which reads as under:-

"Ref No. MCPS/5095/88/2021 *Dated: 03.08.2021*

Mrs. Santosh
W/o Sh. Sat Pal, Juggi No-41, Block A-2,
'C' Block, Sultanpuri,
New Delhi-110041

Subject: Unauthorised wilfully absence from duties.

On the above subject you are here by informed that you are unauthorisedly absent from duties since April, 2021, regularly, without any intimation and without taking any permission for the leaves due to which the sweeping work of the school is badly hampered since from date of your absence. It is informed you that concerned staff informed you many times regarding your absence from duties and also requested to join your duty and perform your duties sincerely but no use.

I view of above; you are hereby show cause as to why disciplinary proceedings against you should not be initiated as per DSER, 1973. Your reply should reach to the school within 10 days from the date of receipt of this letter failing which it will be presumed that you have nothing to say in question of your prolong absence and necessary ex-parte proceedings.

Manager
Modern Child Public School
Punjabi Basti, Nangloi, Delhi-41"

16. Applicability of section 25(G) and 25(H) is denied on the ground that services of appellant were deficient and appellant has failed to specify which benefits of regular employment were denied to appellant. Rule 25(H) has already been reproduced and Rule 25(H) reads as under:-

*'25G. **Procedure for retrenchment.**- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman".*

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17. **DOE in its reply to the appeal has submitted** that school is bound to follow the provisions of DSEAR; no cause of action is there against DOE and dispute is only between the appellant and school.

18. It is asserted that no day to day interferences is permissible in the affairs of school.

19. It is stated in para 10, at running page No. 109 of paper book (internal page 5) that school has not obtained prior approval as required u/s 8(2) of DSEAR. That rule 118-120 have also not been complied with. Staff statements have been annexed for 2019-20, 2020-21 and 2021-22 vide **annexure R-I.** In parawise reply and reply of grounds of appeal assertions made hereinbefore have been reiterated.

20. **In the rejoinder** appellant has controverted those submissions of the school which are not in consonance of the contents of appeal. Contents of appeal have been reiterated. At page 175 of paper book (internal page 3), it is stated that school despite re-instating the appellant in service, is not allowing her to mark her attendance in the attendance register. That it is a clear-cut case of victimization and unfair labour practices.

21. Arguments were heard at the bar. Counsel for appellant, Sh Anuj Aggarwal, Counsel for school Ms. Anjali Gupta and Mr. Dhiraj Madan, counsel for DOE have been heard at length. They have argued in consonance with their respective pleadings.

22. I have carefully perused the records of the case and considered the submissions. I am not in agreement with Ms. Anjali Gupta, Advocate for the school. It is no more res-integra that obtainment of prior approval in case of dismissal/removal or termination otherwise is a sine qua non by virtue of Section 8(2) of DSEAR and mandate of Raj Kumar v/s. DOE, minority schools apart.

23. I am adverting to the legal exposition of section 2(h), 8(2) and rule 105 of DSEAR at the outset:-

24. In Laxman Public School Society (Regd.) and others V/s Ms. Richa Arora and another bearing W.P(C) 10886/2018 decided on 10/10/2018 Richa Arora was appellant before Delhi School Tribunal (DST).Ms. Richa

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Arora was appointed on probation period of one year which was further liable to be extended in terms of appointment letter dated 22/05/2015.

25. Ms. Richa Arora was terminated within first year of service vide letter dated 13/05/2016. An appeal was filed. Only one ground, out of many other grounds otherwise taken concerning prior approval, in appeal No. 46/2016 decided on 18/05/2018 by my Ld. Predecessor Sh.V.K Maheshwari, was pressed, i.e termination order dated 13/05/2016 was illegal as prior approval from DOE was not taken which was mandatory. **Per contra stand of the school** was that Ms. Richa Arora was appointed as computer teacher on probation for one year and was intimated vide letter dated 22/05/2015 about the terms & conditions of her appointment as TGT (Computer). That the said letter was duly received by the appellant and a copy of the said letter with her declaration of acceptance of terms & conditions mentioned in the letter duly signed by Ms. Richa Arora was returned to the school on 01/06/2015. Further stand of the school was that appellant was neither a diligent worker nor a proficient teacher. That she did not have good control over the class. That in review of her work time and again the aforementioned deficiencies were revealed. That she has been in the habit of physical reprimanding of the students and despite having been given ample opportunities, she did not improve. Ms. Richa Arora, before DST relied on ***Raj Kumar V/s Directorate of Education & Ors***. bearing Civil appeal No. 1020/2011 decided by Hon'ble Apex Court on 13/04/2016, reported in AIR 2016 SC 1855: (2016) 6 SCC 541.Proviso of 105 has also been relied heavily which reads as under:-

> *"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".*

26. Appeal was allowed by Sh. V.K. Maheshwari , my Ld. Predecessor and school went in appeal by way of W.P. (C) 10886/18. Appeal of school was dismissed on 10/10/2018 by Hon'ble Mr.Justice C. Hari Shankar vide a scholarly judgement.

27. Perusal of 'Laxman' supra reveals that in Para 7, Hon'ble High Court has relied upon Section 8(2) and rule 105 in the light of Raj Kumar V/s DOE. Para 9 to 15 onwards are relevant and are being reproduced for the sake of convenience and ready reference.

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9. "The petitioner has challenged the aforementioned order, dated 18th May, 2018 of the learned Tribunal principally on the ground that Raj Kumar (supra) dealt with the case of a regular employee, whereas the respondent was still on probation on the date when her services were terminated. The contention of the petitioner is, therefore, that the rigour of Section 8(2) of the Delhi School Education Act, 1973 and Rule 105 of the Delhi School Education Rules, 1973, would not apply when services of a probationer were terminated during the period of probation.

10. It is not possible to accept such a contention.

11. The following passage, from the judgment of the Supreme Court in Raj Kumar (supra), merits reproduction, in this regard: "45. We are unable to agree with the contention advanced by the learned counsel appearing on behalf of the respondent School. Section 8(2) of the DSE Act is a procedural safeguard in favor of an employee to ensure that an order of termination or dismissal is not passed without the prior approval of the Director of Education. This is to avoid arbitrary or unreasonable termination or dismissal of an employee of a recognized private school."

12. There is nothing, in the judgment of the Supreme Court in Raj Kumar (supra), which limits its applicability to the case of a regular employee, and does not extend the scope thereof to the termination of a probationer. Rather, Rule 105 of the Delhi School Education Rules, itself states that, "every employee shall, on initial appointment, be on probation for a period of one year." This itself indicates that, even during the period of probation, the employee continues to remain an employee. The second proviso to Rule 105 mandates that, except in the case of a minority school, no termination from service, of an employee on probation, shall be made by school, except with the previous approval of the Director of Education. There is no dispute about the fact that, prior to terminating the services of the petitioner, no approval of the Director of Education was taken.

13. One may also refer to the definition of "employee", as set out by the Supreme Court in the judgment Union Public Service Commission v. Dr. JamunaKurup, (2008) 11 SCC 10, of which para 14 is reproduced as under: "14. The term "employee" is not defined in the Delhi Municipal Corporation Act, 1957, nor is it defined in the advertisement of UPSC. The ordinary meaning of "employee" is any person employed on salary or wage by an employer. When there is a contract of employment, the person employed is the employee and the person employing is the employer. In the absence of any restrictive definition, the word "employee" would include permanent or temporary, regular or short term, contractual or ad hoc. Therefore, all persons employed by MCD, whether permanent or contractual will be "employees of MCD."

14. Clearly, therefore, the mandate of Section 8(2) of the Delhi School Education Act, 1973 and Rule 105 of the Delhi School Education Rules, 1973, especially the second proviso thereto, would apply, with equal force, to employees on probation, as it applies to other employees.

15. Resultantly, no exception can be found with the impugned order passed by the learned Tribunal."

28. Para 13, of Law Finder having document ID # 143275 which is para 14 of (2008) 11 SCC 10, is reproduced in full.

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"The term 'employee' is not defined in the Delhi Municipal Corporation Act, 1957. Nor is it defined in the advertisement of UPSC. The ordinary meaning of 'employee' is any person employed on salary or wage by an employer. When there is a contract of employment, the person employed is the employee and the person employing is the employer. In the absence of any restrictive definition, the word 'employee' would include both permanent or temporary, regular or short term, contractual or ad hoc. Therefore, all persons employed by MCD whether permanent or contractual will be 'employees of MCD'. The respondents who were appointed on contract basis initially for a period of six months, extended thereafter from time to time for further period of six months each, were therefore, employees of MCD, and consequently, entitled to the benefit of age relaxation. If the intention of MCD and UPSC was to extend the age relaxation only to permanent employees, the advertisement would have stated that age relaxation only to be extended only to permanent or regular employees of MCD or that the age relaxation would be extended to employees of MCD other than contract or temporary employees. The fact that the term 'employees of MCD' is no way restricted makes it clear that the intention was to include all employees including contractual employees. Therefore, we find no reason to interfere with the judgment of the High Court extending the benefit of age relaxation."

29. **Ms. Meena Oberoi V/s Cambridge Foundation W.P(C) No. 1363/2013 decided on 5/12/2019** again by Hon'ble Mr. Justice C. Hari Shankar reported in MANU/DE/4149/2019:265 (2019) DLT 401 is also of relevance.Meena Oberoi, petitioner was appointed as an office assistant on 4/07/1991 and she was confirmed in 1993 on this post. On 21/07/2009 she was terminated on the ground that her services were no more required by the school. Fourthly of Para 6 (of Meena reported in MANU) has been dealt with, in Para 27 onwards. Para 27 to 51 of Meena Oberoi reported in MANU are relevant and be read as part of this Para and same are not being reproduced for the sake of brevity. The sum and substance of these Paras is as under.

30. In Para 27 it has been detailed that fourthly is predicated on section 8(2) of DSEAR. In Para 28 it is mentioned that services of the petitioner could not have been disengaged by the school without prior approval of DOE. Para 29 is substance of Section 8(2) of DSEAR. Para 30 discusses about "dismissal, removal, reduction in rank" and "nor shall his service be otherwise terminated". It has been held that the above words are comprehensive and all encompassing in nature and embrace, within themselves every possible contingency by which the services of an employee of the school are disengaged. It has been further held that

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legislative intent to cover all forms of disengagement of services of employees is manifest by the cautionary use of the words 'otherwise', in the expression 'nor shall his service be otherwise terminated'. Para 30 to 36 being apposite to explain this, are being reproduced.

> *"30. The expressions "dismissed", "removed", "reduced in rank" and "otherwise... terminated" are comprehensive and all-encompassing in nature and embrace, within themselves, every possible contingency, by which the services of an employee of the school are disengaged. The intention, of the legislature, to cover all forms of disengagement of employees, is manifest by the cautionary use of the word "otherwise", in the expression 'nor shall his service be otherwise terminated'.*
>
> *31. The wide amplitude of the expression "otherwise" has been noticed, by the Supreme Court, in several decisions.*
>
> *32. While examining the expression "or otherwise", as contained in Article 356(1) of the Constitution of India - which empowers the President of India to proclaim a state of emergency "on receipt of a report from the Governor of a State or "otherwise", the Supreme Court held, in S.R. Bommai v. U.O.I (1994) 3 SCC 1, the expression "otherwise" meant "in a different way" and (was) of a very wide import and (could not) be restricted to material capable of being tested on principles relevant to admissibility of evidence in Court of Law." In U.O.I. v. Brahma Dutt Tripathi (2006) 6 SCC 220, the Supreme Court was concerned with the expression "or otherwise" as it occurred in Section 9 of the National Cadet Corps Act 1948, which reads thus:*
>
> > *"7. The Central Government may provide for the appointment of officers in or for any unit of the Corps either from amongst members of the staff of any university or school or otherwise and may prescribe the duties, powers and functions of such officers."*
>
> *The Supreme Court held that the expression "or otherwise" related to other members of the corps other than the staff of any university or school, including a student, who was a member of the corps. Similarly, in Lila Vati Bai v. State of Bombay AIR 1957 SC 521, it was held that the legislature when it used the words "or otherwise" apparently intended to cover other cases which may not come within the meaning of the preceding clauses. Other decisions, of the Supreme Court, which notice the overarching scope of the expression "or otherwise" are Nirma Industries Ltd v. Director General of Investigation and Registration (1997) 5 SCC 279, Sunil Fulchand Shah v. U.O.I. (2000) 3 SCC 409 and Tea Auction Ltd. v. Grace Hill Tea Industry 2006 (12) SCC 104.*
>
> *33. It is also important to note, in this context, that the expression used in Section 8(2), is not merely, "or otherwise", but is "or otherwise terminated". The expression "termination" etymologically, refers to the determination of the relationship, between the employer and the employee. Cases which result in the determination of the said relationship would, therefore, amount to "termination" and, in my view, the expression "or otherwise terminated" is expressive of the legislative intent to include all such cases within the provisions.*

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34. Equally, the expression "remove" has, simply but felicitously, been explained, by the High Court of Mysore in State of Mysore v. B. Chikkavenkatappa 1964 SCC Online Kar 141, as meaning "to take off or away from the place occupied". Every case in which an employee is taken off, or taken away, from the place occupied by him in the establishment would, therefore, amount, etymologically, to "removal from service". For this reason, the expression "removed from service" has been held, by the Supreme Court, to be synonymous with termination of service R.P. Kapur v. S. Pratap Singh Kairon, AIR 1964 SC 295.

35. Clearly, therefore, every type of disengagement, from service, would be covered by the expressions "dismissed", "removed", or "otherwise... terminated", as employed in Section 8(2) of the DSE Act. Cases of cessation of the employer-employee link at the instance of employee, such as cases of abandonment of service would not, therefore, attract the provision. Where, however, by an act of the employer, the employee is removed from the employer's services, the applicability 8(2) of the DSE Act cannot be gainsaid.

36. A case of disengagement from service, on the ground that the post or the employee had become surplus, would, consequently, also be covered thereby".

31. In Para 37 to Para 51, scope of Section 8(2) has been explained and it has been held after adverting to Kathuria Public School MANU/DE/0804/2004:(2005) 123 DLT89, T.M.A. Pai Foundation V/s State of Karnataka MANU/SC/0905/2002:(2002) 8 SCC 481, Prabhudayal Public School V/s Prahalad MANU/DE/2934/2008, Prabhudayal Public School V/s Anirudh Singh MANU/DE/7068/2011, Katra Education Society V/s State of UP MANU/SC/0041/1966:AIR 1966 SC 1307, Principal V/s Presiding Officer MANU/SC/0046/978 and Raj Kumar V/s DOE AIR 2016 SC 1855:2016 (6) SCC 541, that law with respect to Section 8(2) and 8(3) is settled like still water and obtainment of prior approval of Director Education is mandatory before disengagement of the services of any employee of any School.

32. **In Mangal Sain Jain V/s Principal, Balwant Rai Mehta Vidya Bhawan** and others reported in law finder's document #1740651, judgement of Meena Oberoi W.P.(C) No. 3415 of 2012 decided on 10/08/2020was relied by Hon'ble Ms. Justice Jyoti Singh . Hon'ble Ms. Justice Jyoti Singh has explained the concept further. It was observed that prior approval has to be obtained irrespective of nature of employment i.e temporary, permanent, contractual, probationary, ad hoc, etc. Head note reads as under:-

"Termination- without prior approval of Director- Discharge of services of petitioner, violative of Rule and Order or Discharge set aside- Petitioner director to be reinstated in service with 50% Back Wages.

Delhi School Education Act (18 of 1973), S.8, S.2(h)-Delhi School Education Rules (1973), R.118, R.120, R.105- Discharge from service - Validity - Charges of misconduct against Petitioner / Accounts Clerk - Petitioner was an 'employee' under Rule 105(1) and thus acquired status

of a confirmed employee and his appointment being statutory in character, provisions of Rules 118 and 120 of Rules and S.8(2) of Act would hold the field - However, there was non-compliance of mandatory provisions of said Rules as there was no Disciplinary Committee and charge sheet was not framed as per law - Impugned order of discharge passed without prior approval of Director of Education and being in violation of mandate u/s.8(2) of Act, is bad in law and therefore, set aside - In view of petitioner having attained age of superannuation, relief of notional reinstatement granted with 50% back wages from date of discharge and also retiral benefit with interest."

33. In Para 5 of this judgement 3 issues were framed which are as under:-

(a) *Whether the Petitioner is a probationer/confirmed employee and entitled to protection of procedural safeguards of the provisions of DSEA&R?*

(b) *If the provisions of DSEA&R are applicable, whether the Charge sheet was issued by the Disciplinary Committee, as per the mandate of Rules 118 and 120 of DSEA&R and if not, the effect thereof?*

(c) *Whether the Discharge order passed without prior approval of the Director of Education, as required under Section 8(2) of DSEA&R, is liable to be quashed?*

34. Reasoning portion of this judgement starts from Para 13 onwards. In Para 13, it has been mandated that every employee on initial appointment will be on probation for a period of one year extendable by another year(with the prior approval of Director) by the appointing authority and subject to termination without notice during the probation on account of unsatisfactory work and conduct. It is observed that the words used in rules are 'every employee' and word 'employee' has been defined in Section 2(h) and means a teacher and includes every other employee working in a recognized school.

35. In para 14, W.P.(C) 1439/2013 titled as 'Army Public School and Ors

Vs. Narender Singh Nain and Ors. Connected matters decided on 30.08.2013 has been referred to mandate that there is no provision for making a contractual appointment with non minority schools. That despite availability of section 15 and rule 130 of the DSEAR concerning contractual appointments it has been observed by Hon'ble Supreme Court in Management Committee of Mont Fort school Vs. Vijay Kumar (2005) 7 SCC 472 as under :

> *"That the very nature of the employment of employees of a school is that it is not contractual, but statutory. Therefore, if the minority schools can have contractual employment and yet their employees have to be treated as statutory employees, then as a fortiori Non- Minority Schools employees also have statutory protection of their services. The Court held that once the nature of employment of every employee is statutory in nature, the provisions of Rules 118 and 120 of the DSEAR would apply and services can be terminated only after complying with the said provisions."*

36. In para15, Laxman Public School Society (Regd.) and Ors. v. Richa Arora and Ors. W.P. (C) 10886/2018 decided on 10.10.2018 was referred para 12 and 13 ofLaxman Public School Society vs Richa Arora case were referred which I have already reproduced earlier.

37. In para 18, Union Public Service Commission v. Dr. Jamuna Kurup (2008) 11 SCC 10 has been referred and it has been held that word "employee" would include both permanent, temporary, regular or short term, contractual or ad hoc in absence of any restrictive definitions. Para 19 reads as under:

> *"19.What emerges by a combined reading of the judgements collated above juxtaposed with Section 2(h) and Rule 105 of DSEA&R is that the word "employee" has been given a wide meaning and is not restricted to "regular" employee for the applicability of the provisions therein. This interpretation is strengthened by the use of word "every" as a prefix to the word "employee" in Section 2(h). Thus even an ad-hoc employee is covered under the definition of "employee". In case he is a probationer he is entitled to protection and his services cannot be terminated without prior approval of the Director of Education under Rule 105. If he has worked for at least 3 years, he acquires status of confirmed employee as held in several judgements and all procedural safeguards will have to be complied with under the DSEA&R, before imposing a penalty contemplated under Section 8(2). Going a step forward, as elucidated by plethora of judgements, as the appointment is a statutory appointment, it ipso facto entitles the employee to all protections and procedural safeguards envisaged in DSEA&R by the Legislature"*

38. Cursory glance of Mangal Sain in para 19 reveals that even an ad-hoc 'employee' is covered under the definition of 'employee' and is entitled to benefit of sec 8(2) as well as rule 105. Similarly a probationer is entitled to protection of Section. 8(2) and rule 105. Therefore I have no hitch to observe that every employee is entitled to statutory protection of Section 8(2) and rule 105.

39. In para 24 to 26 discussion about Raj Kumar' s case has been made and it has been concluded that prior approval is required.

40. No doubt the observations regarding deemed confirmation after 3 years of satisfactory service on probation are of the period when Hamdard Public School vs Directorate Of Education & Another, Law Finder DOCID #489610; 2013 (202) DLT 111 ; W.P. (C) 8652/11 D.O.D 25/07/2013 , Army Public School & Anr. vs Narendra Singh Nain And Anr. W.P. (C) 1439/2013 D.O.D 30/08/2013 ; Army Public School And Anothers vs Ayodhya Prasad Sunwal And Anothers W,P. (c) No. 2176/2013 D.O.D 30/08/2013 ; Army Public School vs Anusuya Prasad And Another etc. were holding the field and were upheld in LPA No. 86/2018 decided on 07/05/2012 by distinguishing Deputy Director of Education vs Veena Sharma Manu/DE/1944/2010 : (2010) 175 DLT 311 (DB) and thereafter Durgabai Deshmukh Memorial And Anothers vs J.A.J. Vasu Sena And Anothers Manu/SC/1139 ; 262 (2019) DLT 535 has overruled the concept of deemed confirmation. I have no hitch to observe that except the deemed confirmation aspect, rest of observations particularly regarding DOE's approval are not only applicable but the applicability of same stands reiterated by another Bench of Hon'ble Apex Court i.e Marwari Balika VidyalayaVs. Asha Srivastava and Ors. MANU/SC/0365/2019 Civil Appeal No(s).9166/2013 D.O.D 14/02/2019.

41. Hon'ble Supreme Court has followed Raj Kumar v/s DOE in Marwari Bal Vidyalaya Law in Finder Document ID #1389235 Civil Appeal No. 9166 of 2013. D/d. 14.2.2019 relevant portion of head note is as under:-

> *A. Delhi School Education Act, 1973, Section 8(2)- Writ Petition against Private Unaided School- Maintainability- Intent of legislature while enacting Delhi School Education Act, 1973 was to provide security of tenure of employment- employees of school and to regulate terms and conditions of their employment-while functioning of both aided and*

unaided educational institutions must be free from unnecessary Governmental interference, same needs to reconciled with conditions of employment of employees of these institutions and provision of adequate precautions to safeguard their interests- Section 8(2) of Act is one such precautionary safeguard which needs to be followed to ensure that employees of educational institutions do not suffer unfair treatment at hands of management- Therefore, writ petition maintainable.

42. In Reshmawati V/s the Management Committee & others, Law Finder document id #1527102, this view has been reiterated after following Rajkumar. Head note reads as under:

*Delhi School Education Act, 1973, Section 8(2)- Constitution of India, 1950 Article 226 Dismissal from service- Petitioner's case is that she has been dismissed illegally and malafidely because of biasness on account of filing of civil suit against the respondent school- Petitioner was appointed as sweeper vide appointment letter date 01.07.1989 but she had worked as Aaya during the whole service period- It is not in dispute that after appointment of the petitioner in 1989, till 2012, there was no complaint against petitioner and admittedly, no action ever taken by respondent-school – Petitioner and other Class IV employees filed civil suit for payment of necessary benefits as per 6th Pay Commission report and the same was settled in settlement dated 05.06.2012 and 24.09.2012 were issued by the respondent school – All allegations are made against the petitioner only after the suit was decreed in favour of the class IV employees including the petitioner – Respondent school made such allegations and were determined to remove the petitioner from service – Charges are not so serious- Disciplinary authority could have given other punishment lesser than removal from service- **The approval of the termination has not been taken from the Directorate of Education as is mandatory under section 8(2) of Delhi School Education Act, 1973** – The punishment order mentioned above is set aside for violation of the procedures and rules of the Act- Petitioner removed from services in the year 2013- Direction to reinstate petitioner in service with 50% back wages from the date of dismissal- Petition allowed.*

43. This view has been upheld by the division bench in Red Roses Public School V/s Reshmawati and others bearing LPA No. 516/2019 decided on 15.10.2019 although indirectly. The reason to say so is that in Para 21 it has been held as follows:

"21. So far as the aspect of non-compliance of Section 8(2) of the Delhi Education Act is concerned, it is clear that the decision in Kathuria Public School (supra) rendered by a Division Bench of this Court was holding sway right from the year 2005 till 2016, when the said decision was upset by the Supreme Court in Raj Kumar (supra). The appellant, therefore, could not be faulted for non-compliance of the said provision. Pertinently, even the Director of Education took the stand before the Appellant Tribunal that there was no necessity of obtaining of prior approval of the Director under Section 8(2) in the light of the decision of this Court in Kathuria Public School (supra)."

44. So, Rajkumar could have been of help to Ms. Reshmawati had her date of termination been after 13.4.2016 on which date this judgment was announced.

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45. Dr. Swami Rampal Singh Missions School V/s Harvinderpal Singh Bindra and another reported in law finder document ID# 863089 is another mandate of Delhi High Court in this regard, head note of which is as under:-

> *"Constitution of India, 1950 Articles 226/227 – Delhi School Education Act and Rules, 1973 – Termination of services of School Teacher – Termination- In the present case, Delhi School Tribunal notes that respondent no.1's probation period was extended beyond the initial period of the one year – Also that there is no letter on record that petitioner/school observing that the services of respondent no.1 as a probationary employee were unsatisfactory, and therefore, the services were terminated – No approval has been obtained by petitioner/school for termination of services of respondent no.1 – For this additional reason also the impugned letter dated 24.2.2001 is liable to be set aside- Writ petition dismissed."*

46. The Management of Rukmani Devi Jaipuria School V/s DOE reported in Law Finder document id #1046214 is another mandate in the same regard relevant portion of head note of which is to the effect that even the infliction of penalty requires prior approval of Director. This judgment therefore applies by analogy. Another judgment which applies by way of analogy is a 3 Judge Bench Judgment of Honb'le Supreme Court in Modern School V/s Union of India reported in Law Finder doc id# 71989. In this judgment power of Director Education to regulate fee structure & income and expenditure under section 17(3), 18(4) & (5) and 24(3) coupled with rule 172, 175 , 176 & 177 has been upheld post TMA Pai by holding that autonomy does not mean absolute autonomy. Clause 7 of the order passed by the director on 15.12.1999 under section 24(3) of the DSEAR was held as not being contrary to rule 177.

47. Surender Rana v/s. DAV School is a judgment in this regard which explains the position concerning requirement of prior approval which has hitherto gone unnoticed. Complete chain of '*Surender Rana*' is reproduced hereinafter:-

48. ***Surender Rana V/s DAV School and others bearing Appeal No. 37/1997 was decided on 15/01/2002*** by Delhi School Tribunal. Para 5 and 6 of the judgment delivered by Sh. Dinesh Dayal, the then Ld. Distt & Sessions Judge and Principal Secretary Law, Govt of Delhi, read as under:

> *"5. There is no dispute about the fact that the Appellant was working in the Respondent school as store keeper. The appointment letter filed by Appellant shows that he was appointed on 1.8.96 and was put on probation for an initial period of one year. This being the situation, services of Appellant could have been terminated only in accordance with the provisions of rule 105 of Delhi school education rules, 1973.*

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6. Rule 105 of Delhi school education rules, 1973, requires that before the termination of an employee, prior approval of director of education has to be obtained. Admittedly, no such approval was obtained by the respondents before terminating the services of appellant. The order of termination of his services is, therefore, liable to be set aside. The appeal is accordingly accepted. The order or termination dated 30.6.97 is accordingly set aside. It is, therefore, ordered that the appellant be reinstated to his original position. The appellant shall also be entitled to the costs of this appeal, which is assessed as Rs 2,000/-"

49. A bare glance on above extracted inverted portion reveals that prior approval has to be obtained in case of a probationary employee. Appellant Surender Rana was a probationary employee in this case at the time of his termination as he was appointed on 1.8.96 and was terminated on 30.6.97.

50. Order of DST dated 15/01/2002 was challenged in W.P. (C) No.1249/2002 which was disposed on 8.2.2006 by Hon'ble Mr. Justice S. Ravinder Bhatt (now, a Judge of Hon'ble Supreme Court). It was observed as under:

"There is no dispute about the fact that the Appellant was working in the Respondent School as Store Keeper. The appointment letter filed by the Appellant shows that he was appointed on 1.8.96 and was put on probation for an initial period of one year. This being the situation, services of the Appellant could have been terminated only in accordance with the provisions of Rule 105 of the Delhi School Education Rules, 1973.

51. This judgement was challenged before Double Bench in LPA No. 492/2006 which was also dismissed on 30.11.2006 and it was observed as follows:

"11. We are in entire agreement with the observations made by the Learned Single Judge in affirming the order of the Tribunal. We also feel that the Tribunal could not have decided in the favor of the Appellant since the appellant failed to provide any documentary proof to substantiate their claims that they are a minority institution and could thus invoke the right guaranteed under Article 29(2) of the Constitution since they are a religious minority under Article 30(1)."

"13.The records of this case reveal that the Respondent No. 1 was a victim of bureaucratic delay and complete apathy of the Appellant. We are satisfied thus that there is no reason whatsoever for us to interfere with impugned judgment of the Learned Single Judge".

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52. Decision of LPA was challenged in Civil Appeal No. 2719/2007 decided on 3.2.2011. This appeal was also dismissed. It was held by Hon'ble Apex Court as follows:

> *"2. Rule 105 of the Delhi School Educational Rules, 1973 deals with probation and prescribes the period of probation. The second proviso to sub-Rule (1) of Rule 105 clearly provides that no termination from 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."*

53. A review petition was also filed in Surender Rana matter by his school before the Apex Court and the Supreme Court of India dismissed the abovesaid review petition (C) No. 1567/2011(in civil Appeal No. 2719/2011) on 20.7.2011.

54. In the case of Dharmendra Goel V/s. Ahlcon Public School, appeal no. 17/2019, decided on 15.09.2021 issue regarding termination of an employee on probation sans prior approval by DOE was decided by the undersigned threadbare in the light of section 2(h), 8(2) and rule 105 in particular and other provisions in general of DSEAR.

55. The judgment of the above appeal no. 17/2019, decided on 15.9.2021 was challenged by school vide writ petition bearing no. 13193/2021 which was decided on 24.11.2021 by Hon'ble Mr. Justice V. Kameswar Rao. Judgement of this Tribunal has been upheld and grounds taken have been disallowed. Request of the Counsel for the school has been turned down. School challenged the order of Ld. Single Judge dated 24.11.2021 vide LPA No. 511/2021 before the Division Bench comprising of Hon'ble Mr. Justice Rajiv Shakdher and HMJ Talwant Singh, but had to withdraw it on 23/12/2021 during the course of arguments. Thus view taken by the undersigned in appeal no. 17/2019 has become final.

56. Hereinbefore mentioned and discussed judgments make it abundantly clear that even a probationer is entitled to the protection of section 8(2) of DSEA what to talk of a regular/confirmed employee. The list of judgments can be multiplied. The multiplication is being avoided and I deem it expedient to pause here and conclude that obtainment of prior approval of DOE was/is must.

57. It is admitted case of the school at internal page 5 and running page 64 of the paper book that no prior approval was obtained. In view of the

above, there is no hitch to observe that action of the school of termination of the appellant is contrary to the provisions of DSEAR and mandates of Delhi School Tribunal, Hon'ble Delhi High Court and Hon'ble Apex Court. Therefore, the order passed by the school of refusal of duty cannot be sustained and is hereby set aside.

58. In view of the reasons given hereinabove, appeal is allowed and impugned termination order 02.07.2021 is hereby set aside. Respondent No. 1 is directed to reinstate the appellant within a period of 4 weeks. Appellant will be entitled to all consequential benefits. She will be entitled to full wages from date of order onwards.

59. With respect to back wages, in view of mandate of Rule 121 of DSEA&R 1973, read with *Guru Harkishan Public School through its Managing Committee v/s. DOE, 2015, Lab I.C 4410 of Delhi High Court Full Bench,* appellant is directed to submit an exhaustive representation before the management of respondent school within a period of 4 weeks from today as to how and in what manner, appellant is entitled to full back wages. The Respondent school is directed to decide the representation to be given by the appellant within 4 weeks of receiving of the same by a speaking order and to communicate the order alongwith a copy of the same to the appellant. Ordered accordingly. File be consigned to record room.

(DILBAG SINGH PUNIA)
PRESIDING OFFICER
DELHI SCHOOL TRIBUNAL

Dated: 10.01.2022

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