IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 21.02.2025

\+ **LPA 780/2013**

RAJEEV KHURANA **.....Appellant**

versus

PRINCIPAL, SARASWATI BAL MANDIR & ORS. **…..Respondents**

Advocates who appeared in this case:

For the Appellant : In person.

For the Respondents : Mr Puneet Taneja, Senior Advocate with Mr Anil Kumar, Mr Manmohan Singh Narula and Mr Amit Yadav, Advocates for R1.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MR. JUSTICE ANOOP KUMAR MENDIRATTA

JUDGMENT

VIBHU BAKHRU, J

1. The appellant has filed the present appeal, *inter alia*, impugning an order dated 26.08.2013 (hereafter *the impugned order*) passed by the learned Single Judge in W.P.(C) No.4968/2008 captioned *Rajeev Khurana v. Principal, Saraswati Bal Mandir & Others*, whereby the said petition was dismissed.

2. The appellant had filed the aforesaid petition impugning an order dated 17.09.2007 passed by the Delhi School Tribunal (hereafter *the Tribunal)* rejecting the appellant's appeal challenging the order dated 30.04.1998, whereby his services with Saraswati Bal Mandir (hereafter *the respondent school*) were terminated, during the probation period.

3. The appellant challenged the termination of his services during the probation period on several grounds including that the termination of the services were in violation of the Rule 105 of the Delhi School Education Rules, 1973 (hereafter *the DSE Rules*) in as much as the services were terminated without approval of the Director of Education (hereafter *the DOE*).

4. The learned Single Judge rejected the appellant's contention that the termination of his services was illegal as the appellant was not afforded an opportunity of being heard or on account of violation of the principles of natural justice. The learned Single Judge, following the decision of this court in ***Kathuria Public School v. Director of Education & Anr.***[1], rejected the contention that the prior approval of the DOE was required for terminating the services of an employee of an unaided private school.

5. The appellant, who appeared in person, confined his submissions to challenging the termination of his services as illegal, as

[1] 2005 SCC OnLine Del 778

it was without prior approval of the DOE. Thus, the limited question to be addressed is whether the termination of the services of the appellant was illegal for want of the previous approval of the DOE.

FACTUAL CONTEXT

6. The appellant was appointed by Samarth Shiksha Samiti (a registered society – hereafter *SSS*) as TGT (Maths and Science). In terms of an appointment letter dated 03.09.1997, the appellant was appointed in the pay scale of ₹1400-2600 on probation period of two years, with the respondent school. The said appointment letter expressly provided that either party could terminate the employment by giving one month's notice or one month's salary in lieu of such notice.

7. Apparently, there were complaints against the appellant from parents of various students. The management of the respondent school also found his work to be unsatisfactory. The management of the respondent school issued the letter dated 01.04.1998 to the appellant pointing out certain deficiencies concerning his work and behaviour. In view of the unsatisfactory performance of the appellant, the management committee of the respondent school recommended that services of the appellant be terminated.

8. In view of the said recommendations, the General Secretary of SSS (Samarth Shiksha Samiti) sent a letter dated 22.04.1998 to the DOE seeking approval for termination of the services of the appellant

with effect from 30.04.1998. The DOE did not respond to the request. Notwithstanding the same, SSS proceeded to issue termination order dated 30.04.1998.

TRIBUNAL'S ORDER

9. The appellant filed the appeal under Section 8(3) of the Delhi School Education Act, 1973 (hereafter *the DSE Act*) before the Tribunal to assail the termination of his services. The management of the respondent school contested the said appeal. The management of the respondent school also alleged that the appellant had remained absent from his duties for a period of fourteen days without any explanation, which was in violation of the terms of his employment.

10. Based on the pleadings of the parties, the Tribunal framed the following questions for its consideration:

> "i.) Whether any permission is required from Directorate of Education for terminating the services of a probationer as provided in Provision to Rule 105 of Delhi School Education Rules, 1973?
>
> ii.) Whether a probationer can be terminated for unsatisfactory work without holding any enquiry?
>
> iii.) Whether the Appellant was still on probation on 30/04/1998?
>
> iv.) Whether the Appellant was put on notice regarding the deficiencies or not?"

11. The said questions were decided against the appellant and in favour of the respondent school.

12. In regard to the first question, whether permission was required for terminating the services of the appellant in terms of proviso to Rule 105 of the DSE Rules, the Tribunal decided that the issue was settled in favour of the respondent school in view of the decision of the Constitution Bench of the Supreme Court in ***T.M.A. Pai Foundation & Ors. v. State of Karnataka & Ors.***[2] wherein the Supreme Court had observed as under:-

> "64. ….We see no reason why the management of a private unaided educational institution should seek the consent or approval of any governmental authority before taking any such action. ……."

13. The Tribunal also referred to the decision of the Division Bench of this court in ***Kathuria Public School v. Director of Education & Anr.***[1]. In the said case, following the decision of the Supreme Court in ***T.M.A. Pai Foundation & Ors. v. State of Karnataka & Ors.***[2], this court had held that the provisions dealing with approval in respect of the disciplinary matters of teachers and employees were not applicable to unaided non-minority educational institutions.

14. In regard to the second question, the Tribunal referred to the decision of the Supreme Court in ***Muir Mills Unit of NTC (U.P.) Ltd. v. Swayam Prakash Srivastava & Anr.***[3] and held that employer can terminate the services of an employee during the probation period without holding an enquiry and the termination order which holds that the employee's performance was not satisfactory cannot be termed as

[2] (2002) 8 SCC 481
[3] (2007) 1 SCC 491

stigmatic. The Tribunal also found that the appellant was on probation when his services were terminated and rejected his contention that he was appointed on regular services.

15. In regard to the question whether the appellant was put to notice regarding the deficiencies in service, the Tribunal found that a number of issues regarding functioning of the appellant were brought to his notice by a letter dated 01.04.1998 issued by the Principal of the respondent school. The Tribunal also noted that no explanation was furnished by the appellant regarding unauthorised absence of fourteen days from 03.04.1998 to 16.04.1998. The Tribunal held that such absence was in violation of the terms and conditions of his appointment letter dated 03.09.1997.

IMPUGNED ORDER

16. As noted above, the appellant filed the aforementioned petition [being W.P.(C) No.4968/2008] impugning the order dated 17.09.2007 passed by the Tribunal.

17. The learned Single Judge concurred with the opinion of the Tribunal and rejected the aforementioned petition as unmerited. The learned Single Judge referred to a catena of decisions and held that there was no requirement of holding an enquiry for termination of the services of an employee on probation and no opportunity of hearing was required to be afforded in such a case.

18. The learned Single Judge relying on the decision in ***Kathuria Public School v. Director of Education & Anr.***[1] held that no permission of the DOE was required for terminating the services of the appellant as the respondent school is a non-aided private school.

19. Aggrieved by the impugned order passed by the learned Single Judge, the appellant preferred the present appeal.

RIVAL CONTENTIONS

20. The appellant appeared in person and contended that the decision of the learned Single Judge that prior approval of the DOE was not required, is erroneous. He referred to the decision of the Supreme Court in ***DAV College Managing Committee v. Surender Rana & Another: Civil Appeal No.2719/2007*** decided on 03.02.2011, whereby the Supreme Court had declined to interfere with the decision of this court in ***DAV College Managing Committee v. Surender Rana & Anr***[4]**.** In the said case, this court had held that the decision that termination of the services of an employee (Storekeeper) of a private unaided school without the previous approval of the DOE under Rule 105 of the DSE Rules was illegal. He also referred to the decision of the Supreme Court in ***Raj Kumar v. Director of Education & Others***[5] and pointed out that the Court had overruled the decision of the Division Bench of this court in ***Kathuria Public School v. Director of Education & Anr.***[1].

[4] 2006 SCC OnLine Del 1478
[5] (2016) 6 SCC 541

21. Mr Taneja, the learned senior counsel for the respondents countered the aforesaid submissions. He did not contest that the decision in ***Kathuria Public School v. Director of Education***[1], which was relied upon by the learned Single Judge, had been overruled by the Supreme Court in ***Raj Kumar v. Director of Education & Others***[5]. He, however, contended that said overruling must be considered as prospective. He contended that at the material time, no permission of the DOE was required in view of the decision of the Division Bench of this court in ***Kathuria Public School v. Director of Education & Anr.***[1], the respondent school was not expected to seek any approval of the DOE prior to terminating the services of a probationer/appellant.

22. Next, he submitted that SSS had in fact sought approval of the DOE by a letter dated 22.04.1998 but had not received any response from the DoE. He submitted that in the aforesaid circumstances, it must be inferred that the DOE had approved the termination of the appellant's services. He also referred the decision of the Division Bench of this court in ***Sahdeo Singh Solanki v. Government of NCT of Delhi***[6] and submitted that in the said case the contention that prior approval is deemed to have been granted was rejected for the reasons that the letter seeking the approval of the DOE was sent on the same date on which the services of the employee were terminated. However, the observations made by the court indicated that there would be a

[6] 1996 SCC OnLine Del 764

deemed approval, if a reasonable time was granted to the DOE for satisfying itself as to the said request.

REASONS AND CONCLUSIONS

23. As noted at the outset, the principal question to be addressed is whether the previous approval of the DOE was required for terminating the appellant's services.

24. As noted above, the learned Single Judge referred to the decision of this court in ***Kathuria Public School v. Director of Education & Anr.***[1] and held that the prior approval of the DOE was not required as Section 8(2) of the DSE Act as applicable to an unaided non-minority private school had been struck down by the court. Clearly, the said reasoning cannot be sustained in view of the decision of the Supreme Court in ***Raj Kumar v. Director of Education & Others***[5]. The Supreme Court considered the observations of the Constitution Bench in ***T.M.A. Pai Foundation & Ors. v. State of Karnataka & Ors.***[2] and the decision of this court in ***Kathuria Public School v. Director of Education & Anr.***[1], which were cited in support of the contention that the termination of the services of the appellant (Raj Kumar) was justified. However, the said contention was expressly rejected. The Supreme Court also observed that Section 8(2) of the DSE Act was a procedural safeguard in favour of an employee for avoiding arbitrary or unreasonable termination or dismissal of an employee of a recognized private school.

25. It is apposite to refer to the following extract of the of the said decision of the Supreme Court in ***Raj Kumar v. Director of Education & Others***[5]: -

> "48. At this stage, it would also be useful to refer to the Statement of Objects and Reasons of the DSE Act, 1973. It reads as under:
>
> > 'In recent years the unsatisfactory working and management of privately managed educational institutions in the Union Territory of Delhi has been subjected to a good deal of adverse criticism. In the absence of any legal power, it has not been possible for the Government to improve their working. An urgent need is, therefore, felt for taking effective legislative measures providing for better organisation and development of educational institutions in the Union Territory of Delhi, for ensuring security of service of teachers, regulating the terms and conditions of their employment. ... The Bill seeks to achieve these objectives.'
>
> A perusal of the Statement of Objects and Reasons of the DSE Act would clearly show that the intent of the legislature while enacting the same was to provide security of tenure to the employees of the school and to regulate the terms and conditions of their employment.
>
> 49. In Principal v. Presiding Officer : 1978) 1 SCC 498, a Division Bench of this Court held as under: (SCC p. 503, para 7)

> '7. Sub-section (2) of Section 8 of the Act ordains that subject to any rule that may be made in this behalf, no employee of a recognised 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 of Education. From this, it clearly follows that the prior approval of the Director of Education is required only if the service of an employee of a recognised private school is to be terminated.'

50. The Division Bench of the Delhi High Court, thus, erred in striking down Section 8(2) of the DSE Act in Kathuria Public Schoof by placing reliance on the decision of this Court in T.M.A. Pai, 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.

51. The Division Bench of the Delhi High Court, while striking down Section 8(2) of the DSE Act in Kathuria Public School has not correctly applied the law laid down in Katra Education Society v.

State of UP : AIR 1966 SC 1307 wherein a Constitution of 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 recognised 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 Katra Education Society v. State of UP : AIR 1966 SC 1307 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 Frank Anthony Public School Employees Assn, v. Union of India: (1986) 4 SCC 707 is also misplaced as the institution under consideration in that case was a religious minority institution.

52. The reliance placed by the learned counsel appearing on behalf of the respondents on T.M.A. Pai Foundation v. State of Karnataka : (2002) 8 SCC 481 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 Kathuria Public Schoof is also misplaced as the same has been passed without appreciating the true purport of the Constitution Bench decision in Katra Education Society v. State of UP : AIR 1966 SC 1307. Therefore, the decision in Kathuria Public Schoof, striking down Section 8(2) of the DSE Act, is bad in law.

53. Furthermore, the decision in Kathuria Public Schoof does not come to the aid of the respondents for one more reason. Undisputedly, the notice of retrenchment was served on the appellant on 7-1-2003 and he was retrenched from service on 25-7-2003. The decision in Kathuria Public Schoof, striking down Section 8(2) of the DSE Act was rendered almost exactly two years later i.e. on 22-7-2005. Surely, the respondents could not have foreseen that the requirement of prior approval of the order of termination passed against the appellant from the Director would be struck down later and hence decided not to comply with it. Section 8(2) of the DSE Act was very much a valid provision of the statute as on the date of the retrenchment of the appellant, and there is absolutely no reason why it should not have been complied with. The rights and liabilities of the parties to the suit must be considered in accordance with the law as on the date of the institution of the suit. This is a fairly well-settled principle of law. In Dayawati v. Inderjit AIR 1966 SC 1423, a three-Judge Bench of this Court held as under: (AIR p. 1426, para 10)

> '10. Now as a general proposition, it may be admitted that ordinarily a court of appeal cannot take into account a new law, brought into existence after the judgment appealed from has been rendered, because the rights of the litigants in an appeal are determined under the law in force at the date of the suit'."

26. The contention that the decision in ***Raj Kumar v. Director of Education & Others***[5] is required to be considered as operative

prospectively, that is, from the date of the said decision, is without merit. The said decision of the Supreme Court is founded upon earlier decisions and the interpretation of the provisions of the DSE Act, as enacted. This contention also overlooks the fact that the Supreme Court in the case of ***DAV College Managing Committee v. Surender Rana & Another***[4] **–** a decision rendered on 03.02.2011 – whereby the Supreme Court had upheld the decision of the Tribunal and this court holding that the termination of the employee (Storekeeper) without prior approval of the DOE under Rule 105 of the DSE Rules was illegal. The said decision was set out by the learned Single Judge in the impugned order and we consider it apposite to reproduce the same as under: -

> "The first respondent was appointed on 1.8.1996, as Store Keeper, on probation for a period of one year, by the appellant, which runs a private unaided school. He was removed from service on 1.7.1997 by giving a month's salary in lieu of notice. The first respondent challenged his removal by filing an appeal before the Delhi School Tribunal. The said appeal was allowed on 15.1.2002 and the order of removal was set aside on the ground that the appellant had not taken the prior permission of the Director of Education. The writ petition filed by the appellant challenging the said order, was dismissed by a learned single Judge of the High Court on 8.2.2006 and the appeal filed by the appellant was also dismissed by a Division Bench on 30.11.2006. The said order is challenged in this appeal by special leave.
>
> 2. Rule 105 of the Delhi School Education Rules, 1973 deals with probation and prescribe the period probation. The second proviso to sub-Rule (1) of the 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.

> 3. The appellant does not dispute the fact that it is not a minority school. Therefore, the second proviso to Rule 105(1) applies to the order of the removal of first respondent from service.
>
> 4. In the circumstances, the orders of the Tribunal and the High Court holding that the termination without the previous approval of the Director under Rule 105 was illegal, does not call for interference. The appeal is dismissed."

27. It is also material to note that the appellant's services were terminated in April 1998, which is prior to the date of the decision in ***Kathuria Public School v. Director of Education & Anr.***[1] or ***T.M.A. Pai Foundation & Ors. v. State of Karnataka & Ors***[2]. The respondent school also understood the requirement of obtaining the approval of DOE and therefore, had sent a letter seeking such approval.

28. The reasons for which the learned Single Judge had concluded that no permission of the DOE was required for terminating the services of the appellant, cannot be sustained.

29. At this stage, it is relevant to refer to Rule 105 of the DSE Rules and the same is reproduced as under: -

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

> Provided that the provisions of this sub-rule relating to the prior approval of the Director in regard to the extension of the period of probation by another year, shall not apply in the case of an employee of a minority school:
>
> Provided further that no termination from the service of an employee on probation shall be made by a school, other than a minority school, except with the previous approval of the Director.
>
> (2) If the work and conduct of an employee during the period of probation is found to be satisfactory, he shall be on the expiry of the period of probation or the extended period of probation as the case may be, confirmed with effect from the date of expiry of the said period.
>
> (3) Nothing in this rule shall apply to an employee who has been appointed to fill a temporary vacancy or any vacancy for a limited period."

30. As noted above, second proviso to Sub-rule (1) of Rule 105 of the DSE Rules expressly provides that services of an employee on probation cannot be terminated except with the previous approval of the Director of Education (DOE).

31. In the aforesaid view, there can be a little dispute that the previous approval of the DOE was necessary for terminating the services of the appellant, who was at the material time on probation.

32. The question whether approval of the DOE for terminating the services of an employee as required under Section 8(2) of the DSE

Act, is mandatory is not *res integra* and it has been so held in a catena of decisions.[7]

33. It is also relevant to refer to the decision of the Coordinate Bench of this court in ***Anand Dev Tyagi v. Lt. Governor of Delhi***[8], whereby this court had held that absent any approval of the DOE, the suspension of the employee from services could not be extended beyond the period of fifteen days. A similar view was also expressed by the learned Single Judge of this court in ***The Managing Committee Raghumalarya Girls Senior Secondary School v. Govt. of NCT of Delhi and Ors.***[9].

34. In ***Governing Body, K.C. Das Commerce College v. Gautam Choudhury***[10], the Division Bench of Gauhati High Court while interpreting Rule 18 of the Assam Non-Government Colleges Management Rules, 2001 had observed as under:

> "**4.** It is manifest from this Rule that the minutes of the proceedings of the Governing Body meeting are required to be sent to the Director and also to the concerned affiliating University. Rule 18 prohibits finality of the decision of the Governing Body regarding appointment, promotion, suspension, termination, removal or dismissal of teaching and non-teaching employees without prior approval of the Director. Thus, any decision taken by the Governing Body regarding appointment, promotion, suspension, termination, removal or dismissal would attain

[7] Marwari Balika Vidyalaya v. Asha Srivastava & Ors.: 2019 SCC OnLine SC 408; Asha Rani Gupta v. Ravindera Memorial Public School & Anr.: 2024 SCC OnLine Del 7143
[8] 1996 SCC OnLine Del 537
[9] 2012 SCC OnLine Del 4820
[10] 2003 SCC OnLine Gau 442

> finality with the approval of the Director. Unless and until there is approval of the Director on the decision taken by the Governing Body it will not come into existence nor it can be executed. For a decision to become final and operative the Governing Body is to seek and obtain approval of the Director. This is the simple reading of Rule 18 of the Rules of 2001. In the present case, the petitioner who was appointed as Accountant has been removed from service on the basis of the decision taken by the Governing Body, but that resolution has got no sanction from the Director of Higher Education. By virtue of Rule 18 of the Rules of 2001 any decision taken by the Governing Body without approval of the Director will not come into force nor can it be made effective. Under the circumstance, the decision taken by the Governing Body for removal of the petitioner from service without approval of the Director is illegal and cannot be enforced. Consequently, as the post does not become vacant the same cannot be filled in by issuance of advertisement."

35. Although prior approval of the DOE is required for terminating the services of a probationer, it is also necessary to note that there is a distinction between the termination of services of an employee, who is confirmed and the termination of services of a probationer. The employee whose services have been confirmed cannot be terminated except with prior approval of the DOE. Even in cases where the employee resigns from the services, the same would be subject to the approval of the DOE in terms of Rule 114A of the DSE Rules. However, the services of a probationer can be terminated on expiry of the probation period, if the services are found to be unsatisfactory. The requirement of prior approval of the DOE and the consequences of termination of an employee without such approval is required to be viewed differently in case of employee whose services have been

confirmed and an employee who is on probation. This is because probation period cannot be extended indefinitely and the services cannot be confirmed if the employer finds the same to be unsatisfactory.

36. There is merit in the contention that the termination of an employee on probation cannot be held up indefinitely awaiting the approval of the DOE. It is necessary for the DOE to respond to the request with due dispatch.

37. The entire purpose of employing an employee on probation is for the employer to evaluate whether his services are satisfactory. It is trite law that if the services of an employee are found to be unsatisfactory during the probation period the employer would have the right to terminate the same without undertaking any disciplinary enquiry subject to the order of termination not being stigmatic.

38. The office order terminating the services of the appellant clearly indicates that it did not contain any adverse observations regarding the appellant and attached no stigma. The said termination order is set out below:

> "SMARATH SHIKSHA SAMITI (REGD.)
> OFFICE: Mata Mandir Street, Jhandewalan,
> Delhi-110055
> S. No. 2/4/380/97/PR/3949-52 Dt. 30.4.98
> OFFICE ORDER
> As per recommendation of local managing committee of Saraswati Bal Mandir, Paschim Vihar Delhi, the services of Rajeev Khuraina TGT (maths-

science) working on probation is terminated w.e.f. 30.04.98 before noon.

Sd/-
(Khazan Chand Batla)
Gen. Secretary"

39. In the present case, the DOE had not responded to the respondent school's request for approval. Clearly, the respondent school could not be expected to continue with the services of a probationer indefinitely in the given circumstances.

40. As noted above, the Tribunal had found merit in the contention that the appellant's services were found to be unsatisfactory and he had also absented from the services without any explanation for a period of fourteen days in violation of the terms of his appointment letter.

41. It is necessary to bear in mind that the private unaided schools are entitled to certain level of autonomy in their management. The interference of the DOE is permissible to the limited extent as provided in the DSE Act and the DSE Rules and only to the extent necessary to safeguard the interest of the stakeholders. As explained by the Supreme Court in the case of ***Raj Kumar v. Director of Education & Others***[5], Section 8(2) of the DSE Act is "*a procedural safeguard in favour of an employee to ensure that an order of termination or dismissal is not passed without the prior approval of the DOE. This is to avoid arbitrary or unreasonable termination or*

dismissal of an employee of a recognised private school." However, withholding of such approval for indefinite period of time would be detrimental and prejudicial to the interest of the educational institution and would not serve the object of ensuring quality education. As noted above, the probation period of an employee cannot be extended indefinitely.

42. In the present case, SSS sought approval of the DOE *vide* a letter dated 22.04.1998 clearly stating the management of the respondent school had recommended that the services of the appellant be terminated with immediate effect, however SSS intended to do so with effect from 30.04.1998. As noted above, the DOE did not respond to the said letter. In cases where the DOE was of the opinion that it required further time to examine whether to grant approval, it was incumbent upon the DOE at least to indicate the same to the school management. Ignoring such a request for an indefinite period renders Rule 105 of the DSE Rules unworkable.

43. It is also relevant to refer to the decision of the Supreme Court in ***Durgabai Deshmukh Memorial Senior Secondary School & Another v. J.A.J Vasu Sena & Another***[11]**,** wherein the Supreme Court considered the question whether the probation period as contemplated under Rule 105 of the DSE Rules could be extended beyond the period of two years and whether the services of a probationer are deemed to have been confirmed after the period of the probation. The Supreme

[11] (2019) 17 SCC 157

Court held that Rule 105 of the DSE Rules stipulates a fixed period of the probation, which could not be extended. The initial period of the probation was required to be one year, which could be extended by a further period of one year, *albeit* with the approval of the DOE.

44. We consider it apposite to refer to the following extracts of the above decision: -

> "27. The limit placed on the permissible extension of the probationary period draws a balance between the opportunity that must be afforded to a probationer to modify and improve the quality of service and a mandate that the appointing authority of an educational institute hires qualified teachers. To impart a meaning to the words "by another year" that the appointing authority may extend the probationary period one year at a time without a limit will allow an appointing authority to extend the probationary period, with the prior approval of the Director, of a probationer *ad nauseum*. This would allow an appointing authority to convert a period of probation, which serves the limited and time bound purpose of ascertaining suitability, into a temporary appointment and defeat the purpose of probationary service in educational institutions. Though the legislature or the delegated authority is empowered in a given case to stipulate that there is no bar on the period of probation, the interpretation that we have adopted is supported by the words of Rule 105(1) and the ordinary meaning imparted to the word "another".
>
> 28. The plain reading of the words "by another year" implies that the appointing authority of an institution may extend the period of probation by

one additional year over and above the mandatory year of probation with the prior approval of the Director. Rule 105(1) of the 1973 Rules therefore stipulates a limitation on the total probationary period to two years. The first proviso stipulates that the prior approval of the Director shall not be required in the case of a minority institution.

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40. The High Court concluded that Rule 105 fixes a maximum probationary period of two years and that consequently, the continuation of the services of the probationer beyond the period of probation would amount to a deemed confirmation of service even without an order of confirmation. Consequently, the case of the first respondent was according to the High Court within the second category of cases enumerated in High Court of MP v. Satya Narayan Jhavar : (2001) 7 SCC 161. This Court in Satya Narayan Jhavar enumerated three lines of cases. The third stipulates those cases where the rules prescribe a maximum period of probation but also require a specific act on the part of the employer of issuing an order of confirmation for the purposes of confirmation. In such cases, there is no deemed confirmation of the services of a probationer on their continuation in service beyond the maximum period of probation.

41. Admittedly, the appointment letter does not stipulate that the first respondent shall be confirmed upon the expiry of the probationary period. Rule 105(2) stipulates that an order of confirmation may be issued "if the work and conduct of an employee during the period of probation is found to be satisfactory". Rule 105(2) lays down a condition precedent to the issuance of an order of confirmation. It is only if the

appointing authority is satisfied with the performance of the probationer that an order of confirmation may be issued. Rule 105(2) contains an explicit stipulation requiring the issuance of an order of confirmation by the appointing authority upon its assessment that the performance of the probationer has been satisfactory. The mere continuation of the services of a probationer beyond the period of probation does not lead to a deemed confirmation in service. It is only upon the issuance of an order of confirmation by the appointing authority that probationer is granted substantive appointment in the post.

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50. In the view that we have taken, the High Court has erred in concluding that the case of the first respondent falls within the second category of cases enumerated in Satya Narayan Jhavar. Rule 105(2) stipulates the satisfaction of the appointing authority as a condition precedent to the issuance of an order of confirmation. Admittedly, no order of confirmation was issued by the appointing authority. The case of the first respondent falls squarely within the third category of cases enumerated in Satya Narayan Jhavar wherein though the rules prescribe a maximum period of probation and the probationer is continued beyond the expiry of the probationary period, the substantive appointment of the probationer is subject to a specific act on the part of the appointing authority of issuing an order of confirmation. In the absence of an order of confirmation, the first respondent did not acquire the status of a confirmed employee.

51. In the present case, the first respondent served as a probationer for nearly five years. Rule 105(1)

permits the appointing authority to extend the period of probation with the prior permission of the Director. The proviso stipulates that no prior approval of the Director is required for the extension of the probationary period by the appointing authority of a minority institution. The amending history 29 of the provision shows that prior to the amendment in 1990, no prior approval of the Director was required. By virtue of the Amending Rules 1990 the prior approval of the Director was made mandatory, save and except for extensions in the case of minority institutions, for the grant of any extension in the probationary period. The absolute discretion vested with the appointing authority of an institution was made subject to the prior approval of the Director.

52. The power vested in the Director serves as a check on the absolute discretion of the appointing authority to extend the probationary period. The power vested in the Director, however, to approve a request of the appointing authority is not unbridled. Rule 105(1) stipulates that the services of a probationer may be terminated without notice during the period of probation where the services of the probationer are not "in the opinion of the appointing authority, satisfactory". Rule 105(2) stipulates that an order of confirmation may be issued if, in the opinion of the appointing authority, the performance of the probationer is satisfactory. The discretion of the Director must be exercised objectively on the basis of the material produced by the appointing authority bearing on the performance of a probationer.

53. The prior approval of the Director, save and except for minority institutions, is mandatory and must be complied with as a condition precedent for the valid exercise of the power to extend the period

of probation. The Director is required to assess the determination of the appointment authority and based on that assessment, to decide whether to approve an extension of the probationary period. The provision which mandates that the prior approval of the Director shall 30 be sought before extending the period of probation ensures that the appointing authority may not extend the probationary period without legitimate reason. The extension of the probationary period by the appointing authority, save and except for minority institutions, without the prior approval of the Director is impermissible in law.

54. Rule 105(1) of the 1973 Rules, by stipulating a maximum permissible period of probation of two years, draws a balance between the interests of the appointing authority in extending the period of probation to ensure the quality of education and the interests of probationers in their services not being extended on probation ad nauseum. The continuation of the services of a probationer beyond the period permissible under the 1973 Rules defeats the salutary purpose underlying the limit stipulated on the period of extension that may be effected in the probationary period. Upon the expiry of the period of probation, the appointing authority is required by law to either confirm the services of the probationer or terminate their services. The continuation of the services of a probationer by the appointing authority under Rule 105 of the 1973 Rules beyond the maximum permissible period of probation, constitutes a violation of law. Though as we have held, there is no provision for deemed confirmation, the conduct of the management may result in other consequences, including a decision in regard to whether the recognition of a school which

> consistently violates the law should be withdrawn."

45. The following propositions emerge from the plain reading of the judgment of the Supreme Court in ***Durgabai Deshmukh Memorial Senior Secondary School and Anr. v. J.A.J. Vasu Sena and Anr.***[11] and Rule 105 of the DSE Rules:

(i) that every employee on an initial appointment would be on probation for a period of one year;

(ii) that the probation can be extended by a further period of one year and no further;

(iii) that prior approval of the DOE is mandatory for such extension of probation beyond the initial probation period of one year.

(iv) that the services of employee would be continued only if the "work and conduct of the employee during the probation period is found satisfactory."

(v) that an employee will not be considered as deemed confirmed without the employer confirming his employment.

46. At the end of the probation period, the employer would require to take a decision whether it would terminate the services of the probationer or confirm the same. Extending of the probation beyond the period as stipulated would violate the law. It necessarily follows from the aforesaid that the services of an employee as a probationer

cannot continue beyond the period of one year or two years with the prior approval of the DOE. At the end of the probation period, the services of the employee are either required to be confirmed in terms of Sub-rule (2) of Rule 105 of the DSE Rules or are required to be discharged. As explained by the Supreme Court in ***Durgabai Deshmukh Memorial Senior Secondary School and Anr. v. J.A.J. Vasu Sena and Anr.***[11], extending the probation period beyond the maximum period of two years is not an option. Thus, in any case, the services of an employee cannot be continued on probation beyond the period of two years, which is the outer limit provided under the DSE Rules.

47. It is also obvious that in the event the services of an employee are unsatisfactory, the same are required to be terminated at the end of the probation period. Rule 105 of the DSE Rules does not contemplate continuation of the services of a probationer whose performance is found to be unsatisfactory beyond the period as specified for want of permission of the DOE. Plainly, the requirement of seeking prior approval of the DOE for terminating the services of an employee during the probation period cannot be construed to mean that the employer is bound to confirm his employment at the end of the probation period if such approval is not forthcoming. In terms of Sub-rule (2) of Rule 105 of the DSE Rules, the confirmation of services at the end of the probation period, is contingent on the work and conduct of the employee during the period of probation being satisfactory. This assessment is required to be made by the employer alone. Thus, if the

DOE does not grant approval for termination of the services of an employee during the probation period, at the most the same would be required to be continued till the end of the probation period.

48. In the present case, the appellant was appointed on 03.09.1997 and his services were terminated on 30.04.1998. Rule 105 of the DSE Rules provides that every employee be appointed on probation for the period of one year. The appellant was appointed on probation for a period of two years, which is contrary to Rule 105 of the DSE Rules. In terms of Rule 105 of the DSE Rules, the appellant's probation period could not be extended after 03.09.1998 without permission of the DOE. As explained by the Supreme Court in ***Durgabai Deshmukh Memorial Senior Secondary School & Another v. J.A.J Vasu Sena & Another***[11] at that stage, the employer was required to confirm the services in terms of Sub-rule (2) of Rule 105 of the DSE Rules, if the performance of the probationer is satisfactory; or discharge the employee if his conduct and performance is not found satisfactory; or seek approval of the DOE for further extension of the probation period of one year.

49. Sub-rule (2) of Rule 105 of the DSE Rules expressly provides that the services of the employee would be confirmed at the end of the probation period if the work and conduct of the probationer were found to be satisfactory. Plainly, an employer cannot be compelled to confirm the services of the employee, who is on probation and at the same time, the probation cannot be extended, without the employer's

desiring such extension and the DOE approving the same. It necessarily follows that the service of the probationer would require to be terminated at the end of the probation period if the employer found the same to be unsatisfactory.

50. In the present case, it is apparent that the respondent school had found the services of the appellant to be unsatisfactory and, therefore, the question of confirming the same under Sub-rule (2) of Rule 105 of the DSE Rules does not arise.

51. The contention that the services of the employee on probation would continue indefinitely for want of prior approval of the DOE without confirmation, is clearly erroneous.

52. Thus, even if it is accepted that the termination of the services of the appellant during probation period was not in conformity with Rule 105 of the DSE Rules. At best, his services could have continued till the expiry of period of one year, that is, till 03.09.1998 but no further.

53. In the given circumstances, we are unable to accept the appellant's submission that he is entitled to be reinstated in service with full back wages considering the period of probation under Rule 105 of the DSE Rules was fixed as one year and could not be extended without the prior approval of the DOE. It must be accepted that, at the most, the appellant could remain on probation till the end of the period of one year from the date he was appointed.

54. It is material to note that the appellant has not sought any consequential relief for his reinstatement with back wages either in the writ petition or in the present appeal. We also note that the only relief sought by the appellant in the writ petition was for setting aside the order dated 17.09.2007 of the Tribunal.

55. In view of the aforesaid discussions, the impugned order is set aside. The Tribunal's order to the extent it holds that the respondent school did not require the approval of the DOE for terminating the services of the appellant during the probation period is erroneous and is set aside.

56. Considering that the Tribunal found no fault with the respondent school's finding that the appellant's performance was not satisfactory during the probation period, we do not consider it apposite to accede to the appellant's oral request for any further relief.

57. The appeal is allowed in the aforesaid terms.

VIBHU BAKHRU, J

ANOOP KUMAR MENDIRATTA, J

FEBRUARY 21, 2025
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