(2012) 02 DEL CK 0460

Delhi High Court

Case No: LPA No. 883 of 2010

Smt. Leela Sharma		APPELLANT
	Vs	
GNCT of Delhi and Others		RESPONDENT

Date of Decision: Feb. 3, 2012

Citation: (2012) 128 DRJ 132

Hon'ble Judges: Pratibha Rani, J; Pradeep Nandrajog, J

Bench: Division Bench

Advocate: Vinay Kumar Garg, for the Appellant; Aditya Madan, for R-1, Mr. K.C. Mittal with Mr. Puneet Mittal, Advocates for R-2, for the Respondent

Final Decision: Allowed

Judgement

Pradeep Nandrajog, J.

Vide impugned order dated June 02, 2010, the learned Single Judge, while dismissing WP(C) No. 4164/2002, has held that compulsory retirement is an important tool to keep any organization vibrant and to prevent its clogging and decay by the sheer weight of employees who have ceased to be dynamos to propel the organization. To put it in the language commonly used, the learned Single Judge has held that since the object of compulsory retirement is to remove the dead wood from an organization the power to compulsorily retire dead wood employees would be available to the management of recognized schools under the Delhi School Education Act 1973. Holding further that the concept of compulsory retirement is rooted in public good and since the writ petitions by employees of schools against their management are maintainable because imparting education is a public purpose, the two cannot be divorced i.e. the public purpose served by compulsorily retiring dead wood and the right to maintain writ petitions must go hand-in-hand. In other words, as per the learned Judge, an employee of a school who maintains a writ petition against the management and qua maintainability pleads that education is a public purpose and thus the writ petition is maintainable, cannot turn around and say that power of compulsory retirement, which is in public interest, is not

available to the management.

2. Appellant joined respondent No. 2 school, then unrecognized, as a Trained Graduate Teacher (TGT for short) w.e.f. 01.01.1988 on the then consolidated salary of Rs. 900/- per month in terms of the letter of appointment dated 15.07.1988. After the school was granted recognition under the Delhi School Education Act, 1973 (hereinafter referred to as "the Act"), the appellant was confirmed as a regular teacher to the post of TGT w.e.f. 01.08.1989. Eventually, w.e.f. 01.04.1990, respondent school also implemented the regular scales of pay and allowances for its teachers and other staff as per the mandate of Section 10 of the Act.

3. Appellant pleads that during her career as a Hindi Teacher in the school, she had worked hard and students taught by her have consistently shown outstanding performance. Appellant has quoted the result pertaining to class-10, which she had taught, for the last four successive academic years wherein the students taught by her have shown 100% result as under:-

Year	No. of students appearing	No. of students passing	Ist Divn.	IInd Divn.	IIIrd Divn.	Distinction
1999	03	03	01	1	1	--
2000	10	10	09	1	Nil	2
2001	12	12	10	2	Nil	3
2002	14	14	11	3	Nil	6

4. Appellant pleads that during her career, she was never communicated any adverse entry of whatever kind. She pleads that respondents No. 2 & 3 started exerting pressure on her to leave the job so as to make way for some other candidate. She refused and hence the retaliation to compulsorily retire her. It is the case of the appellant that the power of compulsory retirement is not conferred by either the Delhi School Education Act 1973 or the Rules framed there under.

5. It is not in dispute that the tenure of service of the appellant is protected under Rule 110 of the Delhi School Education Rules, 1973 (hereinafter referred to as "the Rules") framed in exercise of Rule making power u/s 28 of the Act. The appellant had yet to attain the age of retirement and on April 02, 2002 was served with an intimation dated 30.03.2002 stating that the Managing Committee/Norms Committee in its meeting held on 27.03.2002 reviewed the cases of teachers above 50 years of age and had resolved to prematurely retire the appellant in the interest of the school on the strength of FR 56(j). Appellant desired to know, as to how in the absence of a specific or implied power/authorization in this behalf either under the Act or the Rules, FR 56(j) can be resorted to by the Management. The respondents did not supply the requisite information and documents, if any. Finally, vide its reply

dated 09.05.2002 respondents No. 2 & 3, refusing to disclose material against her, claimed that they are empowered to resort to FR 56(j) by virtue of circular No. F-17/3/Misc./Per./GASTA/91/3824-4624 dated 25.03.1991 issued by the Department of Education. But, did not supply a copy thereof to the appellant.

6. The appellant filed WP(C) No. 4164/2002 challenging the order dated 30.03.2002 issued by respondents No. 2 & 3 and she pleaded that FR 56(j) would not apply to the teachers of schools recognized under the Act and hence the order of compulsory retirement, sans by way of penalty, is bad in law.

7. We would immediately clarify here that a penal order of compulsory retirement after issuing a charge-sheet and holding an inquiry is not the subject matter of consideration for the reason no charge-sheet was ever served upon the appellant nor was an inquiry held. The order of compulsory retirement is: What we may call the administrative power of compulsory retirement.

8. The respondent No. 1 i.e. the Director of Education, while supporting the case of appellant pleaded that the step taken by the management of the school in terminating appellant''s service was without the approval of Director of Education and hence was in violation of the instructions issued by the Director in this behalf.

9. In the counter affidavit filed by respondent Nos.2 & 3 they claim that the appointment of the appellant was illegal since she was over age. Interestingly, there are no pleadings as to in what manner FR 56(j) was applicable to the teachers of private schools governed by the Delhi School Education Act 1973 and the rules framed there-under, admittedly these teachers are not government servants.

10. Vide impugned decision dated 02.06.2010, the learned Single Judge, though has noted that the Act and the Rules do not provide for compulsory/pre-mature retirement except by way of penalty under Rule 117, and that FR 56(j) would not be applicable to the teachers of a private, un-aided recognized school since they are not government servants and that there is no declaration making the Fundamental Rules otherwise applicable to them, yet has proceeded to hold FR 56(j) applicable on the premise: "there is (thus) essentially an element of public interest in teaching and the concept of compulsory retirement (which hereinabove has been found to be in public interest) as in the Fundamental Rules, can be extended to the teachers of a recognized school also? (refer para 15 of the impugned decision). Learned Single Judge has further held : "Once a recognized school is entitled under the Rules to remove an employee prior to the age prescribed for superannuation, on the grounds of misconduct, it defies logic as to why the power of compulsory retirement is not to be read therein. After all, compulsory retirement is provided as a penalty under the Rules.? Accordingly, the learned Single Judge has dismissed the writ petition directing the appellant to challenge the order of compulsory retirement by way of appeal before the school tribunal on the merits of her being compulsorily retired.

11. Since the issue whether at all there exists a power, not by way of penalty, but by way of an administrative decision, to compulsorily retire a teacher of a recognized school would relate to the very power of the management of the school, and since the learned Single Judge has held that such a power exists by necessary implication, it is apparent that the appellant cannot question said power before the Appellate Tribunal constituted under the Act and thus the issue has to be settled by us.

12. The principal issue that arises for determination before us is as follows:-

Whether FR 56(j) is applicable to the teachers of a school recognized under the Act and governed by the provisions thereof.

13. Implicit within the question would be, whether the Court can read applicability of Fundamental Rules into the conditions of service of a teacher of a recognized school governed by the Act and the Rules.

THE ACT & RULES:

14. The Act defines, u/s 2(d) Aided School; u/s 2(r) Private School; u/s 2(t) Recognized School and u/s 2(u) School. Though, Unaided Recognized Private School has not been separately defined, but a conjoint reading of clauses (d), (r) and (t) of Section 2 would make it clear that a school, not run by the Central Government, the Administrator, a Local Authority or any other Authority designated or sponsored by the Central Government, the Administrator or a Local Authority, recognized by the appropriate authority not receiving aid in the form of maintenance grant from the Central Government, Administrator, a Local Authority or any other Authority designated or sponsored by the Central Government, Administrator or a Local Authority, is an Unaided Recognized Private School. The school, in the present case, undisputedly, is an Unaided Recognized Private School.

15. Chapter-III of the Act deals with establishment recognition and management of aid to school. Section 3 empowers the administrator to regulate education in all the schools in Delhi and Section 4 deals with recognition of schools. The terms and conditions of service of employees of Recognized Private Schools are governed by Chapter-IV of the Act, which as per Section 8, provides that the Administrator may make Rules regulating the minimum qualifications for recruitment, and the conditions of service, of employees (including the teachers) of Recognized Private Schools. The proviso to Section 8(1), relevant for the present purposes, provides that neither the salary nor the rights in respect of leave of absence, age of retirement and pension of an employee in the employment of an existing school shall be varied to the disadvantage of such employee. Sub-Section (2) of Section 8 provides that no employee of a Recognized Private School shall be dismissed, removed or reduced in rank nor shall his service be otherwise terminated except with the prior approval of the Director.

16. Section 28 of the Act deals with the power to make Rules and sub-Section (2) thereof lists the various subjects relating to which the Rules may be made. The Administrator in exercise of this power had made the Rules.

17. The Rules, under Chapter-VIII, deal with the recruitment and terms and conditions of service of employees of the private schools, other than Unaided Minority Schools. Rule 110 prescribes the retirement age of the employees of a Recognized Private School, whether aided or not, as 58 years; whereas per sub Rule (2) the age of retirement for the teachers has been prescribed as 60 years. Rule 117 lists the penalties and the disciplinary authorities. Sub-para (b) of Rule 117 prescribes compulsory retirement as a major penalty. However, the procedure for imposing major penalty has been laid down under Rule 120. Sub-Rule (2) of Rule 120 provides that no order of imposition of major penalty can be made by the disciplinary authority except after receipt of approval of the Director, sub- Rule (3) clearly prescribes that an order imposing penalty of compulsory retirement or any minor penalty may be challenged by way of an appeal to the Tribunal.

18. Thus, from a reading of the Scheme of the Act and the Rules made there-under, it is manifest that the age of retirement of a teacher of recognized school is statutorily protected under proviso to Section 8(1) read with Rule 117 and cannot be curtailed or reduced to her disadvantage, except by way of imposition of a penalty in accordance with Rule 120 of the Rules. Compulsory retirement is a major penalty under the Rules and there is no provision either in the Act or the Rules to curtail tenure of service of a teacher by an administrative order of compulsory retirement other than by way of a penalty.

19. FR 2 provides that Fundamental Rules apply to all government servants whose pay is debitable to civil estimates and to any other class of government servants to which the President may by general or special order declare them (FR) to be applicable. Undeniably, the teachers of an Unaided Recognized Private School are neither government servants nor their pay is debitable to civil estimates. They are also not the employees for whom the President, by any general or special order, has declared the Fundamental Rules applicable. Hence Fundamental Rules cannot be held applicable to the teachers of an Unaided Recognized Private School.

20. In the decision reported as Jai Prakash Wadhwa and Others Vs. Lt. Governor, Delhi Admn. and Another, (para 4) it has clearly been held that unless adopted in exercise of a power conferred, Fundamental Rules would not be applicable to persons other than those listed in FR 2. The same view has been reiterated by Supreme Court of India in the decision reported as Union of India and Others Vs. M. Aslam and Others etc, in the following words:-

...Notwithstanding the fact that we have recorded the conclusion that the employees serving under the Unit-run Canteens could be treated as government servants, but that does not necessarily mean that the service conditions of such employees are

governed by the Fundamental Rules. It would be open for the employer to frame separate conditions of service of the employees or to adopt the Fundamental Rules. There is no decision of the employer that Fundamental Rules would be applicable to such employees and in the absence of such decision the Tribunal was not justified to direct that the question of payment of subsistence allowance should be reviewed in accordance with the provisions contained in the Fundamental Rules.

21. Respondents No. 2 and 3 have urged that Rule 43 of the Rules empowers the Administrator to issue instructions, in the interest of School Education in Delhi, in relation to any matter not covered by the Rules. Accordingly, respondents No. 2 and 3 have pleaded that the Administrator, in exercise of this power, has issued a letter dated 25.03.1991 where-under, guidelines relating to service conditions of employees in aided/unaided schools have been laid down. To urge applicability of FR 56(j) to the teachers of an unaided school, reliance has been placed on para 3 of this letter, which reads as under:-

3. In the matter of discipline/leave: There is a provision in the Delhi School Education Act and Rules, 1973 and rules made thereunder, the applicability of rules governing government employees will be applicable to the employees of aided/unaided schools where the Act and Rules made thereunder is silent.

22. Appellant submitted in rebuttal that letter dated 25.03.1991 does not make any provision for applicability of FR 56(j) to recognized School. Para 3 too, as is clear from the heading of the para itself, operates only in the matter of discipline or leave. We agree. In the decision reported as Eastern Coalfields Ltd. Vs. Sanjay Transport Agency and Another, the Supreme Court held that section heading can be relied upon to clear any doubt or ambiguity in the interpretation of provision and to discern the legislative intent. The heading constitutes an important part of the Act and may be read not only as explaining the provision of the Section but also it affords a better key to the construction of the provision. Thus, the said paragraph, with reference to the heading thereof, makes it clear that it applies to matter of discipline and leave and no more.

23. Compulsory retirement by way of executive order would not mean disciplinary action against the employee. The Constitution Bench of the Supreme Court in the decision reported as Shyam Lal Vs. The State of Uttar Pradesh and The Union of India (UOI), held that "a compulsory retirement has no stigma or implication of misbehaviour or incapacity. It does not amount to a dismissal or removal, hence provisions of Art.311 are not attracted.? The view was reiterated in the decision reported as Mayongbam Radhamohan Singh Vs. The Chief Commissioner (Administrator), Manipur and Others, where the Supreme Court held that compulsory retirement is not a punishment and there is no stigma in the order of compulsory retirement. Same view has been reiterated in the decisions reported as Union of India (UOI) Vs. M.E. Reddy and Another, ; Allahabad Bank Officers Association and another Vs. Allahabad Bank and others, ; Bishwanath Prasad Singh

Vs. State of Bihar and Others, and National Aviation Company of India Ltd. Vs. S.M.K. Khan, . Therefore, para 3 of the letter cannot be relied upon as the source to invoke FR 56(j) to pass an order of compulsory retirement.

24. The learned Single Judge, in the judgment impugned has proceeded on the basis that since there is an element of public interest in teaching, the concept of compulsory retirement which has been found to be in public interest, can be extended to the teachers of recognized schools.

25. There is an inherent fallacy in the principle adopted by the learned Single Judge to hold on the applicability of Fundamental Rules to the teachers of a recognized school, so as to invoke FR 56(j); to weed out the inefficient, dead wood etc. on the ground of there being an element of public interest in the subject of teaching.

26. The two concepts cannot be intertwined. The learned Single Judge has ignored the distinction that remains in the functions of a teacher, considering the importance of schools in view of the Constitutional mandate of Right to Education having a bearing of a public interest element and pertaining to the management of the school, in matters of conditions of service of teachers being engaged in a purely private activity which is regulated by statute and hence the private action being amenable to a writ challenge if it is contrary to a statute. As held in the decision reported as Miss Raj Soni Vs. Air Officer in Charge Administration and another, the functions of a school are governed by the provisions of the Act and the Rules and the management is under statutory obligation not to contravene the same.

27. That apart, it is by now well settled that the Courts are empowered to enforce the law as it stands and not the law what the Courts may think it should be. A Court cannot presume omissus in the language of a statute unless the plain grammatical meaning given to the language, leads to absurdity. In the decision reported as ILR (1974) 1 Del 311 Indore Malwa United Mills v. Union of India this Court held that Courts must proceed on the footing that the legislature intended what it has said. Even if there is some defect in the phrase used by the legislature, the Court cannot add to or amend or by construction, make up the deficiency. Similar is the view taken by the Supreme Court in the decisions reported as Union of India (UOI) and Others Vs. Dharamendra Textile Processors and Others, and UCO Bank and Another Vs. Rajinder Lal Capoor, Court has no power to re-write, re-cast or re-frame the legislation because it has no power to do so [Satheedevi Vs. Prasanna and Another,].

28. Therefore, the Courts cannot permit the invocation of the provisions of FR 56(j) to a teacher of an Unaided Recognised Private School.

29. Before parting we would note that on 05.01.2012, we had directed learned counsel for respondent No. 1 to obtain instructions upon the question of law viz. the stand of Director of Education as to the applicability of FR 56(j) to a teacher of an Unaided Recognised Private School. On 23.01.2012, the learned counsel for

respondent No. 1 had informed the Court that according to respondent No. 1 also, FR 56(j) does not apply to a teacher of an Unaided Recognised Private School.

30. The appeal is accordingly allowed. The impugned judgment and order dated June 02, 2010 is set aside. WP(C) No. 4164/2002 is allowed. The order dated April 02, 2002/March 30, 2002 intimating the decision of the Managing Committee taken on March 27, 2002 is quashed. The decision taken by the Managing Committee on March 27, 2002 is quashed. It is declared that the appellant would be entitled to all benefits which she would have got if she had served till the age of 60 years i.e. the date of her retirement. We are not directing reinstatement since in the interregnum the appellant has already crossed the age of 60 years. Respondents No. 2 and 3 are directed to pay the salary which the appellant has lost and other benefits which she has lost within a period of six weeks from today.

31. No costs.