Raj Kumar vs Dir.Of Education & Ors on 13 April, 2016

Equivalent citations: AIR 2016 SUPREME COURT 1855, 2016 LAB. I. C. 2753, AIR 2016 SC (CIVIL) 1538, (2016) 2 LAB LN 338, (2016) 3 PAT LJR 250, (2016) 2 SCT 503, (2016) 3 JLJR 146, (2016) 4 ALL WC 4168, 2016 (6) SCC 541, (2016) 4 SERVLR 365, (2016) 4 SCALE 150, (2016) 229 DLT 66, (2016) 149 FACLR 941, (2016) 4 ESC 534, (2016) 2 CURLR 353, 2016 (9) ADJ 22 NOC

Author: V. Gopala Gowda

Bench: Amitava Roy, V. Gopala Gowda

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1020 OF 2011

RAJ KUMAR ..... APPELLANT

Vs.

DIRECTOR OF EDUCATION & ORS. ..... RESPONDENTS

J U D G M E N T

V. GOPALA GOWDA, J.

The present appeal arises out of the impugned judgment and order dated 28.07.2008 passed by the High Court of Delhi at New Delhi in Writ Petition (C) No.5349 of 2008, whereby the High Court dismissed the said Writ Petition filed by the appellant in limine and upheld the termination order dated 22.08.2008 passed against the appellant by the Delhi School Tribunal (hereinafter referred to as "the Tribunal") on the ground that the appellant, who was a driver, had been retrenched from his services by the respondent-Managing Committee, DAV Public School by following the procedure laid down under Sections 25F (a) and (b) of Chapter V-A of the Industrial Disputes Act, 1947 (hereinafter referred to as "the ID Act").

The brief facts of the case required to appreciate the rival legal contentions advanced on behalf of the parties are stated as hereunder:

> The appellant was employed as a driver by the DAV Public School, Pocket 'C', LIG Flats, East of Loni Road, Delhi and became permanent on the said post in the year 1994. His terms of service are covered under Sections 2(h), 8(2), 10 and other

provisions of the Delhi School Education Act, 1973 (hereinafter referred to as the "DSE Act").

On 01.05.2001, the DAV College Managing Committee in its 72nd meeting of Public Schools Governing Body, passed a resolution to buy new school buses with CNG facility in compliance with the directions of this Court dated 26.03.2001 passed in the case of M.C. Mehta v. Union of India and allowed the management of the DAV Schools to raise loan from nationalized banks for the said purpose.

The respondent-Managing Committee in its meeting dated 24.08.2002, passed a resolution to retrench the services of the two junior most surplus drivers, namely the appellant and one Amar Nath, for the reason that the school had two old mechanically unfit vehicles namely, a Matador (registration No. DL- IV-1481) and a Maruti Van bearing registration No.DL-5C-3107 which were disposed of on 01.09.1995 and 13.06.1997, respectively. As an alternate arrangement, private buses had to be hired for the transportation of students as per instructions in the earlier resolution, but the respondent- Managing Committee could not purchase new buses due to shortage of funds, which resulted in the appellant being declared surplus on account of non- availability of job.

On 07.01.2003, the respondent-Managing Committee issued a notice to the appellant in accordance with Section 25F (a) of the ID Act, stating that his services were no longer required by the school and that he would be retrenched from his service on the expiry of the notice period of one month. The notice also stated that the appellant was entitled to retrenchment compensation which would be paid after the expiry of the notice period of one month.

On 10.01.2003, the appellant replied to the above said notice through his counsel, in which it was stated that the impugned notice is unjust and illegal, as the appellant is a permanent employee of the school under the provisions of the DSE Act. It was also stated in the notice that the school had failed to pay arrears amounting to Rs. 70,000/- to the appellant as per the recommendations of the Fifth Pay Commission. On the same date, the appellant, through his counsel, wrote a letter to the respondent No.1- Director of Education, Govt of NCT of Delhi regarding payment of all arrears as per the Fifth Pay Commission to the appellant.

By way of letter dated 22.01.2003, the respondent-Managing Committee, through their counsel informed the appellant that the school has been paying pay and allowances to the appellant as per the recommendations of the Fifth Pay Commission which came to Rs.3,500/- per month as basic pay and Rs.1,435/- as Dearness Allowances. In the same letter, the respondent- Managing Committee also denied that it had held back an amount of Rs.70,000/- due to the appellant.

On 31.01.2003, the appellant filed Writ Petition (C) No.957 of 2003 before the High Court of Delhi, praying that the notice served on him dated 07.01.2003 be quashed and to stay the operation of the impugned notice until the Writ Petition was finally disposed of.

Meanwhile, vide letter dated 25.07.2003, the respondent-Managing Committee informed the appellant that since the extended notice period under Section 25F of the ID Act was also over, his

services now stood terminated. Further, a salary cheque for a sum of Rs.4,165/- against one month's notice period from 01.07.2003 to 25.07.2003, along with a cheque bearing No.877690 dated 22.07.2003 for a sum of Rs.25,650/- as retrenchment compensation under Section 25F (b) of the ID Act were enclosed with the letter.

The High Court disposed of the Writ Petition No. 957 of 2003 filed by the appellant vide judgment and order dated 25.02.2004. Placing reliance on the judgment of the Delhi High Court passed in Writ Petition (C) No.970 of 2003 dated 21.07.2003, filed by the other terminated driver Amar Nath, in the case of Amar Nath v. Director of Education, Govt. of Delhi & Ors., the High Court held that Section 8 of the DSE Act is very wide and any kind of termination would fall within its ambit. Accordingly, the Writ Petition was disposed of with liberty granted to the petitioner to seek an appropriate remedy under the DSE Act.

Accordingly, the appellant filed Appeal No.09 of 2004 before the Presiding officer, Delhi School Tribunal under Section 8(3) of the DSE Act against the impugned retrenchment notice dated 07.01.2003. The Tribunal vide its judgment and order dated 22.02.2008, dismissed the said appeal on the ground that the respondent-Managing Committee had the right to retrench surplus drivers of the School after fulfilling all the conditions as laid down under Sections 25F (a) & (b) of the ID Act. The Tribunal while upholding the validity of the retrenchment order held that the appellant is governed by the provisions of the ID Act as well the DSE Act. Section 2(h) of the DSE Act defines "employee" as a teacher and also includes every other employee working in a recognized school as "employee". The Tribunal held as under:

> "2(h) Hence the laws which governs the employment of the Appellant are Delhi School Education Act & Rules, 1973 and Industrial Disputes Act, 1947.Since Delhi School Education Act, 1973 has no provision of retrenchment of workmen, one has to fall back upon the provisions of Industrial Disputes Act, 1947 to see whether the conditions of the said Act regarding retrenchment were fully complied with by the Management or not." The Tribunal further held that all the conditions precedent which are required to be satisfied for retrenchment under Section 25F of the ID Act have been fulfilled in the instant case. The appellant was given notice under the provisions of the ID Act dated 07.01.2003. The intended date of his retrenchment thus, was 07.02.2003. However, the appellant was retrenched only on 25.07.2003. It was held that since the notice of more than one month had been given, the condition of Section 25F (a) of the ID Act has been duly complied with. The Tribunal in its order further held that the appellant had been paid the retrenchment compensation calculating 15 days average pay for every completed year of continuous service. The respondent-Managing Committee calculated his service for a period of 9 years and concluded that the appellant is entitled to salary for a period of four and a half months, which amounts to Rs.19,740/-, after taking into consideration Rs.3,500/- basic pay along with Rs.4,071/- as dearness allowance. In total, the appellant was paid Rs.25,650/- on account of compensation. Therefore, the Tribunal held that Section 25F (b) of the ID Act had also been duly complied with. On the issue of notice being served on the appropriate government in the prescribed manner, the Tribunal

placed reliance on the decision of this Court in the case of Bombay Union of Journalists & Ors. v. The State of Bombay & Anr.[1], wherein it was held that this was only directory in nature, and not a condition precedent for retrenchment. This Court had held as under:

"Clause (c) is not intended to protect the interests of the workman as such. It is only intended to give intimation to the appropriate Government about the retrenchment, and that only helps the Government to keep itself informed about the conditions of employment in the different industries within its region. There does not appear to be present any compelling consideration which would justify the making of the provision prescribed by clause (c) a condition precedent as in the case of clauses (a) & (b). Therefore, having regard to the object which is intended to be achieved by clauses (a) & (b) as distinguished from the object which clause (c) has in mind, it would not be unreasonable to hold that clause (c), unlike clauses

(a) & (b), is not a condition precedent." (emphasis laid by this Court) Thus, the Tribunal held that both the mandatory conditions for retrenchment have been fulfilled in the instant case, and that Section 25F(c) of the ID Act merely lays down a direction and not a condition precedent. The Tribunal further held:

"As far as the question of permission from Directorate of Education before removing an employee is concerned, in view of the judgment of the Hon'ble Supreme Court in the matter of "TMA Pai Foundation v/s State of Karnataka" and the judgment of our own Hon'ble High Court in the matter of "Kathuria Public School v/s Directorate of Education", the provision regarding obtaining prior approval from the Director of Education has been struck down and the School Management has been given a free hand to deal with its employees." The appeal filed by the appellant before the Tribunal was accordingly dismissed.

Aggrieved of the said judgment of the Tribunal, the appellant filed Writ Petition (C) No. 5349 of 2008 before the High Court of Delhi questioning the correctness of the same urging various grounds. The High Court vide impugned judgment and order dated 28.07.2008 dismissed the same in limine as it found no infirmity in the view taken by the Tribunal. Hence, the present appeal.

On the basis of the contentions advanced by the learned counsel appearing on behalf of the parties, the following issues would arise for our consideration:

Whether the appellant is a workman for the purpose of ID Act?

Whether the conditions precedent for the retrenchment of a workman as prescribed under Section 25F (a), (b) and (c) of the ID Act have been fulfilled in the instant case?

Whether the provision of Section 8(2) of the DSE Act is applicable to the facts of the instant case?

What order?

Before we advert to the rival legal contentions advanced on behalf of the parties, it is important for us to consider the relevant provisions of the ID Act and DSE Act in play in the instant case.

The DSE Act was enacted in the year 1973 and is:

“An Act to provide for better organisation and development of school education in the Union Territory of Delhi and for matters connected therewith or incidental thereto” Section 2(h) defines an employee:

“means a teacher and includes every other employee working in a recognized school” Section 8(2) of the DSE Act provides:

“Subject to any rule that may be made in this behalf, no employee of a recognized private school shall be dismissed, removed or reduced in rank nor shall his service be otherwise terminated excepted with the prior approval of the Director” Section 10 of the DSE Act reads as under:

“10.(1). Salaries of employees- the scales of pay and allowances, medical facilities, pension, gratuity provident fund and other prescribed benefits of the employees of a recognized private school shall not be as less than these of the employees of the corresponding status in school run by the appropriate authority…….. (2). The managing committee of every aided school, shall deposit every month, its share towards pay and allowances, medical facilities, pension, gratuity, provident fund and other prescribed benefits with the Administrator and the Administrator shall disburse, or cause to be disbursed within the first week of every month, the salaries and allowances to the employees of the aided schools.” The Industrial Disputes Act, 1947, is:

“An Act to make provision for the investigation and settlement of industrial disputes, and for certain other purposes” Section 2(s) defines a Workman as:

“2(s). "workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, 9 that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any

> such person— who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); who is employed in the police service or as an officer or other employee of a prison;
>
> who is employed mainly in a managerial or administrative capacity; who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature." Section 2(oo) lays down the concept of retrenchment as: "2(oo). Retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include— voluntary retirement of the workman;
>
> (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf;
>
> (bb) termination of the service of the workman as a result of the non-

renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein;"

(c) termination of the service of a workman on the ground of continued ill- health" Section 25F of the ID Act provides for the conditions precedent for the retrenchment of a workman and reads as under:

> "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:
>
> (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.

The spirit and scheme of the ID Act was discussed by a Seven-Judge Bench of this Court in the case of Bangalore Water Supply and Sewerage Board v. A. Rajappa & Ors.[2] as under:

> "To sum up, the personality of the whole statute, be it remembered, has a welfare basis, it being a beneficial legislation which protects Labour, promotes their contentment and regulates situations of crisis and tension where production may be imperiled by untenable strikes and blackmail lock- outs. The mechanism of the Act is geared to conferment of regulated benefits to workmen and resolution, according to a sympathetic rule of law, of the conflicts, actual or potential, between managements and workmen. Its goal is amelioration of the conditions of workers, tempered by a practical sense of peaceful co-existence, to the benefit of both-not a neutral position but restraints on laissez faire and concern for the welfare of the weaker lot. Empathy with the statute is necessary to understand not merely its spirit, but also its sense." (emphasis laid by this Court) It is in this context that any dispute regarding retrenchment of a workman under the ID Act needs to be appreciated.
>
> Answer to Point 1:
>
> Mr. A.T.M. Sampath, the learned counsel appearing on behalf of the appellant contends that in the instant case, the appellant is a permanent employee of the school and thus, he is not a 'workman' for the purposes of the ID Act. His services are covered instead, under Sections 2(h), 8(2) and 10 of the DSE Act, and thus, his services cannot be retrenched under Section 25F of the ID Act. Reliance is placed on the decision of this Court in the case of Miss A. Sundarambal v. Govt. of Goa, Daman & Diu and Ors.[3], wherein this Court has laid down the legal principle that while educational institutions come within the ambit of 'industry', a teacher is not 'workman' for the purpose of the ID Act. The learned counsel submits that using the analogy, the driver of the school would also be not a 'workman' for the purpose of the ID Act, rather would come within the ambit of the term 'employee' as defined under Section 2(h) of the DSE Act.

On the other hand, Mr. S.S. Ray, the learned counsel appearing on behalf of the respondent- School contends that the appellant is squarely covered under the definition of 'workman' under the ID Act as well as the definition of 'employee' under the DSE Act. The learned counsel places strong reliance on the decision of this Court in the case of A Sundarambal (supra), wherein this Court held that teachers are not workmen for the purpose of the ID Act, though educational institutions are industry in terms of Section 2(j) of the ID Act.

We are unable to agree with the contention advanced by the learned counsel appearing on behalf of the appellant. The question 'who is a workman' has been well settled by various judgments of this Court. In the case of H.R. Adyanthaya v. Sandoz (India) Ltd[4], a Constitution Bench of this Court has held as under:

> "..We thus have three Judge Bench decisions which have taken the view that a person to be qualified to be a workman must be doing the work which falls in any of the four categories, viz, manual, clerical, supervisory or technical and two two-judge Bench decisions which have by referring to one or the other of the said three decisions have

reiterated the said law. As against this, we have three three-judge Bench decisions which have without referring to the decisions in May & Baker, WIMCO and Bunnah Shell cases (supra) have taken the other view which was expressly negatived, viz., if a person does not fall within the four exceptions to the said definition he is a workman within the meaning of the ID Act. These decisions are also based on the facts found in those cases. They have, therefore, to be confined to those facts. Hence the position in law as it obtains today is that a person to be a workman under the ID Act must be employed to do the work of any of the categories, viz., manual, unskilled, skilled, technical, operational, clerical or supervisory. It is not enough that he is not covered by either of the four exceptions to the definition. We reiterate the said interpretation." (emphasis laid by this Court) The issue whether educational institution is an 'industry', and its employees are 'workmen' for the purpose of the ID Act has been answered by a Seven-judge Bench of this Court way back in the year 1978 in the case of Bangalore Water Supply (supra). It was held that educational institution is an industry in terms of Section 2(j) of the ID Act, though not all of its employees are workmen. It was held as under:

"The premises relied on is that the bulk of the employees in the university is the teaching community. Teachers are not workmen and cannot raise disputes under the Act. The subordinate staff being only a minor category of insignificant numbers, the institution must be excluded, going by the predominant character test. It is one thing to say that an institution is not an industry. It is altogether another thinking to say that a large number of its employees are not 'workmen' and cannot therefore avail of the benefits of the Act so the institution ceases to be an industry. The test is not the predominant number of employees entitled to enjoy the benefits of the Act. The true test is the predominant nature of the activity. In the case of the university or an educational institution, the nature of the activity is, ex hypothesis, education which is a service to the community. Ergo, the university is an industry. The error has crept in, if we may so say with great respect, in mixing up the numerical strength of the personnel with the nature of the activity.

Secondly there are a number of other activities of the University Administration, demonstrably industrial which are severable although ancillary to the main cultural enterprise. For instance, a university may have a large printing press as a separate but considerable establishment. It may have a large fleet of transport buses with an army of running staff. It may have a tremendous administrative strength of officers and clerical cadres. It may have karamcharis of various hues. As the Corporation of Nagpur has effectively ruled, these operations, viewed in severalty or collectively, may be treated as industry. It would be strange, indeed, if a university has 50 transport buses, hiring drivers, conductors, cleaners and workshop technicians. How are they to be denied the benefits of the Act, especially when their work is separable from academic teaching, merely because the buses are owned by the same corporate personality? We find, with all defence, little force in this process of nullification of the industrial character of the University's multi-form operations." (emphasis laid by this

Court) A perusal of the abovementioned two judgments clearly shows that a driver employed by a school, being a skilled person, is a workman for the purpose of the ID Act. Point No.1 is answered accordingly in favor of the respondents. The provisions of ID Act are applicable to the facts of the present case.

Answer to Point No.2 Mr. A.T.M. Sampath, the learned counsel appearing on behalf of the appellant contends that the retrenchment of the services of the appellant, who is a permanent employee with an unblemished record of service, on the ground of non availability of CNG vehicles is illegal, arbitrary and unjust. The appellant had been working at the respondent-School for more than seven years and had even received a letter of appreciation for his services from the principal of the school. The learned counsel submits that the appellant could have been given alternate employment at any one of the 60 schools under the respondent-Managing Committee. It is further submitted that even the defence of loss is not available to the respondents, as after the retrenchment of the appellant, the respondent- School has appointed another, less experienced person as driver. The learned counsel contends that this is in clear violation of Section 25H of the ID Act, which provides that when an opportunity for reemployment arises, preference must be given to the willing retrenched workmen over any other persons for filling up that vacancy.

The learned counsel further contends that the conditions precedent prescribed under Section 25F of the ID Act have not been complied with before retrenching the appellant. It is submitted that the notice required to be sent to the appropriate government in the prescribed form, as provided for under Section 25F (c) of the ID Act has not been sent.

On the other hand, Mr. S.S. Ray, the learned counsel appearing on behalf of the respondent-School contends that the reason for the retrenchment of the appellant has been explained in detail in the notice dated 07.01.2003. The respondent school had only one car left, while there were three drivers, as the two other cars had been rendered unfit for use. That being the case, the respondent school required the services of only one driver and accordingly, the two junior most drivers were retrenched from service, the present appellant being the junior most driver. It is submitted that all the mandatory conditions as laid down under Section 25F of the ID Act were complied with, including the payment of retrenchment compensation to the appellant.

We are unable to agree with the reasoning adopted by the Tribunal as well as the High Court in the instant case. Admittedly, the notice under Section 25F(c) of the ID Act has not been served upon the Delhi State Government. In support of the justification for not sending notice to the State Government reliance has been placed upon the decision of this Court in the case of Bombay Journalists (supra). This decision was rendered in the year 1963 and it was held in the said case that the provisions of Section 25F

(c) of the ID Act is directory and not mandatory in nature. What has been ignored by the Tribunal as well as the High Court is that subsequently, the Parliament enacted the Industrial Disputes (Amendment) Act, 1964. Section 25F (c) of the ID Act was amended to include the words:

"or such authority as may be specified by the appropriate Government by notification in the Official Gazette" The statement of objects and reasons provides:

"Opportunity has been availed of to propose a few other essential amendments which are mainly of a formal or clarificatory nature" Nothing was done on part of the legislature to indicate that it intended Section 25F(c) of the ID Act to be a directory provision, when the other two sub-sections of the same section are mandatory in nature. The amendment was enacted which seeks to make it administratively easier for notice to be served on any other authority as specified.

Further, even the decision in the case of Bombay Journalists (supra) does not come to the rescue of the respondents. On the issue of interpretation of Section 25F(c) of the ID Act, it was held as under: "The hardship resulting from retrenchment has been partially redressed by these two clauses, and so, there is every justification for making them conditions precedent. The same cannot be said about the requirement as to clause (c). Clause (c) is not intended to protect the interests of the workman as such. It is only intended to give intimation to the appropriate Government about the retrenchment, and that only helps the Government to keep itself informed about the conditions of employment in the different industries within its region. There does not appear to be present any compelling consideration which would justify the making of the provision prescribed by clause (c) a condition precedent as in the case of clauses

(a) & (b). Therefore, having regard to the object which is intended to be achieved by clauses (a) & (b) as distinguished from the object which clause

(c) has in mind, it would not be unreasonable to hold that clause (c), unlike clauses (a) & (b), is not a condition precedent." (emphasis laid by this Court) Thus, this Court read the ID Act and the relevant Rules thereunder together and arrived at the conclusion that Section 25F(c) is not a condition precedent for retrenchment. By no stretch of imagination can this decision be said to have held that there is no need for industries to comply with this condition at all. At the most, it can be held that Section 25F(c) is a condition subsequent, but is still a mandatory condition required to be fulfilled by the employers before the order of retrenchment of the workman is passed. This Court in the case of Mackinon Mackenzie & Company Ltd. v.

Mackinnon Employees Union[5] held as under:

"Further, with regard to the provision of Section 25F Clause (c), the Appellant-Company has not been able to produce cogent evidence that notice in the prescribed manner has been served by it to the State Government prior to the retrenchment of the concerned workmen. Therefore, we have to hold that the Appellant-Company has not complied with the conditions precedent to retrenchment as per Section 25F Clauses (a) and (c) of the I.D. Act which are mandatory in law." In the instant case, the relevant rules are the Industrial Disputes (Central) Rules, 1957.

Rule 76 of the said Rules reads as under:

> "76. Notice of retrenchment.- If any employer desires to retrench any workman employed in his industrial establishment who has been in continuous service for not less than one year under him (hereinafter referred to as 'workman' in this rule and in rules 77 and 78), he shall give notice of such retrenchment as in Form P to the Central Government, the Regional Labour Commissioner (Central) and Assistant Labour Commissioner (Central) and the Employment Exchange concerned and such notice shall be served on that Government, the Regional Labour Commissioner (Central), the Assistant Labour Commissioner (Central), and the Employment Exchange concerned by registered post in the following manner :-
>
> (a) where notice is given to the workman, notice of retrenchment shall be sent within three days from the date on which notice is given to the workman;

(emphasis laid by this Court) Rule 76(a) clearly mandates that the notice has to be sent to the appropriate authorities within three days from the date on which notice is served on the workman. In the instant case, the notice of retrenchment was served on the appellant on 07.01.2003. No evidence has been produced on behalf of the respondents to show that notice of the retrenchment has been sent to the appropriate authority even till date.

That being the case, it is clear that in the instant case, the mandatory conditions of Section 25F of the ID Act to retrench a workman have not been complied with. The notice of retrenchment dated 07.01.2003 and the order of retrenchment dated 25.07.2003 are liable to be set aside and accordingly set aside.

Answer to Point No.3 The learned counsel for the appellant contends that the respondent-School is a recognized private school and the appellant is an 'employee' in terms of Section 2(h) of the DSE Act. Chapter IV of the DSE Act provides for the terms and conditions of services of an employee of a recognized private school. Section 8(2) of the DSE Act contemplates that no employee of a recognized private school shall be dismissed, removed or reduced in rank nor shall their services be otherwise terminated except with the prior approval of the Director of Education, Delhi. In the instant case, the respondent–Managing Committee, before terminating the services of the appellant did not comply with the said mandatory provision of Section 8(2) of the DSE Act. The learned counsel for the appellant further contends that the notice regarding termination of service was served on the appellant on 07.01.2003, and as on that date, the aforesaid statutory provision was valid and binding.

The learned counsel for the appellant submits that Section 8(2) of the DSE Act is a substantive right provided for safeguarding the conditions of services of an employee. The termination of services of the appellant without obtaining prior permission of the Director, renders the action of the respondent-School as void. The learned counsel contends that when statutory provisions provide a procedure to do an act in a particular manner, it should be done in that very manner or not at all. Reliance is placed on the decision of this Court in the case of Babu Verghese & Ors. v. Bar Council Of

Kerala & Ors.[6]:

> "31. It is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any Statute, the act must be done in that manner or not at all. The origin of this rule is traceable to the decision in Taylor v. Taylor which was followed by Lord Roche in Nazir Ahmad v. King Emperor who stated as under :
>
> "Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all."
>
> 32. This rule has since been approved by this Court in Rao Shiv Bahadur Singh and Anr. v. State of Vindhya Pradesh and again in Deep Chand v. State of Rajasthan These cases were considered by a Three-Judge Bench of this Court in State of Uttar Pradesh v. Singhara Singh and Ors. and the rule laid down in Nazir Ahmad's case (supra) was again upheld. This rule has since been applied to the exercise of jurisdiction by courts and has also been recognized as a salutary principle of administrative law." (emphasis laid by this Court) On the other hand, the learned counsel appearing on behalf of the respondent-School contends that there was no requirement on the part of the respondent-Managing Committee to comply with Section 8(2) of the DSE Act.

Reliance is placed on the decision of the Delhi High Court in the case of Kathuria Public School v. Director of Education & Anr.[7], wherein Section 8(2) of the DSE was struck down. It was held as under:

> "21. If the aforesaid observations of the Supreme Court in TMA Pai's case (supra) are taken to its logical conclusion, it would imply that there should be no such requirement of prior permissions or subsequent approval in matter of discipline of the staff. Thus, whether it is for suspension or disciplinary action, the educational institutions would have a free hand.

The safeguard provided is for a judicial Tribunal to be set up to examine the cases." A Constitution Bench of this Court had held in the case of TMA PAI Foundation v. State of Karnataka[8] as under:

> "61...In the case of unaided private schools, maximum autonomy has to be with the management with regard to administration, including the right of appointment, disciplinary powers, admission of students and the fees to be charged.
>
> "64. An educational institution is established only for the purpose of imparting education to the students. In such an institution, it is necessary for all to maintain discipline and abide by the rules and regulations that have been lawfully framed. The teachers are like foster- parents who are required to look after, cultivate and guide the students in their pursuit of education. The teachers and the institution exist for the students and not vice versa. Once this principle is kept in mind, it must follow

that it becomes imperative for the teaching and other staff of an educational institution to perform their duties properly, and for the benefit of the students. Where allegations of misconduct are made, it is imperative that a disciplinary enquiry is conducted, and that a decision is taken. In the case of a private institution, the relationship between the management and the employees is contractual in nature. A teacher, if the contract so provides, can be proceeded against, and appropriate disciplinary action can be taken if the misconduct of the teacher is proved. Considering the nature of the duties and keeping the principle of natural justice in mind for the purposes of establishing misconduct and taking action thereon, it is imperative that a fair domestic inquiry is conducted. It is only on the basis of the result of the disciplinary inquiry that the management will been titled to take appropriate action. 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. In the ordinary relationship of master and servant, governed by the terms of a contract of employment, anyone who is guilty of breach of the terms can be proceeded against and appropriate relief can be sought. Normally, the aggrieved party would approach a Court of law and seek redress. In the case of educational institutions, however, we are of the opinion that requiring a teacher or a member of the staff to go to a civil Court for the purpose of seeking redress is not in the interest of general education. Disputes between the management and the staff of educational institutions must be decided speedily, and without the excessive incurring of costs. It would, therefore, be appropriate that an educational tribunal be set up in each district in a state -- the object being that the teacher should not suffer through the substantial costs that arise because of the location of the tribunal; if the tribunals are limited in number, they can hold circuit/camp sittings indifferent districts to achieve this objective. Till a specialized tribunal is set up, the right of filing the appeal would lie before the District judge or Additional District Judge as notified by the Government. It will not be necessary for the institution to get prior permission or ex post facto approval of a governmental authority while taking disciplinary action against a teacher or any other employee. The state government shall determine, in consultation with the High Court, the judicial forum in which an aggrieved teacher can file an appeal against the decision of the management concerning disciplinary action or termination of service." (emphasis laid by this Court) The learned counsel appearing on behalf of the respondent-School submits that not obtaining prior approval for the termination of the services of the appellant is thus, justified.

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.

> The State Legislature is empowered to enact such statutory provisions in relation to educational institutions, from Entry XI of List II of VIIth Schedule of the Constitution of India, which reads as:
>
> "education including Universities"

A number of legislations across the country have been enacted which deal with the regulation of educational institutions, which contain provisions similar to the one provided for under Section 8(2) of the DSE Act. One such provision came for consideration before a Constitution Bench of this Court in the case of Katra Educational Society v. State Of Uttar Pradesh & Ors.[9] The impugned provisions therein were certain Sections of the amended Intermediate Education Act (U.P. Act 2 of 1921). Section 16-G of the Intermediate Education (Amendment) Act, 1958 provided that Committee of Management could not remove or dismiss from service any Principal, Headmaster or teacher of a college or school without prior approval in writing of the Inspector. The Amendment Act also contained other provisions providing for governmental control over certain other aspects of the educational institutions. Adjudicating upon the competence of the state legislature to enact the amending act, this Court held as under:

> “8. Power of the State Legislature to legislate under the head "education including Universities" in Entry 11 of List II of the 7th Schedule would prima facie include the power to impose restrictions on the management of educational institutions in matters relating to education. The pith and substance of the impugned legislation being in regard to the field of education within the competence of the State Legislature, authority to legislate in respect of the maintenance of control over educational institutions imparting higher secondary education and for that purpose to make provisions for proper administration of the educational institutions was not denied. But it was said that the impugned Act is inoperative to the extent to which it seeks to impose controls upon the management of an educational institution registered under the Societies Registration Act and managed through trustees, and thereby directly trenches upon legislative power conferred by Entry 44 of List I and Entries 10 & 18 of List III. This argument has no substance. This Court has in Board of Trustees v. State of Delhi held that legislation which deprives the Board of Management of a Society registered under the Societies Registration Act of the power of management and creates a new Board does not fall within Entry 44 of List I, but falls under Entry 32 of List II, for by registration under the Societies Registration Act the Society does not acquire a corporate status. It cannot also be said that the pith and substance of the Act relates to charities or charitable institutions, or to trusts or trustees. If the true nature and character of the Act falls within the express legislative power conferred by Entry 11 of List II, merely because it incidentally trenches upon or affects a charitable institution, or the powers of trustees of the institution, it will not on that account be beyond the legislative authority of the State. The impact of the Act upon the rights of the trustees or the management of a charitable institution is purely incidental, the true object of the legislation being to provide for control over educational institutions. The amending Act was therefore within the competence of

> the State Legislature and the fact that it incidentally affected the powers of the trustees or the management in respect of educational institutions which may be regarded as charitable, could not distract from the validity of the exercise of that power.
>
> 10... If the management fails to comply with the directions made by the Director, that Officer may after considering the explanation or representation, if any, given or made by the management, refer the case to the Board for withdrawal of recognition or recommend to the State Government to proceed against the institution under sub-s. (4) and the powers which the State Government may exercise after being satisfied that the affairs of the institution are being mismanaged or that the management has wilfully or persistently failed in the performance of its duties, include the power to appoint an Authorised Controller to manage the affairs of the institution for such period as may be specified by the Government.

The provision is disciplinary and enacted for securing the best interests of the students. The State in a democratic set-up is vitally interested in securing a healthy system of imparting education for its coming generation of citizens, and if the management is recalcitrant and declines to afford facilities for enforcement of the provisions enacted in the interests of the students, a provision authorising the State Government to enter upon the management through its Authorized Controller cannot be regarded as unreasonable." (emphasis laid by this Court) From a perusal of the above judgment of the Constitution Bench, it becomes clear that the state legislature is empowered in law to enact provisions similar to Section 8(2) of the DSE Act.

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 organization 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. In the case of The Principal & Ors. v. The Presiding Officer & Ors.[10], a Division Bench of this Court held as under:
>
> "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." The Division Bench of the Delhi High Court, thus, erred in striking down Section 8(2) of the DSE Act in the case of Kathuria Public School (supra) by placing reliance on the decision of this Court in the case of TMA Pai (supra), as the subject matter in controversy therein was not the security of tenure of the employees of a school, rather, the question was the right of educational institutions to function unfettered. While the functioning of both aided and unaided educational institutions must be free from unnecessary governmental interference, the same needs to be reconciled with the conditions of employment of the employees of these institutions and provision of adequate precautions to safeguard their interests. Section 8(2) of the DSE Act is one such precautionary safeguard which needs to be followed to ensure that employees of educational institutions do not suffer unfair treatment at the hands of the management. The Division Bench of the Delhi High Court, while striking down Section 8(2) of the DSE Act in the case of Kathuria Public School (supra) has not correctly applied the law laid down in the case of Katra Educational Society (supra), wherein a Constitution Bench of this Court, with reference to provision similar to Section 8(2) of the DSE Act and keeping in view the object of regulation of an aided or unaided recognised school, has held that the regulation of the service conditions of the employees of private recognized schools is required to be controlled by educational authorities and the state legislature is empowered to legislate such provision in the DSE Act. The Division Bench wrongly relied upon that part of the judgment in the case of Katra Education Society (supra) which dealt with Article 14 of the Constitution and aided and unaided educational institutions, which had no bearing on the fact situation therein. Further, the reliance placed upon the decision of this Court in the case of Frank Anthony Public School Employees Association v. Union Of India & Ors.[11] is also misplaced as the institution under consideration in that case was a religious minority institution. The reliance placed by the learned counsel appearing on behalf of the respondents on the case of TMA Pai (supra) is also misplaced as the same has no bearing on the facts of the instant case, for the reasons discussed supra. The reliance placed upon the decision of the Delhi High Court in the case of Kathuria Public School (supra) is also misplaced as the same has been passed without appreciating the true purport of the Constitution Bench decision in the case of Katra Education Society (supra).

Therefore, the decision in the case of Kathuria Public School (supra), striking down Section 8(2) of the DSE Act, is bad in law.

Furthermore, the decision in the case of Kathuria Public School (supra) does not come to the aid of the respondents for one more reason. Undisputedly, the notice of retrenchment was served on the appellant on 07.01.2003 and he was retrenched from service on 25.07.2003. The decision in the case of Kathuria Public School (supra), striking down Section 8(2) of the DSE Act was rendered almost exactly two years later, i.e. on 22.07.2005. Surely, the respondents could not have foreseen

that the requirement of prior approval of the order of termination passed against the appellant from Director would be struck down later and hence decided to not 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 the case of Dayawati v. Inderjit[12], a three judge bench of this Court held as under:

> "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 tendered, because the rights of the litigants in an appeal are determined under the law in force at the date of the suit." More recently, in the case of Carona Ltd v. Parvathy Swaminathan and Sons[13], this Court held as under:
>
> ".....The basic rule is that the rights of the parties should be determined on the basis of the date of institution of the suit. Thus, if the plaintiff has no cause of action on the date of the filing of the suit, ordinarily, he will not be allowed to take advantage of the cause of action arising subsequent to the filing of the suit. Conversely, no relief will normally be denied to the plaintiff by reason of any subsequent event if at the date of the institution of the suit, he has a substantive right to claim such relief." The respondent-Managing Committee in the instant case, did not obtain prior approval of the order of termination passed against the appellant from the Director of Education, Govt. of NCT of Delhi as required under Section 8(2) of the DSE Act. The order of termination passed against the appellant is thus, bad in law.
>
> Answer to Point no. 4 The termination of the appellant is bad in law for non-compliance with the mandatory provisions of Section 25F of the ID Act and also Section 8(2) of the DSE Act. Further, the respondent-School has not produced any evidence on record to show that the retrenchment of the appellant was necessary as he had become 'surplus'. The termination of the appellant was ordered in the year 2003 and he is unemployed till date. The respondents have been unable to produce any evidence to show that he was gainfully employed during that period and therefore he is entitled to back wages and other consequential benefits in view of the law laid down by this Court in the case of Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyala (D.ED.)& Ors.[14] wherein it was held as under:
>
> "22. The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer employee relationship, the latter's source of income gets dried up. Not only the concerned employee, but his entire family suffers grave adversities. They are deprived of the

source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi judicial body or Court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. Denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the concerned employee and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments." For the reasons stated supra, we are of the view that the impugned judgment and order dated 28.07.2008 passed by the Delhi High Court is liable to be set aside and accordingly set aside, by allowing this appeal. The retrenchment of the appellant from his service is bad in law. The respondent-Managing Committee is directed to reinstate the appellant at his post. Consequently, the relief of back wages till the date of this order is awarded to the appellant, along with all consequential benefits from the date of termination of his services. The back wages shall be computed on the basis of periodical revision of wages/salary. We further make it clear that the entire amount due to the appellant must be spread over the period between the period of retrenchment and the date of this decision, which amounts to 13 years, for the reason that the appellant is entitled to the benefit under Section 89 of the Income Tax Act. The same must be complied with within six weeks from the date of receipt of the copy of this judgment.

……J. [V. GOPALA GOWDA] ……J. [AMITAVA ROY] New Delhi, April 13, 2016

---

[1] [2] AIR 1964 SC 1671 [3] [4] (1978) 2 SCC 213 [5] [6] (1988) 4 SCC 42 [7] [8] (1997) 5 SCC 737 [9] [10](2015) 4 SCC 544 [11] [12](1999) 3 SCC 422 [13] [14] 113(2004) DLT 703 (DB) [15] [16](2002)8 SCC 481 [17] [18] AIR 1966 SC 1307 [19] [20] (1978) 1 SCC 498 [21] [22](1986) 4 SCC 707 [23] [24] AIR 1966 SC 1423 [25] [26] (2007) 8 SCC 559 [27] [28] (2013) 10 SCC 324