Management Committee Of Montfort ... vs Shri Vijay Kumar And Ors on 12 September, 2005

Equivalent citations: AIR 2005 SUPREME COURT 3549, 2005 (7) SCC 472, 2005 AIR SCW 4724, 2005 (3) ARBI LR 243, 2005 (7) SCALE 254, (2005) 8 JT 279 (SC), 2005 (8) JT 279, (2006) 39 ALLINDCAS 602 (SC), 2006 (39) ALLINDCAS 602, 2005 (9) SRJ 65, 2005 (6) SLT 674.2, 2006 (1) SERVLJ 153 SC, (2005) 5 KHCACJ 205 (SC), 2005 SCC (L&S) 966, (2005) 123 DLT 188, (2005) 4 SCT 326, (2005) 7 SCJ 232, (2005) 5 SERVLR 817, (2005) 3 ARBILR 243, (2005) 2 WLC(SC)CVL 745, (2005) 85 DRJ 91, (2006) 108 FACLR 222, (2005) 4 LAB LN 321, (2005) 6 SUPREME 507, (2005) 7 SCALE 254, (2005) 4 ESC 519

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Bench: Arijit Pasayat, H.K. Sema

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           CASE NO.:
Appeal (civil)  6593 of 2003

PETITIONER:
Management Committee of Montfort Senior Secondary School

RESPONDENT:
Shri Vijay Kumar and Ors.

DATE OF JUDGMENT: 12/09/2005

BENCH:
ARIJIT PASAYAT & H.K. SEMA

JUDGMENT:
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J U D G M E N T WITH CIVIL APPEAL NO. 5143/2005 ARIJIT PASAYAT, J.

Judgment of a learned Single Judge of the Delhi High Court holding that the Delhi School Tribunal (in short the 'Tribunal') while hearing appeal of a dismissed employee of the appellant-school preferred under Section 8(3) of the Delhi School Education Act, 1973 (in short the 'Act') was not required to refer the appeal to an arbitrator on an application being filed before it by the management of the school under Section 8(1) of the Arbitration and Conciliation Act, 1996 (in short the 'Arbitration Act') is under challenge in this appeal.

Factual position is almost undisputed and it is unnecessary to set out the details. In a nutshell the same is as follows:

Managing Committee of an un-aided minority institution is the appellant. The respondent No.1- Vijay Kumar (hereinafter referred to as the 'employee') was working as an Assistant Teacher in the school known as Montfort Senior Secondary School (hereinafter referred to as the 'School'). Disciplinary action was taken against him and by order dated 4.5.2000 the Managing Committee terminated his services.

Against the order of termination, an appeal was preferred before the Tribunal under Section 8(3) of the Act. The present appellant filed an application under Section 8(1) of the Arbitration Act for reference to an arbitrator. The Tribunal dismissed the application by its order dated 7.6.2001. The same was challenged in a writ petition filed before the Delhi High Court and a learned Single Judge by the impugned judgment upheld the view of the Tribunal and dismissed the writ petition.

In support of the appeal, it was submitted that Chapter V of the Act applies to un-aided minority schools and Section 15 of the Act deals with contract of service. Clause

(e) of sub-section (3) of Section 15 deals with arbitration of dispute arising out of any breach of contract between the employee and the managing committee with regard to certain aspects. It is submitted that clause (e) of sub-Section (3) of Section 15 clearly makes arbitration mandatory. As per the requirement of Section 15 the school is legally bound to enter into a written contract of service with every employee. Since there is a specific provision for an arbitration and there is no dispute that a written contract of service was entered into, the Tribunal was in law required to refer the matter to an arbitrator. The Service Rules for the staff of the school govern the conditions of service. They are called "Montfort School Staff Rules"

(in short 'Staff Rules") and have come into effect from 1st July, 1974. Reference is made to Rule 24 dealing with Code of Conduct and Rule 31 containing an arbitration clause. Chapter IV of the Act deals with terms and conditions of service of recognized private schools. Section 12 of the Act states that the provision of Chapter IV is not applicable to un-aided minority schools. Though Section 12 of the Act was held to be discriminatory and void in Frank Anthony Public School Employees' Association v. Union of India and Ors. (AIR 1987 SC 311) and The Ahmedabad St. Xaviers College Society and Anr. v. State of Gujarat and Anr. (AIR 1974 SC 1389), yet effect of Section 15 cannot be diluted.

There is no appearance on behalf of respondent No.1. Therefore, considering the importance of the matter involved, we requested Mr. P.S. Narasimha to assist the Court as Amicus Curiae. He has placed various provisions of the Act and referring to decisions in Frank Anthony and St. Xaviers cases (supra), he submitted that the decision of a learned Single Judge does not require any interference. According to him full effect has to be given to both Chapter IV and V. In order to appreciate the rival submissions the relevant provisions of the Act need to be noted. While Chapter IV prescribes various statutory rights, privileges and remedies for the employees of private aided schools, Chapter V is restricted in its operation and enables creation of contractual rights with the employees of the unaided minority schools. The remedy

for enforcing the contractual right is provided in Section 15(3) (e) of the Act.

Section 8(3), Section 11 and Section 15 read as under:

Section 8(3):- Any employee of a recognized private school who is dismissed, removed or reduced in rank may, within three months from the date of communication to him of the order of such dismissal, removal or reduction in rank, appeal against such order to the Tribunal constituted under Section 11.

Section 11 :- Tribunal

1. The Administrator shall, by notification, constitute a Tribunal, to be known as the " Delhi School Tribunal"

consisting of one person:

Provided that no person shall be so appointed unless he has held office as a District Judge or any equivalent judicial office.

2. If any vacancy, other than a temporary absence, occurs in the office of the presiding officer of the Tribunal, the Administrator shall appoint another person, in accordance with the provisions of this section, to fill the vacancy and the proceedings may be continued before the Tribunal from the stage at which the vacancy is filled.

3.The Administrator shall make available to the Tribunal such staff as may be necessary in the discharge of its functions under this Act.

4. All expenses incurred in connection with the Tribunal shall be defrayed out of the Consolidated Fund of India.

5. The Tribunal shall have power to regulate its own procedure in all matters arising out of the discharge of its functions including the place or places at which it shall hold its sitting.

6. The Tribunal shall for the purpose of disposal of an appeal preferred under this Act have the same powers as are vested in a court of appeal by the Code of Civil Procedure, 1908 (5 of 1908) and shall also have the power to stay the operation of the order appealed against on such terms as it may think fit.

Section 15:- Contract of Service

1. The managing committee of every unaided minority school shall enter into a written contract of service with every employee of such school;

Provided that if, at the commencement of this Act, there is no written contract of service in relation to any existing employee of an unaided minority school, the managing committee of such school shall enter into such contract within a period of three months from such commencement;

Provided further that no contract referred to in the foregoing proviso shall vary to the disadvantage of any existing employee the term of any contract subsisting at the commencement of this Act between him and the school.

2. A copy of every contract of service referred to in sub-section (1) shall be forwarded by the managing committee of the concerned unaided minority school to the Administrator who shall, on receipt of such copy, register it in such manner as may be prescribed.

3. Every contract of service referred to in sub-section (1)shall provide for the following matters namely:

(a)the terms and conditions of service of the employee, including the scale of pay and other allowances to which he shall be entitled;

(b)the leave of absence, age of retirement, pension and gratuity or contributory provident fund in lieu of pension and gratuity, and medical and other benefits to which the employee shall be entitled;

(c)the penalties which may be imposed on the employee for the violation of any Code of Conduct or the breach of any term of the contract entered into by him;

(d)the manner in which disciplinary proceedings in relation to the employee shall be conducted and the procedure which shall be followed before any employee is dismissed, removed from service or reduced in rank;

(e)arbitration of any dispute arising out of any breach of contract between the employee and the managing committee with regard to

(i) the scales of pay and other allowances.

(ii)leave of absence, age of retirement, pension, gratuity, provident fund, medical and other benefits.

(iii)any disciplinary action leading to the dismissal or removal from service or reduction in rank of the employee.

(f)any other matter which, in the opinion of the managing committee ought to be or may be specified in such contract.

As noted above, Section 15 specifically applies to un-aided minority schools. Rule 31 of the Staff Rules is also of some relevance and reads as follows:

> "If the employee feels aggrieved against the decision of the disciplinary committee or of the Managing Committee, he has right to appeal to the arbitrator, appointed as such by the society. His decision shall be final and binding on both parties".

Sections 5 and 8 of the Arbitration Act are also relevant and read as under:

> "Section 5 - EXTENT OF JUDICIAL INTERVENTION.
>
> Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.
>
> 8- POWER TO REFER PARTIES TO ARBITRATION WHERE THERE IS AN ARBITRATION AGREEMENT.
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> (1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.
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> (2) The application referred to in sub-

section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

Section 2(4) of the Arbitration Act embraces statutory arbitration within the ambit of arbitration agreement over which the provisions of the Act are applicable. Reading of Rule 31 of the Staff Rules and Section 2(4) makes it clear that a statutory arbitration agreement was entered into between the parties.

In Frank Anthony's case (supra) it was held in paragraphs 3, 13, 20 and 21 as follows:

> "3. The attack of the petitioner against Section 12 of the Delhi Education Act was based on Article 14 while the provisions were sought to be sustained by the respondents on the basis of Article 30 of the Constitution. While it was argued by Mr Vaidyanathan, learned counsel for the petitioner that Section 12 was hit by Article 14 and that Sections 8 to 11 did not, in any manner, impinge upon Article 30 of the

Constitution, it was argued, on behalf of the respondents, by the learned Additional Solicitor-General and by Shri Frank Anthony, that the classification made by Section 12 was perfectly valid and that, but for Section 12, Sections 8 to 11 would have to be held to interfere with the right guaranteed by Article 30 to religious and linguistic minorities to administer educational institutions of their choice and Sections 8 to 11 would consequently be inapplicable to such minority educational institutions.

13. Thus, there now appears to be a general and broad consensus about the content and dimension of the Fundamental Right guaranteed by Article 30(1) of the Constitution. The right guaranteed to religious and linguistic minorities by Article 30(1) is twofold, to establish and to administer educational institutions of their choice. The key to the article lies in the words "of their own choice". These words indicate that the extent of the right is to be determined, not with reference to any concept of State necessity and general societal interest but with reference to the educational institutions themselves, that is, with reference to the goal of making the institutions "effective vehicles of education for the minority community or other persons who resort to them". It follows that regulatory measures which are designed towards the achievement of the goal of making the minority educational institutions effective instruments for imparting education cannot be considered to impinge upon the right guaranteed by Article 30(1) of the Constitution. The question in each case is whether the particular measure is, in the ultimate analysis, designed to achieve such goal, without of course nullifying any part of the right of management in substantial measure. The provisions embodied in Section 8 to 11 of the Delhi School Education Act may now be measured alongside the Fundamental Right guaranteed by Article 30(1) of the Constitution to determine whether any of them impinges on that fundamental right. Some like or analogous provisions have been considered in the cases to which we have referred. Where a provision has been considered by the Nine Judge Bench in Ahmedabad St. Xaviers College v. State of Gujarat [(1975) 1 SCR 173], we will naturally adopt what has been said therein and where the Nine Judge Bench is silent we will have recourse to the other decisions.

20. Thus, Sections 8(1), 8(3), 8(4) and 8(5) do not encroach upon any right of minorities to administer their educational institutions. Section 8(2), however, must, in view of the authorities, be held to interfere with such right and, therefore, inapplicable to minority institutions. Section 9 is again innocuous since Section 14 which applies to unaided minority schools is virtually on the same lines as Section 9. We have already considered Section 11 while dealing with Section 8(3). We must, therefore, hold that Section 12 which makes the provisions of Chapter IV inapplicable to unaided minority schools is discriminatory not only because it makes Section 10 inapplicable to minority institutions, but also because it makes Sections 8(1), 8(3), 8(4), 8(5), 9 and 11 inapplicable to unaided minority institutions. That the Parliament did not understand Sections 8 to 11 as offending the fundamental right guaranteed to the minorities under Article 30(1) is evident from the fact that Chapter IV applies to aided minority institutions and it cannot for a moment be suggested

> that surrender of the right under Article 30(1) is the price which the aided minority institutions have to pay to obtain aid from the government.
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> 21. The result of our discussion is that Section 12 of the Delhi School Education Act which makes the provisions of Chapter IV inapplicable to unaided minority institutions is discriminatory and void except to the extent that it makes Section 8(2) inapplicable to unaided minority institutions. We, therefore, grant a declaration to that effect and direct the Union of India and the Delhi Administration and its officers, to enforce the provisions of Chapter IV except Section 8(2) in the manner provided in the chapter in the case of the Frank Anthony Public School. The management of the school is directed not to give effect to the order of suspension passed against the members of the staff."

In St. Xaviers' case (supra) the following observation was made, which was noted in Frank Anthony's case (supra):

> "A regulation which is designed to prevent mal-administration of an educational institution cannot be said to offend clause (1) of Article 30. At the same time it has to be ensured that under the power of making regulation nothing is done as would detract from the character of the institution as a minority educational institution or which would impinge upon the rights of the minorities to establish and administer educational institutions of their choice.

The right conferred by Article 30(1) is intended to be real and effective and not a mere pious and abstract sentiment; it is a promise of reality and not a teasing illusion. Such a right cannot be allowed to be whittled down by any measure masquerading as a regulation. As observed by this Court in the case of Rev. Sidhajbjai Sabhai (supra), regulations which may lawfully be imposed either by legislative or executive action as a condition of receiving grant or of recognition must be directed to making the institution while retaining its character as minority institution as an educational institution. Such regulation must satisfy a dual test the test of reasonableness, and the test that it is regulative of the educational character of the institution and is conclusive to making the institution an effective vehicle of education for the minority or other persons who resort to it."

The effect of the decision in Frank Anthony's case (supra) is that the statutory rights and privileges of Chapter IV have been extended to the employees covered by Chapter V and, therefore, the contractual rights have to be judged in the background of statutory rights. In view of what has been stated in Frank Anthony's case (supra) the very nature of employment has undergone a transformation and services of the employees in minorities un-aided schools governed under Chapter V are no longer contractual in nature but they are statutory. The qualifications, leaves, salaries, age of retirement, pension, dismissal, removal, reduction in rank, suspension and other conditions of service are to be governed exclusively under the statutory regime provided in Chapter IV. The Tribunal constituted under Section 11 is the forum provided for enforcing some of these rights. In Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke of Bombay and Ors. (1976 (1) SCC 496), it has been observed that if a statute confers a right and in the same breath provides for a

remedy for enforcement of such right, the remedy provided by the statute is an exclusive one. If an employee seeks to enforce rights and obligations created under Chapter IV, a remedy is available to him to get an adjudication in the manner provided in Chapter IV by the prescribed forum i.e. the Tribunal. That being so, the Tribunal cannot and in fact has no power and jurisdiction to hear the appeal on merits and only way is to ask the parties to go for arbitration.

According to learned counsel for the appellant though there may be two remedies available to the dismissed employee, that is, one the appeal and the other before the arbitrator, his stand was that when one of the parties i.e. the employer wants a particular forum for adjudication there cannot be a compulsion for him to go before the forum chosen by the other party. This argument in our view is clearly without substance. Even if there are plural or multiple remedies available, the principle of dominus litis has clear application. In Dhannalal v. Kalawathi Bai (2002 (6) SCC 16) this Court relying on Ganga Bai v. Vijay Kumar (1974 (2) SCC

393) held as under:

> "There is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statute, one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit.
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> In Dhannalal's case (supra) it was further held as under:
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> "The plaintiff is dominus litis, that is, master of, or having dominion over, the case. He is the person who has carriage and control of an action. In case of conflict of jurisdiction the choice ought to lie with the plaintiff to choose the forum best suited to him unless there be a rule of law excluding access to a forum of the plaintiff's choice or permitting recourse to a forum will be opposed to public policy or will be an abuse of the process of law."

A question has been raised as to whether the Tribunal is a judicial authority and/or whether it exercises judicial power in the background of sub-Section (1) of Section 8 of the Arbitration Act. The expression 'Judicial Authority' has not been defined under the said Act. The Tribunal is presided by a judicial officer of equal rank of the District Judge. The expenditure incurred on the Tribunal is defrayed from the Consolidated Funds of India. It is vested with the power to regulate its own proceedings and is vested with same powers as are vested in a Court of Law under the Code of Civil Procedure, 1908 (in short the 'CPC'). One important factor is that the Tribunal has a power to stay the operation of the order appealed against.

Finality has been attached to the order of the Tribunal subject to any judicial review under Article 226/227 or Article 32 of the Constitution of India, 1950 (in short the 'Constitution'). Meaning of the words "act judicially" and "judicial power" need to be noted at this juncture. Provisions of Section 11 of the Act clearly vest all the powers of a civil appellate court in the Tribunal while dealing with an

appeal preferred before it under Section 8(3) of the Act.

In Regina John M'Evoy Vs. Dublin Corporation (1878) 2 LR Ir. 371 (D) it was observed as under:-

> "The term "judicial" does not necessarily mean acts of a judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances and imposing liability or affecting the rights of others."

In Huddart Parker and Co. v. Moorehead (1909)8 CLR 330 (E) judicial powers were defined as under:-

> "The words "judicial power" as used in section 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects or between itself and its subjects whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."

In Rex Vs. London County Council (1931) 2 KB 215 (F) judicial authority was defined as under:-

> "It is not necessary that it should be a Court in the sense in which this Court is a court; it is enough if it is exercising, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition and it is not necessary to be strictly a Court."

In Royal Aquarium and summer and Winter Garden Society Ltd. v. Parkinson (1892 (1) QB 431) dealing with the meaning of the word 'judicial' it was observed as under:

> "The word 'judicial' has two meanings. It may refer to the discharge of duties exercisable by a Judge or by Justices in Court or to administrative duties which need not be performed in court, but in respect of which it is necessary to bring to bear a judicial mind, that is, a mind to determine what is fair and just in respect of the matters under consideration."

Reference to expressions "judicial", and "judicial power" as detailed in Advanced Law Lexicon by P. Ramanath Aiyar, 3rd Edition, 2005 (at pages 2512 and 2518) would be appropriate:

> "Judicial: Belonging to a cause, trial or judgment; belonging to or emanating from a judge as such; the authority vested in a judge. (Bouvier L. Dict.); of, or belonging to a Court of justice; of or pertaining to a judge; pertaining to the administration of justice, proper to a Court of law.

> The word "judicial" is used in two senses. The first to designate such bodies or officers "as have the power of adjudication upon the rights of persons and property. In the other class of cases it is used to express an act of the mind or judgment upon a proposed course of official action as to an object of corporate power, for the consequences of which the official will not be liable, although his act was not well judged. (See Royal Aquarium v. Parkinson, (1892) 1 QB 431).

Judicial Power: The power to decide cases and controversies (Craig R. Ducat Constitutional Interpretation).

In "Words and Phrases Legally Defined" by John B. Saunders, Volume 3, at page 113, "Judicial Power" has been defined:

> "If a body which has power to give a binding and authoritative decision is able to take action so as to enforce that decision, then but only by then, according to the definition quoted, all the attributes of judicial power are plainly present." "Judicial power" as defined by Chief Justice Griffith in Huddart Parker and Co. v. Moorehead (1909) 8 CLR 330 at 357 approved by the Privy Council in Shell Company of Australia v. Federal Commr. Of Taxation, (1931) AC 275 at p.283 means the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.
>
> The authority to determine the rights of persons or property by arbitrating between adversaries in specific controversies at the instance of a party thereto; the authority vested in some Court, officer, or person to hear and determine when the rights of persons or property or the propriety of doing an act is the subject-matter of adjudication. (Grider v. Tally 54, Am Rep 65).
>
> A judge exercises "judicial powers" not only when he is deciding suits between parties, but also when he exercises disciplinary powers which are properly appurtenant to the office of a judge. (A.G. of Gambia v. N' Jie, 1961 AC 617.
>
> At first flush, Sections 8(3) and 15 of the Act may appear to be self-contradictory. But it is really not so, when considered in the background of what is stated in Frank Anthony and St. Xaviers' cases (supra). By giving benefit of Section 8(3) to employees of recognized unaided minority schools, they are put at par with their counterparts in private schools. The two provisions serve similar purpose i.e. providing a forum for ventilating grievances before a forum. Once a remedy under one is exhausted it is not permissible to avail the other one.

As noted by this Court in Bank of India v. Lekhimoni Das and Ors. (2000 (3) SCC 640), as a general principle where two remedies are available under law, one of them should not be taken as operating in derogation of the other.

In Canara Bank v. Nuclear Power Corporation of India Ltd. (1995 (3) JT SC 42) this Court held that the Company Law Board was a Court while exercising the functions of the Court. No serious challenge is raised by learned counsel for the appellant to the proposition that the Tribunal is a judicial authority within the meaning of the Arbitration Act.

While accepting the stand of the appellant in a given case the provisions of Section 8(3) of the Act could be rendered nugatory by requiring the Tribunal to refer the matter to an arbitrator.

In view of what has been stated above, the inevitable conclusion is that the Civil Appeal No.6593 of 2003 is sans merit.

In view of our judgment in C.A. No.6593 of 2003, this appeal is equally without merit.

We record our appreciation for the valuable assistance rendered by Mr. P.S. Narasimha appeared as Amicus Curiae.

Both the appeals are dismissed without any order as to costs.