

(2019) 07 KAR CK 0024

In the Karnataka High Court

Case No : Writ Petition No. 29597, 29600 Of 2017 (S-RES)

Catholic Board Of Education

APPELLANT

Vs

State Of Karnataka

RESPONDENT

Date of Decision : 12-07-2019

Acts Referred:

Karnataka Education Act, 1983 — Section 141
Karnataka Educational Institutions (Recruitment And Terms And Conditions Of Services Of Employees in Private Aided Primary And Secondary Educational Institutions), Rules, 1999 — Rule 1(ii)(c), 3, 6, 7
Karnataka Educational Institutions (Recruitment And Terms And Conditions Of Service Employees in Private Aided Primary And Secondary Educational Institutions) (Amendment) Rules, 2008 — Rule 1(ii)(c)
Constitution Of India, 1950 — Article 13(2), 14, 16, 19, 19(1)(g), 21, 26(a), 29, 29(1), 30, 30(1), 32, 41, 45, 46, 136, 226, 245, 246, 372, 372(1), 395

Citation : (2019) 07 KAR CK 0024

Hon'ble Judges : P.B. Bajanthri, J

Bench : Single Bench

Advocate : Ganapathi Hegde, Nithin Ramesh, Sreedhar N.Hegde

Final Decision : Disposed Off

Judgement

1. In these petitions petitioners have sought for the following relief:

a. Declare that Rules 1(ii) (c), 3, 6 and 7 in Annexure 1 of the Karnataka Educational Institutions (Recruitment and Terms and Conditions of Services of Employees in Private Aided Primary and Secondary Educational Institutions), Rules, 1999, as amended by the Karnataka Educational Institutions (Recruitment and Terms and Conditions) (Amendment) Rules, 2008 (Vide Annexure D) are not applicable to the institutions managed and run by petitioner No.1 for being inconsistent with Article 30(1) of the Constitution of India; or, in the alternative Declare that Rules 1(ii) (c), 3, 6 and 7 in

Annexure 1 of the Karnataka Educational Institutions (Recruitment and Terms and Conditions of Service of Employees in Private Aided Primary and Secondary Educational Institutions), Rules, 1999, as amended by the Karnataka Educational Institutions (Recruitment and Terms and Conditions of Service of Employees in Private Aided Primary and Secondary Educational Institutions) (Amendment) Rules, 2008 (Vide Annexure D) are ultra vires and Constitution of India for being violative of Articles 14 and 30(1) of the Constitution, having regard to Section 141 of the Karnataka Education Act 1983;

b. Issue a writ in the nature of Certiorari or any other order in the nature of a writ of certiorari quashing the Endorsement bearing No.D3/3108/

Nemakathi Anumodane/Cr-)3/015-2016, dated 24.06.2016 issued by the Respondent No.3, Deputy Director (Admin), Department of Public Instructions (Annexure A);

c. Issue a writ in the nature of Certiorari or any other order in the nature of a writ of certiorari quashing the endorsement bearing No.C8

(5)/Sha.shi.Aa/Ve.Anu.O.22/2016-17, dated 19.07.2016 issued by the respondent No.2, Director Secondary Education (Annexure B.);

d. Issue a writ in the nature of Certiorari or any other order in the nature of a writ of certiorari quashing the Endorsement bearing No.A4:Hudd.

Mam:Anu:188844:2016-17, dated 30.01.2017 issued by the Respondent No.4, Block Education Officer, Karkala (Annexure C);

e. Issue a writ in the nature of Mandamus or any other order to the Respondents to approve the appointment of teachers made by the petitioners and

to release the salary of the teachers so appointed for the period from the date of appointment to till date.

f. Grant any other relief as this Honâ??ble Court may deem fit in the facts and circumstances of this case.

2. Petitioners proceeded to recruit and appoint for the posts of Assistant Teachers i.e., Science- CBZ, Physical Instructor Grade-I and permission to

fill up Hindi Language Teacher. Thereafter, they are required to obtain approval for the grant-in-aid from the respondent - Government. Government

â?" Education Department rejected grievance of the petitioners in respect of approving the aforesaid proposal on the score that selection and appoint

and proposal to fill up Hindi Language Teacher are not in terms of Rule 1 (ii) (c)

of the Karnataka Educational Institutions (Recruitment and Terms and Conditions of Service Employees in Private Aided Primary and Secondary Educational Institutions) (Amendment) Rules, 2008 notified on 22.11.2008.

3. Learned counsel for the petitioners submitted that State Government has committed an error in incorporating the Karnataka Educational Institutions (Recruitment and Terms and Conditions of Service Employees in Private Aided Primary and Secondary Educational Institutions) (Amendment) Rules, 2008 (For short Rules 2008) of item No.1. Rule 1(ii) (c), Rule 3, Rule 6 and Rule 7 and are contrary to Section 141 of the Karnataka Education Act, 1983 (for short Act 1983) r/w Article 30 of the Constitution on the score that petitioner's Society has been notified as Minority Institution and Minority Status has been granted, which is not disputed.

4. Challenging the validity of the aforesaid Rules and Annexures-A, B and C, learned counsel for the petitioners relied on the decision of the Supreme Court reported in the case of Sindhi Education Society Vs. Chief Secretary, Government of NCT, Delhi reported in (2010) 8 SCC 49 (para Nos.1, 2, 4, 7, 58, 59, 90, 91, 92, 105, 112, 114).

5. In view of the principle laid down in the aforesaid decision, State Government incorporating the aforesaid provisions in the Rules, 2008 by which Government has a say in the process of selection of the staff of the Minority Institution is in violation of Article 30 of Constitution, Section 141 of the Act 1983 and Supreme Court verdict cited supra. Hence, Writ petition is to be allowed while reading down the aforesaid provisions to the extent that those provisions are not applicable to the petitioner's minority institution.

6. Per contra, learned counsel for the respondents is not disputing relating to status of the petitioner's Institution that it is a minority institution availing aid from the State of Karnataka. Rules 2008 cited supra are relevant for the purpose of whether petitioner's minority Institution is following the guidelines/regulations including reservation in respect of recruitment of staff of the petitioner? On that count, it is necessary to incorporate various provisions in the Rules 2008. In the aforesaid provisions, role of State is limited to the extent that one of the representative of the State would be participating in the selection process, in terms of provisions, President/Secretary of the Managing Committee, one subject expert

nominated by the Managing Committee and one representative of Public Instructions Department. Major role is being played by the Management-

petitioner in the recruitment of staffs. Representative of the Government is only to see whether selection process is carried out in a fair manner or

not and so also, whether regulation which are governed by the minority institution is being carried out or not? Otherwise, rest of the powers are vested with the Management- petitioner.

7. Learned counsel for the respondents further submitted that there is no violation of Section 141 of the Act 1983 and Article 30 of the Constitution.

He has cited the following decisions:

1. (2007) 1 SCC 386 " Secy., Malankara Syrian Catholic College Vs. T. Jose and Others (paras 10, 12, 18 and 19)

2. (2017) 3 SCC 619 " IVY C.DA Conceicao Vs. State of Goa and Others (para Nos.12 to 14)

3. 2013 SCC Online KAR 6194 " Sri Venkataramana Education Trust (R). Karkala, Karkala Taluk Udupi District- 574 104 Rep. by Secretary Shri

K.P. Shenai Vs. The State of Karnataka Education Department and others. - (para No.6)

4. 2017 (4) SCC KLJ 420 " Dr. (Ms. Rachana Kishore Ubranagala Vs. St. John's National Academy of Health Sciences, Sarjapur Road,

Bengaluru and others (para 8)-

5. ILR 2016 KAR 3381 - Shri Dharmasthala Manjunatheshwara Education Society and Others Vs. Smt. Bharati (Para Nos.16, 17 to 19)

8. In this background, it was submitted that by virtue of the statutory provisions, rights of the management " petitioner has not been taken away, only

limited role is played by the State to the extent of whether petitioner's Minority Institution are following regulations/rules issued by the State

Government from time to time or not?

9. In reply, learned counsel for the petitioners submitted that the cited decisions on behalf of the respondents i.e. 2017(4) Kar. L.J. 420 and ILR 2016

KAR 3381, factual aspects are entirely different and those decisions are not assisting respondent's case. Similarly, in respect of (2017) 3 SCC

619, whereas in 2013 SCC OnLine Kar 6194, he is also relying on para No.6. Further, he has pointed out from para No.72 of T.M.A. Pai Foundation

V/s. State of Karnataka (2002) 8 SCC 481.

10. Cited decisions of the Apex Court, no interference from the State as held by the Supreme Court in the case of Sindhi Education Society (supra)

wherein, T.M.A. Pai Foundation case has been taken into consideration. Relevant paras are 24 to 29 which are reproduced hereunder:

24. While the conclusion that "occupation" comprehends the establishment of educational institutions is correct, the proviso in the aforesaid

observation to the effect that this is so provided no recognition is sought from the State or affiliation from the university concerned is, with utmost

respect, erroneous. The fundamental right to establish an educational institution cannot be confused with the right to ask for recognition or affiliation.

The exercise of a fundamental right may be controlled in a variety of ways. For example, the right to carry on a business does not entail the right to

carry on a business at a particular place. The right to carry on a business may be subject to licensing laws so that a denial of the licence prevents a

person from carrying on that particular business. The question of whether there is a fundamental right or not cannot be dependent upon whether it can

be made the subject-matter of controls.

25. The establishment and running of an educational institution where a large number of persons are employed as teachers or administrative staff, and

an activity is carried on that results in the imparting of knowledge to the students, must necessarily be regarded as an occupation, even if there is no

element of profit generation. It is difficult to comprehend that education, per se, will not fall under any of the four expressions in Article 19(1)(g).

"Occupation" would be an activity of a person undertaken as a means of livelihood or a mission in life. The above quoted observations in Sodan

Singh case [(1989) 4 SCC 155] correctly interpret the expression "occupation" in Article 19(1)(g).

26. The right to establish and maintain educational institutions may also be sourced to Article 26(a), which grants, in positive terms, the right to every

religious denomination or any section thereof to establish and maintain institutions for religious and charitable purposes, subject to public order, morality

and health. Education is a recognized head of charity. Therefore, religious denominations or sections thereof, which do not fall within the special

categories carved out in Articles 29(1) and 30(1), have the right to establish and maintain religious and educational institutions. This would allow

members belonging to any religious denomination, including the majority religious community, to set up an educational institution. Given this, the phrase “private educational institution” as used in this judgment would include not only those educational institutions set up by secular persons or bodies, but also educational institutions set up by religious denominations; the word “private” is used in contradistinction to government institutions.

2. Does Unni Krishnan case [(1993) 1 SCC 645] require reconsideration?

27. In the case of Mohini Jain v. State of Karnataka [(1992) 3 SCC 666] the challenge was to a notification of June 1989, which provided for a fee

structure, whereby for government seats, the tuition fee was Rs 2000 per annum, and for students from Karnataka, the fee was Rs 25,000 per annum,

while the fee for Indian students from outside Karnataka, under the payment category, was Rs 60,000 per annum. It had been contended that charging

such a discriminatory and high fee violated constitutional guarantees and rights. This attack was sustained, and it was held that there was a

fundamental right to education in every citizen, and that the State was duty-bound to provide education, and that the private institutions that discharge

the State's duties were equally bound not to charge a higher fee than the government institutions. The Court then held that any prescription of fee in

excess of what was payable in government colleges was a capitation fee and would, therefore, be illegal. The correctness of this decision was

challenged in Unni Krishnan case [(1993) 1 SCC 645] where it was contended that if Mohini Jain [(1992) 3 SCC 666] ratio was applied, the

educational institutions would have to be closed down, as they would be wholly unviable without appropriate funds, by way of tuition fees, from their

students.

28. We will now examine the decision in Unni Krishnan case [(1993) 1 SCC 645]. In this case, this Court considered the conditions and regulations, if

any, which the State could impose in the running of private unaided/aided, recognized or affiliated educational institutions conducting professional

courses such as Medicine, Engineering etc. The extent to which the fee could be charged by such an institution, and the manner in which admissions

could be granted was also considered. This Court held that private unaided recognized/affiliated educational institutions running professional courses

were entitled to charge a fee higher than that charged by government

institutions for similar courses, but that such a fee could not exceed the maximum limit fixed by the State. It held that commercialization of education was not permissible, and "was opposed to public policy and Indian tradition and therefore charging capitation fee was illegal". With regard to private aided recognized/affiliated educational institutions, the Court upheld the power of the Government to frame rules and regulations in matters of admission and fees, as well as in matters such as recruitment and conditions of service of teachers and staff. Though a question was raised as to whether the setting up of an educational institution could be regarded as a business, profession or vocation under Article 19(1)(g), this question was not answered. Jeevan Reddy, J., however, at p. 751, para 197, observed as follows:

"While we do not wish to express any opinion on the question whether the right to establish an educational institution can be said to be carrying on any "occupation" within the meaning of Article 19(1)(g), " perhaps, it is " we are certainly of the opinion that such activity can neither be a trade or business nor can it be a profession within the meaning of Article 19(1)(g). Trade or business normally connotes an activity carried on with a profit motive. Education has never been commerce in this country."

29. Reliance was placed on a decision of this Court in *Bangalore Water Supply and Sewerage Board v. A. Rajappa* [(1978) 2 SCC 213 : 1978 SCC

(L&S) 215] wherein it had been held that educational institutions would come within the expression "industry" in the Industrial Disputes Act, and

that, therefore, education would come under Article 19(1)(g). But the applicability of this decision was distinguished by Jeevan Reddy, J., observing

[(1993) 1 SCC 645] (at SCC p. 753, para 200) that "we do not think the said observation (that education is an industry) in a different context has

any application here". While holding, on an interpretation of Articles 21, 41, 45 and 46, that a citizen who had not completed the age of 14 years had

a right to free education, it was held that such a right was not available to citizens who were beyond the age of 14 years. It was further held that

private educational institutions merely supplemented the effort of the State in educating the people. No private educational institution could survive or

subsist without recognition and/or affiliation granted by bodies that were the authorities of the State. In such a situation, the Court held that it was

obligatory upon the authority granting recognition/affiliation to insist upon such conditions as were appropriate to ensure not only an education of requisite standard, but also fairness and equal treatment in matters of admission of students. The Court then formulated a scheme and directed every authority granting recognition/affiliation to impose that scheme upon institutions seeking recognition/affiliation, even if they were unaided institutions.

The scheme that was framed, inter alia, postulated (a) that a professional college should be established and/or administered only by a society registered under the Societies Registration Act, 1860, or the corresponding Act of a State, or by a public trust registered under the Trusts Act, or under the Wakfs Act, and that no individual, firm, company or other body of individuals would be permitted to establish and/or administer a professional college, (b) that 50% of the seats in every professional college should be filled by the nominees of the Government or university, selected on the basis of merit determined by a common entrance examination, which will be referred to as "free seats"; the remaining 50% seats ("payment seats") should be filled by those candidates who pay the fee prescribed therefore, and the allotment of students against payment seats should be done on the basis of inter se merit determined on the same basis as in the case of free seats, (c) that there should be no quota reserved for the management or for any family, caste or community, which may have established such a college, (d) that it should be open to the professional college to provide for reservation of seats for constitutionally permissible classes with the approval of the affiliating university, (e) that the fee chargeable in each professional college should be subject to such a ceiling as may be prescribed by the appropriate authority or by a competent court, (f) that every State Government should constitute a committee to fix the ceiling on the fees chargeable by a professional college or class of professional colleges, as the case may be. This committee should, after hearing the professional colleges, fix the fee once every three years or at such longer intervals, as it may think appropriate, and (g) that it would be appropriate for the University Grants Commission to frame regulations under its Act regulating the fees that the affiliated colleges operating on a no-grant-in-aid basis were entitled to charge. AICTE, the Indian Medical Council and the Central Government were also given similar advice.

The manner in which the seats were to be filled on the basis of the common entrance test was also indicated.

Thus, respondents have not made out a case.

11. Heard the learned counsel for the parties.

12. Core issues involved in this petition are:

a) Whether State Government can stipulate impugned rules to be adhered by the Minority Institution or not?

b) Denial of approving appointments at Annexures A and B are in order or not due to non participation of a representative of the Department of

Public instructions?

c) Further, denial to fill up Hindi Teacher's post with the Minority Institution is in order or not?

13. Before advertent to facts of the case and examination of impugned rules and consequential order, it is necessary to take note of whether impugned

rules are beyond the statute is required to be examined with reference to under what circumstances impugned rules are to be held ultra vires. A rule

of regulation made under a statute must be intra vires and consistent with the statute under which it is framed. The conferment of rule making power

by a statute does not enable the rule making authority to make a rule which travels beyond the scope of enabling statute or which is inconsistent

therewith or repugnant thereto and if a rule has been made beyond the rule making powers and is ultra vires and void, subsequent conferment of

power to cover the field will not render to ultra vires rule intra vires. Principle of incidental or consequential power applies in testing the validity of

statutory Rule and, as such, whatever might be regarded as incidental to or consequential upon the specific field over which rule making power is

conferred would construed as included in such field. This is based on well established principle that when a statute prescribes a particular manner for

doing a particular act, that act must be shown in that manner alone. Rules cannot transgress the Section, Forms prescribed under particular Section of

the statute cannot over ride Section. A statutory rule may be void if it is unreasonable.

14. Supreme Court in the case of K.S. Puttaswamy (Retired) and another (Aadhar) Vs. Union of India and another reported in (2019) 1 SCC 1 dealt

with summarized on which primary legislation may be struck down. Para No.102

reads as under: 102) In *Binoy Viswam v. Union of India & Ors.*²⁰,

scope of judicial review of legislative Act was described in the following manner:

“76. Under the Constitution, Supreme Court as well as High Courts are vested with the power of judicial review of not only administrative acts of

the executive but legislative enactments passed by the legislature as well. This power is given to the High Courts under Article 226 of the Constitution

and to the Supreme Court under Article 32 as well as Article 136 of the Constitution. At the same time, the parameters on which the power of judicial

review of administrative act is to be undertaken are different from the parameters on which validity of legislative enactment is to be examined. No

doubt, in exercises of its power of judicial review of legislative action, the Supreme Court, or for that matter, the High Courts can declare law passed

by Parliament or the State Legislature as invalid. However, the power to strike down primary legislation enacted by the Union or the State

Legislatures is on limited grounds. Courts can strike down legislation either on the basis that it falls foul of federal distribution of powers or that it

contravenes fundamental rights or other constitutional rights/provisions of the Constitution of India. No doubt, since the Supreme Court and the High

Courts are treated as the ultimate arbiter in all matters involving interpretation of the Constitution, it is the courts which have the final say on questions

relating to rights and whether such a right is violated or not. The basis of the aforesaid statement lies in 20 (2017) 7 SCC 59 Article 13(2) of the

Constitution which proscribes the State from making “any law which takes away or abridges the right conferred by Part III”, enshrining

fundamental rights. It categorically states that any law made in contravention thereof, to the extent of the contravention, be void.

77. We can also take note of Article 372 of the Constitution at this stage which applies to pre-constitutional laws. Article 372(1) reads as under:

“372. Continuance in force of existing laws and their adaptation.”(1) Notwithstanding the repeal by this Constitution of the enactments referred

to in Article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the

commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent

authority.”

In the context of judicial review of legislation, this provision gives an indication that all laws enforced prior to the commencement of the Constitution

can be tested for compliance with the provisions of the Constitution by courts. Such a power is recognised by this Court in *Union of India v. SICOM*

Ltd. In that judgment, it was also held that since the term 'laws', as per Article 372, includes common law the power of judicial review of

legislation, which is a part of common law applicable in India before the Constitution came into force, would continue to vest in the Indian courts.

78. These contours of the judicial review are spelled out in the clear terms in *Rakesh Kohli*, and particularly in the following paragraphs: (SCC pp.

321-22 & 325-27, paras 16-17, 26-28 & 30) 16. The statute enacted by Parliament or a State Legislature cannot be declared unconstitutional

lightly. The court must be able to hold beyond any iota of doubt that the violation of the constitutional provisions was so glaring that the legislative

provision under challenge cannot stand. Sans flagrant violation of the constitutional provisions, the law made by Parliament or a State Legislature is not declared bad.

17. This Court has repeatedly stated that legislative enactment can be struck down by court only on two grounds, namely (i) that the appropriate

legislature does not have the competence to make the law, and

(ii) that it does not (sic) take away or abridge any of the fundamental rights enumerated in Part III of the Constitution or any other constitutional

provisions. In *McDowell and Co.* while dealing with the challenge to an enactment based on Article 14, this Court stated in para 43 of the Report as

follows: (SCC pp. 737-38)

43. A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone viz. (1) lack of legislative

competence, and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There

is no third ground. if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality

clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by

sub-clauses (a) to (g) of Article 19(1), it can be struck down only if it is found not saved by any of the clauses (2) to (6) of Article 19 and so on. No

enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or the other constitutional infirmity has to be found before

invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament and the legislatures, composed as

they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The

court cannot sit in judgment over their wisdom.â?? xx xx xx

26. In Mohd. Hanif Quareshi, the Constitution Bench further observed that there was always a presumption in favour of constitutionality of an

enactment and the burden is upon him, who attacks it, to show that there has been a clear violation of the constitutional principles. It stated in para 15

of the Report as under: (AIR pp. 740-41)

â??15. â?| The courts, it is accepted, must presume that the legislature understands and correctly appreciates the needs of its own people, that its laws

are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. It must be borne in mind that the

legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest and finally

that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common

report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation.â??

27. The above legal position has been reiterated by a Constitution Bench of this Court in Mahant Moti Das v. S.P. Sahi.

28. In Hamdard Dawakhana v. Union of India, inter alia, while referring to the earlier two decisions, namely, Bengal Immunity Co. Ltd. and Mahant

Moti Das, it was observed in para 8 of the Report as follows: (Hamdard Dawakhana case, AIR p. 559) â??8. Therefore, when the constitutionality of

an enactment is challenged on the ground of violation of any of the articles in Part III of the Constitution, the ascertainment of its true nature and

character becomes necessary i.e. its subject-matter, the area in which it is intended to operate, its purport and intent have to be determined. In order

to do so it is legitimate to take into consideration all the factors such as history of the legislation, the purpose thereof, the surrounding circumstances

and conditions, the mischief which it intended to suppress, the remedy for the

disease which the legislature resolved to cure and the true reason for the remedy?}.â??

In *Hamdard Dawakhana*, the Court also followed the statement of law in *Mahant Moti Das* and the two earlier decisions, namely, *Charanjit Lal*

Chowdhury v. Union of India and *State of Bombay v. F.N. Balsara* and reiterated the principle that presumption was always in favour of constitutionality of an enactment.

30. A well-known principle that in the field of taxation, the legislature enjoys a greater latitude for classification, has been noted by this Court in a long

line of cases. Some of these decisions are *Steelworth Ltd. v. State of Assam* [*Steelworth Ltd. v. State of Assam*, 1962 Supp (2) SCR 589,] *Gopal*

Narain v. State of U.P. [*Gopal Narain v. State of U.P.*, AIR 1964 SC 370,] *Ganga Sugar Corpn. Ltd. v. State of U.P.* [*Ganga Sugar Corpn. Ltd. v.*

State of U.P., (1980) 1 SCC 223 : 1980 SCC (Tax) 90,] *R.K. Garg v. Union of India* [*R.K. Garg v. Union of India*, (1981) 4 SCC 675 : 1982 SCC

(Tax) 30] and *State of W.B. v. E.I.T.A. India Ltd.* [*State of W.B. v. E.I.T.A. India Ltd.*, (2003) 5 SCC 239]â?? (emphasis in original).

83. It is, thus, clear that in exercise of power of judicial review, the Indian courts are invested with powers to strike down primary legislation enacted

by Parliament or the State Legislatures. However, while undertaking this exercise of judicial review, the same is to be done at three levels. In the first

stage, the Court would examine as to whether impugned provision in a legislation is compatible with the fundamental rights or the constitutional

provisions (substantive judicial review) or it falls foul of the federal distribution of powers (procedural judicial review). If it is not found to be so, no

further exercise is needed as challenge would fail. On the other hand, if it is found that legislature lacks competence as the subject legislated was not

within the powers assigned in the List in Schedule VII, no further enquiry is needed and such a law is to be declared as ultra vires the Constitution.

However, while undertaking substantive judicial review, if it is found that the impugned provision appears to be violative of fundamental rights or other

constitutional rights, the Court reaches the second stage of review. At this second phase of enquiry, the Court is supposed to undertake the exercise

as to whether the impugned provision can still be saved by reading it down so as to bring it in conformity with the constitutional provisions. If that is not

achievable then the enquiry enters the third stage. If the offending portion of the statute is severable, it is severed and the Court strikes down the

impugned provision declaring the same as unconstitutional.â??

15. Supreme Court in the case of T.M.A. Paiâ??s case framed number of questions and answered. For the present case, it is relevant to quote

question No.5(c).

Q.5.(c) Whether the statutory provisions which regulate the facets of administration like control over educational agencies, control over governing

bodies, conditions of affiliation including recognition/withdrawal thereof, and appointment of staff, employees, teachers and principals including their

service conditions and regulation of fees, etc. would interfere with the right of administration of minorities?

16. Para Nos.72, 73, 155 and 183 of T.M.A. Paiâ??s are relevant, which are extracted hereunder:

72. Once aid is granted to a private professional educational institution, the government or the state agency, as a condition of the grant of aid, can put

fetters on the freedom in the matter of administration and management of the institution. The state, which gives aid to an educational institution, can

impose such conditions as are necessary for the proper maintenance of the high standards of education as the financial burden is shared by the state.

The state would also be under an obligation to protect the interest of the teaching and non-teaching staff. In many states, there are various statutory

provisions to regulate the functioning of such educational institutions where the States give, as a grant or aid, a substantial proportion of the revenue

expenditure including salary, pay and allowances of teaching and non-teaching staff. It would be its responsibility to ensure that the teachers working

in those institutions are governed by proper service conditions. The state, in the case of such aided institutions, has ample power to regulate the

method of selection and appointment of teachers after prescribing requisite qualifications for the same. Ever since In Re The Kerala Education Bill,

1957 [(1959) SCR 995], this Court has upheld, in the case of aided institutions, those regulations that served the interests of students and teachers.

Checks on the administration may be necessary in order to ensure that the administration is efficient and sound and will serve the academic needs of

the institutions. In other words, rules and regulations that promote good

administration and prevent mal-administration can be formulated so as to promote the efficiency of teachers, discipline and fairness in administration and to preserve harmony among affiliated institutions. At the same time it has to be ensured that even an aided institution does not become a government-owned and controlled institution. Normally, the aid that is granted is relatable to the pay and allowances of the teaching staff. In addition, the Management of the private aided institutions has to incur revenue and capital expenses. Such aided institutions cannot obtain that extent of autonomy in relation to management and administration as would be available to a private unaided institution, but at the same time, it cannot also be treated as an educational institution departmentally run by government or as a wholly owned and controlled government institution and interfere with Constitution of the governing bodies or thrusting the staff without reference to Management.

73. There are a large number of educational institutions, like schools and non-professional colleges, which cannot operate without the support of aid from the state. Although these institutions may have been established by philanthropists or other public-spirited persons, it becomes necessary, in order to provide inexpensive education to the students, to seek aid from the state. In such cases, as those of the professional aided institutions referred to hereinabove, the Government would be entitled to make regulations relating to the terms and conditions of employment of the teaching and non-teaching staff whenever the aid for the posts is given by the State as well as admission procedures. Such rules and regulations can also provide for the reasons and the manner in which a teacher or any other member of the staff can be removed. In other words, the autonomy of a private aided institution would be less than that of an unaided institution.

155. It will be wrong to presume that the government or the legislature will act against the Constitution or contrary to the public or national interest at all times. Viewing every action of the government with skepticism, and with the belief that it must be invalid unless proved otherwise, goes against the democratic form of government. It is no doubt true that the Court has the power and the function to see that no one including the government acts contrary to the law, but the cardinal principle of our jurisprudence is that it is for the person who alleges that the law has been violated to prove it to be so. In such an event, the action of the government or the authority may have to

be carefully examined, but it is improper to proceed on the assumption that, merely because an allegation is made, the action impugned or taken must be bad in law. Such being the position, when the government frames rules and regulations or lays down norms, specially with regard to education, one must assume that unless shown otherwise, the action taken is in accordance with law. Therefore, it will not be in order to so interpret a Constitution, and Article 29 and 30 in particular, on the presumption that the state will normally not act in the interest of the general public or in the interest of concerned sections of the society.

183. It may be remembered that various entries in three lists of the Seventh Schedule are not powers of legislation but field of legislation. These

entries are mere legislative heads and demarcate the area over which the appropriate legislatures are empowered to enact law. The power to legislate

is given to the appropriate legislature by Article 246 and other articles. Article 245 provides that subject to the provisions of the Constitution,

Parliament may make laws for the whole or any part of the territory of India and the legislature of a State may make laws for whole or any part of the

State. Under Article 246 Parliament has exclusive power to make law with respect to any of the matters enumerated in List I in the Seventh

Schedule. Further under clause (2) of Article 246 Parliament and subject to clause (1) the legislature of any State are empowered to make law with

respect to any of the matters enumerated in List III Seventh Schedule and under clause (3) of Article 246, the legislature of any State is empowered

to enact law with respect to any of the matters enumerated in List II in the Seventh Schedule subject to clauses (1) and (2). From the aforesaid

provisions it is clear that it is Article 246 and other Articles which either empower Parliament or State Legislature to enact law and not the Entries

finding place in three Lists of Seventh Schedule. Thus the function of entries in three lists of the Seventh Schedule is to demarcate the area over

which the appropriate legislatures can enact laws but do not confer power either on Parliament or State Legislatures to enact laws. It may be

remembered, by transfer of Entries, the character of entries is not lost or destroyed. In this view of the matter by transfer of contents of entry 11 of

List II to List III as entry 25 has not denuded the power of State Legislature to enact law on the subject 'Education' but has also conferred power on

Parliament to enact law on the subject ""Education"". Article 30 confers fundamental right to linguistic and religious minorities to establish and administer educational institutions of their choice. The test who are linguistic or religious minorities within the meaning of Article 30 would be one and the same

either in relation to a State legislation or Central legislation. There cannot be two tests one in relation to Central legislation and other in relation to State

legislation. Therefore, the meaning assigned to linguistic or religious minorities would not be different when the subject ""Education"" has been

transferred to the Concurrent List from the State List. The test who are linguistic or religious minorities as settled in Kerala Education Bill's case

continues to hold good even after the subject ""Education"" was transposed into Entry 25 List III of Seventh Schedule by the 42nd Amendment Act. If

we give different meaning to the expression ""minority"" occurring in Article 30 in relation to a central legislation, the very purpose for which protection

has been given to minority would disappear. The matter can be examined from another angle. It is not disputed that there can be only one test for

determining minority status of either linguistic or religious minority. It is, therefore, not permissible to argue that the test to determine the status of

linguistic minority would be different than the religious minorities. If it is not so, each linguistic State would claim protection of Article 30 in its own

State in relation to a central legislation which was not the intention of framers of the Constitution nor the same is borne out from language of Article

30. I am, therefore, of the view that the test for determining who are the minority, either linguistic or religious, has to be determined independently of

which is the law, Central or State.

17. In the case of Sindhi Education Society cited supra Para Nos.7, 107 and 114 are relevant for the purpose of present case and they are reproduced

hereunder:

7. In the year 1973, the DSE Act came into force with a view to provide better organization and development of the school education in Union

Territory of Delhi and for matters connected therewith and incidental thereto. Soon after coming into force of the provisions of the DSE Act, 1973, the

Society felt that certain provisions of the DSE Act infringed the minority character of the Society, particularly, in matters related to administration and

management of the school.

107. At the very outset, we may notice that we entirely do not approve the view expressed by the learned Single Judge of the Delhi High Court in the case of Sumanjit Kaur (supra) insofar as it held that the regulation would be unconstitutional since they are likely to interfere with the choice of the medium of instruction as well as minority character of the institution by compelling the appointments to the teaching faculty of the persons, who may be inimical towards the minority community.

114. The minority society can hardly be compelled to perform acts or deeds which per se would tantamount to infringement of its right to manage and control. In fact, it would tantamount to imposing impermissible restriction. A school which has been established and granted status of a linguistic minority for years, it will not be proper to stop its grant-in-aid for the reason that it has failed to comply with a condition or restriction which is impermissible in law, particularly, when the teacher appointed or proposed to be appointed by such institution satisfy the laid down criteria and/or eligibility conditions.

The minority has an inbuilt right to appoint persons, which in its opinion are better culturally and linguistically compatible to the institution.

Article 30 of the Constitution reads as under:

â??30. Right to minorities to establish and administer educational institutions.

(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

[(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a

minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is

such as would not restrict or abrogate the right guaranteed under that clause].

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.â??

Section 141 of the Act 1983 reads as under:

â??141. Application of the Act to certain institutions- Nothing in this Act or the rules made thereunder shall apply to any minority educational

institution to the extent they are inconsistent with the rights guaranteed under

Article 30 of the Constitution of India.

18. Extract of the Karnataka Educational Institutions (Recruitment and terms and conditions service and employees in private aided primary and

Secondary Educational Institutions) (Amendment) Rules, 2008 of "Annexure - 1" at item No.1 " definitions

(ii) (c), Rule 3, 6 and 7 are extracted hereunder:

1. (ii)(c) One representative of the Department of Public Instruction.

3. Advertisement in the News Papers: -

The selecting authority of an educational institution shall, subject to the economy orders relating to filling of vacancies, issued by Government from

time to time, obtain prior permission of the Competent Authority to fill up the vacancies arising due to retirement, resignation, promotion and death

against posts which were admitted to grant-in-aid excluding the vacancies caused on account of sanction of additional section/subjects /combinations.

Permission shall be granted to fill the vacant posts as per the reservation roster points determined by the Competent Authority. Thereafter, it shall

notify at least in one State level daily newspaper having large circulation in the State and in one leading district level daily newspaper having largest

circulation in the district, inviting applications from candidates indicating therein the categories of posts, number of vacancies, minimum qualification

prescribed, classification of vacancies as per the reservation roster etc., A copy of the advertisement shall also be sent to the concerned Deputy

Director of Public Instruction, Block Educational Officer and the concerned employment exchange for displaying on the notice board of their offices.

The managing committee of the institution shall also display the advertisement on the notice board of its office.

6. List of Selected Candidates: - (1) The selecting authority shall, on the basis of the percentage of the total marks secured in the qualifying

examination as determined under Clause 2 and the marks secured in the interview under Clause 5 and taking into consideration the orders in force

relating to reservation of vacancies for the Scheduled Castes, the Scheduled Tribes and the Other Backward Classes, prepare, in the order of merit, a

list of candidates eligible for appointment to the post. If the aggregate of the percentage of total marks secured in the qualifying examination as

determined under clause 2 and the marks secured in the interview under Clause

5 by two or more candidates is equal, the order of merit in respect of such candidate shall be determined on the basis of their age, the person elder in age being placed above in the order of merit. The names of candidates to be included in such list shall be equal to the number of vacancies notified;

(2) The selecting authority shall, in accordance with the provisions of sub-clause (1) also prepare an additional list of names of candidates not included in the list prepared under sub-clause (1) in which the number of candidates to be included shall, as far as possible be ten percent of the number of vacancies notified. This list shall be operated only to the extent of the number of persons included in the main list not reporting for duty:

Provided that if the number of vacancies notified is less than ten, the number of candidates to be included in the additional list shall be one only.

(3) The lists so prepared under sub-clause (1) and (2) shall be published on the notice board of the office of the managing committee and a copy

thereof shall be sent to the appropriate Competent Authority within forty-five days from the last date fixed for receipt of applications. At the same

time, the fact of selection shall be intimated by the managing committee to the selected candidates.

7. Appointment of Candidates:- (1) In respect of candidates whose names are included in the list published under sub-clause (1) of clause 6, proposal

shall be sent to the Competent Authority through the Block Education Officer concerned in case of posts in primary schools and Deputy Director of

Public Instruction in case of posts in high schools. The Competent Authority shall, after verifying that the selection procedure as specified under the

rules has been complied with, shall cause to place the proposal immediately before the screening Committee through the concerned Chief Executive

Officer.

The Screening Committee shall consist of the following namely:-

In respect of High Schools Chief Executive Officer of the Chairman concerned Zilla Panchayat Deputy Director of Public Instruction Member of the

concerned District Senior most Education Officer of the Member office of the Deputy Director of Public Secretary Instruction In respect of Primary

Schools Chief Executive Officer of the Chairman concerned Zilla Panchayat Senior most Education Officer of the Member officer of the office of

the Deputy Director of Public Instruction of the concerned District Block Education officer of the Member concerned block Secretary

(2) The Chief Executive Officer of the concerned Zilla Panchayath, on receipt of the proposal from the Competent Authority, shall send it to the

Member Secretary of the Screening Committee for preparation of background notes and other materials connected with the selection of candidates.

Further, the Member-Secretary shall prepare the relevant background notes and place the same before the Screening Committee and also on

conclusion of the deliberation of the screening committee shall also on conclusion of the deliberation of the screening committee shall prepare

proceedings of the committee and obtain signature of the Chairman and Member of the screening committee and forward the same to the competent

authority along with all the relevant documents for issue of necessary orders.

(3) The screening Committee shall verify with reference to the records submitted by the Member Secretary as to whether the selection is-

(a) to a vacancy which has arisen against an aided post to which grant-in-aid has been sanctioned by the Competent Authority, and

(b) is in accordance with the roster and the qualifications and other eligibility criteria specified under the rules and whether the other conditions of

recruitment are complied with.

And shall make recommendation either for approval or rejection of the selection made. The competent Authority shall consider the recommendation of

the screening committee and take a decision with regard to approval or rejection, as the case may be and convey the same. In case of rejection, the

reasons for such rejection shall also be recorded in writing. The entire procedure including the placing of the proposal before the screening committee

and conveying approval or rejection and issue of orders thereon by the Competent Authority shall be completed within a period of ninety days from the

date of receipt of proposal in the office of the Competent Authority.

(4) The screening committee shall meet as many times as necessary, but not less than once in a month.

(5) The inclusion of the name of a candidate in any list published under clause 5 shall not confer any right of appointment.

(6) The list of candidates published by the selecting authority shall cease to be operative as from the date of publication of a list prepared in respect of

such cadre or post on the next selection.

(7) Candidates whose names are included in the main list prepared in the manner indicated above may be appointed in the vacancies in the order in which their names appear in the list.

(8) In case, a candidate selected in the manner specified above is appointed by the Appointing authority before the Competent Authority has conveyed its approval in accordance with sub-clause

(3), the managing committee shall be liable to pay salary to the candidate so appointed and grant-in-aid at the minimum of the scale applicable to the post shall be payable only from the date the selection has been approved by the Competent Authority.

(9) In case, a candidate who has been selected is not appointed by the appointing authority until the selection has been approved by the Competent Authority, grant-in-aid at the minimum of the scale applicable to the post shall be payable only from the date of reporting for duty after such approval.

19. In this backdrop, whether State has committed an error in incorporating the aforesaid amendment rules 2008 are in conformity with Article 30 of the Constitution and the Karnataka Education Act, 1983. Perusal of number of decisions of the Apex Court and this Court which are related to

whether State Government is empowered to frame terms and conditions in respect of managing the Aided Minority Institutions or not? It is to be

noted that none of the decisions relates to whether State representative has participated in the process of selection or not? State Government

is empowered to prescribe method of recruitment and to follow over all supervision over the Aided Minority Institution. But the State Government has no

power to interfere in respect of selection process of both teaching and non teaching staff of the Aided Minority Institution. This issue is crystal clear

from the decision in the case of TMA Pai r/w Sindhi Education Society r/w K.S. Puttaswamy cited supra. Under Article 30 of the Constitution r/w

141 of the Act 1983, scope of the interference by the State Government in respect of Aided Minority Institution are limited to the extent that framing

of service conditions to the Staff of the Aided Minority Institution in respect of selection and appointment are concerned. Process of selection and

appointment of Staff are left to the Aided Minority Institution. Of course, State is

empower to approve the appointment of staff of the Aided Minority

Institution only to the extent â??Whether such institution has adhered to the service conditions stipulated in respect of process recruitment or not?.

Like qualification and other criteria including reservation to SC, ST and OBC which are part and parcel of Article 16 of the Constitution.

20. Cited decisions on behalf of the State are related to power of the State Government to stipulate service conditions of the Employees of the Aided

Institutions including Minority Institution like petitioner and not participation in the process of selection of its staff like Government officers as a

Member of the interview committee. Whereas, in the present case, State Government to participate in the selection and appointment process of

Teaching and non-Teaching Staff, prior approval of the Government before commencing selection process. Approval of the State officers for

selection list proposal of appointment of candidate, shall be sent to Education Officers of the State Government, Screening Committee Headed by

Chief Executive Officer, Zilla Panchayath for High Schools and Primary Schools. Therefore, impugned relevant provision in the Rules, 1999 r/w

(amendment) Rules 2008 are contrary to Article 30 of the Constitution and Section 141 of the Act 1983 r/w TMA Paiâ??s case like Rules 1 (ii) (c).

In respect of selection and appointment clauses to the Aided Minority Institution, they are only scrutinizing selection and appointment to the extent in

accordance with the service conditions of the post and reservation policy of the State has been followed or not? since the petitioner is an Aided

Minority institution.

ORDER

In view of the aforesaid discussion, both on facts and on law it is ordered that Rule 1(ii) (c), one representative of the Department of Public

instructions stipulated is hereby read down that participation of one representative of the Department of Public Instructions in the selection and

appointment process of both teaching and non-Teaching staff of the Aided Minority Institution to the extent that it is not applicable.

Consequently, Annexures â?" A, B and C are set aside. Further, concerned respondent is hereby directed to examine â??whether selection and

appointment of two teachers are in terms of statutory rules or not? and permit the petitioners to fill up Hindi language teacher post and if such request

is in accordance with rules, in such an event, proceed to approve the appointment and to release salary from the date of their appointment in

accordance with law. The above exercise shall be completed within a period of three months from the date of receipt of this order. Writ petitions are

allowed in part. Memo and pending IAs, if any, do not survive and stands disposed of.

Rule is made absolute in above terms. There shall be no order as to costs.