
(1984) 10 BOM CK 0009
In the Bombay High Court
Case No : Writ Petition No. 1166/80

Fr. Anthony Mendonca and another	Vs	APPELLANT
State of Maharashtra and another		RESPONDENT

Date of Decision : 30-10-1984

Acts Referred:

Constitution of India, 1950 — Article 29(1), 30, 30(1)
Secondary School Code — Rule 57(4), 57.4

Citation : (1985) 2 LLJ 58 : (1985) MhLj 148

Hon'ble Judges : S.P. Bharucha, J

Bench : Single Bench

Judgement

1. A provision has been introduced in the Secondary Schools Code of the Government of Maharashtra which requires the reservation of teaching and non-teaching posts in aided secondary schools for members of the scheduled castes, scheduled tribes, nomadic tribes and other backward communities. The provision is sought to be applied to minority educational institutions that received grant-in-aid. This is a petition by a minority educational institution challenging the validity of such application upon the ground that it infringes the fundamental right guaranteed under Art. 30(1) of the Constitution.

2. The 1st petitioner is the trustee of the St. Joseph's High School, which is a public trust registered under the provisions of the Bombay Public Trusts Act. The 2nd petitioner is the principal of the said school. The trust has been formed with the principal object of giving education to Catholic children and other children, irrespective of religion, race or language. That the said school is a minority educational institution is not seriously in dispute.

3. By the State Government's resolution dated 19th January, 1976, Rule 57.4 of the Secondary Schools Code was substituted by the following :

"Rule 57.4 : The Managements of aided Secondary Schools shall reserve 34% of the total No. of posts of teaching as well as non-teaching staff for the members of the Scheduled Castes, Scheduled Tribes, Nomadic Tribes and other Backward

Communities as follows :

1. Scheduled Castes 13% 2. Scheduled Tribes 7% 3. Nomadic Tribes 4% 4. Other Backward Communities 10% --- Total 34% ===

It was brought into force in 1979. A circular dated 24th October, 1979 issued by the State required the managements of aided secondary schools to maintain the percentage prescribed by the amended rule with effect from 2nd May, 1979 and 15th May, 1979 for teaching and non-teaching posts respectively. Managements of aided secondary schools, which despite efforts, failed to secure the services of persons belonging to particular sections of the backward classes for which the vacancies in teaching posts were earmarked were permitted to appoint non-backward class persons in these vacancies.

4. On 11th August, 1980 the said school through its advocate wrote to the State stating that the provisions of the amended rule and the circular were not applicable to minority educational institutions and called upon the State to issue necessary directions staying the operation of the amended rule and the circular in so far as it concerned the said school. On 9th September, 1980 the Deputy Secretary in the Education Department of the State wrote to the said school's advocate stating that the question of exempting minority institutions from the application of the amended rule and the circular was being examined by the State and its decision would be communicated in due course. On 9th October, 1980 this petition was filed. I am informed that, thereafter, the State took a decision to exempt minority educational institutions from the purview of the amended rule and the circular but, later, countermanded it.

5. It was contended by Mr. Menezes, learned advocate for the petitioners, that the reservation of teaching and non-teaching posts by the amended rule and the circular in secondary aided minority educational institutions contravenes the fundamental right given by Art. 30(1). Mr. Shah, learned counsel for the State, submitted that the administrative autonomy of minority educational institutions was not taken away by the amended rule and the circular, and that, therefore, Art. 30(1) was not infringed. In the affidavit in reply filed by the State it is contended that, since the Constitution itself provided for reservation in favour of the Backward classes, the amended rule and the circular did not violate Art. 30. It is also contended that minority educational institutions that receive grants must abide by the terms specified in the Secondary Schools Code.

6. By the amended rule and the circular a reservation is made of teaching and non-teaching posts to the extent of 34% in aided secondary schools, including minority educational institutions of this character. The managements of aided secondary schools are thereby compelled to select 34% of their teaching and non-teaching staff from among members of the scheduled castes, scheduled tribes, nomadic tribes and other backward communities.

7. The impact of Art. 30(1) has been the subject of numerous decisions of the Supreme Court.

8. In the case of *Rev. Sidhrajbhat Sabbai v. State of Gujarat* AIR 1963 SC 540 6 Judges of the Supreme Court considered the impact of an order which required all private training colleges in the State of Bombay to reserve 60% of "seats for training Boards" School teachers nominated by the Government". A minority educational institution protested against the order in a petition before the Supreme Court. The Supreme Court observed that all minorities, linguistic or religious, had by Art. 30(1) an absolute right to establish and administer educational institutions of their choice, and any law or executive direction which sought to infringe the substance of that right under Art. 30(1) would to that extent be void. This, however, was not to say that it was not open to the State to impose regulations upon the exercise of the right. The fundamental freedom was to establish and to administer educational institutions; it was a right to establish and administer what were in truth educational institutions - institutions which catered to the educational needs of the citizens, or sections thereof. Regulations made in the true interests of efficiency of the instruction, discipline, health, sanitation, morality, public order and the like could be imposed. Such regulations were not restrictions on the substance of the right which was guaranteed; they secured the proper functioning of the institutions in matters educational. The right established by Art. 30(1) was a fundamental right declared in terms absolute. It was not subject to reasonable restrictions. It was intended to be a real right for the protection of the minorities in the matter of setting up of educational institutions of their own choice. The right was intended to be effective and was not to be whittled down by so-called regulative measures conceived in the interest not of the minority educational institution, but of the public or the nation as a whole. If every order which, while maintaining the formal character of a minority institution, destroyed the power of administration was held justifiable because it was in the public or national interest, though not in its interest as an educational institution, the right guaranteed by Art. 30(1) would be but a "teasing illusion", a promise of unreality. Regulations which might lawfully be imposed either by legislative or executive action as a condition of receiving grant or of recognition had to be directed to making the institution, while retaining its character as a minority institution, effective as an educational institution. Such regulation must satisfy a dual test - the test of reasonableness and the test that it was regulative of the educational character of the institution and was conducive to making the institution an effective vehicle of education for the minority community or other persons who resorted to it.

9. In the case of *Rev. Father W. Proost and Others Vs. The State of Bihar and Others*, Hidayatullah, C.J., spoke for the 5 members of the Bench hearing the matter and observed that the width of Art. 30(1) could not be cut down by introducing into it considerations on which Art. 29(1) was based. Art. 30(1) was couched in wide language and had to receive its full meaning. Attempts to whittle down the protection given to minorities could not be allowed.

10. In the case of *D.A.V. College, Vs. State of Punjab and Others*, the Supreme Court was concerned with a provision in a statute made in exercise of powers

under an University Act. One of these provisions required that the staff initially appointed by a college should be approved by the Vice-Chancellor and that all subsequent changes should be reported for the Vice-Chancellor's approval. This was a condition of affiliation. The Supreme Court held that there was no justification for this provision which decidedly interfered with the rights of management of the minority's college. They could not, therefore, be made conditions of affiliation, the non-compliance of which would involve disaffiliation, and, consequently, were struck down as being violative of Art. 30(1).

11. Nine Judges of the Supreme Court decided the case of *The Ahmedabad St. Xavier's College Society and Another Vs. State of Gujarat and Another*, Beg & Dwivedi, JJ. dissented from what was the majority conclusion but several judgments were delivered. Ray, C.J., speaking for himself and Palekar, J. observed that it was manifest that the appointment of teachers was an important part in educational institutions. The qualifications and the character of the teachers were really important. The minority institutions had the right to administer institutions. This right implied the obligation and duty of the minority institutions to render the very best to the students. In the right of administration, checks and balances in the shape of regulatory measures were required to ensure the appointment of good teachers and their conditions of service. The right to administer was to be tempered with regulatory measures to facilitate smooth administration. Regulations which served the interests of the teachers and students were of paramount importance in good administration. In the field of administration it was not reasonable to claim that minority institutions would have complete autonomy. Checks on the administration might be necessary in order to ensure that the administration was efficient and sound and would serve the academic needs of the institution. The right of a minority to administer its educational institution involved, as part of it, a correlative duty of good administration. Jaganmohan Reddy, J. speaking on behalf of himself and Alagiriswami, J. observed that the right of a linguistic or religious minority to administer educational institutions of their choice, though couched in absolute terms, had been held by the Supreme Court to be subject to regulatory measures which the State might impose for furthering the excellence of the standards of education. Khanna, J. noted that the right of the minorities to administer educational institutions did not prevent the making of reasonable regulations in respect of those institutions. Those regulations had necessarily to be made in the interest of the institution as a minority educational institution. They had to be so designed as to make it an effective vehicle for imparting education. The State could prescribe regulations to ensure the excellence of the institution and regulations made in the true interests of efficiency, of instruction, discipline, health, sanitation, morality, public order and the like were not restrictions on the substance of the right but secured the proper functioning of the institution in matters educational. A regulation which was designed to prevent maladministration of an educational institution could not be said to offend Art. 30(1) but it had to be ensured that under the power of making

regulations nothing was 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. A law which interfered with a minority's choice of qualified teachers was void as being violative of Art. 30(1). It was, of course, permissible to prescribe the qualifications of teachers, but once the teachers possessing the requisite qualifications, were selected by the minorities for their educational institutions, the State would have no right to veto the selection of those teachers. The selection and appointment of teachers for an educational institution was one of the essential ingredients of the right to manage an educational institution and the minorities could not be denied such right of selection and appointment without infringing Art. 30(1). Mathew J., speaking for himself and Chandrachud, J. said that if a legislature could impose any regulation which it thought necessary to protect what in its view was in the interest of the State or society, the right under Art. 30(1) would cease to be fundamental right. It sounded paradoxical that a right which the Constitution-makers wanted to be absolute could be subjected to regulations which need only satisfy the nebulous and elastic test of State necessity. No educational institution established by a religious or linguistic minority could claim total immunity from the regulations of the university; but the character of the permissible regulations must depend upon their purpose. Such regulations would be permissible if they were relevant to the purpose of securing or promoting the object of recognition or affiliation. In every case, when the reasonableness of a regulation came up for consideration before the Court, the question to be asked and answered was whether the regulation was calculated to subserve, or would in effect subserve the purpose of recognition or affiliation, namely, the excellence of the institution as a vehicle for general secular education to the minority community. The question whether a regulation was in the general interest of the public had no relevance it did not advance the excellence of the institution as a vehicle for general secular education, as the only permissible regulations were those which secured the effectiveness of the purpose of the facility, namely, the excellence of the educational institutions in respect of their educational standards. That was the reason why the Supreme Court had time and again said that the question whether a particular regulation was calculated to advance the general public interest was of no consequence if it was not conducive to the interests of the minority community and those persons who resorted to it. The right to choose the principal and to have the teaching conducted by teachers appointed by the management after an overall assessment of their outlook and philosophy was perhaps the most important facet of the right to administer an educational institution.

12. It remains only to note the judgment of the Supreme Court in *All Saints High School, Hyderabad and Others Vs. Government of Andhra Pradesh and Others*, Chandrachud, C.J., Fazal Ali and Kailasam, JJ. delivered separate judgments but upon the basic principle they were in agreement. Chandrachud C.J., found that

the earlier decisions of the Supreme Court showed that while the, right of religious and linguistic minorities to establish and administer educational institutions of their choice could not be interfered with, restrictions by way of regulations for the purpose of ensuring educational standards and maintaining the excellence, thereof could be validly prescribed. For maintaining educational standards of an institution, it was necessary to ensure that it was competently staffed. Conditions of service which prescribed minimum qualifications for the staff, their pay scales, their entitlement to other benefits of service and the laying down of safeguards which must be observed before they were removed or dismissed from service or their services were terminated were all permissible measures of a regulatory character. Paragraph 4 of this judgment, upon which Mr. Shah relied, may be quoted :

"In the case of institutions that receive State aid, it is the duty and obligation of the Government which grants aid to see that public funds are usefully and properly expended. If the expenditure incurred for paying the emoluments of the staff is subsidised or financed from out of State funds, it becomes the duty of the State to see that no one who does not possess the minimum qualifications is appointed on the staff, the pay and other emoluments of the staff are guaranteed and their service conditions secured. Minority institutions which receive State aid cannot complain of conditions subject to which the aid is granted, so long as such conditions do not amount to discrimination against them on the ground of language or religion and so long as the aid is not made to depend upon the performance or observance of conditions which amount to deprivation of the right guaranteed by Art. 30(1). There is also no doubt that minority institutions cannot be discriminated against in the matter of granting State aid."

Fazal Ali J. set out the propositions that emerged from an exhaustive analysis of the earlier cases decided by the Supreme Court and the views taken by it during the last two decades on Art. 30(1). From its language it was clear that it enshrined a fundamental right of the minority institutions to manage and administer their educational institutions. The State could make regulatory measures to promote the efficiency and excellence of educational standards and issue guidelines for ensuring the security of the services of the teachers or other employees of the institution. The State or the university could not under the garb of adopting regulatory measures tend to destroy the administrative autonomy of the institution or start interfering with the management of the institution so as to render the right of the administration of the management of the institution nugatory or illusory.

13. Having due regard to the Supreme Court's judgments, there is little doubt that the amended rule and circular infringe Art. 30(1).

14. Article 30(1) guarantees the right of minorities to administer their educational institutions. The selection and appointment of teaching and non-teaching staff thereof is an important ingredient of their administration. The State can regulate the educational qualifications of teaching staff to ensure the

high standard of the education imparted. The amended rule and the circular are not regulatory in character, and are fairly not urged to be. The amended rule and the circular restrict the field of choice of minority institutions for selecting and appointing teaching and non-teaching staff. In so doing the amended rule and the circular impinge upon the administrative autonomy guaranteed by Art. 30(1). The restriction is not valid even though it be for the general welfare of the State. The restriction is also not valid even though the minority educational institution is aided.

15. Mr. Shah submitted, as a preliminary objection, that though the amended rule had been brought into force in 1979, the petition has been filed only in October 1980 and that, therefore, there was delay and laches which ought to deprive the petitioners of relief. Considering that the petition was filed even while the State was considering the representation made by minority institutions, as shown by the State's letter dated 9th September, 1980, there is no merit in the objection.

16. In the result, it is declared that the provisions of the amended Rule 57(4) of the Secondary Schools Code and of the State's circular dated 24th October, 1979, in so far as they are made applicable to secondary aided schools run by minorities, including the schools in petition, infringe Art. 30(1) of the Constitution.

17. The respondents shall pay to the petitioners the costs of the petition.

18. Rule accordingly. Order accordingly.