
(1987) 12 BOM CK 0004

In the Bombay High Court

Case No : Writ Petition No. 1144 of 1986 (Bom. Original Side)

Gunvantlal Kantilal Khamar

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 02-12-1987

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 226, 30

Citation : (1988) 90 BOMLR 9 : (1988) MhLj 194

Hon'ble Judges : S.M. Daud, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

S.M. Daud, J.—This petition under Article 226 of the Constitution is to obtain a direction compelling respondents 4 and 5 to appoint the petitioner as an Assistant Head Master (AHM) after quashing the appointment of respondent 7 to that post.

2. Respondent 4 is a Trust/Society registered under the Bombay Public Trust Act, 1950, and the Societies Registration Act, 1860. The governing body of the said respondents, hereinafter referred to as "the society" has for its officebearers a Secretary who is the father-in-law of respondent 6 and a Chief Executive Officer who is the husband of the said respondent. The said Society runs a school in the name and style of Fellowship School which has been impleaded to this petition as respondent 5. The said school has classes right from the Kindergarten to the class which prepares students for the Secondary School Certificate Examination. Respondent 6, the Head Mistress of the School is at daggers drawn with her husband and father-in-law and is presently under suspension. Petitioner and respondent 7 joined the School as Teachers on June 10, 1968. Both are equals so far as academic qualifications are concerned. Petitioner was born on January 8, 1935 while respondent 7 was born on February 7, 1943. On April 1, 1979, the petitioner was appointed to the higher post of a Second Supervisor as from October 3, 1978. By a Circular/Notice of October 20, 1985 eligible teachers from

the Secondary section of the School were invited to apply for the post of an Assistant Head Master. The prescribed qualification was a Bachelor's degree in Education or any other qualification recognised by the Government as equivalent thereto. The applicant had to have not less than 5 years total full-time teaching experience after graduation in a Secondary School or a Junior College of Education, out of which, atleast two years' experience had to be after the acquisition of Bachelor's degree in Teaching or Education. The Circular specified that the eligible candidates were to be interviewed during the Diwali vacation, for which reason they were requested to mention their vacation addresses in the applications. Petitioner and respondent 7 being the only eligibles applied and were interviewed by a Committee. The Committee consisted of Messrs. Palkhiwalla, Ladiwalla, the Secretary and the Chief Executive Officer of the Society. After the interview had taken place on February 4, 1986, the Governing Body of the Society met. This Body accepted the recommendation of the Interview Committee to appoint respondent 7. She was informed of the decision to appoint her as an Assistant Head Mistress and took charge of that post on February 18, 1986.

3. The petition impugning the appointment of respondent 7, contends that the same is illegal and vitiated by bad faith. The School was founded in the year 1927 and the Society was a secular trust. The Montessori and Secondary school, were in receipt of Grants-in-aid from the Government. The school was therefore governed by the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977, and the Rules framed thereunder. Prior to the coming into force of the Act and the Rules, conditions governing the service of the teaching and non-teaching staff of the School were regulated by the Secondary School Code (Code). Under the Code as also the Rules aforementioned, the petitioner was senior vis-a-vis the 7th respondent. This was on account of the seniority in age. The seniority of the petitioner had been recognised by the Society when he was appointed as the Second Supervisor and also the First Supervisor in preference to respondent 7. In fact, the attempt to appoint respondent 7 as Second Supervisor after his elevation to the post of First Supervisor had been objected to by the Education Department, for which reason the contemplated promotion could not be made. Section 3(1) of the Act made it incumbent upon all Private Schools in the State to comply with the provisions of the said Act. The Rules had been framed u/s 16 of the Act. Rules 3, 5, 12 and 15, all read together, indicated that the post of an AHM has to be filled in by promotion. Petitioner complied with the requirements of the Rules in that he was academically qualified, had the requisite experience and had a clean record of service. His junior viz. the 7th respondent, could not be preferred over him. The reason for by-passing him lay in the differing responses of himself and respondent 7 when questioned as to where their allegiance would lie in cases of a conflict between directions given by the Society on the one hand and respondent 6 on the other. Petitioner had answered that respondent 6 was the Head of the teaching section of the School, and he, as a teacher would be bound

by her directions. Respondent 7 on the other hand proclaimed her fidelity to the management. That is why she was preferred over him. Petitioner had questioned the legality and propriety of the recommendation made by the Interview Committee which had been accepted by the Governing Body of the School. Respondents 2 and 3 instead of curbing the patent violation of the rules, fell in with the suggestion of the Society that it was a minority institution and therefore, had rightly excluded petitioner and respondent 7 from the operation of the Act and the Rules by virtue of the power conferred upon them vide Section 3(2) of the Act. The naming u/s 3(2) had been varied from year to year by respondents 4 and 5. Petitioner contends that respondent 5 was not a minority school. The Trust was registered in or about 1927 when Gujarati speaking people were not a linguistic minority. Therefore, even assuming that Gujaratis were a linguistic minority after 1960, when the erstwhile State of Bombay was bifurcated, Gujarati institutions founded prior to that date, could not claim the status of a minority institution. On this ground also he could not be denied the benefit of the Act and the rules governing promotions to the post of an AHM. The decision to supersede him was void ab initio and mala fide. In case it was held that Section 3(2) of the Act justified his supersession, it was petitioner's contention that the said provision was void. Section 3(2) exempted from the operation of the Act the Head Master and three other employees whose names were notified to the Education Department by the institution running the minority school. In the choice of the three persons other than the Head, the teaching staff had no voice. By a unilateral act of the management, any teacher could be deprived of his rights under the Act. Such a unilateral act on the part of the management could be for unspecified reasons and could be used to oppress and harass any member of the teaching staff. No guidelines were given in the section as to how the power of exemption was to be exercised by the minority institution. Article 30(1) of the Constitution of India had for its object, the empowering of minorities to establish and administer educational institutions of their choice. This right could not be enlarged to confer upon minority institutions the right to adopt any wayward or unbridled policy of "hire and fire". Section 3(2) of the Act went much further and conferred arbitrary powers upon minority institutions to pick and choose any member of the teaching staff for denial of the benefits conferred by the Act and the Rules framed thereunder.

4. Such a power could not be defended under Article 30(1) insofar as it violated the rights of the petitioner vis-a-vis Articles 14 and 19 of the Constitution. The Act and the Rules, as also the Code, made it imperative upon respondents 4 and 5 to follow the rule of seniority-cum-suitability in the matter of appointment to the post of an AHM. To the extent, Section 3(2) of the Act permitted a minority institution to go against the Rules in the matter, it was void. Section 3(2) be declared as ultra vires and respondents 4 and 5 be directed to appoint the petitioner as an AHM after quashing the appointment of respondent. 7.

5. An Educational Inspector pleading on behalf of the respondents 1 to 3, avers that respondent 5 applied for exemption u/s 3(2) of the Act and after the

requisite enquiry, was accorded that privilege. Respondent 5 being a minority institution had notified the names of petitioner and respondent 7 under the aforementioned Section. This was done by a letter sent in 1980. The main contestants are respondents 4 and 5. They deny that the interview for the selection of an AHM was confined to asking the aspirants a single question, viz. to whom either would be loyal in case of a conflict between the Head-Mistress and the management. It was not true to say that the selection of respondent 7 was because of suspicion about the loyalty of petitioner and his suspected preference for respondent 6 as against her estranged husband and his father. In fact, respondent 6 had herself reprimanded the petitioner in the past for his having participated in an illegal abstention from work. This misdemeanour coming from the petitioner when he was part of the supervisory staff, was inexcusable. The Interview Committee had taken into consideration all aspects and come to the conclusion that respondent 7 was better entitled to the higher post of an AHM as compared to the petitioner. This decision was made in the interest of the School as also the larger interests of the students attending the same. The names of the petitioner and respondent 7 had been notified u/s 3(2) of the Act as far back as 1982. Respondent 5 was a minority institution in that it was founded by members of a linguistic group who had Gujarati for their mother tongue. Being a minority educational institution it was exempted from the operation of the Act to the extent specified in Section 3(2) thereof. Respondents 4 and 5 were not bound by the Rules in the matter of making an appointment to the post of an AHM. Appointment to that post was a vital part of the right to administration and this right was guaranteed by Article 30(1) of the Constitution. The petition was without substance and deserved to be dismissed.

6. The first question to which I have to address myself is one of fact, viz. what transpired at the interview which took place on February 4, 1986. The account given by the petitioner is to the effect that only one question was put by the Committee to him as also respondent 7. This was the query as to whom they would be loyal to, in the event of a conflict between the office-bearers of respondent 4 on the one hand and respondent 6 on the other. According to the petitioner, his reply that he being part of the teaching staff, had to carry out the orders of the Head of the said staff, to wit respondent 6, made him suspect in the eyes of the management. As against this, respondent 7 came out with the acceptable answer that her first loyalty would be towards the management. The account given by the petitioner is controverted by the office-bearers of respondent 4, respondent 7 and also two from those who comprised the Committee. Mr. Vashi has taken me through the Returns filed by these persons to establish contradictions in the accounts given by them. Now these returns have come in quite sometime after the date of the interview. Significantly, the representations that were made by the petitioner and his counsel to respondent 3 on February 19, 1986 and March 24, 1986 respectively, make no reference to a single question -- that too, a loaded one having been asked at the interview. The first representation a copy whereof is at Exh. C to the petition compilation,

speaks of the two candidates having been interviewed and the Committee unanimously selecting respondent 7. Exh. C goes on to recite the Rule which the appointment of respondent 7 is said contravened. But there is not a word in Exh. C to indicate that the choice of respondent 7 was based upon the answer given by her affirming her loyalty to the management rather than respondent 6. The omission in the two representations which were made earliest in point of time qua the interview, leads to the inference that the account given in the petition is untrue. The position emerging from the aforesaid conclusion is that the Committee questioned both the candidates and that whatever else may have dictated their preference for respondent 7, it was certainly not the response given by the aspirants to a query relating to loyalty.

7. Petitioner denies the claim of respondents 4 and 5 to the minority status claimed by them. In this connection it is necessary to refer to ground Nos. VII and X of the petition. The VIIth ground avers that respondent 5 had not been registered as a minority school either with the Directorate of Education or the Office of the Charity Commissioner. Petitioner claims to have in his possession documentary evidence to show that respondent 4 is registered as a secular trust in the office of the Charity Commissioner. Such a Trust is different from a minority trust, there being separate Registers and different provisions for registration of the two classes of trusts. No documentary evidence to bear out this contention has been tendered by the petitioner. In ground No. X, the averment is that respondent 4 was registered in or about the year 1927 and that Gujarati speaking people were not a "minority" at that time. Gujarati speaking people became a minority in the State of Maharashtra only after the bifurcation of the erstwhile State of Bombay into Gujarat and Maharashtra. It is contended that unless respondents 4 and 5 prove that the institution was established at a time when the group establishing it was a minority, the said group could not claim the privilege granted to minorities under Article 30(1) of the Constitution. Respondents 4 and 5 deny the correctness of this submission. In J.K. Ladiwalla's return on behalf of respondents 4 and 5, the return being dated January 19, 1987, it is contended that respondent 4 is a minority institution being managed and conducted by the Gujarati speaking people. Mr. Vashi is quick to point out that the vital words occurring in Article 30(1) viz. "established and administered" are not attracted to the instant case. It will not be possible to hold that the pleading necessary to attract Article 30(1) of the Constitution is missing from the return of respondents 4 and 5. The words used in the return are synonymous with the words used in Article 30(1) of the Constitution. Is the petitioner right in his submission that the point of time for considering where an institution is a minority institution, is the date of its establishment? Mr. Vashi relies upon the decision in the S. Azeez Basha and Another Vs. Union of India (UOI), to support ground No. 10 of the petition.

That the words "establish and administer" appearing in Article 30(1) had to be read conjunctively and it would have to be read that the party claiming minority status had to establish two things: (i) that it had established the institution; and

(ii) that it was administering the same. The mere fact that the minority was administering the institution did not suffice, for, it was quite possible that the institution was established by somebody else.

Applying this test to the Aligarh University, it was held that the establishment of the University was attributable to the Aligarh Muslim University Act, 1920 passed by the then Central Legislature. This case goes some way to support the petitioner's point. Mr. Chinoy for respondents 4 and 5 counters with the D.A.V. College, Vs. State of Punjab and Others, . The passage relied upon by learned Counsel is at para 9 and reads thus:

Though there was a faint attempt to canvass the position that religious or linguistic minorities should be minorities in relation to the entire population of the country, in our view they are to be determined only in relation to the particular legislation which is sought to be impugned, namely that if it is a State legislation, the minorities have to be determined in relation to the population of the State.

According to Mr. Chinoy this passage bears out the submission that the claim to minority status has to be adjudged qua the date of the enactment under which the right is claimed. I do not read the aforementioned passage in the sense suggested by learned Counsel. What the passage says, is, that minority status vis-a-vis a legislation would depend upon the identity of the body legislating. In other words, if the issue were the determination of a minority vis-a-vis Central legislation, the population of the minority to be taken into consideration would be vis-a-vis the entire country. On the other hand if the claim was with reference to a State legislation, the question had to be considered vide the State concerned. Another decision in which this point has been considered, though not directly, is that of Patro The Right Rev. Bishop S.K. Patro and Others Vs. The State of Bihar and Others, . There also the application of Article 30(1) with special reference to the word "establish" occurring therein, was adjudged with reference to the date of the founding of the institution. Mr. Vashi submitted that the date of founding of the institution was important and it had been so held in R.P. Nath's case [1986] Mh. L.J. 607. There, the applicability of Article 30(1) came up for consideration in regard to an institution established in 1945 by five persons who were then Hindus, but who after 1956, became Buddhists. The converts to Buddhism who were administering the institution were the very persons who were the founders, but at the date of the foundation, were Hindus. Mr. Vashi relies on para 17 of the Judgment at page 615 which is to the following effect:

In the present case, as mentioned above, the Society which runs the Dr. Ambedkar College was founded on or about July 8, 1945 by Late Dr. B.R. Ambedkar and other members of the Scheduled Castes. The founders of the institution who belonged to Scheduled Castes did not constitute a religious or linguistic minority at the time when the institution was established in 1945. They were Hindus and became Neo-Buddhists and constituted a religious minority after they embraced Buddhism in October 1956. It was after some of the members of the Scheduled Castes embraced Buddhism that those persons who

are styled as Neo-Buddhists constituted a religious minority. The institution that came to be administered by Neo-Buddhists after 1956 was not established by them. It was constituted by Scheduled Castes persons, who, as mentioned above, were Hindus. The Society and, therefore, Dr. Ambedkar College are not minority institutions within the meaning of Article 30 of the Constitution of India and proviso to Section 42(1) of the Act of 1974. The institution, therefore, cannot contend that the Statutes framed by the University of Bombay governing the service conditions of the members of the staff in the affiliated colleges are not binding on it and that the service conditions of its employees will be governed solely by the Rules and Regulations for the staff framed by the Society.

Admittedly, the society came into existence in the year 1927. In which year the School was established is not clear, but assuming that it came into existence in 1927, does it follow that the Gujarati speaking people in that year were not a minority? Mr. Vashi submits that the burden to establish that Gujaratis were a minority in 1927 lay upon respondents 4 and 5. The mere fact that this claim of theirs had been accepted by respondents 1 to 3 did not absolve them of the task to prove the claim by satisfactory evidence. They made the claim of being a minority educational institution and the State authorities without further ado accepted the same. In any case such acceptance if it was going to affect valuable rights of the petitioner could not be treated as conclusive. In this connection counsel points to the facts in *Indulal Hiralal Shah and Others Vs. S.S. Salgaonkar and Others*, where the claimant adduced overwhelming evidence to bear out the claim of being a minority school. In that case, the claimants had to establish that they were entitled to the exercise of the fundamental right guaranteed under Article 30(1), so as to get over certain provisions of the Secondary School Code. What was established to get over the Code was that Settlor-cum-Trustee and the remaining Trustees were all Gujarati speaking, that 90% students came from Gujarati speaking families having Gujarati as their mother tongue, that 80% of the teaching staff and 50% of the non-teaching staff were all Gujaratis. The Deputy Director of Education in his return claimed that the petitioners had not established as to how Gujarati people in the State of Maharashtra constituted a linguistic minority. *Pendse J.* held that the aforementioned factors sufficed to justify the claim to minority status put forth by the petitioners. This decision is not an authority for the proposition that a heavy burden is cast upon the claimants to establish minority status. Moreover in *I.H. Shah's case (supra)*, the claim to minority status was disputed by the Directorate of Education. In the instant case, the State authorities accept the claim of respondent 5 of being a minority institution. The acceptance would suffice for the purpose of this case. After all, it is the State which disburses the grants-in-aid. If an institution claims to be a minority institution, the degree of supervision the State can exercise is reduced. It will have to be presumed that acceptance of minority status claimed by an institution is so accepted after a fairly satisfactory enquiry by the authorities. Next, it is not possible to hold that Gujarati speaking people were not a linguistic minority in the erstwhile State of Bombay. While the exact population

figures for the year 1927 are not forthcoming, judicial notice can be taken of the fact that the Marathi speaking were the dominant linguistic group in the erstwhile State of Bombay. There is no reason to believe that the position in 1927 was any different. I therefore hold that respondent 5 was established and is being administered by a linguistic minority, viz. Gujarati speaking and is therefore entitled to the right conferred upon such minorities by Article 30(1) of the Constitution.

8. This brings me to the vires of Section 3(2) of the Act. At this stage it will be necessary to enumerate the precise question that falls for determination. Mr. Chinoy suggests and I accept, the phrasing of the question thus:

Whether Section 3(2) of the Act insofar as it excludes the applicability of Rule 5 read with Rule 3 to a minority school, is unconstitutional?

Section 3 is in two parts: the first part makes the provisions of the Act applicable to all private schools in the State of Maharashtra, whether or not receiving any grant-in-aid from the State Government. A "private school" under the Act means a "recognised school" established or administered by a management other than Government or a local authority. Now so far as respondent 5 is concerned, it is a private recognised school in receipt of grant-in-aid from the Government and administered by a Society. It cannot be said, and that is not disputed, that except to the extent permitted by the second part of Section 3, the Act and the Rules framed thereunder, apply to this school. Section 3(2) overrides Sub-section (1) in these words:

Notwithstanding anything contained in Sub-section (i), the provisions of this Act shall not apply to the recruitment, conditions of service and conduct and discipline of the Head of a minority school or any other persons (not exceeding three) who are employed in such school and whose names are notified by the Management to the Deputy Director for this purpose.

The words "conditions of service and conduct and discipline" were deleted vide Maharashtra Act XXX of 1986 and the deletion came into force as with effect from August 7, 1987. The material portions of Rules 3, 5 and 15 are to the following effect:

5(1). Management of secondary school with more than twenty classes shall appoint an Assistant Head to assist the Head in his organizational, administrative and supervisory duties.

3(3). The Management of a school...shall fill up the post of the Head by appointing the seniormost member of the teaching staff...who fulfils the conditions laid down in Sub-rule (1) and who has a satisfactory record of service.

3(1)(b). A person to be appointed as the Head of a secondary school...shall be a graduate possessing Bachelor's degree in teaching or education of a statutory University or any other qualification recognised by Government as equivalent thereto and possessing not less than five years' total full-time teaching

experience after graduation in a secondary school or a Junior College of Education out of which at least two years" experience shall be after acquiring Bachelor's degree in teaching or education.

3(6). Explanation: For the purpose of this rule the record of service shall be deemed to be satisfactory if there is nothing adverse in the annual confidential reports of the teacher concerned during the previous five years. Adverse remarks not duly communicated in writing to the teacher concerned shall be disregarded for this purpose.

5(2). Subject to the provisions of Sub-rule (5), the provisions of Rule 3 relating to qualifications and appointment of Head shall mutatis mutandis apply to the post of an Assistant Head and Supervisor.

15(1). The confidential reports shall be written annually in the respective Form in Schedule "G"....

(2). The confidential reports so written in respect of the employees and the Head shall be reviewed by....

(5). Failure to write and maintain confidential reports and to communicate adverse remarks to the employees within the period prescribed in Sub-rule (3) shall have the effect that the work of the employee concerned was satisfactory during the period under report." In the matter of reckoning of seniority according the Rules, the admitted position is that petitioner would be senior because of a note which reads thus:

In the case of teachers whose date of continuous appointment in one of the same categories the teacher who is senior by age will be treated as senior.

9. In exercise of the right given to respondent 5, it notified the names of three persons. This was done in 1982. Petitioner questions the naming as a unilateral act intended to deprive any employee picked out by the management for discriminatory treatment. The contention is that Section 3(2) does not lay down guidelines on the basis of which the power of naming is to be exercised. In the absence of guidelines, the management can pick any person and at any time to deprive him of the benefits of the Act and the rules framed thereunder. Changes can be made at any time in the naming, and this, without notice to the affected persons. Mr. Bora representing respondents 1 to 3 tries to restrict the apparently wide power given by the words used in Section 3(2), to those like the Head Master exercising supervisory powers. Unfortunately the language used is far wider but it can be read down by recourse to the rule of *ejusdem generis*. Construed thus, the words "any other persons" will have to be read as confined to those assisting the Head of the school in his organisational administrative and supervisory duties. Petitioner became a Supervisor in the year 1979 and his name was intimated for exemption u/s 3(2) of the Act in 1982. This may have been done without reference to him. If the words any other persons are read as confined to Supervisors and Assistants to the Head Master, it cannot be said that

the section confers an uncanalised power upon the management of a minority institution. Would the exclusion of supervisors from the rest of the teaching staff be violative of Article 14? The class excluded can be seen as being different from the general run of teachers. The Head Master and those assisting him in his organisational, administrative and supervisory duties, have to discharge duties far in excess of duties falling upon the shoulders of the rest of the teaching staff. Therefore, the exclusion cannot be voided per se on the ground that it constitutes hostile class legislation. Coming now to the main question, Mr. Vashi relies upon the decision in *Frank Anthony Public School Employees' Association Vs. Union of India (UOI) and Others*, . That decision is the most authoritative of the pronouncement from the highest Court of the land, which moreover has received later approval in *Mrs. Theclamma v. Union of India* : [1987]2SCR974 . A careful reading of the decision is necessary. First, what exactly was the point in issue? The answer is to be found in paragraph 14 at page 730 and it is thus worded:

The principle controversy between the parties centres around Section 10 which requires that the scale of pay and allowances, medical facilities, pension, gratuity, provident fund, and other prescribed benefits of employees of the recognised private school shall not be less than those of the corresponding status run by the appropriate authority.

In the present case, the controversy centres around the right of a minority institution to recruit/appoint an A.HM, unfettered by Rules 3 and 5 vide the power given to it by Section 3(2) of the Act. It was argued that the above quotation from para 14 is followed by the following which brings the question in this petition virtually on par with *Frank Anthony* (supra):

The submission on behalf of the respondents was that the right to appoint members of staff being an undoubted right of the management and the right to stipulate their salaries and allowances etc. being part of their right to appoint, such right could not be taken away from the management of a minority institution.

The Court speaking through Chinnappa Reddy J. reviewed the entire case law on the subject and summarised the same thus:

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 30CO is two fold, 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.

Having stated thus, His Lordship went on to state:

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.

Again, it was made clear that the Court was not throwing overboard the decisions rendered in the past. That is why it remarked that:

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-Judges Bench in *The Ahmedabad St. Xavier's College Society and Another Vs. State of Gujarat and Another*, we will naturally adopt what has been said therein and where the Nine-Judges Bench is silent we will have recourse to the other decisions.

His Lordship further clarified that the point before the Bench was a new one by saying:

The learned Additional Solicitor General very fairly stated before us that there was no case in which it had been held that the right to pay whatever salaries and allowances they liked and stipulate whatever conditions they liked, was part of the right to administer the minority institutions under Article 30(1) of the Constitution.

The Bench had before it a petition impugning various provisions of the Delhi School Education Act 18 of 1973. The summation of Nine-Judges Bench decision was noted with these words in para 15 of the judgment:

Thus we see that more of the learned Judges who constituted the Nine-Judges Bench were inclined to the view that prescription of conditions of service which would have the effect of attracting better and competent teachers would not be considered violative of the fundamental right guaranteed by Article 30(1) of the Constitution- That would right" ly be so because the mere prescription of scale and other conditions of service would not jeopardise the right of the management of minority institutions to appoint teachers of their choice.

(Underlining mine) [herein indicated in italics. -- Editors.]

Mr. Vashi referred to para 16 of the judgment at page 731 to justify the contention that conditions of service for teachers were regulated. The paragraph recites:

The excellence of the instruction provided by an institution would depend directly on the excellence of the teaching staff, and in turn, that would depend on the quality and the contentment of the teachers. Conditions of service pertaining to

minimum qualifications of teachers, their salaries, allowances and other conditions of service which ensure security, contentment and decent living-standards of teachers and which will consequently -enable them to render better service to the institution and the pupils cannot surely be said to be violative of the fundamental right guaranteed by Article 30(1) of the Constitution. The management of a minority educational institution cannot be permitted under the guise of the fundamental right guaranteed by Article 30(1) of the Constitution, to oppress or exploit its employees any more than any other private employee. Oppression or exploitation of the teaching staff of an educational institution is bound to lead, inevitably, to discontent and deterioration of the standard of instruction imparted in the institution affecting adversely the object of making the institution an effective vehicle of education for the minority community or other persons who resort to it. The management of a minority institution cannot complain of invasion of the fundamental right to administer the institution, when it denies the members of its staff the opportunity to achieve the very object of Article 30(1) which is to make the institution an effective vehicle of education.

But as said earlier, the question before the Bench was confined to that set out in para 14 reproduced above. In clear terms, it was held that prescribing a scale of pay and other conditions of service would not adversely affect the management's right to appoint teachers of their choice. Frank Anthony (supra) cannot be said to be an authority for the proposition that Section 3(2) of the Act is void. Mr. Vashi submits that promotion is a condition of service and that an absolute right given to the management by Section 3(2) to ignore seniority for the purpose of promotion, could not be deemed a matter in the sphere of administration. That the right of actual promotion or being considered for promotion, is a condition of service was so laid down in Mohammad Shujat Ali and Others Vs. Union of India (UOI) and Others, . But as Mr. Chinoy submits, a rule of promotion even if it be a condition of service, cannot be outside the protection given to the minorities by Section 3(2) of the Act. A long line of decisions has been relied upon by Mr. Chinoy to support the vires of Section 3(2) of the Act. In Aldo Maria Patroni and Another Vs. E.C. Kesavan and Others, , the Full Bench of the Kerala High Court had to consider a decision of the Director of Public Instruction purporting to implement Rule 44 of the Kerala Educational Rules (1959). The rule prescribed that the Head Master of an aided school, shall ordinarily be appointed according to seniority and that a teacher aggrieved by an appointment had a right of appeal to the Education Department of the State. The school was one managed by the Jesuits of the Calicut Mission. The management appointed a junior member of the staff who was a member of the Society of Jesus as the Head-Master of the School, in preference to another teacher who was senior to him in the service of the School. The Director of Public Instruction held that there was no justification for departing from the ordinary rule of appointing a Head Master according to seniority under Rule 44. His direction that the senior teacher be appointed as the Head-Master, led to the filing of the writ petition by the management. The effect of the decisions of the Supreme Court in

Kerala Education Bill AIR[1958] S.C. 956, and *Sidhrajibhai v. State of Gujarat* AIR[1963] S.C. 540, was summarised by the Full Bench in the form of four propositions:

(i) A school established by a minority -- whether before or after the Constitution -- will come within the ambit of Article 30(1) of the Constitution, even though what it imparts is a general education and its students are drawn not merely from the minority community but from other communities as well.

(ii) The right guaranteed under Article 30(1) is a right that is absolute and any law or executive direction which infringes the substance of that right is void to the extent of the infringement.

(iii) The absolute character of the right will not preclude regulations in the true interests of efficiency of instruction, discipline, health, sanitation, morality, public order and the like, as such regulations are not restrictions on the substance of the right guaranteed by the Constitution.

(iv) The fundamental rights enshrined in Article 30(1) is intended to be effective and should not be whittled down by any regulative measure conceived in the interest, not of the minority educational institution but of the public or the nation as a whole." On the issue of an appointment to the post of Head Master the Full Bench had this to say:

The post of the Headmaster is of pivotal importance in the life of a school. Around him wheels the tone and temper of the institution; on him depends the continuity of its traditions, the maintenance of discipline and the efficiency of its teaching. The right to choose the Headmaster is perhaps the most important facet of the right to administer a school; and we must hold that the imposition of any trammels thereon -- except to the extent of prescribing the requisite qualifications and experience -- cannot but be considered as a violation of the right guaranteed by Article 30(1) of the Constitution. To hold otherwise will be to make the right "a teasing illusion, a promise of unreality.

This decision is very germane to the question that arises in the instant case. The slight difference between the two cases is that *Partoni* (supra) was concerned with the appointment of a Head Master, whereas the present case concerns the appointment of an AHM. If the post of a Head Master is of pivotal importance in the life of a school, there is no gainsaying that the same importance governs the post of an AHM. The rules themselves contemplate an AHM to assist the Head in his "organisational, administrative and supervisory duties". If the right to choose the Head Master is perhaps the most important facet of the right to administer a school, the right to choose an AHM can be only slightly less in importance. Nonetheless, to whatever extent the degree of importance be reduced, it would be an important facet of the right to administer the institution. There is nothing in *Frank Anthony* (supra) to indicate that the right to make an appointment to a pivotal post in a minority educational institution, is unconnected to the right of administration conferred upon a minority institution by Article 30(1) of the

Constitution. The Rev. Father W. Proost and Others Vs. The State of Bihar and Others, , upon which Mr. Chinoy relies is not really attracted. The point at issue there was the refusal of the State of Bihar to accept the claim of a minority institution to being such an institution and therefore, exempt from Bihar State University Act, 1960. The claim for exemption was made u/s 48B of the aforementioned Act. This is not the position that has arisen for determination in the present case. Here, the management and the State are one in saying that Section 3(2) of the Act applies to the appointment of an AHM because of respondent 5 being a minority educational institution. The The Ahmedabad St. Xavier's College Society and Another Vs. State of Gujarat and Another, , which Chinnappa Reddy J. declared as binding goes against the contention put forth on behalf of the petitioner. One of the sections impugned in that case was Section 33-A (1)(a) & (b), which said that every college shall be under the management of a Governing Body which shall include amongst its members, a representative of the University nominated by the Vice-Chancellor and representatives of teachers, non-teaching staff and students of the college. These provisions had the effect of displacing the management and entrusting its functions to a different agency. Section 33-A(7X6) laid down that for recruitment of the Principal and members of the teaching staff of the college, there should be a selection Committee of the college which was to consist of, in the case of recruitment of a principal, a representative of the University nominated by the Vice Chancellor and in the case of recruitment of a member of the teaching staff of the college, a representative of the University nominated by the Vice-Chancellor and the Head of the Department, if any, for the subject taught by such persons. Section 33-A(1)(bb) affected the right of a minority institution to choose teachers. The Nine-Judges Bench delivered 6 to 7 opinions. The majority struck down Section 33-A(1)(b) on the ground that it violated the rights of a minority to run educational institutions of their choice guaranteed under Article 30(1) of the Constitution. It was recognised that the right conferred on the minorities to administer educational institutions of their choice, was not an absolute right. It was not a right free from regulation. Regulative measures were necessary to maintain the educational character and content of minority institutions. They were also necessary to ensure orderly, efficient and sound administration. Cited with approval was the oft-quoted comment of Das C.J. in the Kerala Education Bill Reference (supra) that the right to administer was not a right to mal-administer. With all this, the farthest the State could go, was, by prescribing regulations which would serve the interests of the students, the interest of the teachers and such others which would advance the efficiency of the teachers and ensure discipline and fairness in the administration. But with all this, the extinction of the right to administer or its debasement to the extent where it became a mere formality, was held as not countenanceable. Mr. Justice Khanna observed:

Another conclusion which follows from what has been discussed above is that a law which interferes with a minority's choice of qualified teachers or its

disciplinary control over teachers and other members of the staff of the institution is void as being violative of Article 30(1). It is, of course, permissible for the State and its educational authorities to prescribe the qualifications of teachers, but once the teachers possessing requisite qualifications are 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 is one of the essential ingredients of the right to manage an educational institution and the minorities can plainly be not denied such right of selection and appointment without infringing Article 30(1). (Underlinings mine) [herein indicated in italics. -- Ed.]

Again, Mathew J. speaking for himself and Chandrachud J. (as His Lordship then was) observed:

It is upon the principal and teachers of a college that the tone and temper of an educational institution depend. On them would depend its reputation, the maintenance of discipline and its efficiency in teaching. 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, is perhaps the most important facet of the right to administer an educational institution. We can perceive no reason why a representative of the University nominated by the Vice-Chancellor should be on the Selection Committee for recruiting the Principal or for the insistence of head of the department besides the representative of the University being on the Selection Committee for recruiting the members of the teaching Staff. So long as the persons chosen have the qualification prescribed by the University, the choice must be left to the management. That is part of the fundamental right of the minorities to administer the educational institution established by them.

As said earlier, the Nine-Judges Bench's decision is the bedrock on which the judgment in Frank Anthony's case (*supra*) rests. Nothing said in that decision has been retracted. The effect of the foregoing discussion, is, that Section 3(2) conferred upon respondent 4 the power to select an AHM without regard to the rules framed under the Act, Had the Act applied, the management could not have disregarded the claims of the petitioner. They could not have taken recourse to the alleged reprimand administered to the petitioner for having participated in a wrongful abstention from work. If it had been wrongful, it should have been entered into his Confidential Report. That no such record is maintained, is the admitted position and the further inference flowing therefrom would be, that the petitioner had a clean record. However, the right of the society to select an AHM who is in the supervisory cadre, is unfettered. Section 3(2) of the Act construed thus, is valid and its constitutionality has to be sustained. The result is that petitioner is not entitled to the reliefs claimed by him. The petition fails and the rule stands discharged. Having regard to the many complex questions that arose for determination, parties are left to bear their own costs.