

(1993) 01 GUJ CK 0015
In the Gujarat High Court

Haji Musa Ismail

APPELLANT

Vs

District Education Officer and Another

RESPONDENT

Date of Decision : 22-01-1993

Acts Referred:

Gujarat Secondary Education Act, 1972 — Section 17, 17(26), 34, 35, 40A

Citation : (1993) 1 GLR 377

Hon'ble Judges : C.K.Thakker, J

Bench : Single Bench

Judgement

C.K. Thakker, J.—A short but interesting question of law has been raised in the present petition by the petitioner society. The petitioner is running an educational institution in the name and style of Pariej High School at village Pariej, District : Bharuch, registered under the Gujarat Secondary Education Act, 1972 (hereinafter referred to as "the Act") and recognised by the Government for the purpose of grant-in-aid. According to the petitioner, the school is a minority educational institution established and administered by a minority based on religion. Necessary certificate has also been granted in favour of the petitioner bearing No. SEB/Minority /B/I0/6825/7003 by the Gujarat Secondary Education Board, Gandhinagar.

2. One Mohammadbhai Daudbhai Patel - third respondent herein -was appointed as Principal of the School by the petitioner society on June 15, 1973. He attained the age of 58 years in September, 1989. It was the case of the petitioner that since the third respondent was physically fit and mentally alert and as he was discharging duties efficiently, diligently, sincerely and to the utmost satisfaction of the students as well as the School management, the petitioner decided to grant extension for a further period of two years. Since the School was a minority institution, certain provisions of the Act were not applicable to the petitioner by virtue of Section 40-A of the Act. Likewise, certain provisions of the provisions of the Gujarat Secondary Education Regulations, 1974 (hereinafter referred to as "the Regulations") were also not applicable to the petitioner (vide

Regulation 43). The provisions of the Grant-in-Aid Code were, therefore, pressed into service by the petitioner and an application was made to the Chairman, Secondary Education Board, Gandhinagar - Annexure "A" on January 12, 1988 that in the interest of the education as also of the students, the petitioner had resolved to extend the services of the third respondent for two years by passing unanimous resolution. It was stated that the school was a minority institution and, therefore, it was exempted from the provisions of Regulation 36(1). It was also mentioned that the third respondent was physically fit and necessary certificate would be produced as and when required by the respondent authorities. The first respondent - District Education Officer - vide his communication, Annexure "B" dated 10th February, 1988 informed the President of the Society that nothing could be done on the application of the petitioner since there was no provision for continuing the Head Master after he reached the age of superannuation. Once again, a similar application was made and once again it came to be rejected by the respondent authorities. Against that action, the petitioner has approached this Court by filing the present petition.

3. Mr. A.J. Patel, learned Advocate appearing for the petitioner submitted that the respondent authorities have not applied their minds to the relevant provisions of the Act and the regulations and the provisions of Grant-in-Aid Code and have committed an error of law apparent on the face of the record in rejecting the application and the prayer made by the petitioner. Hence, the impugned orders are required to be quashed and set aside.

4. Now, Section 17 of the Act prescribes powers of the Board. It enables the Board to lay down qualifications, methods of selection and conditions of appointment and termination of employment and rules for conduct and discipline of the Head Master and teaching and non-teaching staff of the registered private secondary schools. Section 54 provides for framing of the regulations by the State Government. Regulation 36 provides for superannuation of the teaching staff and is material for the decision of question raised in this petition. The relevant part of Regulation 36 reads as under:

36. (1) An employee of a registered Secondary School shall be compulsorily retired on the date on which he attains the age of 58 years.

(2) No management shall employ or re-employ any person who has completed the age of 58 years:

Provided however that if the date of superannuation of an employee falls within a term, his service shall automatically be extended upto end of that term:

Provided further that re-employment upto the age of 60 years should normally be given to peons and such other menial servants by the management if they are physically fit.

5. Mr. Patel submitted that it is Hue that under the provisions of the Act, the Board is authorised to lay down qualifications, selection and conditions of service

of the Head Master and the teaching and non-teaching staff of the registered private secondary schools. It is also true that Regulation 36 specifically lays down the age of superannuation of every employee of the registered secondary school to be 58 years. It is equally clear that it does not empower the management to grant extension or to re-employ any person who has completed 58 years of age unless such employee is covered by proviso to Regulation 36(2). Mr. Patel is, however, right in contending that while considering and interpreting these provisions, the other provisions of the Act as well as of the regulations cannot be ignored. He submitted that the school ran by the petitioner is a minority institution, and while rejecting the application, the respondent authorities have not considered the relevant provisions of the Act and of the regulations. Drawing the attention of the Court to Section 40A, Mr. Patel submitted that the said Section makes it clear that the provisions of Sections 17(26), 34 and 35 would not apply to any educational institution established and administered by a minority. Similarly, Regulation 43 enacts that nothing contained in Regulation 36 would apply to any educational institution established and administered by a minority. The resultant effect, according to Mr. Patel, would be that the relevant provisions relating to appointment and superannuation of the Head Master and teaching staff of the registered private secondary school would be governed by the provisions of the Act and regulations provided the said private secondary school is not a minority institution. In the case of a minority institution, those provisions would not be applicable. I see considerable force in the argument of Mr. Patel. Looking to the scheme of the Act and the regulations, there is no doubt in my mind that the provisions relating to employment and conditions of service as reflected in various provisions of the Act and the regulations do not apply to minority institutions.

6. The next question which arises for my consideration is whether a step taken by petitioner of granting extension to the third respondent till he attains the age of 60 years can be said to be legal and in accordance with law. Now, it cannot be gainsaid that if the educational institution is an institution to which the provisions of the Act and the regulations apply, it has no power, authority or jurisdiction to grant such extension. But, on the other hand, if the institution is a minority institution to which certain provisions of the Act and Regulations do not apply, the position would be different.

7. Mr. Patel submitted that in such a situation, the provisions of Grant-in-Aid Code would be attracted and a decision can be taken on the basis of Grant-in-Aid Code. The relevant rule is Rule 81 which reads as under:

81.1 A Secondary School Teacher shall ordinarily retire from service at the age of 58.

81.2 The management may grant to teachers extensions upto the age of 60. If the Inspecting Officers report on the basis of their inspection that any teacher beyond the age of 58 is unable to discharge his duties properly, the teacher will be sent for Medical examination and if declared unfit will be compelled to retire.

81.3 If a management for any reasons, desires to give extension to a teacher in its employ, beyond the age of 60, it should obtain the previous permission of the Educational Inspector who may grant such extension for a period not exceeding one year at a time on the merit of the case and subject to the teacher being physically and mentally fit. No teacher who has completed the the age of 65, shall however, be continued in service under any circumstances.

81.4 The case of part-time teachers and special teachers like teachers for Drawing, Music, Craft, etc. and part-time non-teaching staff who are treated on par with other teaching and non-teaching staff in respect of service conditions etc. shall also be governed by these rules.

81.5 No person who has already attained the age of 58 years shall be employed as a teacher or on the non-teaching staff. Retired persons from Government or non-Government Educational Institutions may however, be re-employed by the Educational Institutions provided they are physically and mentally fit. The employment of such retired persons should be subject to the provisions made in clauses 81 2 and 81.3 above and such other terms and conditions not in contravention of these rules and the general service conditions as may be mutually agreed upon between the employer and the employee. Such reemployed persons will not however, be eligible for the departmentally prescribed scales of pay and allowances, etc. and to the Government aided Provident Fund scheme.

8. Looking to the above rule it is clear that even under the Grant-in-Aid Code, ordinarily, a teacher in a secondary school should retire from service at the age of 58 years. The management may, however, grant to such teacher extension upto the age of 60 years. Again, if the Inspecting Officer reports on the basis of inspection that any teacher beyond the age of 58 years is unable to discharge his duties properly, such teacher will be sent for medical examination and if he is declared unfit, the management must retire him. Rule 81.5 provides that once a person who has attained the age of 58 years, he cannot be employed as a teacher or on non-teaching staff. Retired persons from the Government or non-Government Educational Institutions provided they are physically and mentally fit but such employment would be subject to the provisions of Clauses (2) and (3) of Rule 81 of the Code and the terms and conditions of the appointment of such persons should not be in contravention of the rules and the general conditions of service mutually agreed upon between the employer and the employee. Again, such re-employed persons would not be eligible for prescribed pay scales and allowances and also to the Government aided provident fund scheme.

9. From the aforesaid discussion, it is evident that a minority institution to which certain provisions of the Act and the regulations do not apply may grant extension to a teacher who has attained the age of 58 years provided he is physically and mentally fit. If such person is unable to discharge his duties properly, he will have to be retired and the management cannot insist for his continuation. Similarly, if the person has already retired at the age of 58 years

and is re-appointed by the management, such re-appointment must be in accordance with the provisions of the rules and he would not be entitled to claim pay scales prescribed by the department and such re-appointment would be subject to the terms and conditions of the agreement mutually arrived at between the parties. Again, the institution cannot claim government aided provident fund scheme.

10. In the instant case, it is clear that the institution is a minority institution and certain provisions of the Act as also the regulations are not applicable to it. It was, therefore, permissible to the management to extend services of Respondent No. 3 after he attained the age of 58 years which was done unanimously by the petitioner. It was the case of the petitioner that Respondent No. 3 was physically fit and the petitioner had also shown its readiness to produce necessary certificate as and when required by the respondent authorities. It was not even the allegation of the authorities that the Respondent No. 3 was physical and/or mentally unfit. Unfortunately, the respondent authorities did not consider the material fact that it was open to the petitioner to adopt such a course and rejected the application. The petition, therefore, requires to be allowed. Since the action of the petitioners in granting extension in favour of Respondent No. 3 was legal, valid and in accordance with law, the petitioners were also entitled to claim grant from the Government. Even at the time of admission, such an order was passed by this Court (Coram : J. N. Bhatt, J.) on April 13, 1991 subject to the result of the petition.

Mr. Sompura, learned Assistant Government Pleader for the respondent-State placed reliance on resolution passed by the Government of Gujarat on December 2, 1975 making certain alterations in Regulations of 1974 and particularly in Regulation 36 by which earlier Regulation 36 was substituted. I have considered Regulation 36 duly amended as quoted above. But in my opinion, when Regulation 36 is not applicable to a minority institution, any amendment therein is of no consequence whatsoever.

11. In the result, this petition is allowed. It was permissible to the petitioners to extend the services of Respondent No. 3 till, he reached the age of 60 years and on that basis, the petitioners are entitled to claim grant from the respondent authorities. Rule is accordingly made absolute to the aforesaid extent with no order as to costs.