

(2006) 04 BOM CK 0087
In the Bombay High Court
Case No : Writ Petition No. 542 of 1993

Hussain Khan

APPELLANT

Vs

Shah Babu Education Society

RESPONDENT

Date of Decision : 26-04-2006

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 16, 16(1), 16(4)
Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act,
1977 — Section 3, 3(1), 3(2), 30(1), 9

Citation : (2006) 4 BomCR 726 : (2006) 4 MhLj 553

Hon'ble Judges : Zoting D.S., J; Joshi A.H., J

Bench : Division Bench

Advocate : Z.A. Haq, for the Appellant; Anoop Parihar, A.G.P. for respondent
Nos. 3, 4 and 6, for the Respondent

Final Decision : Dismissed

Judgement

Joshi A.H., J.—The petition proceeds on admitted facts which are as follows:

(a) Respondent No. 1 is a Minority Institution as contemplated by Article 30 of the Constitution of India.

(b) The petitioner is an employee, a senior most teacher engaged in respondent No. 1's Jr. College who is in employment since 2.8.1971.

(c) Due to retirement of Mr. M.H. Kabir, the Head Master with effect from 30.6.1992, the post of Head Master became available, on which respondent No. 1 appointed respondent No. 2.

(d) The Management took recourse to Section 3(2) of Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977, claiming that it has a privilege to appoint the Head of the School by not following the mandate contained in Sub-section 1 of Section 3.

2. Aggrieved by the appointment of Respondent No. 2 and consequential

suppression of the petitioner's claim, he preferred an appeal u/s 9(1)(b) of the said Act, which was registered as Appeal No. 106 of 1992. The said appeal was heard and decided by the School Tribunal by Judgment and order dated 18.12.1992.

3. The School Tribunal recorded the finding in para No. 9 which reads as follows:

9. In view of the discussions made in the foregoing paragraphs, I am of the opinion that the respondent school is a minority school, established and administered by the Minority Community based on religion and the respondent management has inherent right to appoint the Head of their School as per their choice. Therefore, the respondent No. 2 as the head of their school. Recruitment means appointment and appointments can be made by nomination or selection in both the cases whether it is an appointment or promotion enlistment is necessary. In the instant case the recruitment of the respondent No. 2 can easily hold as appointment by nomination, for which they have already notified the name to the Dy. Director of Education and in turn the Dy. Director appear to have accepted the same his letter dated 10.12.1991, which is at page No. 63. Therefore, the plea taken by the respondents Nos. 1 and 2 that the provisions of the Act shall not be applied to the appointment of the respondent No. 2 are acceptable. Consequently, I do not find any ground to interfere with the impugned order of appointment of the respondent No. 2 dated 1.7.1992, issued by the respondent No. 1 u/s 9 of the Act. I have, therefore, decided the point in the negative.

4. The petitioner has preferred the present petition under Articles 226 and 227 of the Constitution of India. The petitioner finds that on the face of existence of Section 3(2) of the MEPS Act, the Judgment of the Tribunal cannot be faulted with Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 and he has, therefore, made the following prayer:

1) strike down the provisions of Section 3(2) of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977, as violative of Article 14 of the Constitution of India.

5. The petition has been admitted by this Court on 11.3.1993. In view of amendment to Rule 18 Clause Part-I of Chapter XVII of the High Court Appellate Side Rules, in so far as the prayer 2 challenge in the judgment of the School Tribunal is concerned, the writ petition would lie before the Single Judge, however, in view of the challenge to the validity of statutory provisions, the matter continues to be within the jurisdiction of Division Bench.

6. Heard Learned Advocate Mr. Z.A. Haq for the petitioner and learned Assistant Government Pleader Mr. Purohit appearing for respondents 3 to 6.

7. Submissions of learned Advocate Haq are as follows:

(a) The right of minority institution u/s 3(2) of Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977, was considered directly by

this Court in three cases namely:

(i) 1991(1) Mh.L.J. Mrs P.V. Patole v. State of Maharashtra (sic).

(ii) 1993(1) C.L.R. 295 Gunvantlal K. Khamar v. State of Maharashtra and Ors.

(iii) Hakimsingh Ram Sumer Singh Yadav Vs. Vardhaman Sthanakwasi Jain Shrivak Sangh and Others, ,

and this Court recognized the right of the management available under statute through Section 3(2) of the Act. According to Mr. Haq, in any of these cases, constitutional validity of Sub-section 2 of Section 3 was not directly tested.

(b) The fundamental right of being considered for promotion under Article 16 is available against the School which is run on 100% grants, since such school shall fall within the description of any other authority under Article 12 of the Constitution, in view of reported Judgment Manmohan Singh Jaitla Vs. Commissioner, Union Territory of Chandigarh and Others, and Vidya Dhar Pande Vs. Vidyut Grih Siksha Samiti and Others, .

(c) Right to be considered for promotional post is a fundamental right as recognized in case of K.C. Joshi Vs. Union of India (UOI) and Others, and Ajit Singh and Others Vs. The State of Punjab and Others, , particularly when, the School in question is run on 100% grant-in-aid.

(d) Right of minorities institutions to establish, manage and administer educational institutions includes the right to appoint the head of their choice and this position is maintained unaffected by consistent judgments of Apex Court right from Karnataka Education Bill's case. The position has, however, undergone change after the judgment of Supreme Court in T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others, .

(e) Common reading of law as it emerges from the case law referred to in foregoing points (b), (c) & (d), it reveals that the right of minorities under Article 30(1) does not any more continue to be absolute and enforceable even by disregarding the rights of citizens or individuals under Article 16 of Constitution of India, as was in vogue prior to T.M.A. Pai Foundation case.

(f) Though the provisions of Section 3(2) were held to have a right vested in favour of the management of a minority Institution, after judgment of Constitution Bench of Supreme Court in T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others, case, (supra) the management's right to appoint Head of the Institution by giving a total go-bye to the rule of seniority-cum-fitness turns out to be recognition of power conferred by statute which is opposed to fundamental rights of citizens, in particular, the teachers who fall in the zone of consideration.

(g) The management's right to establish, manage and administer Educational Institution of own choice ought to be held not to include right to appoint Head of the Institution. Consequently Section 3(2) of Maharashtra Employees of Private

Schools (Conditions of Service) Regulation Act, 1977, defeats individual rights available under Article 16 of Constitution of India vested in the employees, particularly, when the School in question run by the Minority Institution is aided, run on 100% grants such institution falls within the compass of definition of State or other authority under Article 12 of Constitution of India.

(h) Rights under Articles 14 & 16 and right under Article 30(1) which are flowing from the same Chapter i.e., Chapter III of Constitution of India will have to be so interpreted that exercise of one namely right under Article 30(1) does not negate or nullify the right under Articles 14 & 16 of the Constitution of India.

8. Learned AGP Mr. Purohit opposed the petition contending that:

(a) The right available to minorities under Article 30(1) of Constitution of India was considered by Honourable Apex Court, and the view on this point is consistent through out and has not undergone any change right from Kerala Education Bill 1957, In ref AIR 1958 S.C. 956 to T.M.A. Pai Foundation case. This question had also come before Full Bench of this Court in the case of St. Francis De Sales Education Society, Nagpur and Anr. v. State of Maharashtra and Anr 2002(1) Bom. C.R. 1650 2001(3) Mh.L.J. 261 and the law of land as exists is in favour of respecting minority rights under Article 30(1) of the Constitution of India.

In view of the precedents which are consistent, the dictum is that the fundamental rights of Minority Institution under Article 30(1) are enforceable and need to be respected.

(b) Section 3 Sub-section (2) does not offend or militate against the fundamental rights as it operates as reasonable restriction on individual right, in order to respect a more superior and un-abatable fundamental right of minorities.

Mr. Anoop Parihar, therefore, urged that the Writ Petition be dismissed.

Analysis of respective submissions and conclusions.

9. Though learned Advocate Mr. Haq has initially admitted that, but for conjoint reading of the judgments referred to in the submissions No. (b), (c) & (d) noted in para 7, the rights of minorities to appoint the Head was absolute, it would be useful to refer to the summary of precedents as emerged from various cases between Kerala Education Bill's case, till The Gandhi Faiz-E-Am College, Shahjahanpur Vs. University of Agra and Another, . The said ratio is summarized as in paras to follow:

10. According to Mr. Haq, therefore, a new facet and guiding line has been opened by the Supreme Court for interpreting the restrictions on the fundamental right of the minorities to run educational institution, while deciding T.M.A. Pai Foundation's case.

This facet was dealt with by the Supreme Court considering the right of the students to have education and the power of the State to regulate the process of

admission to various Educational Institutions run by the minority institution. Hon'ble Supreme Court observed that it would be difficult to hold that the framers of Constitution intended to give an absolute right to the minorities so as to defeat the right of the citizens under the said Chapter, and it would, therefore, be difficult to hold that no law of land would apply to the minority institution. Thus State has power to regulate the procedure of admission to students in minority institutions and rights of students to education is the foundation of such powers, and right to run and administer is subject to such restrictions on this point.

11. In order to appreciate the submissions of the learned Advocate Mr. Haq, it would be appropriate to deal with the aspect of rights of minorities and individual rights dealt with by him which is done as hereinafter.

12. These submissions need to be tested. For this it is necessary to take resume of effect & dictum of various precedents, on Article 30 of Constitution and what reveals as ratio therefrom.

13. Conclusions and ratio as falling from or deducted from various judgments of Hon'ble Supreme Court & Full Bench Judgment of this Court are clear from the following:

(a) Law as stated from Kerala Education Bill case AIR 1958 S.C. 956 till The Ahmedabad St. Xavier's College Society and Another Vs. State of Gujarat and Another, is holding the field. The minorities as referred to in Article 30(1) of the Constitution of India have fundamental rights to establish, manage and administer the educational institutions of their choice, which includes right of recognition and freedom from excessive regulation.

(b) Exception to general rule was carved out in Gandhi Faiz Jr. College case to the extent that the right is not free from regulations and whether given regulation on violating this right can be tested.

(c) The rights of minority educational institution to establish, manage and administer the educational institutions shall be subject to restrictions thereon necessary to honour rights of the students to get admission and the State has power to regulate the matters relating to admission. Judgment in T.M.A. Foundation case does not erode the rights of minorities under Article 30(1) & render the individual rights of power to regulate absolute.

14. Justice V.K. Krishna Iyer speaking for the majority found in Gandhi Faiz case that when the Principal and one amongst the Lecturers were ordered to be the member of managing committee, it did not amount to interference in the rights of minorities to administer and for that the Court held "we see no interference in the petition to innocuous insider being sitting in the Managing Committee" and therefore, found that the rule enforced by Agra University did not offend the rights of minority institution as available under the Constitution and as recognized in three earlier cases namely Kerala Education Bill case, D Sales

College case as well as Ahmedabad St. Xavier College case.

These aspects were again a matter of discussion before Full Bench judgment of this Court in case of St. Francis de Sales Education Society and Another Vs. State of Maharashtra and Another, particularly while enforcing reservations in employment by virtue of Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act and Rules made thereunder and rights of minority are recognized as fundamental rights. Reference to the discussion in this case will be useful. Paras 25 and 28 thereof are quoted below for ready reference as follows:

25. Thus, we see that right from the Kerala Education Bill (supra) to Rev. Sidhrajibhai Sabbar v. State of Gujarat AIR 1963 S.C. 540 to St. Xaviers College (supra) to St. Stephen's College etc., etc. Vs. The University of Delhi Etc., Etc., to N. Ammad Vs. The Manager, Emjay High School and Others, the law has been enumerated to the following effect:

(a) the fundamental right guaranteed under Article 30(1) is absolute and not subject to reasonable restrictions as under Article 19.

(b) Notwithstanding the absolute character of the fundamental right under Article 30(1), it is permissible for the State to make regulations in the interest of efficiency, instruction, discipline, health, sanitation, morality, public order and the like; such regulations are not restrictions on the substance of the right guaranteed by the Constitution, but are intended to advance that right;

(c) the right of selection of the head of the minority education institution or teachers therein or the right of admission of students thereto is to facet of right to administer the minority educational institution. Consequently, any restriction thereupon would impinge on the fundamental right guaranteed under Article 30(1).

26....

27-28. Drawing inspiration from the observations made in Kerala Education Bill (supra) (vide paragraph 10), the learned Government Pleader contended that the Supreme Court has recognised the power of the State to take regulatory measures in the interest of efficiency and instructions, health, hygiene, sanitation, law and order or social and welfare measures and apply them to institutions run by minorities. It has been held by the Supreme Court that such measures do not infringe the fundamental right guaranteed under Article 30(1). Our attention was drawn to observations in paragraphs 174 and 177 of the judgment (Mathew, J.) in St. Xaviers College (supra). It was contended that the general rule of the Constitution against discrimination contained in Article 14 is subject to exception in favour of backward classes. It is pointed out that Article 16(4) and Article 16(4A) are not merely recognised as exceptions to the rule of non-discrimination in Article 16, but have been recognised as independent facets of the fundamental right guaranteed under Article 16. It is contended that Article 16(4) read with Article 46 of the Constitution creates a positive fundamental

right in favour of backward classes and if the State legislates in furtherance of these positive fundamental rights there would arise a conflict between such a fundamental right and the fundamental right guaranteed under Article 30(1). In such circumstances, the Court must balance the conflict between the two fundamental rights, both equally guaranteed under the Constitution, in such a way that the interest of society at large is advanced and the philosophy of the Constitution is observed. Reference was also made to the minority judgment (vide para 31) of Kasliwal, J. in *St. Stephen's College* (Supra).

The dictum emerging from what is quoted above still governs the field.

15. Testing petitioner's claim that Right of consideration for Promotion is fundamental right.

(a) The petitioner's claim is that right of consideration in the matter of promotion is a fundamental right and it emerges from Article 16 of the Constitution of India and from the observations and dictum contained in paras 22 and 27 in the case of *Ajit Singh and Others Vs. The State of Punjab and Others*, .

(b) Second proposition is that the protection of Articles 14 and 16 is available to employees of Corporations whose employees are not the Government employees, yet are entitled for protection if the employer is falling in the category of other authority within the contemplation of Article 12 of Constitution of India.

(c) The institutions, which are getting 100% grant, are falling within the category and compass of Article 12 of Constitution of India, and therefore, the protection under Articles 14 and 16 is available based on reported judgments:

(i) AIR 1985 SC 364 *Manmohan Singh v. Commissioner U.T. Chandigarh*, and.

(ii) AIR 1989 SC 341 *Vidya Dhar Pande v. Vidyut Grih Samiti and Ors.*

16. It shall suffice to refer and discuss the judgment reported in 1999 (7) S.C. 209 *Ajit Singh and Ors. (II) v. State of Punjab and Ors.*, as other aspects of 100% grant and amenability to writ jurisdiction and consequentially to fundamental rights is not in controversy.

17. The relevant para in case of *Ajit Singh and Ors. (II)* supra sought to be relied upon is in fact, para 22 only. It is clear from para 27 that the earlier view in case of *Jagdishlal* is disapproved and overruled and what is stated in para 22 is the dictum of the Court. The law as it stands is that when "if there exists a statutory right for being considered for promotion, refusal to consider the candidature of such person offends the fundamental right available to such candidate under Article 16(1)".

Thus, "the fundamental right of being considered" is germane to the provision as to conditions of service providing and deciding the "eligibility." Consequently, Article 16(1) would get attracted upon the contingency of "existence of eligibility based on conditions of service governed by rules concerned. It shall suffice to

refer by quoting para 22 of the judgment and adding emphasis to the relevant portion as below.

22. Article 14 and Article 16(1) are closely connected. They deal with individual rights of the person. Article 14 demands that the "State shall not deny to any person equality before the law or the equal protection of the laws". Article 16(1) issues a positive command that "there shall be equity of opportunity for all citizens in matters relating to employment or appointment to any office under the State".

It has been held repeatedly by this Court that Clause (1) of Article 16 is a facet of Article 14 and that it takes its roots from Article 14. The said clause particularises the generality in Article 14 and identifies, in a constitutional sense "equality of opportunity" in matters of employment and appointment to any office under the State. The word "employment" being wider, there is no dispute that it takes within its fold, the aspect of promotions to posts above the stage of initial level of recruitment. Article 16(1) provides to every employee otherwise eligible for promotion or who comes within the zone of consideration, a fundamental right to be "considered" for promotion. Equal opportunity here means the right to be "considered" for promotion. If a person satisfies the eligibility and zone criteria but is not considered for promotion, then there will be a clear infraction of his fundamental right to be "considered" for promotion, which is his personal right.

"Promotion" based on equal opportunity and "seniority" attached to such promotion are facets of fundamental right under Article 16(1).

[Emphasis supplied]

18. In the present case, it is the claim of the petitioner that he fell in the zone of consideration and despite that, he was not considered for promotion to the post of Head Master.

The petitioner claims that by virtue of exclusive reading of Sub-section (1) of Section 3, senior most teacher is liable to be considered for promotion unless found ineligible.

Admittedly, the conditions of service as to appointment of Head applicable to private Schools is governed by the statute legislated by the competent State Legislature. The scheme of appointment/promotion to the post of Head is composite in Sections 3(1) and 3(2) of Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977. Section 3(2), operates as a mandatory proviso in the nature of exception or a non obstante clause by virtue of language employed therein to the rule of law incorporated in Section 3(1). Therefore, Section 3 has to be read in entirety and as a complete scheme and not by intersecting these two Sub-sections i.e. (1) & (2) therein.

While on plain reading of Section 3(1), it reveals that the rule of law as to the appointment to the post of Head is by seniority as a general rule of law. Section

3(2) provides that the rule of seniority shall not apply to the School run by the minority institution. Therefore, the petitioner's claim that there exists a set of rules which brings him into the field of consideration is primarily fallacious and is a product of sheer incomplete reading of Section 3.

19. The correct reading of Ajit Singh (II)'s case reveals that when a person by virtue of "conditions of service is eligible" comes in to the Zone of consideration, and refusal to consider thereafter would offend the Article 16(1) of the Constitution of India. Thus, "eligibility" as per the set of rule in vogue has to be the criteria. Ajit Singh (II)'s case is thus, of no use for supplying to the petitioner foundation for testing the legality, validity and virus of Sub-section (2) of Section 3 of Maharashtra Employee of Private Schools (Conditions of Service) Regulation Act, 1977.

20. Next submission to be dealt with is an effort of coherent reading and congruence in Articles 16(1) and 30(1). The basic foundation of submission which learned Advocate Mr. Haq has advanced is the right of consideration emerged from Ajit Singh (II)'s case and it is seen that the submission of basing the proposition that the petitioner has fundamental right of being considered in Article 16 is found to be fallacious. In the result, the petitioner's claim that Article 16(1) and Article 30(1) need to be read coherently, thus, does not find the basis of the very foundation of the claim of the petitioner.

21. Reliance of the petitioner on para 135 of the judgment in T.M.A. Pai Foundation's case is thus, found to be contingent on this Court's accepting the petitioner's plea that he has right of consideration is constitutionally available and that, therefore, Sub-section (2) of Section 3 is violative of constitutional guarantee. This Court finds that as the petitioner does not have fundamental right of consideration even relying upon Ajit Singh (II)'s case, the petitioner has, therefore, failed to make out a case for holding that Section 3(2) of Mah. Act No. III of 1978 offends fundamental rights under Article 16 of Constitution of India.

In keeping with what is held by Pull Bench of this Court in St. Francis De's case, paras 25 and 28 in para No. 14 above, while striking a balance in conflict between two fundamental rights both equally guaranteed under the Constitution, it will have to be done in such a way that the interest of society at large is advanced and the philosophy of the Constitution is sub-served. Learned Advocate Mr. Haq contends that the observations contained in para 135 of T.M.A. Pai Foundation's case therein need to be applied while examining the virus and validity of Section 3 Sub-section (2) to hold that Article 30(1) does not render right therein to be superior than right under Article 16. It is necessary to quote para 135 for reference which reads as follows:

135. It is difficult to comprehend that the framers of the Constitution would have given such an absolute right to the religious or linguistic minorities, which would enable them to establish and administer educational institutions in a manner so as to be in conflict with the other parts of the Constitution. We find it difficult to

accept that in the establishment and administration of educational institutions by the religious and linguistic minorities, no law of the land even the Constitution is to apply to them.

22. Learned Advocate Mr. Haq seeks emphasis for his contention that different articles contained in Chapter III conferring fundamental rights on the Institution will have to be construed in such a fashion fundamental rights of citizens need to be respected and for that purpose, rights of minorities available under Article 30(1) need to be construed to have some more restrictions as are found in T.M.A. Pai Foundation's case. Keeping this view in mind, this Court finds that since while right u/s 30(1) is fundamental right, it is the spirit of the Constitution, while restrictions on an individual's right are in the nature of reasonable restrictions and therefore, cannot be held to militate against the fundamental right. Moreover, strength of the argument that the petitioner has fundamental right for being considered is already negated by this Court. This Court, therefore, finds that the petitioner's claim gets support from para 135 of T.M.A. Pai Foundation case is based on isolated reading thereof, since the Full bench Judgment of this Court in St. Francis De's case supra which is based on law as reiterated in Ahmedabad St. Xavier's case decided by 9 Judge Bench case still holds the field is precedent on the point and this Court finds that these judgments are binding on this Court.

23. Learned Advocate Mr. Haq made his last attempt of persuading this Court to refer the matter to the Hon'ble Chief Justice for reference to a larger Bench in view that he would be successful in pursuing this Court in said Full Bench Judgment, to hold that earlier view of this Court that the minorities have enforceable fundamental right needs reconsideration in the light of what is held in T.M.A. Pai Foundation's case.

We find the submission being finely articulated, however, considering the different set of circumstances in which rights of minorities to run and administer educational institutions was considered, every time, it was examined that a different perspective as indicated earlier firstly viz-a-viz power to legislate, then power to regulate and then power to control and then viz-a-viz rights of students reveal that there is absolutely no material to show that the view taken by this Court of finding the provisions contained in Section 3(2) of Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977, are on the lines of law evolved on the basis of earlier judgments, does not need any re-consideration, since the Larger Bench Judgment 9 Judges Bench in St. Xavier's case has not yet been varied by the Apex Court by another Constitutional Bench of a strength still larger. The petitioner has, therefore, not made out a case even for a reference as this Court is bound by the law of stare decisis, as the observations relied upon by the learned Judge from (1) Manmohan Singh Jaitla Vs. Commissioner, Union Territory of Chandigarh and Others, and (2) Vidya Dhar Pande Vs. Vidya Grih Siksha Samiti and Others, do not in any manner equip the petitioner with any submission, on the other, the

dictum in these judgments is contrary to the petitioner's submission.

24. Rule discharged. Petition dismissed, however, there shall be no order as to costs.