

(2020) 10 BOM CK 0040
In the Bombay High Court
Case No : Writ Petition No. 12448 Of 2019

Mahadev Rama Kaikadi

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 14-10-2020

Acts Referred:

Constitution Of India, 1950 — Section 30

Citation : (2020) 10 BOM CK 0040

Hon'ble Judges : Anuja Prabhudessai, J

Bench : Single Bench

Advocate : Narendra Bandiwadekar, A.B. Kadam, Vinayak Kumbhar

Final Decision : Allowed

Judgement

1. Rule. Rule is made returnable forthwith. With consent of the learned counsel for the respective parties, the Petition is heard finally at the stage of admission.
2. The Petitioner herein has questioned the legality and validity of the order dated 17/09/2016 whereby Respondent No.2 - Education Officer, Sangli has returned the proposal to grant approval to the appointment of the Petitioner as a Peon in Respondent No.4 - School on compassionate basis.
3. The Respondent No.3 is a minority institution and is entitled to the protection available to the minority institution under Article 30 of the Constitution of India. Respondent No.4 is a School run by Respondent No.3 - Institution. The father of the Petitioner was serving in Respondent No.4 - School as a Peon on a sanctioned post on aided basis. The appointment of the father of the Petitioner as a Peon was approved by Respondent No.2. The father of the Petitioner expired in the course of his service, leaving behind a widow and the three children including the Petitioner herein.
4. The Petitioner claimed that his father was the only earning member of the family and due to his sudden demise, the family was facing acute financial crisis. To tide over the financial crises, the Petitioner made an Application for

appointment as a Peon on compassionate ground. The copy of the said Application was forwarded to Respondent No.2 - Education Officer, Sangli. By letter dated 16/03/2016, Respondent No.2 - Education Officer directed the Respondent No.3 to take appropriate decision on the Petitioner's Application for compassionate appointment and to submit the compliance report. Accordingly, in a meeting held on 05/06/2016, Respondent No.3 took a decision to appoint the Petitioner as a Peon on compassionate ground. Pursuant to the said Resolution, an appointment order dated 27/06/2016 came to be issued appointing the Petitioner as a Peon in Respondent No.4 - School on compassionate basis w.e.f. 01/07/2016 on honorarium of Rs.1,700/-. The Petitioner accepted the said appointment and joined the service.

5. By letter dated 13/08/2016, Respondent No.4 - School submitted a proposal to Respondent No.2 - Education Officer for approval to the appointment of the Petitioner. By the impugned order dated 17/09/2016, Respondent No.2 - Education Officer returned the proposal on the ground that :- (i) Government Resolution dated 02/05/2012 imposes a ban on recruitment of teachers / non-teaching employees, (ii) as per Government letter dated 06/09/1999 and Government Resolution dated 20/06/2014, there is a provision of organizing camp for grant of individual approval and hence proposal could be re-submitted when the camp for individual approval would be organized.

6. Mr. N.V. Bandiwadekar, learned counsel for the Petitioner submits that the Respondent No.4 - School is a Minority Institution and that ban imposed by Government Resolution dated 02/05/2012 would not be applicable to the minority institution. He submits that the Government Resolution dated 20/06/2014 makes it clear that condition regarding absorption of surplus employees is not applicable to the Minority Institution. He further submits that the ban is also not applicable to compassionate appointments. He has placed reliance on the decisions of the Division Bench of this Court in Parbhani Education Society v/s. The State of Maharashtra and anr. in Writ Petition No.3707 of 2013, and Shri. Meghshyam Chintaman Nand v/s. The State of Maharashtra and ors. in Writ Petition No.9966 of 2015 and the judgment of the Co-ordinate Bench of this Court in Sunil Sakharam Uttekar and ors. v/s. The State of Maharashtra and anr. in Writ Petition No.6977 of 2018.

7. Mr. A.B. Kadam, learned AGP submits that the Government Resolution dated 12/02/2015 imposes a ban on fresh recruitment of non-teaching employees in the grant-in-aid schools. He further submits that Government Resolution dated 20/06/2014 provides for organizing camps for grant of individual approval and in view of this GR, the proposal has been returned with liberty to re-submit the same.

8. I have perused the records and considered the submissions advanced by learned counsel for the respective parties. 9. It is not in dispute that Respondent No.3 is a Minority Institution. Respondent No.3 had submitted a proposal for approval to the appointment of the Petitioner as a peon on compassionate

ground. The said proposal has been rejected in view of Clause 1.8 of the Government Resolution dated 02/05/2012, which imposes a ban on appointment of teaching / non teaching staff until 100% absorption of surplus teachers. The applicability of the ban imposed by the Government Resolution dated 02/05/2012 to the minority institutions has been considered by the Division Bench of this Court in Parbhani Education Society (supra). The facts giving rise to the said decision were that the Petitioner, which was a minority institution had appointed selected candidates as Shikshan Sevaks. Proposal for approval to the appointment of Shikshan Sevak was rejected for want of compliance of condition contained in GR dated 2/5/2012. The Division Bench of this Court upon considering the decisions of the Hon'ble Supreme Court in T.M.A. Pai Foundation v/s. State of Karnataka (2002) 8 SCC 481, the Ahmedabad St. Xavier's College Society and Anr. v/s. State of Gujarat and anr. (1974) 1 SCC 717 and the decision of the Division Bench of this Court in Writ Petition No.116/2012 and that of the Delhi High Court in Writ Petition (C) No.2845/1992 has held thus :-

"14. Position clearly emerges that petitioner institution is indisputably a minority institution and, in various rulings cited on behalf of the Petitioner, it is held that the appointments by minority institutions would not be able to be withheld till the time surplus teachers are accommodated/absorbed. In view of the aforesaid prevailing position, as exemplified under the decisions of the Apex Court and the High Courts, particularly of this Court as depicted in judgment dated 16th July, 2012, which could not be effectively countered by the respondents, save that impugned order being tried to be supported by Government Resolution dated 02.05.2012, the impugned order is incompatible with emerging legal position and as such is unsustainable. "

10. A similar issue, as raised in the present petition, also fell for consideration of the Division Bench of this Court in St. Francis De Sales Education Society, Aurangabad and ors. v/s. The State of Maharashtra and anr. (Writ Petition No.5547 of 2013), Snehal Subhash Mane and anr. v/s. The State of Maharashtra (Writ Petition No.7673 of 2016), Young Boys Educational and Industrial Circle v/ s. The State of Maharashtra and ors., 2016 2 Mah.L.J. 212 and Vinod Laxman Shelkar and anr. v/s. The State of Maharashtra (Writ Petition No.2207 of 2016). The Division Bench of this Court has taken a consistent view that Clause 1.8 of the circular is not applicable to the minority institution.

11. In the Canossa Society and Anr. Vs. The Commissioner, Social Welfare Directorate and Ors. (Writ Petition No.1049 of 2012) a minority institution was directed to absorb an employee, who was rendered surplus on account of the closure of a school for handicapped. The Division Bench of this Court upon considering decisions of the Apex Court in T.M.A. Pai Foundation (supra), Sindhi Education Society and Anr. Vs. Chief Secretary, Government of NCT of Delhi and Ors. (2010) 8 SCC 49, Secretary Malankara Syrian Catholic College vs. T. Jose and Ors. (2007) 1 SCC 386 as well as the decision of the Full Bench of this Court in St. Francis De Sales Education Society, Nagpur Vs. State of Maharashtra

(2001) 3 Mh.LJ 261 has held thus:-

"21..... a minority educational institution has a fundamental right to establish and administer an educational institution of its choice. This right encompasses several facets one of them being a right to appoint teaching and non-teaching staff. It is held that the right to appoint teaching and non-teaching staff is an integral part of a right conferred under Article 30 of the Constitution of India namely to administer a minority educational institution. Merely because aid has been granted to a minority institution it would not lose its character as a minority institution and cease to enjoy constitutional guarantee conferred on it by virtue of the provisions of Article 30 of the Constitution of India. The grant of aid would not convert a minority institution into a departmentally conducted school or a department of the Government so that its autonomy of administration of an educational institution of its choice conferred under Article 30 of the Constitution of India would stand restricted. The State would be within its right to impose only such restrictions so as to maintain standards of education and to check any kind of maladministration. However, the autonomy in regard to day to day administration of the minority institution cannot be taken away by imposing any condition or restrictions which would take away the minority character of a minority institution and infringe the Constitutional guarantee conferred by Article 30 of the Constitution of India."

12. It is thus well settled that the right of Respondent no. 3, a minority institution, to appoint teaching or non teaching staff of its choice cannot be interfered with. It cannot be compelled to appoint or absorb an employee, either surplus or otherwise, who is not of its choice. Hence, the ban on appointment of teaching and non teaching staff, until 100% absorption of surplus teachers, as stipulated in Clause 1.8 of Government Resolution dated 2/5/2012 is not applicable to the minority institutions. The subsequent Government Resolution dated 28/06/2014 also makes it explicitly clear that the condition relating to absorption of surplus teachers is not applicable to minority institutions. Under the circumstances, the Education Officer could not have refused approval in view of the ban on the recruitment of teaching / non teaching employees as per the Government Resolution dated 02/05/2012.

13. It is also pertinent to note that the father of the Petitioner who was working in Respondent No.4 - School as a Peon had expired during the course of his service. The Petitioner has been appointed as a Peon, in place of his deceased father, on compassionate ground. The object of the scheme of compassionate appointment is to mitigate the hardship of the family members of an employee, who dies in harness, leaving his family in financial destitution. The object of the scheme has been explained by the Division Bench of this Court in *Samita Sameer Desai and anr. vs The State of Maharashtra and anr.* (Writ Petition No.7507 of 2016), thus :-" The very object and purpose of such employment and conferring a power to make appointment on compassionate ground is that the employer assists the family to tide over the financial crisis caused by the loss of bread

winner. It is an assistance to the family and which is in distress. In the circumstances, this is not a fresh appointment or an appointment which ordinarily requires the approval. ". It has been further held that compassionate appointment on a post which was permanent and duly sanctioned, does not require creation of post nor there is any question of appointment being made through recruitment process which is covered by the ban. The Division Bench has observed that the appointment on compassionate ground is made in terms of a Government Circular dated 31/12/2012, which has not been superseded, by a subsequent Government Resolution and particularly the one imposing ban dated 02/05/2012. In fact, such appointments were kept out of the purview of the general ban imposed on recruitment. The very object in all such appointments enables the State Government to carry forward its earlier policy despite the overall ban on recruitment and appointment. It is thus held that the ban imposed by the GR does not cover compassionate appointment on permanent and sanctioned posts.

14. Similarly, in Shri. Meghshyam Chintaman Nand (supra), the Division Bench of this Court has reiterated that :- 'the approval should not be refused only on the ground that the appointment has been made during the subsistence of Government Resolution dated 02/05/2012. That Government Resolution imposing a ban on appointment does not apply to the compassionate appointments. This Court has in several orders and judgments clarified the legal position.'

15. Thus, the issue involving applicability of Clause 1.8 of Government Resolution dated 02/05/2012 to Minority Institutions and to the appointment made on compassionate grounds is no more res- integra. The clear dictum of this Court is that a ban on recruitment as per Government Resolution dated 02/05/2012 does not apply to the Minority Institution and to the appointment made on compassionate ground.

16. In the instant case, the Petitioner No.1 was appointed as a Peon in a School run by Respondent No.3, a Minority Institution, on compassionate ground. The appointment was on a duly sanctioned and aided post and in accordance with the rules. In such circumstances Respondent No.2 was not justified in refusing approval citing the ban imposed by GR dated 02/05/2012, which as stated earlier, is not applicable to minority institutions and compassionate appointments

17. It is pertinent to note that Mr. Sudhakar Telang, (Education Officer), Zilla Parishad, Sangli has stated in his affidavit-in-reply (paragraph 8) that the State Government has recently issued Government Resolution dated 12/02/2015 imposing a ban on fresh recruitment of non-teaching employees in the private grant in aid school till further orders as per Government Resolution dated 23/10/2013 and that the authority making appointment in contravention of status-quo order is liable for penal action.

18. It may be mentioned that the impugned order does not make any reference

to the Government Resolution dated 12/02/2015. In Mohinder Singh Gill and anr. v/s. The Chief Election Commissioner, New Delhi and ors., 1978 AIR 851, the Hon'ble Supreme Court has held that 'when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise.' It is thus trite that the affidavit cannot supplement or supplant the reasoning in the order. The reasons given in paragraph 8 of the affidavit-in-reply appear to be an after thought and hence, cannot be looked into.

19. Considering the facts and circumstances of the case, the impugned order cannot be sustained and hence the following order :-

(i) The Writ Petition is allowed.

(ii) The impugned order dated 17/09/2016 issued by the Respondent No.2 - Education Officer, Sangli is quashed and set aside.

(iii) Respondent No.2 is directed to grant approval to the appointment of the Petitioner on compassionate basis in the post of Peon in the Respondent No.4 School w.e.f. 01.07.2016 and sanction payment of monthly honorarium applicable to his post from the date of appointment.

(iv) The Education Officer, Sangli shall pass the order of approval within a period of six weeks from the date of this order.

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