

(2022) 08 BOM CK 0071

In the Bombay High Court

Case No : Writ Petition No.3000 Of 2021

Shaikh Azimoddin Zainoddin

APPELLANT

Vs

State Of Maharashtra And Others

RESPONDENT

Date of Decision : 26-08-2022

Acts Referred:

Constitution Of India, 1950 — Article 30(1)
Maharashtra Employees Of Private Schools (Conditions Of Service) Rules, 1981 — Rule 3, 3(1), 3(2), 3(5), 9(7), 9(8), 9(9), 9(10)
Gujarat University Act, 1949 — Section 33A
Maharashtra Employees Of Private Schools (Conditions Of Service) Regulation Act, 1977 — Section 3, 3(2), 16, 57(3)

Citation : (2022) 08 BOM CK 0071

Hon'ble Judges : Mangesh S. Patil, J; Andeep V. Marne, J

Bench : Division Bench

Advocate : Shailesh Brahme, A.R. Syed, K.N. Lokhande, S.S. Kazi, Tarek Mobin H. Shaikh, P.D. Bachate, H.P. Randhir

Final Decision : Dismissed

Judgement

Sandeep V. Marne, J

1. Heard. Rule. It is made returnable forthwith. Learned AGP Mr. K.N. Lokhande waives service for Respondent Nos.1 & 2, learned advocate Mr. S.S. Kazi and learned advocate Mr. Tarek Mobin H. Shaikh waive service for Respondent No.3, and learned advocate Mr. P.D. Bachate h/f. Mr. H.P. Randhir waives service for respondent no.4. At the joint request of learned advocates for the petitioner and the learned AGPs, the matter is heard finally at the admission stage.

2. The issue involved in the present case is, whether it is mandatory to follow rule of seniority while appointing a Head Master in a school managed by a minority educational institution.

3. The issue arises on account of competing claims of the petitioner and respondent no.4 to the post of Head Master in the school managed by

respondent no.3. It is common ground that the school managed by respondent no.3 is a minority educational institution. It is also undisputed that the petitioner is senior to respondent no.4 in the seniority list. The petitioner is aggrieved by the grant of approval to the appointment of respondent no.4 on the post of Head Master ignoring his claim.

4. The facts of the case, in brief, are as under:

. In the seniority list of Anglo Urdu High School Bhadgaon / Pachora managed by respondent no.3, for the year 2017-18 the name of the petitioner figured at Serial no.4, whereas the name of respondent no.4 figured at serial no.6. The petitioner claimed that a resolution was passed on 17.05.2020 by respondent no.3 for his appointment as Head Master and accordingly an order was issued on 18.05.2020 appointing him as Head Master on permanent basis. He claims that a proposal was sent by the management to the Education Officer on 19.05.2020 and an approval was granted by order dated 17.07.2020 for his appointment as in-charge Principal for a period upto 31-08-2020.

5. While the petitioner was expecting approval for regular appointment as permanent Head Master, order came to be issued on 3. 06.2020 by Education Officer granting approval for regular appointment of respondent no.6 as Head Master with effect from 1. 06.2020. This order dated 03.06.2020 has been challenged in the present petition.

6. It appears that one Mr. Amanulla Khan Ahmed Khan claiming to be secretary of respondent no.3 Management protested against the approval order dated 03.06.2020 by submitting complaint before the Education Officer on 29.07.2020. Acting on the said complaint, the Education Officer initially stayed the decision dated 3. 06.2020 by order dated 30.07.2020, but later on vacated the stay by decision dated 21.11.2021 and held the decision dated 03.06.2020 to be valid. Therefore, the petitioner is also aggrieved by the decision dated 21.01.2021.

7. The claim of the petitioner is resisted by respondent nos.3 and 4 by filing their respective replies inter alia contending that respondent no.3 is a minority educational institution and therefore, it is exempted from application of the provisions of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (hereinafter referred to as the 'Act of 1977'). It is, therefore, contended that the rule of seniority need not be followed by respondent no.3 while appointing a Head Master.

8. Appearing for the petitioner, Mr. Brahme contended that the privilege conferred upon a minority educational institution under the provisions of Section 3 of the Act of 1977 is not absolute. He submitted that the exception provided for by Section 3 (2) applies only to 'recruitment' and not to 'promotion'. Relying on Rule 3 (1) of MEPS Rules, 1981 (hereinafter referred to as 'the Rules of 1981') he submitted that what is effected by respondent nos.2 and 3 is 'promotion' and not a 'recruitment'. He further contended that the requisite condition of notification of names by the management to the Director or Deputy Director as

provided for under Section 3 (2) of Act of 1977 has not been followed and therefore, the exemption under Section 3 (2) cannot be claimed by respondent nos.3 and 4.

9. Per contra, Mr. Kazi appearing for respondent no.3 - Management submitted that full autonomy is enjoyed by a minority educational institution and therefore, the rule of seniority need not be followed for appointment of a Head Master. He vehemently contended that grant of approval as in-charge Head Master to the petitioner was an outcome of unauthorized actions of Mr. Amanulla Khan Ahmed Khan, who had ceased to be a secretary of respondent no.3. He submitted that Mr. Amanulla Khan Ahmed Khan was already removed from the post of secretary on 01.08.2019, despite which he created documents in an unauthorized manner for sending a proposal for appointment of petitioner as Head Master. He submitted that there was no resolution passed by respondent no.3 - Management for petitioner's appointment as Head Master. Copy of proceeding book (Exh.'B') relied upon by the petitioner was created by Mr. Amanulla Khan Ahmed Khan on 17.05.2020 i.e. after his removal from the post of secretary on 01.08.2019. He submitted that the order of appointment and the proposal in respect of the petitioner were also unauthorizedly signed by Mr. Amanulla Khan Ahmed Khan.

10. Mr. Tarek Mobin H. Shaikh has also surprisingly filed vakalatnama on behalf of respondent no.3 - Management and claims to have been authorized by Mr. Amanulla Khan Ahmed Khan to represent respondent no.3 - Management. He attempted to demonstrate before us as to how he continued to hold the post of Secretary while issuing appointment order and proposal in respect of the petitioner.

11. Mr. Bachate appearing for respondent no.4 supported the submissions of Mr. Kazi.

12. In support of their contention that a minority educational institution enjoys full autonomy in the matter of appointment of Head Master, Mr. Kazi and Mr. Bachate relied upon following decisions:

(i) The Ahmedabad St. Xavier's College Society and another Vs. State of Gujarat and another (1974) 1 SCC 717

(ii) Secy., Malankara Syrian Catholic College Vs. T. Jose and Others (2007) 1 SCC 386.

(iii) N. Ammad Vs. Manager, Emjay High School and Others (1998) 6 SCC 674.

(iv) Board of Secondary Education and Teachers Training Vs. Jt. Director of Public Instructions, Sagar and Others (1998) 8 SCC 555.

(v) St. Francis De Sales Education Society, Nagpur and another Vs. State of Maharashtra and another [2001 (3) Mh.L.J. 261].

13. Rival contentions of the parties now fall for our consideration.

14. The entire thrust of arguments of Mr. Brahme is on the provisions of Rule - 3 of the Rules of 1981. No doubt, Rule-3 provides for appointment of senior-most teacher as the head of the school. It is also undisputed that the petitioner is senior to respondent no.4. However, the dispute has arisen on account of minority status of respondent no.3 – Management.

15. Disputes existing in the school management have also come to the fore during the course of submissions of rival parties. Though the learned advocates for the parties have made extensive submissions about who was entitled to send proposal for appointment of Head Master, considering the ultimate order that we propose to pass in the present petition, we do not wish to go into the merits of the submissions with regard to the disputes in the management.

16. We, therefore, proceed to decide the issue as to whether it is mandatory for a school managed by the minority educational institution to follow seniority rules as envisaged in Section 3 of the Act of 1977 while making an appointment on the post of Head Master.

Section 3 of the Act of 1977 provides as under:

“3. Application of Act. - (1) The provisions of this Act shall apply to all private schools in the State of Maharashtra, whether receiving any grant-in-aid from the State Government or not.

(2) Notwithstanding anything contained in sub-section (1), the provisions of this Act shall not apply to the recruitment [of the Head of a minority school and] any other persons (not exceeding three) who are employed in such school and whose names are notified by the Management to [the Director or, as the case may be] the Deputy Director for this purpose.”

17. Mr. Brahme sought to exclude petitioner’s alleged appointment as Head Master from the purview of the provisions of Section 3 (2) on two counts, (i) what is effected is his ‘promotion’ and not ‘recruitment’ and (ii) mandatory requirement of notification of names by the management to the Directors / Deputy Director has not been followed.

18. We are not impressed by the first submission of Mr. Brahme that the provisions of the Act of 1977 applies only to direct recruitment and not to promotion of Head Master. His submission is based on provisions of Sub-rule (5) of Rule 3 of the Rules of 1981 which provides that in the event of non-availability of a suitable teacher possessing the qualification laid down in sub rules (1) to (4), the management can advertise the post and select and appoint a person possessing the requisite qualification and experience. He submitted that what is envisaged under Sub-rule (5) of Rule 3 is a direct recruitment, which is opposed to a promotion under sub-Rule (1) and (2) of Rule 3. However, perusal of provisions of sub-Rule (1) and (2) of Rule-3 shows that the word ‘appointment’ has been used.

19. Thus, the movement of a teacher to the post of a Head Master has been

termed as an 'appointment' under Sub-rule (1) for primary school and Sub-rule (2) for secondary school. It is, therefore, difficult to accept the distinction sought to be created by Mr. Brahme for escaping the provisions of Sub-section (2) of Section 3 of the Act of 1977 to the present case. In our opinion, Sub-section (2) of Section 3 uses the word 'recruitment' which would cover appointment of existing teacher under Sub-rules (1) and (2) as well as appointment of an outsider under Sub-rule (5) of Rule 3 of the Rules of 1981. Therefore, we reject the contention of Mr. Brahme.

20. Thus, the position that emerges is that for a minority educational institute like respondent no.3 provisions of Act of 1977 would not apply for appointment as head of minority school. The Rules of 1981 have been enacted under Section 16 of the Act of 1977 and therefore, even the Rules of 1981 would have no application for the purpose of appointment of head of minority school.

21. The autonomy enjoyed by the minority educational institution in the matter of appointment of teaching and non-teaching staff has been repeatedly reiterated by the Apex Court in catena of judgments:

(i) In the nine Judge Bench judgment in the case of The Ahmedabad St. Xavier's College Society (*supra*), the issue of applicability of provisions of Section 33A of the Gujarat University Act, 1949 to minority educational institutes was involved. Section 33A (1)(a) provided that every college shall be under the management of a governing body which shall include the Principal of the college, a representative of the University nominated by the Vice-Chancellor, and three representatives of the teachers of the college and at least one representative each of the members of the non-teaching staff and the students of the college. The Apex Court held that the said provision overreached the right of religious minorities to administer educational institutions of their choice. In para - 182 of the judgment the Apex Court held as under:

"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."

(ii) In *Secy., Malankara Syrian Catholic College* (*supra*) the Apex Court held in para - 29 as under:

"29. Section 57(3) of the Act provides that the post of Principal when filled by promotion is to be made on the basis of seniority-cum-fitness. Section 57(3) trammels the right of the management to take note of merit of the candidate or the outlook and philosophy of the candidate which will determine whether he is supportive of the objects of the institution. Such a provision clearly interferes with the right of the minority management to have a person of their choice as head of the institution and thus violates Article 30(1). Section 57(3) of the Act cannot therefore apply to minority run educational institutions even if they are aided."

(iii) In N. Ammad (supra) the Apex Court held in para - 28 as under:

"28. Thus the management's right to choose a qualified person as the Headmaster of the school is well insulated by the protective cover of Article 30(1) of the Constitution and it cannot be chiselled out through any legislative act or executive rule except for fixing up the qualifications and conditions of service for the post. Any such statutory or executive fiat would be violative of the fundamental right enshrined in the aforesaid article and would hence be void."

(iv) In Board of Secondary Education and Teachers Training (supra) the Apex Court held in para - 3 of the judgment that in the matter of appointment of the Principal, the management of a minority educational institution has a choice.

(v) In St. Francis De Sales Education Society, Nagpur (supra) Full Bench of this Court held that minority educational institution cannot be directed to appoint teachers or other staff on the basis of reservation policy laid down by the State under Rules 9 (7) to 9 (10) of the Rules of 1981.

22. Thus, it has been consistently held that a minority educational institution has right to appoint head of the school as per its choice. We are afraid, the condition of appointing senior-most teacher as head of the school as provided for in Rule - 3 of the Rules of 1981 cannot be made applicable for appointment of a Head Master in the school of respondent no.3. The petitioner's claim for being appointed as Head Master on the basis of higher seniority over respondent no.4, therefore, cannot be accepted.

23. We, therefore, do not find any merit in the petition and it is dismissed without any order as to the costs. Interim protection granted earlier stands vacated. Rule is discharged.

(SANDEEP V. MARNE, J.)

(MANGESH S. PATIL, J.)

LATER ON :

24. After pronouncement of the order, learned advocate for the petitioner points out that the interim relief has been in operation till date and it may be extended for a reasonable time to enable the petitioner to approach the Supreme Court.

25. It is a matter of record that the interim relief is in operation till date and considering the nature of the dispute, we feel it appropriate to grant a reasonable time to the petitioner to approach the Supreme Court.

26. Interim relief to continue for a period of three weeks.