

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P. (C) 7568/1999 & CM APPL 14179/1999

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Reserved on: July 28, 2010
Decision on: August 13, 2010

MOUNT CARMEL SCHOOL SOCIETY & ANR Petitioners
Through: Mr. K.K. Rai, Senior Advocate with
Mr. A.K. Sakhuja and
Mr. S.K. Pandey, Advocates.

versus

THE GOVT. OF NCT OF DELHI & ANR Respondents
Through: Ms. Sujata Kashyap with
Mr. Pramod K. Tiwary, Advocate
for R-1/GNCTD.
Mr. Atul Kumar, Advocate for R-2/CBSE.

And

W.P.(C) 8710/2007 & CM APPL 16416/2007

MOUNT CARMEL SCHOOL SOCIETY & ANR Petitioners
Through: Mr. K.K. Rai, Senior Advocate with
Mr. A.K. Sakhuja and
Mr. S.K. Pandey, Advocates.

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Through: Ms. Sujata Kashyap with
Mr. Pramod K. Tiwary, Advocate
for R-1/GNCTD.
Mr. Atul Kumar, Advocate for R-2/CBSE.

CORAM: JUSTICE S. MURALIDHAR

1. Whether reporters of local paper may be allowed
to see the judgment? ✕
2. To be referred to the reporter or not? ✓
3. Whether the judgment should be referred in the digest? ✓

Signature Not Verified
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file and no page is missing.

JUDGMENT
13.08.2010

The Questions of Law

14-A

1. These two petitions involve the following questions of law:

i) Notwithstanding the fundamental right guaranteed to minority institutions under Article 30(1) of the Constitution, can the Government of the National Capital Territory of Delhi ('GNCTD') insist that the retirement age of the Principal of an unaided minority school can be no different from that of a Principal of a government school or a private unaided or aided school recognised as such by the GNCTD in terms of the Delhi School Education Act, 1974 ('DSE Act')?

(ii) Is the GNCTD right in its stand that Rule 110(1) of the Delhi School Education Rules, 1973 ('DSE Rules'), which, inter alia, governs the retirement age of a Principal of a recognised private aided or unaided recognised school, also applies to a recognised unaided minority school?

Both petitions arise out of a similar set of facts and are therefore being disposed of by this common judgment.

Facts in W.P. (C) 7568 of 1999

2. The Petitioner No. 1 Society established a senior secondary school at Anand Niketan, New Delhi in 1972. It is an unaided minority school recognized by the Director of Education, GNCTD, Respondent No. 1. Petitioner No. 2 Mr. V.K. Williams was the Principal of the school since 1976. Considering that Petitioner No. 2 was completing 60 years of age on 15th October 1997, the Managing Committee of the Petitioner No. 1 Society passed a resolution on 12th July 1997 extending the services of

Petitioner No. 2 from 15th October 1997 to 15th October 1999. It is stated that although as an unaided minority school it was not obligatory for Petitioner No. 1 to seek the approval of Respondent No. 1 for the extension of service granted to Petitioner No. 2, Petitioner No. 1 nevertheless informed Respondent No. 1 of it on 3rd September 1998. By a letter dated 9th June 1999, Respondent No. 1 informed Petitioner No. 1 that under Rule 110(1) of the DSE Rules the retirement age was sixty years and therefore, no further extension of the tenure of Petitioner No. 2 was permissible. Petitioner No. 1 was asked to make necessary arrangements for the appointment of a new Principal. The Petitioner No. 1 Society wrote to Respondent No. 1 on 18th August 1999 informing it that Rule 110 (1) was not applicable to the school as it was under Chapter VIII of the DSE Rules which began with Rule 96 which clearly mentioned that the rules in that chapter were not applicable to unaided minority schools.

3. Meanwhile, in response to the application of Petitioner No. 1 for extension of the affiliation of its school with the Central Board of Secondary Education ('CBSE'), the latter by a letter dated 15th October 1998 informed Petitioner No. 1 that it would grant extension of the affiliation on the pre-condition that Petitioner No. 1 appointed another person in place of Petitioner No. 2 as Principal of the school. This was reiterated on 7th July 1999. Succumbing to the pressure brought about by the CBSE, Petitioner No. 1 appointed Dr. N.M. Williams, who was working as the vice-Principal since 1976, as Principal of the school at Anand Niketan on 7th July 1999. After Dr. Williams was appointed as the

Principal, the CBSE granted affiliation to the school on 1st November 1999. But by then Petitioner No.1 had started another school at Dwarka. Dr. N.M. Williams was appointed as Principal of that school and Mr. V.K. Williams, Petitioner No. 2 was re-appointed as Principal of the school at Anand Niketan. /6

4. It is stated that on 26th October 1999 a decision was taken by Respondent No. 1, without informing Petitioner No. 1, declaring the resolution dated 12th April 1997 of the managing committee of Petitioner No. 1 Society extending the services of Petitioner No. 2 by two years as *ultra vires* the DSE Rules. By an order dated 11th November 1999, Respondent No. 1 directed Petitioner No. 1 Society to relieve Petitioner No. 2 immediately and appoint a fresh Principal in accordance with the provisions of the DSE Rules, failing which appropriate action would be initiated under Section 24(4) of the DSE Act. Aggrieved by the above order dated 26th October 1999 conveyed to the Petitioners on 11th November 1999, the Petitioners filed Writ Petition (Civil) No. 7568 of 1999 seeking the quashing of the said order.

5. While directing notice to be issued in this petition by an order dated 20th December 1999, this Court directed that the impugned order dated 11th November 1999 shall remain stayed.

Facts in W.P. (C) 8710 of 2007

6. The Petitioner No. 1 Society established another senior secondary school at Dwarka in 1997. This was also an unaided minority school

recognised by the Director of Education, GNCTD and affiliated to the CBSE. Dr. N.M. Williams, Petitioner No. 2 in W.P. (C) 8710 of 2007, was appointed as Principal of the school at Dwarka since its inception.

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7. By a resolution dated 11th August 2001, the Petitioner No. 1 Society extended the tenure of Petitioner No. 2 for a period of five years, i.e., till 31st August 2006. Dr. N.M. Williams completed sixty years of age on 30th August 2001. By a letter dated 13th September 2005, Respondent No. 2 CBSE sought removal of Petitioner No. 2 from the post of the Principal on the ground that she had superannuated. The Petitioner No. 1 Society complied with the direction and one Dr. M.V. Sarathy was appointed as the acting Principal on 22nd September 2005. By a letter dated 17th October 2005, the CBSE insisted that a regular Principal should be appointed. After taking legal advice, on 3rd December 2005 the Chairman of Petitioner No. 1 Society permitted Petitioner No. 2 to resume her duties as the Principal of the school at Dwarka. On 1st April 2006, the view of the Chairman was endorsed by the Board of the Petitioner No. 1 Society.

8. The CBSE on 12th April 2006 granted permission to the Petitioner No.1 for introduction of additional subjects in the school but insisted that no superannuated teacher/Principal should be working at the school. Petitioner No. 1 replied on 7th July 2006 stating that Chapter IV of the DSE Act was not applicable to unaided minority schools like that of the Petitioner No. 1. On 29th July 2006, Petitioner No. 1 in its Board meeting extended the services of Petitioner No. 2 as the Principal up to 31st

August 2009. On 21st May 2007, Respondent No. 1 issued a show cause notice to the Manager of the school about the continuance of Petitioner No. 2 as the Principal beyond the age of sixty years. On 30th July 2007, the CBSE rejected the Petitioner's application for approval of additional subjects on various grounds, one of them being the age of Petitioner No. 2. On 11th September 2007 Respondent No. 1 passed an order directing the Manager of the Petitioner No. 1 Society to dispense with the services of Petitioner No. 2 by 31st December 2007. By a letter dated 12th October 2007, Petitioner No. 2 protested against this move. The present writ petition was filed thereafter seeking the quashing of the letter dated 30th July 2007 of the CBSE rejecting the Petitioner's application for approval of two additional subjects and the order dated 11th September 2007 passed by Respondent No. 1.

9. While directing notice to be issued in this petition on 23rd November 2007, this Court stayed the operation of the order dated 11th September 2007.

Submissions of Counsel

10. Mr. K.K. Rai, learned Senior counsel appearing for the Petitioners submitted that the Petitioner No. 1 Society-run-schools are unaided minority institutions which receive no grants from the GNCTD or any other government authority. The right of minority established and run institutions was one of the fundamental rights guaranteed by Article 30 of the Constitution. He further submitted that the Supreme Court has, in a large number of its decisions, reiterated the settled position in law that

the post of the Principal or the headmaster of an unaided minority school, being a key position, was outside the regulatory ambit of the state. It is submitted that notwithstanding the decision of the Supreme Court in *Frank Anthony Public School Employees' Association v. Union of India* (1986) 4 SCC 707, the position as regards the post of the Principal of the Petitioner No. 1 Society would not be altered. He distinguished the judgment in *Frank Anthony* on facts. He pointed out that the issue there was that the terms and conditions of employment of the staff and teachers of the minority school were adverse as compared to those governing government school employees. It was in this context that it was held that the terms and conditions of the employees of minority schools must be consistent with those of the employees of government schools and Section 12 was held to be *ultra vires* the Constitution and struck down, which meant the provisions of Chapter IV of the DSE Act became applicable to unaided minority schools. He submitted that the decision in *Secretary, Malankara Syrian Catholic College v. T. Jose* (2007) 1 SCC 386 conclusively settled the legal position. He also placed reliance upon the decisions of the Supreme Court in *State of Kerala v. Very Rev. Mother Provincial* (1970) 2 SCC 417, *N. Ammad v. Manager, Emjay High School* 1998 (6) SCC 674, *All Bihar Christian Schools Association v. State of Bihar* (1988) 1 SCC 206, *Gandhi Faiz-E-Am College v. University of Agra* (1975) 2 SCC 283 and *Sindhi Education Society v. The Chief Secretary, Govt. of NCT of Delhi* 2010 (6) SCALE 578.

11. It was submitted by Mr. Atul Kumar, learned counsel appearing for

the CBSE and Ms. Sujata Kashyap, learned counsel appearing for the Respondent No. 1 GNCTD that after the judgment in *Frank Anthony*, the entire Chapter VIII of the DSE Rules would automatically become applicable to unaided minority schools. Therefore, notwithstanding Rule 96 which stated that the said Chapter would not apply to unaided minority schools, Rule 110 which prescribed the age of retirement of a Principal of a government school, would nevertheless be applicable even 20 to an unaided minority school.

12. It is further submitted by the counsel for the Respondents that the right of minority institutions to administer is a qualified one. With a view to maintain standards of education it was permissible for the state to place restrictions on unaided minority schools. It was submitted that the minority schools could not provide better service conditions than government run schools as their service conditions were to be consistent with those of the government schools. Therefore, if the Principal of an unaided minority school was asked to retire at the same age by which the Principal of a government school was asked to, there would be no discrimination. If it was higher, then that was not permitted under Rule 110 of the DSE Rules interpreted in light of the decision of the Supreme Court in *Frank Anthony*.

The decision in the Frank Anthony Public School Case

13. Since the Respondents placed considerable reliance upon the decision of the Supreme Court in the *Frank Anthony* case, this Court first

proposes to discuss the said judgment. The Supreme Court was deciding a writ petition brought before it under Article 32 of the Constitution by the Frank Anthony Public School Employees' Association. The grievance was that the scales of pay and other conditions of service of the teachers and other employees of Frank Anthony Public School compared unfavourably with their counterparts in the schools run by the Delhi Administration. However, Section 12 of the DSE Act made inapplicable the provisions of Sections 8 to 12 occurring in Chapter IV of the DSE Act to unaided minority institutions. The inapplicability of Chapter IV of the DSE Act meant that the terms and conditions of service of employees of recognised unaided minority schools could be less than what was offered to their counterparts of government run schools. This was held to be discriminatory. It was held that the staff and teachers of unaided minority schools could not be worse off than their counterparts in government schools. 21

14. A reading of the decision in *Frank Anthony* makes it clear that the said case did not deal with the question of the retirement age or even the terms and conditions of service of a person holding a 'key post', like that of the headmaster or Principal, in an unaided minority institution. Secondly, the decision in *Frank Anthony* was in the context of terms and conditions of service of teachers and employees of unaided minority schools being worse off than that of their counterparts in government schools. After elaborately discussing the decisions in *Ahmedabad St. Xaviers College Society v. State of Gujarat (1974) 1 SCC 717* and *All Saints High School v. Government of Andhra Pradesh (1980) 2 SCC*

478, the Supreme Court in *Frank Anthony* held as under (SCC, p.731):

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“17..... We, therefore, hold that Section 10 of the Delhi School Education Act which requires that the scales of pay and allowances, medical facilities, pension, gratuity, provident fund and other prescribed benefits of the employees of a recognized private school shall not be less than those of the employees of the corresponding status in schools run by the appropriate authority and which further prescribes the procedure of enforcement of the requirement is a permissible regulation aimed at attracting competent staff and consequently at the excellence of the educational institution. It is a permissible regulation which in no way detracts from the fundamental right guaranteed by Article 30(1), to the minority institutions to administer their educational institutions. **Therefore, to the extent that Section 12 makes Section 10 inapplicable to unaided minority institutions, it is clearly discriminatory.**”
(emphasis supplied)

15. It was in the above context that it was further held in para 20 as under (SCC, p.734):

“20. Thus, Sections 8(1), 8(3), 8(4) and 8(5) do not encroach upon any right of minorities to administer their educational institutions. Section 8(2), however, must, in view of the authorities, be held to interfere with such right and, therefore, inapplicable to minority institutions. Section 9 is again innocuous since Section 14 which applies to unaided minority schools is virtually on the same lines as Section 9. We have already considered Section 11 while dealing with Section 8(3). **We must, therefore, hold that Section 12 which makes the provisions of Chapter IV inapplicable to unaided minority schools is discriminatory not only because it makes Section 10 inapplicable to minority institutions, but also because it makes Sections 8(1), 8(3), 8(4), 8(5), 9 and 11 inapplicable to**

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unaided minority institutions. That the Parliament did not understand Sections 8 to 11 as offending the fundamental right guaranteed to the minorities under Article 30(1) is evident from the fact that Chapter IV applies to aided minority institutions and it cannot for a moment be suggested that surrender of the right under Article 30(1) is the price which the aided minority institutions have to pay to obtain aid from the government.” (emphasis supplied)

16. Consequently, it was held as under (SCC, p.735):

“21. The result of our discussion is that Section 12 of the Delhi School Education Act which makes the provisions of Chapter IV inapplicable to unaided minority institutions is discriminatory and void except to the extent that it makes Section 8(2) inapplicable to unaided minority institutions. We, therefore, grant a declaration to that effect and direct the Union of India and the Delhi Administration and its officers, to enforce the provisions of Chapter IV [except Section 8(2)] in the manner provided in the chapter in the case of Frank Anthony Public School. The management of the school is directed not to give effect to the orders of suspension passed against the members of the staff.”

17. This Court does not find the decision in *Frank Anthony* to be holding that the entire Chapter VIII of the DSE Rules, which talks of recruitment and terms and conditions of service of employees of private schools other than unaided minority schools, is *ipso facto* applicable to unaided minority schools. Given the factual context in which the decision in *Frank Anthony* was delivered, there was no occasion for the Supreme Court to consider the position with respect to the key post of the Principal in an unaided minority school and whether the provisions of Chapter IV

of the DSE Act would continue to apply to such post and consequently whether Chapter VIII of the DSE Rules would apply. In the considered view of this Court the judgment in *Frank Anthony* cannot come to the aid of the Respondents in justifying their impugned orders insisting on the applicability of Rule 110 (1) DSE Rules as regards the retirement age of the Principal of the schools run by the Petitioner No.1 Society.

Power of the State to regulate minority institutions

18. The extent of the power of the State to regulate the working of minority institutions has been explained in a number of decisions some of which will be discussed hereafter. However, before doing so, the scheme of the DSE Act and the DSE Rules may first be noticed.

19. A perusal of Chapter VIII of the DSE Rules shows that a wide range of matters are covered, including recruitment of teachers and staff, minimum qualifications for appointment of teachers, fixation of pay, seniority and so on. Rule 110 talks of retirement age, and reads as under:

“110 Retirement age – (1) Except where an existing employee is entitled to have a higher age of retirement, every employee of a recognized private school, whether aided or not, shall hold office until he attains the age of 58 years:

Provided that the managing committee may grant extension to a teacher for a period not exceeding two years in the aggregate, if in the opinion of the managing committee such teacher is fit for such extension and has no mental or physical incapacity which would disentitle him to get such extension.

Provided further that no such extension shall be granted in the

case of a teacher of an aided school except with the previous approval of the Director.

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(2) Notwithstanding anything contained in sub-rule (1), every teacher, laboratory assistant, Librarian, **Principal or Vice Principal employed in such school shall continue to hold office until he attains the age of 60 years**

Provided that where a teacher, Principal or vice-Principal attains the age of superannuation on or after the 1st day of November of any year such teacher, Principal or Vice-Principal shall be re-employed up to the 30th day of April of the year immediately following.

(3) Notwithstanding anything contained in sub-rule (1) and sub-rule (2), **where a teacher, Principal or Vice-Principal has obtained National or State award for rendering meritorious service as a teacher, Principal or Vice-Principal or where he has received both the National and State awards as aforesaid, the period of service of such teacher, Principal or Vice-Principal may be extended by such period as the Administrator may, by general or special order, specify in this behalf.**" (emphasis supplied)

20. It may be noticed that in terms of the proviso to Rule 110(2), the services of the Principal, vice-Principal or teacher in an unaided or aided private school recognised by the government (and not an unaided **minority** school) can be extended beyond 60 years. In terms of Rule 110(3) the services of a Principal or vice-Principal of such school who has won a national or state award for rendering meritorious service can be extended for such period as the Administrator may specify. Therefore even for a private aided or unaided school it is not as if the retirement age

of 60 for a Principal is sacrosanct. However, by virtue of Rule 96 of the DSE Rules, Rule 110 can have no application to an unaided minority school.

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21. It is only where the retirement age for a Principal of a minority school has been fixed at an age lower than a Principal of a government school or an aided or unaided private school, can a comparison be possibly drawn with the facts in *Frank Anthony* to contend that the terms and conditions of the Principal of an unaided minority school cannot possibly be worse than that of the Principal of a government school or an unaided or aided minority school. Viewed from any angle therefore, the decision in *Frank Anthony* cannot come to the aid of the Respondents in seeking to interfere with the decision of the Petitioner No. 1 Society to extend the tenure of Petitioner No. 2.

22. In para 9 of its decision in *All Bihar Christian Schools Association v. State of Bihar*, after examining the purport of Article 30(1) of the Constitution and the earlier decisions of the Court, the Supreme Court observed as under (SCC, p.220):

“9.... Minority institutions may be categorized in three classes (1) educational institutions which neither seek aid nor recognition from the State (ii) institutions that seek aid from the State, and (iii) **educational institutions which seek recognition but not aid**. Minority institutions which fall in the first category are free to administer their institution in the manner they like; the State has no power under the Constitution to place any restriction on their right of administration. This does not mean that an unaided minority institution is immune from operation of general laws of the

land. A minority institution cannot claim immunity from contract law, tax measures, economic regulations, social welfare legislation, labour and industrial laws and similar other measures which are intended to meet the need of the society. But institutions falling within the second and third categories are subject to regulatory provisions which the State may impose. It is open to the State to prescribe conditions for granting recognition or disbursing aid. These conditions may require a minority institution to follow prescribed syllabus for examination, course of study; they may further regulate conditions of employment of teachers, discipline of students and allied matters. **The object and purpose of prescribing regulations is to ensure that minority institutions do not fall below the standard of excellence expected of an educational institution and that they do not fall outside the mainstream of the nation.** A minority institution must also be fully equipped with educational excellence to keep in step with others in the State; otherwise the students coming out of such institutions will not be fully equipped to serve the society or the nation. **While the State has every right to prescribe conditions for granting recognition or disbursing aid, it cannot under the guise of that power prescribe onerous conditions compelling the minority institutions to surrender their rights of administration to the government. On the one hand the State is under an obligation to ensure that educational standards in the recognized institutions must be according to the need of the society and according to standards which ensure the development of personality of the students in turning out to be civilized, useful members of the society, and to ensure that the public funds disbursed to the minority institutions are properly utilized for the given purpose. On the other hand the State has to respect and honour minority rights under Article 30(1) in the matter of establishing and carrying on of administration of**

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institution of their choice. In order to reconcile these two conflicting interests the State has to strike a balance and statutory provisions should serve both the objects and such statutory provisions have to withstand the test of Article 30(1) of the Constitution. These principles have to be borne in mind in considering the question of validity of statutory provisions relating to minority educational institutions.” (emphasis supplied) 98

23. As far as the present case is concerned, Petitioner No. 1 falls in the third category identified in the above decision in *All Bihar Christian Schools Association* i.e. “educational institutions which seek recognition but not aid”. Therefore, “while the State has every right to prescribe conditions for granting recognition or disbursing aid, it cannot under the guise of that power prescribe onerous conditions compelling the minority institutions to surrender their rights of administration to the government.”

24. In *T.M.A. Pai Foundation v. State of Karnataka (2002) 8 SCC 481*, the eleven-judge bench of the Supreme Court considered inter alia the position of **aided** minority institutions and held “the conditions of aid that do not involve a surrender of the substantial right of management would not be inconsistent with constitutional guarantees, even if they indirectly impinge on some facet of administration. The specific question posed concerning minority institutions and the response in the said judgment were as follows (SCC, p. 588):

Q. 5. (c) Whether the statutory provisions which regulate the facets of administration like control over educational agencies, control over governing bodies, conditions of affiliation including

recognition/withdrawal thereof, and appointment of staff, employees, teachers and principals including their service conditions and regulation of fees, etc. would interfere with the right of administration of minorities? 28

A. So far as the statutory provisions regulating the facets of administration are concerned, **in case of an unaided minority educational institution, the regulatory measure of control should be minimal and the conditions of recognition as well as the conditions of affiliation to a university or board have to be complied with, but in the matter of day-to-day management, like the appointment of staff, teaching and non-teaching, and administrative control over them, the management should have the freedom and there should not be any external controlling agency.** However, a rational procedure for the selection of teaching staff and for taking disciplinary action has to be evolved by the management itself.

For redressing the grievances of employees of aided and unaided institutions who are subjected to punishment or termination from service, a mechanism will have to be evolved, and in our opinion, appropriate tribunals could be constituted, and till then, such tribunals could be presided over by a judicial officer of the rank of District Judge.

The State or other controlling authorities, however, can always prescribe the minimum qualification, experience and other conditions bearing on the merit of an individual for being appointed as a teacher or a principal of any educational institution.

Regulations can be framed governing service conditions for teaching and other staff for whom aid is provided by the State, without interfering with the overall administrative control of the management over the staff.

Fees to be charged by unaided institutions cannot be regulated but no institution should charge capitation fee.” (emphasis supplied)

This was reiterated in *P.A. Inamdar v. State of Maharashtra* (2005) 6 ³⁰ SCC 537.

25. In *Secretary, Malankara Syrian Catholic College v. T. Jose* the position was summarized thus (SCC, p. 399):

“19. The general principles relating to establishment and administration of educational institution by minorities may be summarised thus:

(i) The right of minorities to establish and administer educational institutions of their choice comprises the following rights:

(a) to choose its governing body in whom the founders of the institution have faith and confidence to conduct and manage the affairs of the institution;

(b) to appoint teaching staff (teachers/lecturers and Headmasters/ Principals) as also non-teaching staff; and to take action if there is dereliction of duty on the part of any of its employees;

(c) to admit eligible students of their choice and to set up a reasonable fee structure;

(d) to use its properties and assets for the benefit of the institution.

(ii) The right conferred on minorities under Article 30 is only to ensure equality with the majority and not intended to place the minorities in a more advantageous position vis-à-vis the majority. There is no reverse discrimination in favour of minorities. The general laws of the land relating to national interest, national security, social welfare, public order, morality, health, sanitation, taxation, etc. applicable to all, will equally apply to minority institutions also.

(iii) The right to establish and administer educational institutions is not absolute. Nor does it include the right to maladminister. There can be regulatory measures for ensuring educational character and standards and maintaining academic excellence. There can be

checks on administration as are necessary to ensure that the administration is efficient and sound, so as to serve the academic needs of the institution. Regulations made by the State concerning generally the welfare of students and teachers, regulations laying down eligibility criteria and qualifications for appointment, as also conditions of service of employees (both teaching and non-teaching), regulations to prevent exploitation or oppression of employees, and regulations prescribing syllabus and curriculum of study fall under this category. Such regulations do not in any manner interfere with the right under Article 30(1).

(iv) Subject to the eligibility conditions/qualifications prescribed by the State being met, the unaided minority educational institutions will have the freedom to appoint teachers/lecturers by adopting any rational procedure of selection.

(v) Extension of aid by the State does not alter the nature and character of the minority educational institution. Conditions can be imposed by the State to ensure proper utilisation of the aid, without however diluting or abridging the right under Article 30(1)."

The position vis-a-vis key posts in unaided minority institutions

26. As regards the position vis-à-vis key posts in unaided minority institutions, the law is again well settled in a number of decisions of the Supreme Court.

27. In *St. Xavier's College Society v. State of Gujarat* (1974) 1 SCC 717 the validity inter alia of Section 33-A (1) of the Gujarat University Act 1949 which stipulated how the governing body of any non-government institution seeking affiliation should be constituted was challenged by a minority institution. Concurring with the majority in holding the provision to be violative of the fundamental right of minorities under

Article 30(1) of the Constitution, Mathew. J., observed (SCC, p.815):

“182. 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 qualifications 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.”

28. In *Gandhi Faiz-E-Am College v. University of Agra*, the Supreme Court by a 2:1 majority rejected the contention of the minority institution that Statute 14-A framed by the University of Agra which compelled the institution, as a condition for grant of affiliation, to include the Principal and a teacher to represent the teaching staff on the Governing Body of the institution constituted a violation of Article 30(1) of the Constitution. Speaking for the majority, Krishna Iyer, J. noted (SCC, p. 293):

“21. An activist principal is an asset in discharging these duties which are inextricably interlaced with academic functions. **The principal is an invaluable insider — the management’s own choice — not an outsider answerable to the Vice-Chancellor. He brings into the work of the Managing Committee that intimate acquaintance with educational operations and that necessary expression of student-teacher aspirations and**

complaints which are so essential for the minority institution to achieve a happy marriage between individuality and excellence. And the role of the seniormost teacher, less striking maybe and more unobtrusive, is a useful input into managerial skills, representing as he does the teachers and being only a seasoned minion chosen by the management itself. After all, two creatures of the society on a 16-member Managing Committee can bring light, not tilt scales. Moreover, the Managing Committee itself is subject to the hierarchical control of the governing body and the General Council.” (emphasis supplied)

Rejecting the contention that the Agra University Statute was no different from the one that the Supreme Court had struck down in *St. Xavier's College Society*, the majority in para 29 explained that (SCC, p. 298) “the features of the Agra University Act vis-à-vis the minority institutions are conspicuously different and leave almost unaffected the total integrity of the administration by the religious group, save in the minimal inclusion of two internal entities, namely the Principal of their own choice and the senior most lecturer independently appointed by them.” (Mathew J., dissented and held that the provision was no different from the one struck down by the constitution bench in *St. Xavier's*).

29. In *N. Ammad v. Manager, Emjay High School* the question considered was: “is the management of a minority school free to choose and appoint any qualified person as Headmaster of the school or whether such management is hedged by any legislative edict or executive fiat in doing so?” Answering the earlier part of the question in the affirmative and the later part in the negative, the Supreme Court held (SCC, p. 681) “if the management of the school is not given very wide freedom to

chose the personnel for holding such a key post, subject of course to the restrictions regarding qualifications to be prescribed by the State, the right to administer the school would get much diminished.” Elaborating on the concept of a “key post” the Supreme Court explained (SCC, p. 680):

“18. Selection and appointment of Headmaster in a school (or Principal of a college) are of prime importance in administration of that educational institution. The Headmaster is the key post in the running of the school. He is the hub on which all the spokes of the school are set around whom they rotate to generate result. **A school is personified through its Headmaster and he is the focal point on which outsiders look at the school. A bad Headmaster can spoil the entire institution, an efficient and honest Headmaster can improve it by leaps and bounds. The functional efficacy of a school very much depends upon the efficiency and dedication of its Headmaster.** This pristine precept remains unchanged despite many changes taking place in the structural patterns of education over the years.

19. How important is the post of Headmaster of a school has been pithily stated by a Full Bench of the Kerala High Court in *Aldo Maria Patroni v. E.C. Kesavan* AIR 1965 Ker 75. Chief Justice M.S. Menon has, in a style which is inimitable, stated thus:

“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 trammel 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'."
(emphasis supplied)

30. In *Secretary, Malankara Syrian Catholic College v. T. Jose* the post of the Principal in the Malankara Syrian Catholic College, which was a minority institution, fell vacant on 31st March 2000. The Manager passed an order dated 27th March 2000 giving charge of the post of the Principal to a lecturer in the college. The Vice Chancellor approved the said decision on 15th April 2000. A challenge was raised to the appointment of the interim Principal and since there was a stay of such appointment, the management appointed another senior lecturer to discharge the duties of the Principal. Thereafter, the High Court modified its interim order and permitted the management to make a regular appointment of the Principal. This was challenged by the senior lecturer who had been asked to take charge the second time, by filing an appeal before the Kerala University Appellate Tribunal. The Tribunal directed the management to make a fresh appointment. This order was challenged in the Kerala High Court. The High Court held that the statutory provision, i.e., Section 57(3) of the Kerala University Act, 1974 applied to minority institutions as well, and in accordance with the provisions of the Act, the senior most among the eligible and fit lecturers, had to be appointed as the Principal.

31. Reversing the judgment of the High Court, the Supreme Court held in para 21 as under (SCC, p. 400):

"21. We may also recapitulate the extent of regulation by the State, permissible in respect of employees of minority

educational institutions receiving aid from the State, as clarified and crystallized in *TMA Pai*. The State can prescribe:

(i) the minimum qualifications, experience and other criteria bearing on merit, for making appointments;

(ii) the service conditions of employees without interfering with the overall administrative control by the Management over the staff.

(iii) a mechanism for redressal of the grievances of the employees;

(iv) the conditions for the proper utilization of the aid by the educational institutions, without abridging or diluting the right to establish and administer educational institutions.

In other words, all laws made by the State to regulate the administration of educational institutions, and grant of aid, will apply to minority educational institutions also. But if any such regulations interfere with the overall administrative control by the Management over the staff, or abridges/dilutes, in any administer educational institutions, such regulations, to that extent, will be inapplicable to minority institutions.”

32. Thereafter, the Court examined the question of appointment of Principal or headmaster and noted that such person was responsible for the functional efficiency of the institution, as also for maintaining the philosophy and objects of the institution. After noticing other relevant decisions of the Supreme Court, it was held in para 27 as under (SCC, p. 404):

“27. It is thus clear that the freedom to choose the person to

be appointed as Principal has always been recognized as a vital facet of the right to administer the educational institution. This has not been, in any way, diluted or altered by *T.M.A. Pai*. Having regard to the key role played by the Principal in the management and administration of the educational institution, there can be no doubt that the right to choose the Principal is an important part of the right of administration and even if the institution is aided, there can be no interference with the said right. The fact that the post of the Principal/Headmaster is also covered by State aid, will make no difference.”

33. In *St. Stephen's College v. University of Delhi* 152 (2008) DLT 228 (DB) this Court declared that Clause 7(2) of the Ordinance XVIII of the Delhi University concerning the appointment of a Principal cannot apply to a minority institution.

Conclusion

34. The position in law as is evident from the above decisions is that the post of the Principal or the Headmaster of an unaided minority institution is a 'key post' and therefore apart from mandating that the minimum qualification for such post should not be less than that prescribed for other schools, the State cannot have any say on what should be the terms and conditions of service. The age of retirement of a Principal of an unaided minority institution, being a term of service, cannot be more disadvantageous than that of the Principal of a non-minority or aided or unaided private institution. But the converse is not true. If the age of retirement of the Principal of a unaided minority institution is more advantageous, it will not be held to be discriminatory or unconstitutional.

It would in fact stand protected under Article 30 (1) of the Constitution.

35. Both the questions posed in para 1 of this judgment are answered in the negative. In other words, the GNCTD cannot insist that notwithstanding the fundamental right guaranteed to the institutions run by Petitioner No. 1 under Article 30 (1) of the Constitution the retirement age of the Principal of such institutions can be no different from that of a Principal of a government school or a private unaided or aided school recognised as such by the GNCTD in terms of the DSE Act. Further, the stand of the GNCTD that Rule 110 (1) of the DSE Rules also governs the retirement age of the Principal of a recognised unaided minority institution is untenable in law. The result is that the Rule 110 of the DSE Rules does not have any application to the schools run by the Petitioner No.1 Society.

36. Consequently, the order dated 26th October 1999 passed by Respondent No. 1 conveyed to the Petitioners by letter dated 11th November 1999, the letter dated 30th July 2007 issued by the CBSE and the order dated 11th September 2007 passed by Respondent No. 1 are unsustainable in law and are accordingly quashed.

37. The writ petitions are allowed in the above terms, with costs Rs. 5,000/- each which will be paid in equal halves by the Respondents to the Petitioners in each petition within a period of four weeks. The pending applications also stand disposed of.


S. MURALIDHAR, J

AUGUST 13, 2010
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