

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.259 OF 2016

- 1) Aurangabad Silk Mills Educational Society, Silk Mills Colony, Aurangabad, through its Secretary.
- 2) Shekh Pasha Shekh Ali, Age: 38 Yrs., occu. Service.
- 3) Mahendra s/o Vishwasrao Deshmukh, Age: 29 Yrs., occu. Service,
- 4) Sayyed Azharuddin Sayyed Rafiuddin, Age: 28 Yrs., occu. Service.
- 5) Qazi Faheemuddin Nizamuddin, Age: 23 Yrs., occu. Service.

Moinul Uloom High School
Silk Mills Colony, Aurangabad,
Tq. And Dist. Aurangabad.

- PETITIONERS

VERSUS

1. The State of Maharashtra,
Through its Secretary,
School Education Department,
Government of Maharashtra,
Mantralaya, Mumbai -32.
2. The Education Officer (Secondary)
Zilla Parishad, Aurangabad.

- RESPONDENTS

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Mr. Chandrakant K. Shinde, Advocate for Petitioners;
Mr. SB Yawalkar, AGP for Respondent Nos.1 and 2.

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**CORAM : S.S.SHINDE &
 P.R.BORA,JJ.**

DATE : 26th July, 2016.

ORAL JUDGMENT (PER:- S.S.SHINDE,J.)

1) Heard. Rule. Rule made returnable forthwith. With the consent of learned Counsel for the parties, the petition is taken up for final disposal at admission stage.

2) This petition takes exception to communication dated 31.12.2015 issued by Respondent No. 2 – Education officer (Secondary), Zilla Parishad, Aurangabad, thereby refusing to accord approvals to the appointments of the petitioners Nos. 2 to 5 as Shikshan Sevak.

3) It is the submission of learned Counsel for the petitioners that since Petitioner No. 1 is a minority institution, and in view of the Judgment of the Division Bench in the case of Cannossa Society & Anr. Vs. Commissioner and Ors. - 2014(3) Bom.C.R. 556, Respondent No. 2 – Education officer ought to have granted approval to the appointments of the petitioners.

4) On the other hand, learned counsel for

Respondent No.2 submits that the approval to the appointments of the petitioners as prayed for cannot be granted due to following reasons, -

- (i) The appointments of the petitioners were made after issuance of Government Resolution dated 2nd May, 2012; and
- (ii) There is ban to recruitment till absorption of the surplus teachers in view of clause 1.8 of Government Resolution dated 2nd May, 2012 issued by School Education Department, Mantralaya, Mumbai.

5) We have heard learned Counsel for the petitioners; learned AGP and learned Counsel for respondents. The issue / point raised in this petition is no longer *res integra*. In similar fact situation, the Division Bench of this Court in case of **Canossa Society & anr** (supra), in paragraphs 19 to 22 observed, thus:

"19. In a judgment of the Full Bench of this Court in the case of St. Francis De Sales Education Society, Nagpur & another vs State of Maharashtra & another 2001 (3) Mh.L.J. 261 in dealing with an issue falling under the Maharashtra Employees of Private Schools

(Conditions of Service) Act and rules framed thereunder, it has been held that a minority institution cannot be directed to appoint teachers or other staff on the basis of reservation policy followed by the State as evidenced in rule 9 (7) to Rule 9 (10) of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981. It has been held that the fundamental right guaranteed under Article 30 of the Constitution of India are absolute and not subject to reasonable restrictions as under Article 19. It was held that a minority institution cannot be directed to appoint teachers or other staff on the basis of reservation policy followed by the State.

20. The similar issue as raised in the present petition also fell for consideration of the Division Bench of the Gujarat High Court in the case of Hajinural Hasan Master Charitable Trust vs State of Gujarat in Letters Patent Appeal No.1225 of 2003. Considering the law laid down by the Supreme Court in regard to the rights of a minority institution. The Division Bench of the Gujarat High Court in its judgment dated 15.1.2013 held that only because aid has been granted to a minority educational institution it would not take away the its minority character of a minority institution and its rights to make appointment of the teaching and non- teaching staff. A similar view has been taken by the Division bench of this Court of Aurangabad bench

in Writ Petition No.3707 of 2013.

21. Adverting to the settled legal position as discussed herein above it becomes clear that 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.

22. There is merit in the submissions of the learned counsel for the petitioners. In the present case by the impugned directive dated 17.6.2011 the respondent nos. 1 to 3 have foisted upon the petitioners the appointment of the respondent no.4 who is rendered a surplus employee in view of the closure of a school situate in Nanded District. Admittedly, there is no consultation with petitioner no.2-school before such appointment is thrust upon the petitioner no.2-school. The respondent-authorities have also failed to take into consideration the fact that there is no vacancy as urged by the petitioners before the authorities, in view of the appointment of Mrs.Jyotsna Thorat who came to be appointed on 30.9.2006 and whose appointment was approved on 18.8.2007. Consequence of the impugned order issued by the respondent no.1 is that the approved appointment of Mrs.Jyotsna Thorat as validly done by the petitioner No.2-institution in exercise of its right to administer a minority educational institution is being interfered, coupled with a consequence that such

valid appointment would be required to be cancelled. In our considered opinion it is impermissible for respondent nos. 1 to 3 to resort to such an action of foisting appointment of respondent no.4 on the petitioner no.1-institution as it directly infringes the fundamental right guaranteed under Article 30(1) of the Constitution of India conferred on the petitioner no.2 institution to administer and establish petitioner no.2 school. The State authorities cannot indirectly do an act which cannot directly be done. In other words, when the State has no authority to make appointment of teaching and non-teaching staff in respect of a minority institution, even if aid has been granted, such action of making an appointment cannot be taken by directing absorption of a surplus employee. This is nothing but, making appointment of a staff member in a minority institution. The law confers no such authority and power with the State Government to thrust an employee rendered surplus in other schools to be absorbed by a minority institution. Rule 25 A of the Maharashtra Employees of Private Schools (Conditions of Services) Rules cannot be made applicable to appoint surplus staff in a minority institution unless the minority institution is consulted and concurs for such an appointment. We, therefore have no hesitation to conclude that the impugned order dated 17.6.2011 issued by respondent no.1 is wholly arbitrary and illegal as the same infringes on the

petitioner's right guaranteed under Article 30(1) of the Constitution of India."

6) It is necessary to reproduce clause 2 of Government Resolution dated 20th June, 2014, which reads thus, -

"०२) या बिगर अल्पसंख्यांक शाळांमध्ये अतिरिक्त ठरलेल्या शिक्षकांचे समायोजन अल्पसंख्यांक शाळा तसेच भाषिक अल्पसंख्यांक शाळांमध्ये लागू होणार नाही."

7) In that view of the matter, since the issue raised in this petition is clearly answered by the authoritative pronouncement of the Division Bench of this Court in case of **Canossa Society & anr** (supra), the impugned communication of the respondent No.2 – Education Officer (Secondary), Zilla Parishad, Aurangabad deserves to be set aside.

8) Accordingly, the letter 31st December, 2015 issued by the respondent No.2 – Education Officer (Secondary), Zilla Parishad, Aurangabad stands quashed and set aside. It is needless to observe that, the proposals of the petitioners Nos. 2 to 5 for approval of the appointments to the post of Shikshan Sevak pending with the respondents shall be

decided within ten weeks from today.

9) The writ petition is allowed to above extent. Rule is made absolute accordingly, with no order as to costs.

sd/-
(P.R.BORA)
JUDGE

sd/-
(S.S.SHINDE)
JUDGE

bdv/