

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.5899 of 2015

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1. Md. Khattab Khan son of Md. Aquil Khan resident of Village- Kabirpur, P.O. & P.S. Nathnagar , District- Bhagalpur.
 2. The Managing Committee of Madarsa Islamia Khairul Chiraya, at and P.O.- Chiraya, P.S. Amarpur, District- Banka through its Secretary, Naushad Khan , son of Zainul Khan resident of village- Sangrampur, P.O.- Lagain, P.S. Amarpur, District- Banks. Petitioner/s

Versus

1. The State of Bihar
 2. The Special Director Secondary Education , Human Resources Development Department , Bihar, Patna.
 3. The District Education Officer, Banka.
 4. The District Programme Officer (Establishment) , Banka. Respondent/s
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Appearance :

For the Petitioner/s : Mr. Obaidur Rahman
For the Respondent/s : Mr. Dr. Anshuman- Sc14

CORAM: HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY
ORAL JUDGMENT
Date : 03-12-2018

Heard learned counsel for the petitioners and the counsel appearing on behalf of the Madarsa Board as well as learned counsel appearing on behalf of the State.

2. There are two petitioners. Petitioner no.1 is Assistant Teacher appointed by the respondent whereas petitioner no.2 is the Managing Committee of Madarsa Islamia Khairul Uloom Chiraya, Banka.

3. The instant application has been filed for quashing the order dated 1.6.2013 passed by the District Education Officer contained in Memo No. 2206.

4. The District Education Officer, Banka has rejected



the claim of the petitioner for payment of salary on the ground that service of the petitioner has not been approved by the Madarsa Board.

5. Learned counsel appearing on behalf of the petitioner has submitted that the Board has no power to grant approval in the matter of appointment made by the managing committee against sanctioned pattern. He submitted that Madarsa Board has absolutely no jurisdiction in the matter of fixation of pay scale and power to make appointment and pay fixation is the domain of the concerned Managing Committee of the Madarsa Board.

6. He referred to the judgment reported in **1985 PLJR 870**, judgment reported in **2001(3) PLJR page 30** and judgment reported in **2013 (1) PLJR page 198** to contend that the aforesaid judgments are clinching on the point that Madarsa Board has absolutely no jurisdiction in the matter of grant of approval of either service or termination as that would amount to interference with the right of minority to establish and manage the educational institutions of their own choice.

7. In the judgment reported in **1985 PLJR 870** the issue was approval of the appointment of the petitioner was refused by the Madarsa Board and in that case the Managing Committee of the Madarsa made appointment on the post after advertisement in



the newspaper. After the advertisement was published, the Managing Committee conducted selection by Selection Committee and on the basis of interview, select list was prepared. The Managing Committee appointed the petitioner on the post and thereafter Secretary, Managing Committee sought approval of the appointment. The board appointed the respondent no.6 and granted approval instead of approving the service of petitioner.

8. The issue before the court was when selection process was undertaken by the Managing Committee after advertisement was published, the Managing Committee on selection sent the case of the petitioner for approval then it was not open for the Board to take different view and appoint the respondent no.6 who was not appointed by the Managing Committee.

9. The Court held out that since the petitioner was appointed by the Managing Committee, the Madarsa Board was not justified in appointing respondent no.6 and approving the service of the respondent no.6. Accordingly, the Court interfered with and quashed the action of the Madarsa Board.

10. The fact situation in the present case is quite different. Here the petitioner is challenging the jurisdiction of the Board in the matter of grant of approval. The judgment reported



in **1985 PLJR 370** is no answer to the situation involved in the present case. The judgment reported in **2001(3) PLJR pg. 30** where the dispute was with regard to appointment of Fazil teacher in Madarsa Mahmedia, Semaria, Bhagalpur.

11. The petitioner challenge the order of the Chairman of the Board approving appointment of the respondent no.5. In that case respondent no. 5 was shown as sl. No.1 in the select list and challenge was made on the ground that his appointed was made pursuant to his application which was submitted without obtaining no objection certificate.

12. The Court in the totality of facts situation held out that once a candidate was allowed to appear without insisting for issuance of no objection certificate his candidature cannot be rejected on the ground that he has not obtained no objection certificate at the time of participating in the selection process. In that judgment, the coordinate bench held out that the Chairman/Secretary or Madarsa Board has no jurisdiction to interfere with decision of the selection committee or Managing Committee.

13. The Court in that case referred to the judgment in the case of Managing Committee Madarsa Islamia **1985 (2) PLJR** and **Yunus vs. Md. Abdul Kalam AIR 1999 Supreme**



Court page 1377 and considered that section 7(2) (n) and 24 of the Act is unconstitutional being violative of Article 30(1) of the Constitution.

The relevant part of the discussion in **2001(3) PLJR 30** reads as follows:-

“4. Mr. S.A.Nasar Warsi, learned counsel for the respondents submitted that respondent no.4 was already working as a teacher on the post of Alim in the same Madarsa and therefore, he was not required to take ‘no objection’ and the ground for rejecting his candidature was thus not valid. Having been placed at Sl. No.1 in the panel, the approval of his appointment was rightly accorded. The respondent has since been working on the post and there can be no justification to interfere with his appointment. It was contended that if the petitioner was aggrieved by the decision of the chairman of the Madarsa Board, he should have preferred appeal under Section 28 of the Bihar State Madarsa Board Act, 1981. In this connection he referred to a decision of this Court in the case of Managing Committee, Madarsa Islamia Fatahul Muslemeen vs. State of Bihar, 1995(2)PLJR 447. On the point of exclusive competence of the Managing Committee of the Madarsa as a minority institution-in the matter



of appointment etc. Of the teachers, reliance was placed on **Yunus Ali Sha vs. Md.Abdul Kalam**, AIR 1999 Supreme Court 1377.

5. The decision in the above mentioned case of Yunus Ali Sha was rendered in the context of termination of the services of the teachers and the point for consideration was whether the prior approval of the Director of Education under the provision of Orissa Education Act was necessary. The Supreme Court held that while the Director of Education may have power to supervise the functioning of the minority schools in order to ensure that they do not mal-function or are not a mal-administration, in view of the Article 30(1) of the Constitution, the Director has no control over the actual management of the school regarding appointment or termination of the services of the teachers which falls within the control of the managing committee of the minority institutions. In this regard the Court noticed an earlier decision of the Supreme Court rendered in the context of the Bihar Madarsa Education Board Act in the case of **Bihar State Madarsa Education Board vs. Anjuman Ahle-Hadees**, 1994 Supp. (2) SCC 509 and I consider it proper to refer to the said decision. As a matter of fact, from perusal of the said decision, it would appear that the Supreme Court merely affirmed the decision of



this Court, albeit by a speaking order, and therefore, it becomes necessary to look into the judgment of this Court which is reported in 19845 PLJR 837 entitled Anjuman Ahle-Hadees vs. State of Bihar.

6. It would appear that the point at issue in Anjuman Ahle-Hadees was the validity of certain provisions relating to supervisory functions of the Madarsa Board in the matter of disciplinary control over the teachers and staff of the Madarsa, as contained in Section 7(2) and 24 of the Act. The relevant part of the Section 24 laid down that services of the approved teachers and non-teaching staff of a recognised Madarsa shall be under the supervision of the Board and no employee shall be discharged or dismissed from service without prior approval of the Board. This court observed at page 846 of the Report that although for the maintenance or achievement of excellence of education and institutions, it is essential that teachers and non-teaching staff of a Madarsa have fixity of tenure and that they are not hired and fired Ad-lib by the Managing Committee, but that is entirely different from laying down that no person can be dismissed or discharged without the prior approval of the Board. This Court held that such a provision impinges upon the fundamental right of minority institutions under Article 30(1) of the



Constitutions. Same view was expressed by the other learned Judge of the Bench at page 849 of the Report. The decision in Anjuman Ahle Hadees' case, rendered in the context of exercise of power by the Madarsa over disciplinary action taken by the Managing Committee, according to me, is not quite relevant to the point at issue in the present case which involves the question relating to exercise of similar supervisory power in the matter of appointment of teachers. The case is rather covered by the ratio of the decision in All Bihar Christian Schools Association vs. State of Bihar, AIR 1988 Supreme Court 305: 1988 PLJR (SC)7.

While considering the validity of provisions of Section 18(2)(b) of the Bihar Non-Government Secondary Schools (Taking-over of Management and Control) Act, 1982, ruining as under:

“According to the prescribed qualification laid down by the State Government for the teachers of the nationalized secondary schools and within the number of sanctioned posts, the managing committee of the minority secondary schools shall appoint the teacher with the concurrence of the school service board constituted under S.10 of this Act. Provided that while



considering the question of giving approval to appointment of any teacher under this Sub-section the board shall only scrutinize as to whether the proposed appointment is in accordance with the rules laying down the qualification and the manner of making appointment framed by the State Government has been followed or not, and no more.”

the Supreme Court, upholding the provision, observed at page 316 of the report:

“Clause (b) provides for two things, firstly it requires the managing committee of a minority school to appoint teachers possessing requisite qualifications as prescribed by the State Government for appointment of teachers of other nationalized school, secondly, the managing committee is required to make appointment of a teacher with the concurrence of the School Service Board constituted under S. 10 of the Act. Proviso to cl. (b) lays down that the School Service Board while considering the question of granting approval to the appointment of a teacher shall ascertain if the appointment is in accordance with the rules laying down qualifications and manner of making appointment framed by the State Government. The provision makes it clear that the Schools Service Board has no further power to interfere with the right of managing



committee of a minority school in the appointment of a teacher. Under cl. (b) the managing committee is required to make appointment of a teacher with the concurrence of the school service board. The expression 'concurrence' means approval, such approval need not be prior approval, as the clause does not provide for any prior approval. Object and purpose underlying cl. (b) is to ensure that the teachers appointed in a minority school should possess requisite qualifications and they are appointed in accordance with the procedure prescribed and the appointments are made for the sanctioned strength. The selection and appointment of teachers is left to the management of the minority school, there is no interference with the managerial rights of the institution. In granting approval the School Service Board has limited power. The appointment of qualified teachers in a minority schools is a sine qua non for achieving educational standard and better administration of the institution. Clause (b) is regulatory in nature to ensure educational excellence in the minority.

7. The Bihar State Madarsa Education Board Act however, does not contain any provision similar to the one contained in Section 18 (2)(b) of the Bihar Non-Government Secondary Schools (Taking over of



Management and Control) Act. Section 26 (2) (k) of the Act empowers the State Government to frame Rules relating to appointment and other service conditions of the teachers and non-teaching employees of the recognized Madarsa but it is an admitted position that no Rules in this regard have been framed by the Government. In the absence of any statutory provision empowering the Madarsa Board to approve/disapprove the selection/appointment made by the Managing Committee of the Madarsa, it has to be held that the Board has no jurisdiction or authority to interfere with the selection/appointment made by the Managing Committee.

14. From the discussion in **2001 (3) PLJR page 30** one can come to conclusion that the Court only held out that Madarsa Board has no jurisdiction to interfere with the selection and appointment made by the Managing Committee but there is no authority on the point that the Madarsa Board has absolutely no jurisdiction in the matter of grant of approval to the selection made by the Managing Committee.

15. The next judgment on which the counsel for the petitioner has placed reliance i.e. **2013 (1) PLJR 198** that the dispute in that case was non-payment of salary despite valid appointment of the petitioner against the vacant sanctioned post.



The court held out that there is no requirements for approval under section 24 and 25 of the Madarsa Board Act 1999.

The relevant part of the consideration in that case paragraph-7 and 8 of the judgment reported in **2013(1) PLJR 198** is quoted below:-

7. The Bihar State Madarsa Education Board Act however, does not contain any provision similar to the one contained in Section 18 (2)(b) of the Bihar Non-government Secondary Schools (Taking over of Management and control) Act. Section 26(2)(k) of the Act empowers the State Government to frame Rules relating to appointment and other service conditions of the teachers and non-teaching employees of the recognized Madars but it is an admitted position that no Rules in this regard have been framed by the government. In the absence of any statutory provision empowering the Madarsa Board to approve/disapprove the selection/appointment made by the Managing Committee of the



Madarsa, it has to be held that the Board has no jurisdiction or authority to interfere with the selection/appointment made by the Managing Committee.

8. As a matter of fact, counsel for both the petitioner and the respondents agree in principle that the Madarsa Board has no jurisdiction to make any modification or change in the selection/appointment made by the Managing Committee of the Madarsa. The contention put forward on behalf of the petitioner is that although the respondent was placed at Sl. No. 1 in the panel, his candidature having been rejected by the Selection board, the Secretary or the Chairman of the Madarsa Board could not have meddled with the decision of the Selection Board/Managing committee. The submission appears to be attractive in the first instance but cannot be accepted, for, it may result in injustice to the respondents. The respondent was undisputedly working in the



same Madarsa on the post of Alim. Even it it be assumed that 'no objection' was required, the application submitted by the respondent was entertained and he was also allowed to participate in the selection and, in fact, placed at Sl. No.1 in the panel by the Selection Board/Managing Committee. The requirement of production of 'no objection' certificate must be treated as having been substantially complied with or waived. If the Managing Committee though that without such 'no objection' certificate, the respondent was not eligible for submitting the application, the committee/Selection Board should have better rejected his candidature at the very first instance. Having entertained the same and found him otherwise suitable, there was no point in not appointing him on a technical ground, which did not go to the root of the matter.

16. On the basis of aforesaid, learned counsel appearing on behalf of the petitioner would submit that against



the sanctioned post the Managing Committee has free hand in the matter of appointment and pay fixation and there is no requirement of approval by any party. Section **7, 24 and 25** of the Madarsa Board Act does not provide such power to Madarsa Board.

17. Learned counsel appearing on behalf of the petitioner would submit that respondent State has not framed any rule or prescribed any procedure for appointment and promotion of teachers in Madarsa and as such in the absence of any such rule framed by the State Government, Madarsa Board has no role in the matter of appointment and pay fixation.

18. Learned counsel for the Board has referred to the judgment of this Court reported in **2001 (3) BLJ page 83 (Abdul Azeem Haidri Vs. the State of Bihar & Ors.)** a coordinate Bench of this court on consideration of the scheme under section 28 also considered various aspects of the matter and inter play of the scheme of the Act and also considered the judgment of the Apex Court in the case of **Abdul Kalam reported in AIR 1999 SC 1377** and held out that Madarsa Board has definite role to play.

19. Para-13 of the aforesaid judgment is relevant for the purpose of deciding the present application which is quoted



below:-

“13. The second objection taken by the Supreme Court reported in AIR 1999 SC 1377 (Yunus Ali Shah v. Md. Abdul Kalam.) In that case the Apex Court held that section 10-A of the Orissa Education Act which requires prior approval of the Director before termination of the services of the teachers of an aided institution has no application to a minority institution. This was held in view of the Article 30(1) of the Constitution by holding that in view of the Article the Directorate of Education, may have power to supervise the functioning of the school to ensure that it the functioning of the school to ensure that it does not mal-function or is not mal-administered but Directorate cannot have control over the actual management of the school including hiring or termination of the services of teachers. On the basis of aforesaid principles of law settled by the Apex Court it was submitted that the Madarsa Board or its Chairman cannot have any control over the hiring or termination of services of teachers of Madarsa by way of approval/recognition of a teacher's appointment as was done by the chairman vide orders contained in Annexure 8 and 9. Learned Counsel for the respondent no.6 further placed reliance upon judgment of



the Supreme court in the case of Bihar State Madarsa Education Bord v. Anjuman Ahle-hadees (1994 Supp(2) Supreme Court Cases 509) to submit tht since section 7(2) (n) and section 24 of the Act has been struck down by the Apex Court as violation of Article 30(1) hence now there is no provision which warrants a prior approval of Madarsa Board in the matter of discharge or dismissal of a teacher of Madarsa. On behalf of petitioner I t was submitted in reply that clause (n) of section 7(2) of the Act or Section 24 of the Act are not attracted I the case of the petitioner because by Annexures 8 and 9 the Madarsa Board or the Chairman gave approval to petitioner's appointment as Headmaster of the Madarsa and turned down the request of Respondent no.7 to approve the action taken against the petitioner by Respondent No.7, only in exercise of its power of control and supervision available under section 7(2) of the Act and such power must also be held to act and such power must also be held to be implicit in the Madarsa Board because for the purpose of payment of salary etc. From the grants in aid received from the Government the Madarsa Board must have knowledge as to who are the Headmaster and teachers of a Madarsa. This is also necessary to ensure that there is no mal-function or



mal/administered of the Madarsa, without in any way interfering with the actual power of management over the Madarsa.

20. Considering the rival submission of the parties the Court finds it difficult to uphold contention of the petitioner that in the matter of approval of appointment the Madarsa Board has absolutely no role to play. There is difference between prior approval and approval as a matter of check and balance. In the case of prior approval the role of Managing Committee would be under the control of Madarsa Board which is impermissible but approval of the decision of Managing committee in the matter of appointment would be permissible. It is true that where there is no financial liability of State there is no requirement of approval of appointment. In the event appointments are made by the Managing Committee and payments are made from its own resources, but in the case of utilization of public exchequer the Court is of the considered view that there should be some role to play by the Madarsa Board comprising of the people who belongs to minority community otherwise the power of the Managing Committee would be unguided and unbridled and there would be no check and balance if there is no question of any approval from any authority then Managing Committee of the



Madarsa would be free to make appointment of any person irrespective of any qualification prescribed and also free to grant any pay-scale irrespective of fact that for grant of appointment and promotion and grant of such pay scale there are statutory qualification prescribed. If the Managing Committee is granted absolute liberty in the matter of appointment without adhering to the norms as to the qualification and selection process and fixation of pay scale without prescribing any eligibility would amount to mal-administration and mal-administration is not protected under Article 30 of the Constitution of India.

22. Reference in this regard may be made to the judgment of the **Apex Court in the case of Chandera Deo vs. Stat of West Bengal (2015) 12 SCC 140**. However, while rejecting the contention as to the absolute power of the managing Committee, the Court is of the considered view that the process of approval is only for check and balance, the Madarsa Board is supposed to exercise such power so that unqualified and disqualified are not appointed as teacher and public exchequer may not be burdened for payment of those teachers. Pay fixation again requires application of mind and scrutiny whether the incumbent was eligible for grant of one or the other scale. Since the State has to pay and therefore, it shall be the obligation of the



District Education Officer to examine with reference to qualification and eligibility of the candidate while approving pay-scale. Decision of managing Committee itself will not do unless it is according to the approved norms for grant of such pay-scale.

23. In the peculiar facts and circumstances, the Court directs the petitioner to approach the Bihar Madarsa Board for grant of approval of the service and the Board is required to grant approval of the service of the petitioner no.1, if there is no otherwise legal infirmity in the appointment of the petitioner by taking decision within a maximum period of sixty days from the date of receipt/production of a copy of this order. Immediately, thereafter the District Education Officer is required to ensure payment of salary to the petitioner within a further period of 30 days from the date of approval of service of the petitioner by the Madarsa Board.

24. It is made clear that the Madarsa Board has limited role to play in the matter of approval as the Board has to only see whether appointment was made on the basis of merit of the candidates or not?

25. It is made clear that if the Board fails to take decision within time frame as indicated hereinabove, it shall be deemed that the appointment of the petitioner has been approved



by the Madarsa Board.

26. With the aforesaid, the writ application stands disposed of.

(Anil Kumar Upadhyay, J)

Ravi/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	27.12.2018
Transmission Date	

