

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.542 OF 2008

Mrs. Ivy C. da Conceicao
r/o H.No.1041, Allem Waddo,
Chinchinim, Salcete Goa.

... Petitioner

Versus

1. State of Goa,
Through its Chief Secretary,
having his office at Secretariat,
Porvorim Bardez Goa.
2. The Director,
Directorate of Education,
Government of Goa,
with his office at
18th June Road near
Pharmacy College,
Panaji Goa.
3. Diocesan Society,
A duly registered Society,
under the Societies Registration Act, 1860,
through its Secretary,
having his office at Instituto
Nossa Senhora de Piedada,
Dayanand Bandodkar Marg.,
Panaji Goa.
4. Smt. Victoria D'Souza,
major, married,
Teacher Grade I/Principal
Rosary Higher Secondary School,
Navelim Salcete Goa.

5. Shri Trevor Barreto,
Teacher Grade I/Principal,
Fr. Basilio Andrade,
Memorial Higher Secondary
School, Majorda, Salcete Goa.

6. Shri Walter Socorro A. Cabral,
major married,
Principal, Santa Cruz,
Higher Secondary School,
Santa Cruz, Goa.

7. Smt. Melba Leitao
major, married, Principal,
St. Thresa's Higher Secondary School,
Candolim, Bardez Goa.

.... Respondents

Mr. Nitin Sardesai, Senior Advocate with Ms. Gautami Kamat,
Advocate for the Petitioner.

Mr. J. E. Coelho Pereira, Senior Advocate with Mr. S. Karpe,
Advocate for Respondent No.3.

Mr. J. Godinho, Advocate for Respondent Nos.4, 5 and 7

Mr. P. Faldessai, Additional Government Advocate for Respondent
Nos.1 and 2.

***Coram : N.M. Jamdar &
Prithviraj K. Chavan, JJ.***

Reserved on : 30 August 2018.

Pronounced on: 12 September 2018

Judgment (Per N. M. Jamdar, J):

The Petitioner, Mrs. Ivy C. da Conceicao, works as a teacher in the school run by the Respondent No.3-Diocesan Society. She has filed this petition challenging the appointments of her colleagues as Principals.

2. The Division Bench of this Court had dismissed this petition¹. In the Civil Appeal² filed by the Petitioner, the Supreme Court³ has set aside the order and remitted the matter back to this Court.

3. The Respondent No.3 – is the Diocesan Society. The Society receives Government aid for running several Primary, Secondary and Higher Secondary Schools in the State of Goa. The other respondents are the education authorities and the teachers who have been appointed as principals.

4. The Petitioner is B.A. in Economics and Commerce and M. A. in Economics from the University of Bombay. She also has a B.Ed degree. The Petitioner is teaching Economics in the Rosary

¹ Judgment dated 14 August 2012

² No.1257 of 2017

³ Judgment dated 31 January 2017

Higher Secondary School at Navelim. The Diocesan Society maintains a common seniority list of its teachers working in its school. At the relevant time, the Petitioner was at serial No.16 in the seniority list. Respondent No.4 – Smt. Victoria D'Souza was at serial No.43, Respondent No.5 – Mr. Trevor Barreto was at serial No.35 and Respondent No.6- Mr. Walter Socorro A. Cabral was at serial No.28.

5. Mr. Walter Socorro A. Cabral was appointed as a Principal in Fr. Basilio Andrade Memorial Higher Secondary School, Majorda. Thereafter, on 31 July 2008, Smt. Victoria D'Souza, Mr. Trevor Barreto were also appointed as Principals. A vacancy arose on 1 August 2008 to the post of Principal due to the retirement of one of the Principal. Another vacancy arose on 4 August 2008. The Petitioner represented that she was eligible and qualified for the post of a Principal. She stated that she also worked as in-charge Principal in the absence of regular Principal and had no adverse remarks in her confidential reports. Petitioner was not appointed as a principal.

6. The Petitioner by filing this petition challenged the appointment of the Respondent Nos.4, 5 and 6 as Principals by orders dated 31 July, 2008, 31 July 2008 and 4 June 2008 respectively. By amending the petition, the Petitioner challenged the

appointment of Respondent No.7 as Principal given by the letter dated 18 June 2010.

7. This petition was argued before the earlier division bench and after remand, it is argued before us. The enquiry before us is as per the observations of the Supreme court in the judgement dated 31 January 2017.

8. Before the earlier bench, the Petitioner had contended that the Diocesan Society is neither a religion based minority institution nor satisfies any requirements of a religion based minority institution. The grounds taken in the petition show that this was one of the main contention. The Division Bench, in the judgment dated 14 December 2012, rejected the contention of the Petitioner. This aspect stands concluded, and the matter is argued before us on the premise that the Diocesan Society is a minority educational institution.

9. It is the contention of the Petitioner, both earlier and now, that she is senior to the Respondent Nos.4 to 7 amongst Grade I teachers of the Higher Secondary School. This is an admitted position. The Petitioner is also senior to them in the list of teachers eligible to be appointed as a Principal. It is her case that the Diocesan

Society is governed by the provisions of the Goa School Education Rules of 1986 framed under the Goa School Education Act, 1984 and the appointments of the Respondent Nos.4 to 7 are in breach of Rules of 1986, more particularly, the Rules 74 and 86 thereof. The Petitioner had contended that no Promotion Committee meetings were held and appointments of Respondent Nos.4 to 7 are completely illegal. Respondents have been selected although they were not in the zone of consideration at the time when they were considered for appointments. The Diocesan Society had given no reasons for refusing to appoint eligible senior teachers and, as such, the appointments of these Respondents are liable to be set aside. It was contended that there were no recommendations by the Promotion Committee in favour of the Respondent Nos.4, 5 and 6. Rules of 1986 have been breached and the claim of the Petitioner, the senior teacher, has been arbitrarily bypassed.

10. In response, the Diocesan Society contended that the Petitioner was considered, but the Diocesan Society consciously chose the most suited candidate as a Principal. It was contended that various teachers who were otherwise eligible in terms of the seniority had declined the offer of selection and therefore next to them in the seniority list were considered. It was asserted that Committees were constituted and the teachers were selected. It was contended that all

the selected were qualified to be appointed and their candidature has been duly considered. It was contended that as far as the vacancy in Rosary Higher Secondary School, Navelim, the post was held by one Mr. Mervin D'Souza from the Science stream and the Petitioner being an Arts Graduate did not qualify to be considered and appointed. A selection Committee set up on 30 May 2008 was referred to. It was stated that after due consideration of the Respondent Nos.4, 5 and 6, the appointments were made. The appointments were in consonance with the rights conferred on Diocesan Society under Article 30 of the Constitution of India. The Society sought leave to produce the minutes of such Committees as and when directed.

11. Respondent No.4 filed an affidavit in reply on 10 November 2008 contending that the Petitioner was not the most qualified person to the post of a Principal. Respondent No.5 filed his affidavit in reply⁴ and the Respondent No. 7 also filed her affidavit⁵ contending that they are duly qualified and have been appropriately selected and appointed. The Petitioner filed a rejoinder⁶ and

⁴ 5 February 2010

⁵ 6 January 2011

⁶ 16 January 2009

additional affidavit⁷ in respect of the minority status. After the Petition was amended, the Diocesan Society filed an affidavit⁸. The Petitioner filed a further affidavit. The Government supported the stand of the Diocesan Society and relied on the decision in the case of *Secretary, Malankara Syrian Catholic College Vs T. Jose and others*⁹.

12. The Division Bench considered the decisions in the case of *Secretary, Malankara Syrian Catholic College, Sindhi Education Society and another Vs The Chief Secretary, Govt. of NCT of Delhi and others*¹⁰ and *Shri Manohar Naik Vs Fr. Thomas Gonsalves and others*¹¹. The Division Bench noted that, in the case of *Secretary Malankara Syrian Catholic College*, the Apex Court has reiterated the legal position that the minority educational institutions have a freedom to choose a Principal, irrespective of seniority. The Division Bench also noted the order passed by the Apex Court in the the case of *Thomas Gonsalves & Anr. Vs Manohar Naik & others*,¹². In the said order, the Supreme Court had set aside the order passed by the Division Bench on 10 February 2004 in which it was held that the appointment of Respondent therein as a Head Master was in breach

⁷ 27 August 2009

⁸ 29 June 2011

⁹ (2007) 1 SCC 386

¹⁰ JT 2010(7) SC 98

¹¹ WP No.57/1991 dated 10 February 2004.

¹² Civil Appeal No.5311 of 2005

of Rules of 1986. The decisions relied upon by the Petitioner were distinguished. By judgment dated 14 August 2012, the Division Bench dismissed the petition.

13. The Petitioner thereafter challenged the judgment and order passed by the Division Bench by way of a Special Leave Petition. Leave was granted.

14. The Apex Court framed a question for consideration as to whether the process of appointment of a Principal in the minority institution is open to judicial review and what are the parameters. The Apex Court after noting the facts and rival contentions and the observations of the Division Bench, reproduced the Rules 74 and 86 and proceeded to discuss the issue at hand. After reproducing the Rules 74 and 86 of the Rules, it was observed thus:

“8. The above rules are admittedly applicable. Learned counsel for the State and the private respondents have relied upon Article 30 and judgment of this Court in T. Jose (supra) to submit that a minority institution had the autonomy in selecting a principal and that seniority is not the only criteria and, therefore, it was not open to go into the claim of the petitioner on merits.

On the decision in the case of *Malankara Syrian Catholic College Vs T. Jose*, the Supreme Court observed thus:

9. *We have given our anxious consideration to the rival submissions. There is no dispute with the proposition laid down in the case of T. Jose (supra), that right to choose a principal is a part of a right of minority institution under Article 30(1) of the Constitution and the said right is not affected merely because aid is extended by the State to a minority institution. In T. Jose (supra), this Court held that Section 57(3) of the Kerala University Act, 1974 which required appointment of senior most lecturer as Principal did not apply to a minority institution. However, the decision of this Court cannot be read as laying down a principle that a minority institution could act arbitrarily or unfairly in dealing with the selection out of the eligible candidates. The minority institution may not be compelled to go by seniority alone, but it must follow a criteria which is rational.*

The Supreme Court then referred to the decision of the Full Bench of the Kerala High Court in *Belsi M. v. Corporate Management of Latin Catholic Schools, Diocese of Neyyattinkara*. It noted the question the Full Bench had posed for consideration. The question was whether the judgment delivered in *T. Jose, (Malankara)*, dispensed with the requirement of fair procedure in selecting headmaster of a school in a minority educational institution. The Supreme Court noted and approved the observation of the Full Bench that the procedure adopted must have to be fair and cannot be absurd. The Supreme Court then observed that power of judicial review under Article 226 is available to go into the question whether

the action of an aided educational minority institution is transparent and fair. It observed that despite the autonomy under Article 30 of the Constitution of India, the exercise of power by a minority institution discharging public functions is open to judicial review. Then the reference was made to the decision of the Constitutional Bench in *T.M.A. Pai Foundation & Ors. v. State of Karnataka & Ors.* The Supreme Court quoted the paragraphs from the said decision and more particularly referred to the observations in paragraph 232 of the decision of the Constitution Bench where a question was posed as to what grounds the staff and teachers, if aggrieved, can challenge the arbitrary decisions of the management. Considering the status of the minority institutions, the grounds available under labour laws were held to be too wide, and it was held to be appropriate if adverse decisions of the management are tested on the grounds of breach of the principles of natural justice and fair play or any regulation made in that respect.

15. The Supreme Court then referred to the decision in the case of *M. Nagaraj & Ors. v. Union of India & Ors.* After referring to the above legal position, the Supreme Court concluded as under :

14. The above decisions clearly show that autonomy of a minority institution does not dispense with the requirement to act fairly and in a transparent manner

and the High Court in exercise of its power of judicial review is entitled to examine fairness of selection process. Grievance of a citizen that he was treated unfairly cannot be ignored on the ground that a minority institution has autonomy or right of choice. Exercise of right of choice has to be fair, non-discriminatory and rational.

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15. We, thus, hold that while under the constitutional scheme, a “minority institution” is free to select and appoint a principal, without being bound by the principle of seniority alone, whether the appointment has been made fairly and reasonably and whether there is violation of right of an individual eligible candidate by the minority institution by not adopting fair procedure, is liable to be tested in exercise of power of judicial review under Article 226 of the Constitution. Since this aspect of the matter has not been gone into by the High Court, we allow this appeal and set aside the impugned order. The matter stands remitted back to the High Court for a fresh decision in accordance with law. We make it clear that we have not expressed any opinion on merits of the controversy between the parties. No costs.

The Supreme Court allowed the appeal¹³ and remitted the matter back to the High Court for a fresh decision as per law. Thereafter this matter is placed before us for consideration afresh.

¹³ Judgment dated 31 January 2017

16. We have heard Mr. N. Sardessai, learned Senior Advocate for the Petitioner, Mr. J. E. Coelho Pereira, learned Senior Advocate for Diocesan Society, Mr. J. Godinho, learned counsel for Respondent Nos.4, 5 and 7 and Mr. P. Faldessai, learned Additional Government Advocate for the State.

17. Mr. Coelho Pereira, learned Senior Advocate firstly contended that the decision of the Supreme Court dated 31 July 2017 is *per incuriam* and as per the settled law there cannot be a free-ranging inquiry into the matter of appointment and selection of a Principal in the minority educational institution. Mr. Coelho Pereira contended that since the matter is sent back, it is to be decided in accordance with law. Mr. Coelho Pereira, in furtherance of his submission, relied upon a decision in the case of *Secretary Malankara Syrian Catholic College*, more particularly on the following passages.

“22. The Principal or Headmaster of an educational institution is responsible for the functional efficiency of the institution, as also the quality of education and discipline in the institution. He is also responsible for maintaining the philosophy and objects of the institution.

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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 TMA 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.

28. *The appellant contends that the protection extended by Article 30(1) cannot be used against a member of the teaching staff who belongs to the same minority community. It is contended that a minority institution cannot ignore the rights of eligible lecturers belonging to the same community, senior to the person proposed to be selected, merely because the institution has the right to select a Principal of its choice. But this contention ignores the position that the right of the minority to select a Principal of its choice is with reference to the assessment of the person's outlook and philosophy and ability to implement its objects. The management is entitled to appoint the person, who according to them is most suited, to head the institution, provided he possesses the qualifications prescribed for the posts. The career advancement prospects of the teaching staff, even those belonging to the same community, should have to yield to the right of the management under Article 30(1) to establish and administer educational institutions.*

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.”

Mr. Coelho Pereira relied upon a decision of the Supreme Court in the case of *the Manager Corporate Educational Agency Vs James Mathew and others*¹⁴. In this case, the question of Head Master and the Principal had arisen for consideration of the Supreme Court. Mr. Coelho Pereira relied upon the following passage from the said decision.

“5. As far as the selection and appointment of the Headmaster or the Principal, as the case may be, is concerned, this Court in Secy. Malankara Syrian Catholic College Vs. T. Jose and Other s, reported in (2007) 1 SCC 386, after referring to all the celebrated cases on minority rights, viz. T M A Pai Foundation v. State of Karnataka [(2002) 8 SCC 481], P.A. Inamdar vs. State of Maharashtra [(2005) 6 SCC 537], State of Kerala v. Very Rev. Mother Provincial [(1970) 2 SCC 417], The Ahmedabad St. Xavier’s College Society v. State of Gujarat [(1974) 1 SCC 717], Frank Anthony Public School Employees’ Association v Union of India [(1986) 4 SCC 707], Rev. Sidhajibhai v. State of Bombay [(1963) 3 SCR 837], D.A.V. College v. State of Punjab [(1971) 2 SCC 269], All Saints High School v. Government of A.P.

¹⁴ Civil Appeal Nos.826-827 of 2017 dated 11 July 2017

[(1980) 2 SCC 478], St. Stephen's College v. University of Delhi [(1992) 1 SCC 558], N. Ammad v. Manager, Emjay High School [(1998) 6 SCC 674], Board of Secondary Education & Teachers Training v. Joint Director of Public Instructions [(1998) 8 SCC 555], has held in Paras 27 to 29 that the Management of a minority aided educational institution is free to appoint the Headmaster or the Principal, as the case may be, of its own choice and has no obligation to appoint the available senior qualified member from the same community.

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The emerging position is that, once the Management of a minority educational institution makes a conscious choice of a qualified person from the minority community to lead the institution, either as the Headmaster or Principal, the court cannot go into the merits of the choice or the rationality or propriety of the process of choice. In that regard, the right under Article 30(1) is absolute.”

Mr. Coelho Pereira also relied upon the decision of the Supreme Court in *N. Ammad Vs Manager, Emjay High School and others*¹⁵ wherein the Supreme Court has observed thus :

“ 18. Selection and appointment of Headmaster in a school (or Principal of a college) are of prime importance in administration of that educational institution. 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

¹⁵ (1998) 6 SCC 674

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.

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26. If the said observations were meant for a non-minority school, we would not have considered its implications here. But as the observations are meant for a minority school in that case we may state at once that we are unable to concur with it. The management of a minority school is free to find out a qualified person either from the staff of the same school or from outside to fill up the vacancy. We may point out, in this context, that the Division Bench in Henry Gomes's case (supra) has quoted with approval the following observations of another earlier Division Bench decision of the same High Court in Manager Corporate E. Agency vs. State of Kerala:

"The right to appoint the Headmaster of a school or the Principal of a college, is one of prime importance in the administration of the institution. The right of the minority to administer an educational institution of its choice requires the presence of a person in whom they can repose confidence, who will carry out their directions, and to whom they can look forward to maintain the traditions, discipline and the efficiency of the teaching. When once the pivotal position of the

Headmaster is recognised, it has to be held that the right to appoint a person of its choice as Headmaster is of paramount importance to the minority, any interference with which (otherwise than by prescribing qualifications and experience) will denude the right of administration of its content, reducing it to mere husk, without the grain. Such an inroad cannot be saved as regulation which the State might impose for furthering the standards of education.”

Approval of the above observations of the earlier Division Bench decision of the same court does not go in consonance with the direction issued in Henry Gomez case that the management is bound to find out a qualified teacher from among the members of its staff to be posted as Headmaster of the school.”

18. Mr. Coelho Pereira further submitted that the Supreme Court in the case of *Board of Secretary Education and Teachers Training Vs Jt. Director of Public Instructions, Sagar and others*¹⁶ has acknowledged that it is settled position of law that in the appointment of a Principal the management of minority educational institution has a choice. He relied upon the following passage from the said decision.

“ 3. The decisions of this Court make it clear that in the matter of appointment of the Principal, the management of a minority educational institution has a choice. It has

¹⁶ (1998) 8 SCC 555

been held that one of the incidents of the right to administer a minority educational institution is the selection of the Principal. Any rules which take away this right of the management have been held to be interfering with the right guaranteed by Article 30 of the Constitution. In this case, both Julius Prasad selected by the management and the third respondent are qualified and eligible for appointment as Principal according to rules. The question is whether the management is not entitled to select a person of their choice. The decisions of this Court including the decision in State of Kerala v. Very Rev. Mother Provincial, and Ahmedabad St. Xavier's College Society v. State of Gujarat, make it clear that this right of the minority educational institution cannot be taken away by any rules or regulations or by any enactment made by the State. We are, therefore, of the opinion that the High Court was not right in holding otherwise. The State has undoubtedly the power to regulate the affairs of the minority educational institutions also in the interest of discipline and excellence. But in that process, the aforesaid right of the management cannot be taken away, even if the Government is giving hundred percent grant. We need not go into any other question in this appeal."

19. Mr. Coelho Pereira also relied on the order passed by the Supreme Court in Civil Appeal No.5311 of 2005. Mr. Coelho Pereira contended that the decision in the case of *Secretary, Malankara Syrian Catholic College* and the other decisions of the Supreme Court as above followed the decision in the case of the *Ahmedabad St. Xavier's College Society and another Vs State of*

*Gujarat and another*¹⁷, a decision of nine learned Judges bench of the Supreme Court and various other decisions including that of eleven Judges decision in the case of *T. M. A. Pai Foundation and others V/s State of Karnataka and others*¹⁸.

20. Mr. Coelho Pereira submitted that it is beyond the shadow of doubt that the minority educational institution has a right to select the Principal of its choice and the seniority is not the criteria. He submitted that therefore there could not be any inquiry as directed by the Supreme Court in its decision¹⁹. He relied upon a decision in the case in the case of *Official Liquidator V/s Dayanand and others*²⁰ of the three learned Judges of the Supreme Court that the judgment of the Constitution Bench is binding on all the Courts including the Supreme Court until it is overruled by a larger Bench. It was submitted that the judgment²¹ is contrary to the decision in the case of *Ahmedabad St. Xavier's College Society* of the learned eleven judges and the decision in the case of *Secretary, Malankara Syrian Catholic College* following *St. Xavier's*. It was submitted that the decision also has to be treated as *per incuriam*.

¹⁷ (1974) 1 SCC 717

¹⁸ (2002) 8 SCC 481

¹⁹ 31 January 2017

²⁰ (2008) 10 SCC 1

²¹ 31 January 2017

21. It is not possible for us to accept the contention raised by Mr. Coelho Pereira. The decisions relied upon by Mr. Coelho Pereira more particularly, in the case of *Secretary, Malankara Syrian Catholic College* were referred to by the Supreme Court. Furthermore, the very same matter, between the same parties who are bound by the decision, is remitted to this Court. It is pursuant to the specific observations, we are hearing the petition afresh.

22. Next contention raised by Mr. Coelho Pereira was that the word '*admittedly*' used in paragraph 8 of the decision of the Supreme Court²², is not correct. The Diocesan Society had never admitted that the Rules are applicable. He submitted that this position was contested when the appeal was heard before the Apex Court also by way of filing written submissions. Mr. Coelho Pereira contended that the fundamental rights under Article 30 is sacrosanct and that the Society has not given up its right. Again it is not possible to adjudicate upon this aspect. No review application was filed. Mr. Coelho Pereira however, is right in contending, which he says is an alternate argument, that when the Supreme Court stated that the above Rules are applicable, the sentence will have to be read in the totality of the circumstances and in a limited context. It is settled that a purport of any phrase or word employed in the decision cannot be

²² 31 January 2017

torn out to context and will have to be read in entirety. Mr. Coelho Pereira submitted that the settled law as laid down by various decisions would have to be taken into consideration.

23. We now turn to the relevant Rules. Rules 74 and 86 of the Rules of 1986 are of importance for the controversy at hand. They read thus :

“74. Recruitment and promotion.

(2) Recruitment/promotion of employees in each recognised private school aided or unaided shall be made on the recommendation of the selection committee/promotion committee.

(3) The selection committee/promotion committee shall consist of:

(a) in the case of recruitment/promotion of the head of the school/Hr. Secondary school/primary Teachers Training Institute.

(i) the chairman of the managing committee;

(ii) the Dy. Education Officer of the area or an educationist nominated by the Director of Education;

(iii) an educationist nominated by the managing committee and

(b) in the case of an appointment/promotion of a teacher (other than the headmaster of the school) : -

(i) the chairman of the managing committee or a member of the managing committee nominated by the chairman;

(ii) the head of the institution;

(iii) the Dy. Education Officer of the area or his representative to be nominated by him; and

(iv) in the case of appointment of a teacher in the Hr.

Secondary school or a primary Teachers' Training Institute, a specialist may be co-opted by the committee and in such a case he/she shall carry the same rights and privileges on par with other members.

(c) in the case of an appointment/promotion of a non-teaching staff

(i) the chairman of the managing committee or a member of the managing committee to be nominated by the chairman;

(ii) head of the institution;

(iii) the Dy. Education Officer of the area or his nominee;

Explanation: In case of minority schools the nominee of the Department or an Educationist appointed by the Director of Education in sub-rule

(3) shall function as an observer and can participate in the discussion, but he/she shall not have the right to vote or make selection of the candidates, however he/she shall send a separate report to the Director of Education about his/her observations.

(4) The chairman of the managing committee, or, where he is not a member of the "selection/promotion" committee, the member of the managing committee who is nominated by the chairman to be a member of the "selection/promotion" committee, shall be the chairman of the "selection/ /promotion" committee.

(5) Selection Committee/Promotion Committee shall "follow the procedure applicable to the corresponding posts in the Government Schools".

(6) The selection made by the selection committee/ /promotion committee shall be ordinarily accepted by the managing committee of the school. Where any selection made by the selection committee/promotion committee is

not acceptable to the Managing committee of the school, the managing committee shall record its reasons for such non acceptance and refer the matter to the Director of Education for his decision and the Director of Education shall decide the same.

(7) Where a candidate for "recruitment/promotion" to any post in the recognised school is related to any member of the selection committee, promotion committee the member to whom he is related shall not participate in the selection and a new member shall be nominated "by the Managing Committee of the school or by the Director of Education as the case may be as provided in sub-rule (3)".

(8) No managing committee shall entertain any application for employment from a person who is already serving as a teacher or otherwise in a recognised school, whether aided or not, unless, the application from such person is duly forwarded by the manager of the school in which such applicant is serving:

"Provided that every such application shall be forwarded by the applicant through the Head of the School to the Manager who shall forward the same to the prospective employer within seven days of its receipt by the Head of the School, under intimation to the applicant well within the time stipulated by the later towards the receipt of such application. In case the Manager fails to forward the application, the applicant may send a copy of his/her application to the prospective employer and appear directly for the interview."

Provided further that no such employee shall be relieved of his duties on registration except after the expiry of a period of:

(i) three months, in the case of a permanent employee from the date on which notice of resignation to leave the school

is given;

(ii) one month, in the case of an employee who is not permanent, from the date of which notice of resignation to leave the school is given;

Provided also where the employee desires to relieve himself before the expiry of the notice period he shall be relieved forthwith after recovery of three months salary including allowances from the permanent employee and one month salary with allowances from the non-permanent employee as the case may be and the amount so recovered shall be credited to the Government treasury within one month of the acceptance of the resignation.

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86. Filling of vacancies.- (1) Notwithstanding anything contained in rule 78, every vacancy in an aided school shall be filled up by promotion failing which by direct recruitment, in accordance with such rules as may be framed by the Director of Education in this behalf and notified/circulated separately.

"Provided that the claim of any employee already working under the said Management in the Under graduate category possessing the requisite qualifications for the direct recruit shall be given due consideration while filling up the post with direct recruitment."

(2) The vacancy of Principal, Higher Secondary School/ Primary Training Institutes, Headmasters of Secondary Schools and Middle Schools, and the Asstt. Headmasters of Secondary Schools shall be filled up by promotion subject to the eligibility conditions prescribed in rule 78. While filling up of these posts, the managements shall first explore the possibility of selecting the senior most teacher from the next below 'category indicated in column 5 of Table under rule 78. While making such selection the management shall

also give very careful consideration and shall select the best qualified and most competent person among those available for selection/ appointment to the post. Seniority shall be the first criteria subject to fitness and merit. If the claim of a senior eligible teacher is by-passed, the reason for the same in writing will have to be recorded in the minutes by the promotion committee. The claim of the senior qualified teacher shall not be by-passed arbitrarily without tangible reasons.

Explanation:- Common managements running the secondary schools as well as Higher Secondary schools, shall consider the claims of the Headmasters of Secondary schools in the order of inter se seniority for the promotion to the post of Principal of Higher Secondary Schools subject to eligibility conditions prescribed in rule 78.

(3) The management shall make appointment of Heads only on probation for a year in the first instance and communicate full particulars with their biodata to the Director of Education for his approval. No Head of the school shall be confirmed without the prior approval of the Director of Education.

(4) Every vacancy which is to be filled up by direct recruitment shall be notified to the Employment Exchange or in the local newspapers as the case may be as per the rules applicable to Government Offices while recruiting the corresponding posts in Government schools. However the harness cases shall be regulated as per the rules applicable to Government offices and the Director of Education shall be the controlling authority.”

24. Rule 74 deals with the recruitment and promotion of the employees. It lays down a procedure for the appointment of

employees in the recognised aided and unaided schools. The Selection Committee specified therein for minority schools has a nominee of the Government or Educationist appointed by the Government to act as an observer. The selection made by the Selection Committee is ordinarily accepted. If the selection is not accepted, the Managing Committee has to record its reasons. If the candidate is related to the member of the Selection Committee then such member is not to participate. Rule 86 deals with the filling of vacancies and also deals with the vacancy of Principal of the Higher Secondary School/Primary Training Institutes, Headmasters of Secondary Schools and Middle Schools. Rule 86(2) states that the management shall give very careful consideration and select the best qualified and most competent person among those available for selection. If the seniority is by-passed, the reason for the same shall be recorded in the minutes of the Committee Meeting.

25. Mr. Sardesai, the learned Senior Advocate argued that once the Rules 74 and 86 have been held to be admittedly applicable, the only question now to be considered is whether they are followed or not. He submitted that breach of the Rules, apart from the illegality, gives rise to the unfairness. Mr. Coelho Pereira, on the other hand, emphasized on the right of the minority institution under Article 30 to select a Principal of the Institution choice and contends

that even assuming the Rules are held to be applicable, the scrutiny can only be in the context to ensure whether the procedure adopted is fair.

26. In the decision²³, the Supreme Court has laid down that the right to choose a Principal is a part of the fundamental right of the minority institution under Article 30 of the Constitution of India. It is held that the right under Article 30 is not affected because the State extends aid to such minority institution. Thirdly, it is held, following the decision in the case of *Malankara* that it is not the law that the minority institution must appoint the senior most teacher.

27. The Supreme Court, referring to the right of the minority to appoint a Principal of their own choice and not as per the seniority, proceeded to examine whether this right is beyond any scrutiny whatsoever. After referring to the Full Bench decision of the Kerala High Court in *Belsi M. Vs Corporate Management of Latin Catholic Schools, Diocese of Neyyattinkara*²⁴ and the observations in *T. M. A. Pai Foundation and others*, the Supreme court held that autonomy of minority institution does not dispense with the requirement of fair procedure and necessity to act in a transparent manner. The grievance that the person was treated unfairly cannot be

²³ 31 January 2017

²⁴ 2010(2) KHC 220

ignored on the ground of minority institution has an absolute right, and the judicial review is permissible to find out whether there was fairness in the procedure.

28. While exercising the judicial review to decide the fairness in the procedure in these circumstances, it is evident that we cannot exercise an appellate power. While we carry out scrutiny to determine the fairness in the procedure, we have to keep in mind that the minority institution has a right to select its Principal and seniority is not the criteria. The simplistic proposition of the Petitioner that whenever there is an infraction of any of the service rules, it will automatically give rise to unfairness is too widely stated for the case at hand. The Supreme Court while remitting the matter, has not indicated such sweeping parameters. In *T. M. A. Foundation* it was observed by the Constitution bench that adverse decision of the management would be tested on the ground of breach of principles of natural justice, fair play and any regulation "*made in that respect*". Therefore the reference is to the rules which embody the principles of natural justice and fair play.

29. An indication of the degree of scrutiny to test the fairness in action in the context of the present circumstances is found in the decision in the case of *Belsi M.* of the Full Bench of the Kerala High

Court. The Supreme Court²⁵, has referred to and approved this decision. The scope can be discerned from the examples given by the Full Bench to illustrate the unfairness. The Full Bench held that, though there is a right to select any teacher as Principal, the choice cannot rest on absurd criterions such as a teacher with red hair or teacher who wins a 100 meters race. Thus the procedure adopted by the minority institutions cannot be absurd on the face of it, and it cannot act in a manner that shocks the conscience of the Court. Keeping this in mind, we will proceed to examine whether there was a breach of the principle of natural justice or absolute lack of fairness in the selection process or that absurd criterias were adopted. This inquiry has to be counterbalanced with the right of the minority institution to appoint their own Principal without following the aspect of seniority.

30. First to consider the essential facets of principles of Natural Justice in this case. It is not the argument of the Petitioner that the Managing Committee nor any of the members have an active malice against the Petitioner nor there are any pleadings to that effect with particulars. It is not the case that the Respondent Nos.4, 5, 6 and 7 are not qualified nor there any specific pleadings of favouritism shown by anyone. It is also not her case that the Selection Committee

²⁵ Judgment dated 31 January 2017

had recommended the Petitioner yet the Managing Committee did not appoint her as required under the Rule. Rule 74, which mandates that no relatives of the candidate should be in the Selection Committee embodies the principle of natural justice of not being a Judge of his own cause. It is not the case of the Petitioner that this Rule has been breached.

31. The pleadings of the Petitioner in the petition show that the Petitioner had categorically asserted that no Selection Committee was held. The Petitioner had filed a petition on the premise that no minutes of the Selection Committee existed when appointing the Respondent Nos.4, 5 and 6.

32. When the Diocesan Society filed the affidavit in reply²⁶, it categorically asserted that the Departmental Promotion Committee was constituted and rival candidature of all the candidates was considered. Mr. Coelho Pereira submitted that since it was the stand of the Diocesan Society that it has a fundamental right under Article 30, it was not necessary for the Diocesan Society to produce the proceedings of the Departmental Promotion Committee. He submitted that the Diocesan Society nowhere accepts that it is bound by the Rules. In fact what was contended that the appointments are

²⁶10 November 2008

in consonance with the rights conferred under Article 30 of the Constitution of India. Affidavit in reply filed by the Diocesan Society does disclose this stand. Therefore, it cannot be said that the proceedings of the Selection Committee placed on record subsequently in the year 2017, after remitting the matter will have to be discarded only because they were produced later in the Court. The Diocesan Society has sought leave to produce the documents of the Selection Committee as and when called upon. The President of the Society filed an additional affidavit²⁷ placing on record the minutes of the Selection Committee meetings dated 30 May 2008, 30 July 2008 and 10 March 2010 and consolidated assessment sheets in respect of the meeting dated 30 July 2008 and 10 March 2010. It is stated that the office of the Society was shifted in August 2008 and various documents were lost. The explanation in respect of Mrs. Cheryl Colaco was also given in the affidavit. In the affidavit also refers to the right of the Society under Article 30 of the Constitution of India.

33. Much is argued by the Petitioner that the minutes of the Selection Committee have been withheld from the Court. Mr. Sardesai also argued that the proceedings of the Selection Committee produced on record by way of the affidavit dated 25 September 2017

²⁷25 September 2017

appear to be fabricated. It was contended that at two places the chart had not been signed by the Fr. Antimo Gomes. It was contended that the minutes are typed when the table seems to be computerized. It was contended that many papers which should be part of the minutes are not placed on record. However, these arguments are made across the bar. The affidavit dated 25 September 2017 is sworn by the President of the Society. It is stated on oath that the documents which are available are being placed and when the premises of the Diocesan Society were shifted in August 2008, many files and documents were misplaced and could not be found. There is no rejoinder to this affidavit. Even after the minutes of the Selection Committee have been placed on record, the petition is not amended, nor any grounds of fabrication have been taken. The Petitioner is working with the Diocesan Society, and she is aware of the factual position. The petitioner does not assert before us on oath that the entire records of the Diocesan Society were not shifted to the new premises or no such event took place. The least the Petitioner could have done to amend the petition or file a rejoinder. There is therefore no reason to discard the affidavit filed by the Society.

34. Further, the oral argument of the Petitioner on the minutes are not even factually correct. The minutes of the Selection Committee do not show that they were typed on a typewriter and

that the charts were of computer generated. Though Fr. Antimo Gomes has not signed at two places, he has signed in the tally sheet and on the other pages. Nothing much turns around this position. Fr. Gomes, we are informed, is no more. In these circumstances, the proceedings of the Committee placed before us by way of an affidavit and the chart therein will have to be looked into and will have to be given due credence. Mr. Coelho Pereira right in contending that not only the minutes of the Selection Committee will have to be considered as authentic, the factual position asserted therein will have to be accepted for want of any challenge to the same.

35. As regards the other minutes of the Committee dated 10 March 2010, Mr. Sardesai contends that since the Petitioner is a senior most, the reason for not selecting will have to be explicitly given in the records. According to him, by introducing the criteria of a teaching subject, the Rules are being deviated. He contended that the zone of consideration had deviated as can be seen from the meeting. It was contended that the zone was by-passed on the specious premise that the other teachers had expressed their unwillingness and submitted letters. It was submitted that the stand of the Diocesan Society that the letters have gone missing is convenient and cannot be believed. It was contended that the Departmental Promotion Committee minutes of 30 July 2008 refers

to the two vacancies and the zone of consideration has been split from five to three only to suit the candidates successful therein. He submitted that there is a difference between the selection and non-selection post. The post of a Headmaster as per Rule 86, is not purely selection basis but seniority subject to merits and fitness. It was submitted that it is clear from the minutes of the Committee that the post has been treated as selection post. It was contended that the subject criteria is entirely irrelevant as a person can be promoted and transferred to the school or teacher can be brought from another school.

36. None of these contentions have any merit when we are considering the matter to decide the fairness in the procedure. The Committees consisted of Chairman, Educationalist and Government Officer. All Committees contained this composition. In all Committee meetings, the Government observer has remained present and has signed the minutes. We are informed that the appointments were sent to the Government and approvals have been granted. Therefore, the constitution of the Committee cannot be said to be absurd or unfair and even without going into the argument whether the Rules are applicable in toto or not; they are in consonance with Rule 74.

37. The second common thread that runs through all the Committee proceedings is that the Petitioner's case is considered. It is not that the Petitioner is wholly omitted from consideration. Her candidature has been considered and discussed as can be seen from the minutes.

38. In the Committee meeting minutes dated 10 March 2010, five candidates were considered, including the Petitioner. Rating of the five candidates was done from the confidential reports of the three years. The personal assessment and oral interaction was from the administrative skills, problem-solving skills and general impression. A final chart of the selection was made. Some of the candidates had shown their unwillingness to accept the post of a Principal. Some did not have satisfactory capabilities. Some of the candidates could not be considered for the position being from Arts and Commerce stream Higher Secondary School, and there was no sufficient teaching work load of Science as the post was in the Higher Secondary School where there is no Science stream. After that, final evaluation was done on the following points.

“a) Their report with the Management, colleagues, students, their parents and their guardians,

b) Their involvement in the overall functioning and development of the school and efficiency in teaching,

- c) Their leadership qualities and administrative skills,*
- d) With reference to their outlook and philosophy, their ability to implement the objectives of the Diocesan Society of Education in the context of the Minority character of the institution.*

The minutes refer to the ratings of the candidates. It then refers to the criteria and chart that have been annexed to the eligible candidates. The table shows their gradation as per the subject wise marks in graduation examination, their confidential reports, and the personal assessment. All these charts have been signed. Even the independent representative, after evaluation of the candidates, has given lesser marks to the Petitioner.

39. Reaching a conclusion after evaluation of the merits of each candidate based on a chart having rational criteria under the supervision of the Government observer, cannot possibly said to be an unfair procedure. We do not find anything in the method adopted by the Committee in the meeting of 10 March 2010 to hold it was unfair, absurd or that it shocks the conscience. The Petitioner cannot convert this limited scrutiny into an appellate inquiry.

40. The Petitioner contends that the letters of relinquishment by the other teachers are not being produced and therefore this theory

cannot be believed. This argument has no substance. In all the minutes of the Committee and on affidavit it has been asserted by the Diocesan Society that some of the teachers who were in the zone of consideration have shown their unwillingness. This is not an impossibility to be rejected outright. None of these teachers who have relinquished their claim have come forward to assert that it was untrue. The Petitioner has also not contended on oath that no relinquishment by any of her colleague. Nor she has stated the names of any one of the teachers who had not given the relinquishment. The minutes are on record. It is easily discernible from the minutes as to who have relinquished their claim, for the Petitioner to counter the assertion.

41. The minutes of the meeting dated 30 July 2008, were criticized on the ground that there has been splitting of the zone of consideration for two posts. As far as the splitting of the zone of consideration is concerned, it is contended that for two posts, the zone of consideration should have been eight instead it has been split into five and three. It was sought to be demonstrated that this would benefit the selected candidates. None of this is germane. There were two vacancies and eight candidates, and the Petitioner was one of the eight candidates. As regards the contention regarding the subject criteria is concerned, there is no Rule which says that the minority

institution cannot keep in mind, while it selects the best candidate to find out, whether he can teach a particular subject. If this criterion is employed how it would become unfair, irrational or absurd is not demonstrated, except by stating that the Petitioner could have been promoted and transferred. Thus for the Petitioner the procedure will be fair only when the outcome is in her favour.

42. The contention of the petitioner that the criteria differed from the selection to selection is also without any merit. Each time the Petitioner has been considered and rating of the candidates was done. The oral interviews were conducted and assessment was carried out. What needs to be considered is whether the particular procedure adopted is fair. Deviation, if any, between two Committees, cannot *ipso facto* mean that it is not a fair procedure.

43. Third Committee meeting minutes are dated 30 May 2008. Again the same exercise is carried out of the evaluation of the candidates based on the leadership qualities, administrative skills, their rapport with other authorities, colleagues and other staff members and students and overall functioning in the school. In fact in this Committee meeting, the decision of the Supreme Court in the case of *Board of Secondary Education and Teachers Training Vs Jt. Director of Public Instructions, Sagar and others* (1998 (8) SCC 555

has been referred to.

44. Mr. Sardesai argued that the none of the candidates held to be suitable yet the Respondents were selected without any reason. If fairness of the procedure adopted is the touchstone, we find that in fact the Committee has been candid in stating that none of the candidates were well conversant with the administrative procedures and did not have special achievements to their credit to make them suitable for the post, but keeping in mind the need of the institution they were selecting a Headmaster. Here also the Petitioner's candidature has been considered.

45. This scrutiny of the minutes of the Committee cannot be as if we are exercising an appellate power. Furthermore, the scrutiny of fairness of the procedure has to be hand in hand with the fundamental rights of the minority institution under Article 30 to appoint Principal of its own choice. We have to be mindful of both the parameters. It is also not a case of completely random choice without any application of mind with utter disregard to the seniority of the candidates. It is also not that the procedure reflects the complete abuse by the Society of its minority status. Having scrutinized matter in detail, we do not find that any of the parameters indicated by the Supreme Court have been breached.

46. As regards the challenge to the appointment of Respondent No.7 is concerned, it has been stated on oath by the Diocesan Society that the Respondent No.7 has a Degree in Psychology and teaching Psychology subject. She was appointed as a Principal in the year 2002. The Diocesan Society has commenced the Science stream in Rosary Higher Secondary School at Navelim and as the Respondent No.7 was a teacher of Psychology when the Science stream was started in Rosary Higher Secondary School, the Diocesan Society transferred the Respondent No.7 to the Rosary Higher Secondary School. This is the explanation given for appointment of Respondent No.7. This has not been countered by filing any affidavit in rejoinder.

47. Therefore, we are of the opinion that the procedure adopted by the Diocesan Society was not grossly unfair, absurd, or in breach of principle of natural justice or any regulation embodying the principle of natural justice to interfere with decision, exercising the power of judicial review.

48. The writ petition is dismissed. Rule discharged. No costs.

Prithviraj K. Chavan, J.

N.M. Jamdar, J.