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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 496 OF 2012

St. Isabel's High School ..Petitioner
Vs.
The Education Inspector & anr. ..Respondents
.....
Mr. A.G. Kothari for petitioner.
Mr. Amit Shastri, AGP for respondent Nos.1 and 2.

.....
CORAM : S.C. DHARMADHIKARI &
M.S. KARNIK, JJ.

RESERVED ON : 10th JANUARY, 2019

PRONOUNCED ON : 27th SEPTEMBER, 2019

JUDGMENT (PER M.S.KARNIK, J.) :-

Rule. Rule is made returnable forthwith by consent of the parties and heard finally.

2. The petitioner – St. Isabel's High School, Mumbai, invokes the jurisdiction of this Court under Article 226 of the Constitution of India to challenge the impugned Government Resolution ('GR' for short) dated 25th November, 2005 of the respondent No.2 – State Government to the extent it prescribes a maximum appointment age of 33 years for Shikshan Sevaks/ Junior Clerk. Consequently, the petitioner prays for setting aside the

impugned order dated 12/1/2011 passed by respondent No.1 – the Education Inspector thereby not approving the proposal submitted by the petitioner for approval of the appointment of a junior clerk, Shri Godwin D'Almeida. The reason for disapproval stated is that as per the said GR, Shri Godwin D'Almeida's age exceeds the maximum age limit prescribed by the G.R.

3. The second ground on which the proposal is rejected is that there are candidates available in the compassionate appointment wait list who are to be given preference.

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

The petitioner is a Primary High School catering exclusively to and imparting education to girl students. The petitioner is a religious Minority Institution as per Article 30(1) of the Constitution of India. By a GR dated 25/11/2005, the State of Maharashtra prescribed entitlement of the number of staff to private schools. The petitioner is concerned with their entitlement to appoint a junior clerk which is covered under the GR. The Government prescribed maximum age limit of 33 years for appointment of clerical staff and also honorarium of Rs.2000/- per month for junior clerks.

5. The petitioner made oral inquiries in the last week of April, 2010 with respondent No.1 – Education Inspector, South Zone, regarding availability of surplus candidates for the post of junior clerk. The petitioner also requested the respondent No.1 by letter dated 9/5/2010 to send the list of surplus candidates for the post of junior clerk but there was no response. No candidate was sent for absorption. The petitioner was left with no option but to appoint Mr. Godwin D'Almeida as junior clerk with effect from 13/5/2010. His age at the time of the appointment was 38 years.

6. The respondent No.1 rejected the approval of Mr. Godwin D'Almeida by a communication dated 13/10/2010. The reason for rejection being availability of candidates for appointment on compassionate grounds and non furnishing list of handicapped candidates. The petitioner thereafter sent a detailed letter on 7/12/2010 to respondent No.1 bringing to his notice that the petitioner being a minority Institution, reservation in appointment was not applicable. It was further brought to the notice of the respondent No.1 that none of the petitioner's employee had expired necessitating appointment of his family member on compassionate basis. It is further stated that there cannot be a backlog as

employment is given on compassionate grounds in the same school. It is further pointed out that availability of candidate on compassionate basis can be no ground as the vacancy did not arise on account of death of an employee. By the impugned order dated 12/1/2011, the approval of Mr. Godwin D'Almeida was rejected for the reasons already stated in paragraph 1 herein before.

7. The petitioner sent a detailed letter on 24/1/2011 pointing out to respondent No.1 that the petitioner is a minority Institution having a right to select staff of their own choice and further Rule 9(4) (b) of the MEPS Rules does not stipulate any maximum age for employment.

8. Learned counsel for the petitioner assailing the impugned order contends that the petitioner being a minority Institution have a right to administer their Institution which includes the right to choose and select staff of their own choice and any restriction thereupon would be in gross violation of Article 30(1) of the Constitution of India. It is next contended by learned counsel that GR dated 25/11/2005 stipulating a maximum age of 33 years is violative of Rule 9 (4)(b) of the Maharashtra Employees of Private

Schools Rules, 1981 (hereinafter referred to as “the rules” for short) which stipulates a minimum age of 18 but does not stipulate a maximum age for appointment.

9. It is urged by learned Counsel that the Maharashtra Employees of Private Schools (Conditions of Service) Act, 1977 (hereinafter referred to as “the said Act” for short) and the rules are self contained Code and further there is no provision made in the said Act and the rules empowering the State Government to supplement the rules by executive instructions. In the submission of the learned counsel, it is only when the Act empowers the State Government in that regard, then the Government would have the power to fill up the gaps in the rules by issuing administrative instructions.

10. Relying on Section 16 of the said Act which confers powers on the State Government to frame “Rules under the said Act”, learned counsel contends that a bare reading of this provision rules out the possibility of framing any rules by way of a GR. Learned counsel submits that when the law provides that something is to be done in a particular manner then it has done in that manner only and all other modes are prohibited by implication.

11. Learned counsel would submit that the GR being in the nature of administrative instructions will be applicable only if there is no primary or secondary legislation in place. The GR issued by the Government from time to time in exercise of its administrative powers under Article 162 of the Constitution of India would be inapplicable to the appointments in the schools and junior colleges.

12. Learned counsel further contends that if an Act or law has been made by the legislature conferring any function on an authority, in that case the Governor is not empowered to make any order in exercise of his executive power. By virtue of Section 16 of the said Act, the power is conferred on State Government to frame “Rules under the said Act by following prescribed procedure”, hence the issuance of GR by the State in its exercise of executive powers is illegal and contrary to the mandate of Section 16. It is next contended by learned counsel that once the Act and the Rules viz. 'Law' occupies the field, it will not be open for the State in exercise of its executive powers under Article 162 to prescribe in the same field by an executive order.

13. Learned counsel invited our attention to Rule 9 (4) (a) of the said Act which prescribes upper age limit for appointments in primary schools. Inviting our attention to Rule 9 (4) (b) of the Rules, which does not prescribe upper age limit as under Rule 9(4) (a), learned counsel submits that the act of the legislature must be deemed to be deliberate. According to him, the language of Rule 9 (4) (a) and 9 (4) (b) is clear and unambiguous. It is therefore his contention that the State cannot supplement the Rules by issuing a GR prescribing an upper age limit for junior clerks in the Secondary Schools.

14. Learned counsel urged that rejecting the approval on the ground that the candidates wait listed for compassionate appointments are available is completely untenable. He submits that the petitioner is admittedly a minority Institution under Article 30 (1) of the Constitution of India. It is their absolute right to choose and select the staff of their own choice. The impugned order encroaches and restricts their right to select staff of their own choice and therefore, the same is in violation of their right under Article 30 (1) of the Constitution of India. According to him, none of the petitioner's employees had expired necessitating the appointment of

his family member and therefore, no wait listed candidates awaiting appointment on compassionate basis could be foisted on petitioner's Institution which has a minority status.

15. Learned counsel in support of his submissions relied upon the following decisions with specific emphasis on the paragraphs mentioned hereunder :-

(a) The decision of this Court in **Writ Petition No. 1049/2012 – The Canossa Society & anr. vs. The Commissioner, Social Welfare**, paragraphs 16 and 21 ;

(b) Full Bench decision of this Court in **St. Francis De Sales Education Society & anr. vs. State of Maharashtra & anr. [2001(3) ALL MR 384]**, paragraphs 32 and 36 ;

(c) **Laxman Dundappa Dhamanekar vs. Management of Vishwa Bharata Seva Samiti – 2001(8) SCC 378**, paragraph 9 ;

(d) **Tanaji Madhukar Barbade vs. State of Maharashtra – 2010 (6) MLJ 901**, paragraph 9 ;

(e) **Nishad Sadashiv Pawar & ors. vs. Dnyanasadhana College (through Hon. General Secretary) & ors. - 2005 (4) ALL MR 101**, paragraphs 3 and 4 ;

(f) **P.H. Paul Manoj Pandian vs. P. Veldurai – (2011) 5 SCC 214**, paragraphs 46 and 47 ;

(g) **Mohammad Hasan Khan vs. Mohammad Majidulla & ors.**
- MES 388, Aurangabad High Court, paragraph 11 ;

(h) **Shikshan Prasarak Mandal & anr. vs. Ramesh Bhimrao Narayankar & ors**, 2016(3) ALL MR 375 (Full Bench), paragraph 47 ;

(i) **Mahadeo s/o. Pandurang More & ors. vs. The State of Maharashtra & ors.**, 2014(5) ALL MR 1, paragraph 46.

16. Learned AGP on the other hand supported the G.R. He invited our attention to the affidavit-in-reply filed by Shri Dhansing C. Suryawanshi, Deputy Education Inspector, South Zone. It is submitted that notwithstanding the absolute right under Article 30(1) of the Constitution of India to administer the minority institutions, it is permissible for the State to make Regulations in the interest of efficiency, instruction, discipline, health, sanitation, morality, public order and like and such regulations are not restrictions on the substance of the right guaranteed by the Constitution, but are intended to advance it.

17. Learned AGP would thus submit that issuance of the G.R. is not in contravention of any of the provisions of the Act or the Rules

and in fact considering the financial implications the revised structure has been formulated. He would submit that the clause prescribing maximum age in respect of non teaching employee should not be read in isolation but in the context of issuance of G.R. dated 25th November 2005 read as a whole.

18. Heard learned counsel. We have gone through the Petition, the annexures and the Affidavit-in-reply filed by the State.

19. The challenge in this Petition is to G.R. dated 25th November 2005 prescribing a maximum age of 33 years for Shikshan Sevak/Junior Clerk. The employee concerned was more than 33 years at the time of his initial appointment. By the said G.R. dated 25th November 2005 the State of Maharashtra has revised norms to be applied for the approval of the non teaching staff in State recognized partly/fully aided secondary/higher secondary schools, higher secondary classes/junior colleges and military schools. A committee of Joint Secretaries and Higher Secretaries was formed to consider the recommendations made by G.R. of Finance Department dated 10th September 2001. The committee thereupon approved the renewed structure after their suggestions and necessary changes.

Accordingly the State Government was contemplating of giving instructions regarding sanction of posts, permission to fill vacant posts, absorb the employees rendered surplus, surplus posts to be scrapped, etc. Accordingly, by the said G.R., the revised structure and norms to fill non teaching staff posts in a given method was formulated. The conditions for inclusion of non teaching staff are given in Annexure-A. Annexure-B provides for procedure for appointing non teaching staff in secondary, higher secondary and military schools. The same is reproduced below :

Annexure 'B'

1	Appointment of non-teaching staff	As per the regulations of the Maharashtra Pvt. Schools employees (Service conditions)
2	Education qualification for non-teaching staff	The candidates for clerical job, Librarians, Laboratory Assistant, Class IV employees must prevalent lowest Educational qualifications.
3	Honorarium for non-teaching employees	As noted in the proforma 'A' of this G.R. it will be done in the manner of Secondary Pay Commission.
4	Period of appointment on such honorarium	Three calendar years. They will be paid for 12 months.
5	Age limit for non-Teaching Employees	The age limit for this post-lower 18 years higher 33 years and 38 years for B.C.
6	Absorbing the employees in regular pay-scale	3 years after appointment, with satisfactory record of work, they

		can be appointed on regular post in regular pay scale lower i. Para No.9 beside sanctioned absence & holidays, other absent days will be cancelled from working days – then appoint in regular pay-scale will go ahead postponed by those many days.
7	Selection of non-teaching staff	Done by the institution / School committee, Approval from competent authority is essential. Selection be made as per the regulations in the Maharashtra Pvt. School Employees (Service conditions) 1981 Rule No.9.
8	Reservations for non-teaching posts	Reservation Policy of Govt. is applicable.
9	Leave for non-teaching employees	8 days leave by prior Notice. Other Holidays/Leave applicable to other Employees (not C.L.) Women employees are eligible for Maternity Leave.

20. The procedure would thus reveal that the appointment of non teaching staff has to be made as per the Rules, 1981. Further as per Item 5 of Annexure 'B', the age limit for non teaching employees is minimum of 18 years and maximum of 33 years.

21. It is the contention of the petitioner that Rule 9 (4) (b) of the MEPS Rules does not stipulate any maximum age for employees. The question is whether the said G.R. stipulating

maximum age limit of 33 years amounts to putting fetters on their right to select staff of their own choice being minority institution under Article 30(1) of the Constitution of India. Further whether the State Government by issuance of G.R. is empowered to prescribe maximum age limit when no such limit is prescribed by the 'Rules'.

22. In our opinion, Clause (5) of Annexure 'B' prescribing maximum age limit of 33 years for non teaching employees cannot be read in isolation but has to be read in the context of issuance of G.R. G.R. dated 25th November 2005 in its entirety prescribed revised norms to be applied for the approval to the non teaching staff in the State. The State of Maharashtra obviously will have a power to prescribe the norms which are not contrary to the provisions of the Act and the Rules. The said norms and revised structure are to enable the institution concerned to avail the grant-in-aid. There are ample provisions in the MEPS Act and the Rules made thereunder empowering the State to prescribe such norms. G.R. dated 25th November 2005 will have to be construed in its entirety in as much as the State has fixed revised structure and norms for non teaching staff in a given method which have to be applied for the purpose of approval of non teaching staff.

23. Merely prescribing a maximum age limit does not take away the right to choose and appoint an employee of the petitioner's choice. The right to choose and appoint an employee in the non teaching staff still rests with the petitioner. What the State has done is to prescribe a maximum age limit of 33 years for non teaching employees for the purpose of approval. This in no manner can be construed as putting fetters on the right to choose and appoint an employee of the choice of the minority institution.

24. Let us now consider some of the provisions of the MEPS Act. MEPS Act is an Act to regulate recruitment and conditions of service of employees in certain private schools.

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

(emphasis supplied)

Sub-section (3) of Section 4 provides that if the scales of pay and allowances, post-retirement and other benefits of the employees of any private school are less favourable than those provided by the rules made under sub-section (1), the Director shall

direct in writing the Management of such school to bring the same upto the level provided by the said rules, within such period or extended period as may be specified by him.

It would also be material to refer to sub-section (4) of Section 4 which provides for failure to comply with any direction given by the Director in pursuance of sub-section (3) may result in the recognition of the school concerned being withdrawn, provided that the recognition shall not be withdrawn.....

Section 4 (1) provides that the State Government may make rules providing for the minimum qualifications for recruitment (including its procedure), duties, pay, allowances, post-retirement and other benefits, and other conditions of service of employees of private schools.....

Section 16 provides for the power of the State Government to make rules for carrying out the purposes of this Act.

25. A reading of the provisions would reveal that MEPS Act is enacted for regulating the recruitment and conditions of service of employees in certain private schools. It would also be material to refer to definition of “minority school” as defined in Clause (13) of Section 2 which means a school established and administered by a

minority having the right to do so under clause (1) of article 30 of the Constitution of India. “School” is defined in clause 24 of Section 2 to mean a primary school, secondary school, higher secondary school, junior college of education or any other institution by whatever name called including technical, vocational or art institution or part of any such school, college or institution, which imparts general, technical, vocational, art or, as the case may be, special education or training in any faculty or discipline or subject below the degree level.

26. In exercise of the power conferred by sub-section (1) and (2) of the Section 16 of the MEPS Act and all others enabling powers in that behalf, the Government of Maharashtra made the rules called the Rules of 1981. Rule 9 is regarding “Appointment of Staff”. Rule 9 (1)(4-a) and (4-b) read thus :

9. Appointment of staff.

(1) The teaching staff of the school shall be adequate having regard to the number of classes in the school and the curriculum including alternative courses provided and the optional subjects taught therein.

(4) The age limit for appointment of any post in a school shall be as follows, namely :-

(a) for an appointment to be made to any post in a primary school, a candidate shall not be less than 18

years of age and more than [28] years of age, and in the case of candidate belonging to the Backward Classes he shall not be more than [33] years of age :]

Provided that, upper age-limit may be relaxed in case of women, ex-servicemen and persons having previous experience with the previous permission of the Deputy Director.

(b) for an appointment to be made to any post in any school other than primary school, a candidate shall not be below the age of 18 years.

Reading of Rule 9 (1) (4a) and (4b) would reveal that in respect of appointment to be made to any post in a primary school, a candidate shall not be less than 18 years of age and more than 28 years of age. However, in so far as an appointment to be made to any post in any school other than primary school, Rule 9 (4b) provides that candidate shall not be below 18 years of age. Rule 9 (4b) does not provide for the maximum age limit in respect of employees in any school other than primary school.

27. Rule 9(1)(4b) cannot be read to mean that in no contingency a maximum age limit for appointing non teaching staff can ever be provided for. Undoubtedly, it will be impermissible for the State to issue a GR which contravenes the provisions of the Act or the

Rules. Section 3(1) provides that the Act shall apply to all private schools in the State of Maharashtra, whether receiving any grant-in-aid from the State Government or not. By the impugned G.R., while formulating the revised structure or norms to fill non teaching post in a given method a maximum age limit of 33 years for non teaching employees is stipulated. This stipulation prescribing a maximum age limit cannot be said to be contrary to the Act or the Rules framed thereunder. The State can exercise the rule making power under Section 16 of the said Act and in fact has framed the Rules of 1981 for carrying out the purposes of the Act. The State while issuing the G.R. has not tinkered with the minimum age prescribed by the Rules. As the rules are silent on the prescription of maximum age limit for non teaching employees, the G.R. provides for a maximum age limit in pursuance to the policy prescribing revised structure and norms being a condition for grant of approval. By doing so, it cannot be said that the G.R. is contrary to the Act or the Rules.

28. It is not possible for us to accept the submission of learned counsel for the petitioner that their right to choose and appoint an employee is taken away merely because G.R. prescribes a maximum age limit of 33 years. The petitioners obviously have a

right to choose and appoint an employee of their choice subject to the maximum age limit of 33 years. For the purpose of grant-in-aid and releasing salary grants, the State has formulated revised structure and norms which are in consonance with the provisions of the Act and the Rules. This in no manner takes away the right of petitioner to administer the minority educational institution. Prescription of maximum age limit as a condition for grant of approval of non teaching staff does not amount to putting any restriction on the right of the minority institution to choose and select the staff of their choice. The fundamental right guaranteed under Article 30(1) of the Constitution of India cannot be said to be infringed merely on a prescription made by the State Government stipulating maximum age limit for the purpose of approving the appointment of a non teaching staff.

29. The salary grant of the non teaching employees is to be released only if the appointment of the employee is approved. The G.R. lays down the detailed revised structure and the norms to be applied to the non teaching staff in the State. There is no embargo on the petitioner – institution in making appointment of an employee of their choice even beyond the maximum age limit, but if the petitioner

is seeking approval for the purpose of releasing salary grant, then it is not open for the petitioner to contend that the State Government cannot provide any norms prescribing the conditions for approval. The G.R. issued by the State is not at all contrary to the mandate of Rule 4(b). In the absence of a stipulation of maximum age limit in the 'Rules' for appointment of a non teaching employee, the State is well within its rights to prescribe the upper age limit as a condition of approval in the revised structure and norms to fill the non teaching posts in a given method.

30. In the light of what is discussed herein above, the right of the petitioner to choose and appoint an employee of its own choice is in no manner restricted. The petitioner, if seeks approval for the appointment of a non teaching employee, then it has to necessarily comply with the norms prescribed by the G.R.

31. The decisions relied upon by learned counsel for the petitioner will not have any application to the facts of the present case as the stipulation of maximum age limit cannot be said to be contrary to the provisions of the Act or the Rules, nor does it put any fetters on the power of the petitioner – institution to choose and

appoint the employees of its choice.

32. We may however clarify that we have not dealt with the issue as to whether the right of appointment on compassionate ground is available only to the employees working in the petitioner – institution or to employees of other schools also and the said issue is kept open.

33. The Petition is accordingly dismissed.

34. Rule is discharged with no order as to costs.

(M.S. KARNIK, J.)

(S.C. DHARMADHIKARI, J.)

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