drp

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.3707 OF 2013

Parbhani Education Society PETITIONER
Parbhani, Through it's President
M.A.Rasheed s/o M.A.Razak,
Age-80 years, Occ-Retired
R/o Gujari Bazar, Mominpura
Parbhani

VERSUS

1. The State of Maharashtra RESPONDENTS
Through Education Department,
Mantralaya, Mumbai

2. The Education Officer (Primary)
Zilla Parishad, Parbhani

.....

Mr. Ashok B.Tele, Advocate for the petitioner
Mrs.A.V.Gondhalekar, AGP for respondent State
Mr. B.A.Shinde, Advocate for respondent No.2

.....

[CORAM : R. M. BORDE AND
SUNIL P.DESHMUKH, J.J.]

DATE : 2nd SEPTEMBER 2013

JUDGMENT (PER SUNIL P.DESHMUKH, J.):

1. Rule. Rule made returnable forthwith. Heard finally with consent of the parties.

2. The petitioner questions, in this petition under Article 226 of the Constitution of India, legality and validity of the letter dated 09.11.2012 issued by respondent No.2 – Education Officer (Primary), Zilla Parishad, Parbhani communicating that proposals for approval to the appointments of *Shikshan Savaks*, submitted by the petitioner institution, could not be accepted as those *Shikshan Sevaks* have been appointed without prior permission of office of respondent No.2 as also pursuant to Government Resolution dated 2nd May 2012 (Herein after will be referred to as 'impugned order').

3. The petitioner has asserted that it is a minority institution and has been recognized as such under notification dated 11.08.2003. The petitioner, therefore, claims that petitioner institution is entitled to all the privileges and rights guaranteed to it, based on the minority status, under Articles 29 and 30 of the Constitution of India, including *inter alia* choice of making appointments to posts in the schools run and conducted by petitioner institution.

4. The petitioner contends that staff approval has been granted by respondent No.2 to the primary sections of the schools

run under its aegis. It is further contended that there were various vacancies in said sections of the schools and in order to fill up the said vacant posts, the institution had issued an advertisement in newspaper "Aurangabad Times" (Urdu), on 23.08.2012 inviting applications for appointment of teachers. The advertisement received huge response, as, as many as 581 candidates applied for the posts against 11 vacancies. The petitioner, therefore, decided to screen the applications through written test and to shortlist the candidates. In said screening test, 116 candidates emerged successful for oral interview. In order to further shortlist the candidates, further written, practical and oral tests were carried out. Subsequently, based on merit, 11 candidates came to be selected for appointment to the posts of *Shikshan Sevaks* (teacher). Pursuant to selection, the petitioner issued appointment orders to the selected candidates on 07.09.2012. On receipt of said appointment orders, the candidates joined service in the respective schools. Heads of said schools, thereupon, submitted proposals for approval to the appointments as *Shikshan Sevaks*, to respondent No.2.

5. It is contention of the petitioner that respondent No.2 though aware about the minority status of the petitioner institution yet, rejected aforesaid proposals for approval to the appointments purportedly on the ground that prior permission for advertisement was not obtained and with reference to Government Resolution dated 02.05.2012.

6. It appears that communication was issued taking into account clause 1.8 of the said resolution which reads thus -

> "*1.8 अतिरिक्त ठरलेले शिक्षक 100% समायोजित झाल्याशिवाय खाजगी किंवा स्थानिक स्वराज्य संस्थांच्या शाळामध्ये नवीन शिक्षक वा शिक्षकेतर कर्मचा-याची भरती करु नये*"

7. Aforesaid clause 1.8 of the Government Resolution dated 02.05.2008 purports to convey that, unless and until 100% absorption of surplus teachers would not take place, private managements will not be able to appoint new teaching / non teaching staff.

8. The petitioner contends that it is a minority institution having its own social, economic and cultural qualities, properties and it is it's constitutional right to conserve and preserve its

culture, language etc. The petitioner submits that having regard to the above, it has right and privilege to choice upon and to appoint such persons as teachers, who possess requisite eligibility and qualifications. As such, contemplated directions would not be enforceable as far as minority institutions are concerned. Any insistence to enforce the same would tantamount to thrusting upon it regulations not applicable in its case. Such an enforcement is not only improper but also illegal as the same would amount to interference with its right to make choice, and would hit the very basis of its existence as a minority institution infringing the rights and privileges available under the Constitution. Negation of its proposals tantamounts to infringement of its right to manage and control a minority institution. Such an insistence in respect of minority institution is impermissible under the Constitution.

9. The petitioner submits that *Shikshan Sevaks* appointed by it possess all the qualifications and satisfy the eligibility criteria according to law and as such refusal to grant approval to their appointments pursuant to proposals submitted by the petitioner institution, for the reason that no prior

permission was sought for the advertisement, tantamounts to infraction of its rights and privileges to appoint teachers of its choice. It is further submitted that the petitioner has a right to appoint persons, who, in its opinion, are better suited culturally and linguistically compatible with the objects and aims of their institution.

10. The petitioner has relied on various rulings of the Supreme Court as well as the High Courts, viz., reported in (1974) 1 SCC 717, (paragraphs No.112 and 114 of the judgment); (2002) 8 SCC 481 (paragraphs No.123, 142 and 143) and the judgment of the Delhi High Court in Writ Petition (C) No.2845 of 1992 with Writ Petition (C) No.4291 of 1993 dated 21.11.2011 as well as judgment of a Division Bench of this Court in Writ Petition No.116 of 2012 dated 16th July 2012, authored by one of us (R.M.Borde, J.). In said judgment, this Court, after making reference to various other judgments and rulings of the Apex Court, has concluded that -

> *"13. Considering the law laid down by the Supreme Court in the judgments cited supra, it is clear that the law which interferes with a minority's choice of qualified teachers or its disciplinary control over teachers and other members of the staff of the institution would be void as being violative of Article 30 (1). It is, of course,*

permissible for the State and its educational authorities to prescribe the qualifications of teachers, but once the teachers possessing the requisite qualifications are selected by the minorities for their educational institutions, the State would have no right to veto the selection of those teachers. The right to have the teaching conducted by teachers appointed by the management after an overall assessment of their outlook and philosophy is perhaps the most important facet of the right to administer an educational institution. So long as the persons chosen have the qualifications prescribed by the University, the choice must be left to the management and this is facet of fundamental right of the minorities to administer the educational institutions established by them. It is made clear by the judgments of the Supreme Court, cited above, that making appointment of teacher is a part of regular administration and management of the educational institution and, therefore, minority institutions have right to appoint a teacher selected and chosen by them and nobody can force upon the minority institutions to appoint a particular person who is not selected by it as a teacher.

14. The directions issued by the Grievance Committee to the Education Officer in respect of sending surplus teachers for being accommodated by the minority institution and mandate requiring the managements of minority institutions to absorb such teachers and prescription of consequences for breach of the directives issued by the Grievance Committee, is beyond the scope of interference in view of the rights guaranteed to the minority institutions under Article 30 (1) of the Constitution."

11. It would be useful to refer to that similar question had fallen for consideration of Delhi High Court and the High Court in

Writ Petition (C) No.2845/1992 had ruled that Rules 47, 64, (1) (b), (e) and 96 of the Delhi School Education Rules are inapplicable to the aided minority schools to the extent they mandate such schools to fill up the posts "*without any discrimination or delay as per the recruitment rules prescribed for such posts*". However, it was clarified that the management of such aided minority schools shall adhere to the recruitment rules and other general norms to the extent they prescribe qualifications, experience, age and other such criteria for appointment, being regulatory in nature. Rule 47 of Delhi School Education Rules, challenged in the said petition, enabled the authorities under the Act to direct absorption of all surplus teachers in minority educational institutions as well as mandating participation of director nominated members on the selection committees to be advisors. Said judgment also makes reference to the decision of the Supreme Court, referred to herein above in addition to some other judgments.

12. Having regard to the aforesaid, it is submitted that the impugned communication issued making reference to Government Resolution dated 02.05.2012, which purportedly injuncts private

managements / local authorities from filling up posts in their schools unless there is 100% absorption of surplus teachers, is not applicable in the case of petitioner, which indisputably is a minority institution.

13. On the other hand, respondent No.2 opposes the claims under the writ petition relying on the proviso of sub section (1) of section 5 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, which reads thus -

"..... fill in, in the manner prescribed, every permanent vacancy in a private school ....." stressing the words *'in the manner prescribed a permanent vacancy is required to be filled in'* and contends that no appointment can be made on permanent vacancy unless it is preceded by a prior intimation to Education Officer. It is further asserted that the appointments have been made without ascertaining from the authorities as to whether there is any surplus teacher. Respondent No.2 further relies on the background under which government resolution dated 02.05.2012 was issued, making reference particularly to clause 1.8, referred to herein above. It has been contended that said resolution was

subject matter of challenge in various writ petitions and operation of clause 1.8 has not been stayed and as such supports the impugned order. Respondent No.2 also refers to that Dr.Zakir Husain Urdu Primary School, Jintur / Sailu of the petitioner institution had not taken permission for giving advertisement to fill up vacant posts from authorities and submits that the stipulations under Government Resolution dated 02.05.202 bans making appointment of teachers in the school until absorption of surplus teachers.

14. Position clearly emerges that petitioner institution is indisputably a minority institution and, in various rulings cited on behalf of the petitioner, it is held that the appointments by minority institutions would not be able to be withheld till the time surplus teachers are accommodated/absorbed. In view of the aforesaid prevailing position, as exemplified under the decisions of the Apex Court and the High Courts, particularly of this Court as depicted in judgment dated 16th July 2012, which could not be effectively countered by the respondents, save that impugned order being tried to be supported by Government Resolution dated

02.05.2012, the impugned order is incompatible with emerging legal position and as such is unsustainable.

15. Having regard to the aforesaid, the petition deserves to be allowed and it is accordingly allowed. The impugned communication dated 09.11.2012 issued by respondent No.2, Education Officer (Primary) Zilla Parishad, Parbhani is quashed and set aside. Rule is made absolute in terms of prayer clause 'C". In the facts and circumstances of the case, there shall be no order as to costs.

[SUNIL P.DESHMUKH, J.] **[R.M.BORDE, J.]**

drp/A13/wp3707-13