IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1049 OF 2012

1. The Canossa Society, }
Canossa Convent
MahakaliCaves Road,
Andheri (East) }
MUMBAI-400 093

2. The Canossa Special School }
Canossa Annexe, Pitambar
Lane, Mahim,MUMBAI-400 016 .. Petitioners

vs

1. The Commissioner, Social }
Welfare,Directorate, Government of
Maharashtra, 3 Church Road,
PUNE -400 001.
}
2. The Special District Social
Welfare Officer,
New Administrative Bldg No.1 }
4th Floor, Ramkrishna Chembur Rd
MUMBAI-400 071.
}
3. The State of Maharashtra
through Government Pleader,
High Court, (O.S.)
MUMBAI. } .. Respondents

Mr.A.G.Kothari for Petitioners
Ms.S.Shreedharan AGP for Respondents
...

CORAM : V.M.KANADE AND
G.S.KULKARNI, JJ
JUDGMENT RESERVED ON: 17.1.2014
JUDGMENT PRONOUNCED ON: 7/5/2014

JUDGMENT (Per G.S.Kulkarni, J)

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Admit. By consent of the parties petition is taken up for final hearing.

1. By this Writ Petition filed under Article 226 of the Constitution of India, the petitioner challenges an order dated 17.6.2011 passed by the respondent no.1-The Commissioner, Apang Kalyan Ayuktalaya, Maharashtra State, Pune. By the impugned order the petitioner has been directed to absorb respondent no.4 on the post of Caretaker, who is an employee rendered surplus on account of the closure of a handicapped school at Gadipura, Taluka and District Nanded.

The factual matrix lies in a narrow compass :

2. The petitioner no.1 is a trust registered under the Bombay Public Trust Act, 1950 and is conducting petitioner no.2 school, catering exclusively to impart education to mentally challenged students. The respondent no.1-the Commissioner for Social Welfare, Government of Maharashtra is an authority which exercises control on such schools.

3. The petitioner no.1 trust was established on 1.2.1955 by Roman Catholic Trustees professing and practicing Christianity as their religion. The founding trustees of the petitioner no.1 were Roman Catholics nuns. Since inception the trustees of the petitioner no.1 were nuns practicing and professing Christianity. The petitioner no.2 school was established in the year 1976 and was recognized by the respondent no.1 on 8.12.1989.

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4. Petitioner no.1 had applied to the State Government for a recognition that it is a religious minority institution within the meaning and purview of Article 30 of the Constitution of India. The appropriate authority has issued a certificate dated 22.1.2009 recognizing the petitioner no.1 as a religious minority institution in the State of Maharashtra. There is no dispute in this regard.

5. In the course of managing the petitioner no.2 school, the petitioners had made an appointment of one Ms.Jyotsna S.Thorat on a non-teaching post namely post of a Caretaker by issuing the appointment letter dated 3.9.2006. The appointment was on probation for 1 year with initial pay of Rs.2000/- per month. An approval was sought in respect of the appointment of Mrs.Jyotsna Thorat from the Special District Welfare Officer. By a communication dated 18.8.2007 such approval was granted.

6. The Special District Welfare Officer, Mumbai city issued a show cause notice dated 3.5.2011 to the petitioner no.2 calling upon the petitioners to show cause as to why the approval granted to Mrs.Jyotsna Thorat on the post of Caretaker be not cancelled. The show cause notice was issued on the basis that before making the appointment of Mrs.Jyotsna Thorat the petitioner No.2 had not sought a NOC from the respondents which was necessary in the light of the directions of the Division Bench judgment of this Court in Writ Petition No.5744 of 2003 of the Aurangabad Bench. The

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Division Bench in this Judgment had directed the respondents to comply with the provisions of Rule 25A of the Maharashtra Employees of Private Schools (Conditions of Service) Rules 1981 (hereinafter referred to as MEPS Rules) which contemplates that surplus employees in aided schools whose services are terminated on account of de-recognition or closure and who are thus rendered surplus would be kept in the waiting list and would be absorbed in other schools on appropriate vacancies. It was alleged that the petitioners had not sought a NOC so that the surplus employees in other schools would get an opportunity to be absorbed on the vacant posts. It was alleged that the appointment of Mrs.Jyotsna Thorat was contrary to the said directions of the Division bench of this Court.

7. The petitioner no.2 submitted its reply to the show cause notice by its letter dated 6.6.2011 inter alia stating that Mrs.Jyotsna Thorat was properly appointed on a vacancy arising on superannuation of one Vimal Adsul who superannuated on 31.8.2006. It was stated that the appointment of Mrs.Jyotsna Thorat was duly approved on an appropriate proposal being forwarded by the petitioner no.2 to the concerned authorities and that approval was granted on 18.8.2007. It was stated that hence, Mrs.Jyotsna Thorat was a permanent employee and her services were protected. It was stated that Mrs.Thorat was paid her normal salary in regular scale till June 2010. However, thereafter the salary of only Rs.2000/- per month was being released and that the balance amount was paid by the management so that the employee does not suffer. It was stated that the petitioner no.2 has not

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breached any order passed by the Aurangabad Bench of this Court in as much as the petitioners were not parties thereto nor orders was served on the petitioner no.2 as also Government Resolution were never served on the petitioners. It was stated that they had no knowledge of the orders of the High Court which was also clear from the fact that the department itself had granted approval to the appointment vide letter dated 18.8.2007. It was therefore, requested that approval granted to the appointment of Mrs.Jyotsna Thorat be not cancelled at such belated stage and that the show cause notice be withdrawn considering the fact that the appointment of Mrs.Jyotsna Thorat was appropriately made and approval granted by the concerned authorities.

8. The Commissioner, Apang Kalyan Ayuktalaya,Maharashtra State, Pune passed an order dated 17.6.2011 directing the petitioner no.2 to absorb on the post of Caretaker Respondent No.4 Shri Ayub Khan Basir Khan from the Citizen Urdu Handicapped School,Gadipura, Nanded who was on the waiting list at Serial No.244. It was directed that the petitioner no.2 should immediately permit Mr.Ayub Khan Basir Khan to join duties and make a report to that effect to the Commissioner for Social Welfare failing which action for cancellation of registration of the petitioner no.2 would be initiated. This order was received by the petitioner no.2 on 17.8.2011.

9. The petitioner no.2 submitted a representation dated 14.9.2011 to the Commissioner for Welfare of the Handicapped, Maharashtra State, Pune

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inter alia stating that the order dated 17.6.2011 directing the petitioner no.2 to absorb Shri.Ayub Khan Basir Khan was on the basis of the judgment of the Aurangabad bench of this Court to which the petitioner was not a party. It was further stated that it was not clear as to whether the decision of the Aurangabad Bench would be applicable to minority institutions. It was stated that the petitioner is a minority institution and having rights guaranteed under Article 30 (1) of the Constitution of India which would include the right to recruit staff of its choice so long as the persons chosen possess the qualifications prescribed by the authorities. It was stated that the petitioner no.2 was not given any opportunity to consider whether Mr.Ayub Khan Basir Khan was a suitable person. It was stated that this action on the part of the Commissioner for Social Welfare of the Handicapped was violative of the rights guaranteed to minority institutions as also the same was contrary to the law laid down by the Supreme Court in the case of **Secretary, Malankara Syrian Catholic College vs T.Jose (2007) 1 SCC 386.** It was requested that the order passed by the Commissioner for Social Welfare for the Handicapped directing absorption of Shri.Ayub Khan Basir Khan be withdrawn. The petitioners relied on the orders passed by the Division Bench of this Court in two Writ Petitions being Writ Petition No.43 of 2008 and Writ Petition No.342 of 2007 filed before the principal bench at Mumbai wherein the Division Bench of this Court had admitted the Writ petitions when similar challenge was raised by the two minority institutions. Interim orders were passed granting stay to the orders of absorption of surplus teachers by the petitioner minority institutions in the light of the judgment of the Supreme

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Court in case of **Secretary, Malankera Syrian Catholic College.**

10. In the meantime, Shri.Ayub Khan Basir Khan filed a Writ Petition No.9207 of 2011 before the Aurangabad bench of this Court seeking implementation of the orders of absorption by petitioner no.2 school. The petitioner no.2 was impleaded as a respondent in the said writ petition and arrayed as respondent No.5. The petitioner filed an affidavit in reply to the said Writ Petition inter alia contending that orders of absorption of Respondent No. 4 were not applicable qua the petitioner-institution in view of the fact that the petitioner no.2 is a minority institution and that Mrs.Jyotsna Thorat was already appointed and there was no vacancy in the petitioner's institution.

11. We have heard Mr.A.G.Kothari learned counsel for the petitioners and Ms.S.Shreedharan learned A.G.P. for respondent nos.1 to 3. With the assistance of the learned counsel, we have gone through the paper book of the writ petition.

12. Learned counsel for the petitioner contends that the impugned order dated 17.6.2011 passed by the Commissioner, Apang Kalyan, Maharashtra State directing Shri.Mr.Ayub Khan Basir Khan respondent No.4 be absorbed is per se illegal in as much as the respondent no.1 has not considered that the petitioner no.2 is a minority institution within the meaning and purview of Article 30 of the Constitution of India. In view of the protection granted

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under Article 30 (1) the petitioner institution is entitled to make appointments of the teaching and non teaching staff and that the respondent-authorities cannot foist upon the petitioner no.2 absorption of respondent no.4 as sought to be done by the impugned order. It is further submitted that in fact there was no vacancy in as much as Mrs.Jyotsna Thorat was already appointed by the appointment order dated 3.9.2006 and her appointment was already approved by the concerned department on 18.8.2007.It is submitted that it is a settled principle of law that in respect of appointment of staff, the respondent authorities cannot interfere except to for see that the employee who are appointed to fullfil the required qualifications and norms so as not to affect the standard of education. The petitioners rely on the following judgments in support of their submissions : (i) **T.M.A.Pai Foundation & ors vs State of Karnataka** **(2002) 8 Supreme Court Cases 481** (ii)) **Secretary Malankara Syrian Catholic College vs T.Jose & ors** **(2007) 1 SCC 386** (iii) **Sindhi Education Society vs Chief Secretary, Government of NCT of Delhi & ors** **(2010) 8 SCC 49** (iv) **Bombay Institution for Deaf and Mutes & anr vs Deartment of Social Welfare & ors** **2002 (1) Mh.L.J. 354** (v) **St.Francis De Sales Education Society, Nagpur & anr vs. State of Maharashtra & anr** **2001 (3) Mh.L.J. 261** (vi) **Brahmo Samaj Education Society & ors vs State of W.B.& ors** **(2004) 6 SCC 224** (vii) **Judgment of the Gujrat High Court in Letters Patent Appeal No.1225 of 2003 & other matters (Hajinural Hasan Master Charitable Trust vs State of Gujrat (Hon'ble Mr Justice M.R.Shah and Mr.Justice**

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S.H.Vora) Date of Judgment : 15.1.2013.

13. Learned AGP has appeared on behalf of the respondent nos.1 to 3 and has made submissions to oppose the Writ Petition. The learned AGP has relied on the Affidavit in reply file by Mr.Pramod Baliram Jadhav, Assistant Commissioner, Social Welfare, Mumbai city in support of her submissions. It is submitted that as per section 63 of the Special School Code for differently abled children and Maharashtra Employees of Private Schools (Conditions of Service) Act ...and Rules framed thereunder are applicable to the petitioner no.2 school. It is submitted that rule 25A of the Maharashtra Employees of Private Schools (Conditions of Service) Rules 1978 is squarely applicable to the petitioner no.2 school in regard to the absorption of the surplus staff on vacant post. It is submitted that petitioner no.2 is not permitted to employ privately any candidate without prior permission of the competent authority. The learned AGP relies on the order dated 20.7.2004 of the Division Bench of the Aurangabad bench of this Court in Writ Petition No.5744 of 2003 to submit that it was obligatory on the petitioner no.2 school to absorb surplus staff of other schools. It is submitted that an appropriate No objection certificate ought to have been taken by the petitioner no.2-school before appointing Mrs.Jyotsna Thorat. It is further submitted that the petitioner no.2 is an aided school and hence it is obligatory on it to comply with the directives of the State Government to absorb surplus staff as mandated by Rule 25A of the M.E.P.S.Rules It is then submitted that the staffing pattern as prescribed by Government Resolution dated 18.8.2004 also mandates

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concurrence of the competent authority in regard to filling up of public posts. The learned AGP relies on the judgment of the Supreme Court in the case of **T.M.A.Pai Foundation & ors vs State of Karnataka & ors (2002) 8 Supreme Court Cases 481** in support of the aforesaid submissions. It is contended that the petitioners cannot claim dispensation of such compliance under the garb of claiming protection under Article 30 of the Constitution of India.

14. Having considered the rival contentions, the issue which falls for consideration in the present Writ Petition is as to whether it is permissible for the State authorities to direct a minority institution to absorb an employee rendered surplus from other schools. In other words, whether the State authorities can make an appointment of a staff member in a minority aided school and whether such an action would be valid when tested on the touchstone of the constitutional right of a minority institution.

15. The rights of a minority institution have been an issue of consideration of the Supreme Court in catena of decisions. An examination of the legal position of the right of the minority institution becomes imperative in that regard in the present context.

16. The issue in regard so the rights of a minority institution was a matter of adjudication of the 11 Judges Bench of the Supreme Court in the case of **T.M.A.Pai Foundation & ors vs State of Karnataka (2002) 8**

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SCC 481. In a majority judgment delivered by the learned Chief Justice Mr Justice B.N.Kirpal (as his Lordship then was) it was held that the right to establish and administer an educational institution by a a minority institution includes within its ambit the right to appoint staff (teaching and non-teaching), It has held that the aided institution does not become Government owned and Government controlled institution, or a departmentally run and interfere with the constitution of the governing bodies or thrusting staff without reference to the management. The enunciation of law in the majority judgment can be seen from the following observations:

> 50"The right to establish and administer broadly comprises the following rights:
>
> (a) to admit students;
> (b) to set up a reasonable fee structure;
> c(c) to constitute a governing body;
> ci(d) to appoint staff (teaching and non-teaching) ; and
> (e) to take action if there is dereliction of duty on the part of any employees.
>
> 54.The right to establish an educational institution can be regulated, but such regulatory measures must, in general, be to ensure the maintenance of proper academic standards, atmosphere and infrastructure (including qualified staff) and the prevention of maladministration buy those in charge of management. The fixing of a rigid fee structure, dictating the formation and composition of a governing body, compulsory nomination of teachers and staff for appointment or nominating students for admissions would be unacceptable restrictions. "
>
> 72..................
>
> At the same time it has to be ensured that even an aided institution does not become a government-owned and controlled institution. Normally, the aid that is granted is relatable to the pay

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and allowances of the teaching staff. In addition, the management of the private aided institutions has to incur revenue and capital expenses. Such aided institutions cannot obtain that extent of autonomy in relation to management and administration as would be available to a private unaided institution but at the same time it cannot also be treated as an educational institution departmentally run by government or as a wholly owned and controlled government institution and interfere with constitution of the governing bodies or thrusting the staff without reference to management. “

17. The Supreme Court in the case of **Secretary, Malankara Syrian Catholic College vs T.Jose & ors (2007) 1 SCC 386** has reiterated and held that legal position and that the right of a minority institution to administer an educational institution of its choice comprises of a right to appoint teaching and non-teaching staff.

In dealing with the issue as to what extent the State can recognize the right of minority. educational institution and when such institution received aid from the State, the Supreme Court has held in para 19 and 21 as under :

19. The general principles relating to establishment and administration of educational institution by minorities may be summarised thus:

(i) The right of minorities to establish and administer educational institutions of their choice comprises the following rights:

(a) to choose its governing body in whom the founders of the institution have faith and confidence to conduct and manage the affairs of the institution;

(b) to appoint teaching staff (teachers/lecturers and Headmasters”

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> 21"We may also recapitulate the extent of regulation by the Staff, permissible in respect of employees of minority educational institutions receiving aid from the State, as clarified and crystallised in T.M.A.Pai.Foundation, the State can prescribe:
>
> (i) the minimum qualifications, experience and other criteria bearing on merit, for making appointments,
>
> (ii) the service conditions of employees without interfering with the overall administrative control by the management over the staff.
>
> (iii) a mechanism for redressal of the grievances of the employees.
>
> (iv) the conditions for the proper utilisation of the aid by the educational institutions, without abridged or diluting the right to establish and administer educational institutions.
>
> (v) In other words, all laws made by the State to regulate the administration of educational institutions and grant of aid will apply to minority educational institutions also. But, if any such regulations interfere with the over all administrative control by the management over the staff, or abridges/dilutes in any other manner, the right to establish and administer educational institutions, such regulations, to that extent will be inapplicable to minority institutions.

18. In a recent judgment of the Supreme Court in the case of **Sindhi Education Society & another vs Chief Secretary,Government of NCT of Delhi & ors (2010) 8 SCC 49** dealing with a similar issue in regard to an aided linguistic minority school, the Supreme Court has held as under :

> 111. "A linguistic minority has constitution and character of its own. A provision of law or a circular, which would be enforced against the general class, may not be enforceable with the same rigours against the minority institutions particularly where it relates to establishment and management of the school. It has been held that founders of the minority institution have faith and confidence in their own committee or body consisting of the persons selected by them. Thus, they could choose their

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managing committee as well as they have a right to choose its teachers. Minority institutions have some kind of autonomy in their administration. This would entail the right to administer effectively and to manage and conduct the affairs of the institution. There is a fine distinction between a restriction on the right of administration and a regulation prescribing the manner of administration. What should be prevented is the maladministration. Just as regulatory measures are necessary for maintaining the educational character and content of the minority institutions, similarly regulatory measures are necessary for ensuring orderly, efficient and sound administration.

112. Every linguistic minority may have its own social, economic and cultural limitations. It has a constitutional right to conserve such culture and language. Thus, it would have a right to choose teachers, who possess the eligibility and qualifications, as provided, without really being impressed by the fact of their religion and community. Its own limitations may not permit, for cultural, economic or other good reasons, to induct teachers from a particular class or community. The direction, as contemplated under Rule 64 (1) (b), could be enforced against the general or majority category of the government-aided schools but, it may not be appropriate to enforce such condition against linguistic minority schools. This may amount to interference with their right of choice and at the same time may dilute their character of linguistic minority. It would be impermissible in law to bring such actions under the cover of equality which in fact, would diminish the very essence of their character or status. Linguistic and cultural compatibility can be legitimately claimed as one of the desirable features of a linguistic minority in relation to selection of eligible and qualified teachers. (emphasis supplied)

113. A linguistic minority institutions is entitled to the protection and the right of equality enshrined in the provisions of the Constitution. The power is vested in the State to frame regulations, with an object to ensure better organisation and development of school education and matters incidental thereto. Such power must operate within its limitation while ensuring that it does not, in any way, dilutes or impairs the basic character of linguistic minority. Its right to establish and administer has to be construed liberally to bring it in alignment with the constitutional protections available to such communities.

114. The minority society can hardly be compelled to perform acts or deeds which per se would tantamount to infringement of its right to manage and control. In fact, it would tantamount to imposing impermissible restriction. A school which has been established and granted status of a linguistic minority for years, it will not be proper to stop its grant-in-aid for the reason that it has

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> failed to comply with a condition or restriction which is impermissible in law, particularly when the teachers appointed or proposed to be appointed by such institution satisfy the laid down criteria and/or eligibility conditions. The minority has an inbuilt right to appoint persons, which in its opinion are better culturally and linguistically compatible to the institution. "

19. In a judgment of the Full Bench of this Court in the case of **St.Francis De Sales Education Society, Nagpur & another vs State of Maharashtra & another 2001 (3) Mh.L.J. 261** in dealing with an issue falling under the Maharashtra Employees of Private Schools (Conditions of Service) Act and rules framed thereunder, it has been held that a minority institution cannot be directed to appoint teachers of other staff on the basis of reservation policy followed by the State as evidenced in rule 9 (7) to Rule 9 (10) of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981. It has been held that the fundamental right guaranteed under Article 30 of the Constitution of India are absolute and not subject to reasonable restrictions as under Article 19. It was held that a minority institution cannot be directed to appoint teachers or other staff on the basis of reservation policy followed by the State.

20. The similar issue as raised in the present petition also fell for consideration of the Division Bench of the Gujarat High Court in the case of **Hajinural Hasan Master Charitable Trust vs State of Gujarat in Letters Patent Appeal No.1225 of 2003.** Considering the law laid down by the Supreme Court in regard to the rights of a minority institution. The Division Bench of the Gujarat High Court in its judgment dated 15.1.2013

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held that only because aid has been granted to a minority educational institution it would not take away the its minority character of a minority institution and its rights to make appointment of the teaching and non-teaching staff. A similar view has been taken by the Division bench of this Court of Aurangabad bench in Writ Petition No.3707 of 2013.

21. Adverting to the settled legal position as discussed herein above it becomes clear that a minority educational institution has a fundamental right to establish and administer an educational institution of its choice. This right encompasses several facets one of them being a right to appoint teaching and non-teaching staff. It is held that the right to appoint teaching and non-teaching staff is an integral part of a right conferred under Article 30 of the Constitution of India namely to administer a minority educational institution. Merely because aid has been granted to a minority institution it would not loose its character as a minority institution and cease to enjoy constitutional guarantee conferred on it by virtue of the provisions of Article 30 of the Constitution of India. The grant of aid would not convert a minority institution into a departmentally conducted school or a department of the Government so that its autonomy of administration of an educational institution of its choice conferred under Article 30 of the Constitution of India would stand restricted. The State would be within its right to impose only such restrictions so as to maintain standards of education and to check any kind of maladministration. However, the autonomy in regard to day to day administration of the minority institution cannot be taken away by imposing

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any condition or restrictions which would take away the minority character of a minority institution and infringe the Constitutional guarantee conferred by Article 30 of the Constitution of India.

22. There is merit in the submissions of the learned counsel for the petitioners. In the present case by the impugned directive dated 17.6.2011 the respondent nos. 1 to 3 have foisted upon the petitioners the appointment of the respondent no.4 who is rendered a surplus employee in view of the closure of a school situate in Nanded District. Admittedly, there is no consultation with petitioner no.2-school before such appointment is thrusted upon the petitioner no.2-school. The respondent-authorities have also failed to take into consideration the fact that there is no vacancy as urged by the petitioners before the authorities, in view of the appointment of Mrs.Jyotsna Thorat who came to be appointed on 30.9.2006 and whose appointment was approved on 18.8.2007. Consequence of the impugned order issued by the respondent no.1 is that the approved appointment of Mrs.Jyotsna Thorat as validly done by the petitioner No.2-institution in exercise of its right to administer a minority educational institution is being interfered, coupled with a consequence that such valid appointment would be required to be cancelled. In our considered opinion it is impermissible for respondent nos. 1 to 3 to resort to such an action of foisting appointment of respondent no.4 on the petitioner no.1-institution as it directly infringes the fundamental right guaranteed under Article 30 (1) of the Constitution of India conferred on the petitioner no.2 institution to administer and establish

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

23. In view of the aforesaid discussion, the impugned order dated 17.6.2011 issued by the respondent no.1 is quashed and set aside. We allow the Writ Petition in terms of prayer clauses (a) and (b). Rule is accordingly made absolute. In the circumstances, there shall be no order as to costs.

(G.S.Kulkarni, J) (V.M.Kanade, J)

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