Andhra High Court
Modern High School, Zamisthanpur vs Government Of Andhra Pradesh And ... on 9 November, 2001
Equivalent citations: 2002 (1) ALD 96, 2002 (5) ALT 96
Author: B Nazki
Bench: B Nazki, E D Rao
JUDGMENT Bilal Nazki, J.

1. These writ petitions raise common questions of law and fact as in all petitions vires of G.O. Ms. No.76, dated 2-11-1999 has been challenged.

2. The admitted facts are that, the petitioner institutions are minority educational institutions. Some of these institutions are admitted to grant-in-aid by the Government and some of them are unaided institutions. In terms of powers conferred on the Government under Section 99 of the A.P. Educational Institutions Act, 1982 rules were framed by the Government being G.O.Ms.No.1, Education (PS2) Department, dated 1-1-1994; Rule 12 of these rules deals with the appointment of the staff. By virtue of G.O.Ms.No.76, dated 2-11-1999 Rule 12 was amended retrospectively with effect from 5-8-1998. The amendment to rule 12 is challenged in all these writ petitions as illegal. It is contended that the impugned G.O. contravenes the right of managements of the Educational institutions guaranteed under Article 30(1) of the Constitution of India.

3. The short question before this Court is, whether the impugned G.O. is depriving the managements of the institutions rights guaranteed under Article 30(1) of the Constitution. It is nowhere contended in the counter-affidavit that Government has a right to restrict the power of the managements of the minority institutions, but it is contended that the Government has the power to regulate the education, educational standards and allied matters of the minority institutions as well.

4. Now, in the light of these pleadings let us examine what Rule 12 says. Rule 12 is reproduced.

"12. Appointment of staff :--(1) The educational agency shall appoint staff as per the staffing pattern prescribed by Government from time to time. All staff shall conform to the qualifications prescribed by Government from time to time.

(2) All the staff teaching as well as non-teaching shall be recruited through Staff Selection Committee to be constituted by the educational agency in accordance with these rules.

(3) All the posts shall be advertised in atleast two newspapers having large circulation which one shall be in Telugu.

(4) All educational institutions receiving grant-in-aid from Government shall notify vacancies to the employment exchange and in addition, advertisement in the news papers, that they shall also be required to call the candidates sponsored by Employment exchange for test and interview provided that the persons applying to the post in response to the advertisement in the news papers should have got registered their names in any Employment exchange in the State.

(5) Aided schools shall also be required to have a nominee of the District Educational Officer not below the rank of Deputy Educational Officer in the Staff Selection Committee. The Educational agency shall fix the selection process (test/interview) in consultation with the District Educational Officer or his nominee and shall afford the DEO's nominee a reasonable opportunity of being present. The selection however, shall not be vitiated only on the ground of the absence of DEO's nominee if the educational agency has offered reasonable explanation. The burden of proving this shall lie with the educational agency.

(6) The selection of the posts in all private educational institutions shall conform to the communal rotation roster. However, this shall not apply to minority educational institution only if they are selecting a candidate belonging to the concerned minority community. Where such a candidate is fitted in a vacancy belonging to SC/ST vacancy shall be carried forward to the next point.

(7) The procedure in respect of aided schools as indicated in Sub-rules 4, 5 and 6 above shall apply whether the selection is for an aided post or an unaided post.

(8) All appointments made either of teaching or non-teaching staff by aided or unaided institutions shall be subject to the approval of the competent authority. For this purpose the educational agency shall inform the competent authority within one month of the selection. The competent authority shall grant approval unless the selection has been made in violation of these rules. If the approval is not granted within two months from the date of receipt of the proposals in respect of unaided posts the approval shall be deemed to have been granted. In order to obviate confusion, it shall be incumbent on the educational agency to remind the competent authority one month after the initial communication, if no approval is received. The burden of proof of having communicated the selection to the competent authority shall lie with the educational agency.

(9) The educational agency shall make the appointments only on the approval as per Sub-rule (8) above.

(10) Nothing in this rule shall prevent an educational agency from making a temporary appointment in a casual vacancy of unaided post provided that such appointment is not for a period of 60 days."

By G.O.Ms.No.76 Sub-rule (2-A) has been inserted in Rule 12 and it is this amendment in the form of Sub-rule (2-A) to Rule 12 which is the subject-matter of controversy. Sub-rule (2)A is reproduced.

"2-A). (i) Before filling up for the aided teaching posts, the recruiting agency shall necessarily obtain clearance from the District Level Surplus Man Powe/ Cell under the control of the District Collector. If there are suitable candidates in the Surplus Man Power Cell of the District they should be absorbed against the said vacancies as per the subject requirements, if there are no suitable candidates available as per the subject requirement, further action to fill the vacancies may be taken by the recruiting agencies and competent authorities as per these rules without any further clearance from the Government in Finance Department subject to fulfilment of all the provisions of the said Rules.

All such recruitment clearance will be consolidated on every 1st July and 1st January and be submitted to the Commissioner of School Education to the SMPC in the Finance Department.

N.B: However the permission from the Surplus Man Power Cell at the District Level is not required in case the vacancies in the aided schools are to be filled by promotion of persons working in the feeder categories as per the rules or by recruitment by transfer from other category of service if the rules permit.

(ii) In respect of non-teaching staff, the recruiting agency shall obtain clearance from the District Level Surplus Man Power Cell under the control of District Collector. If there are suitable and eligible candidates are available in the District Level cell, the recruiting agency shall send particulars to the District Educational Officer and the District Educational Officer shall address the Government in Finance Department directly and obtain clearance before taking action to fill the vacancies."

This sub-rule restricts the choice of the managements to select the candidates for aided teaching posts as well as non-teaching staff. It appears that the Government has some surplus man power and they want this surplus man power to be employed by the writ petitioners in their private institutions.

5. Now, it has to be examined as to whether in terms of Article 30 (1) of the Constitution the managements have the unfettered power of appointment as well. Mr. E. Manohar and Mr. M.R.K. Chowdary, senior Advocates appearing for some of the petitioners have submitted that this question is no longer res Integra and has already been decided by Supreme Court in St. Xaviers College v. State of Gujarat, . It is a nine Judges Constitutional Bench judgment. It is a very long judgment and many Judges wrote their separate judgments. There were various matters relating to the affairs of the minority institutions which were decided by the Supreme Court. The Chief Justice A.N. Ray as His Lordship then was, wrote the judgment on his behalf and on behalf of Justice D.G. Palekar. In para-41, these Judges held:

"41. Autonomy in administration means right to administer effectively and to manage and conduct the affairs of the institutions. The distinction is between a restriction on the right of administration and a regulation prescribing the manner of administration. The right of administration is day to day administration. The choice in the personal of management is a part of the administration....."

Justice H.R. Kharma in para 103 stated :

"103. Another conclusion which follows from what has been discussed above is that, a law which interferes with a minority choice of qualified teachers or its disciplinary control over teachers and other members of the staff of the institution is 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 vote the selection of those teachers. The selection and appointment of teachers for an educational institution is one of the essential

ingredients of the right to manage an educational institution and the minorities can plainly be not denied such right of selection and appointment without infringing Article 30(1)....."

Justice K.K. Mathew wrote judgment on his behalf and on behalf of Justice Y. V. Chandrachud as His Lordship then was. In para 183 he stated :

"183. It is upon the principal and teachers of a college that the tone and temper of an educational institution depend. On them would depend its reputation, the maintenance of discipline and its efficiency in teaching. The right to choose the principal and 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. We can perceive no reason why a representative of the University nominated by the Vice-Chancellor should be on the Selection Committee for recruiting the Principal or for the insistence of head of the department besides the representative of the University being on the Selection Committee for recruiting the members of the teaching staff. So long as the persons chosen have the qualification prescribed by the University the choice must be left to the management. That is part of the fundamental right of the minorities to administer the educational institution established by them."

It is interesting to note that in this case that the selections were made by the management itself but it was made imperative that a representative of the University nominated by the Vice-Chancellor should be on the Selection Committee. This was also considered by the Supreme Court to be an interference in the management of the institutions.

6. Now, in the light of his Constitutional Bench judgment we do not intend to go through the judgments which have been passed by the Supreme Court earlier to this Constitutional Bench judgment, however, we would refer to certain judgments which came after the Constitutional Bench judgment referred to above. Mr. M.R.K. Chowdary, learned senior Advocate appearing for some of the writ petitioners relied on Union of India v. Hargopal, . Although this judgment is in different context and is not in the context of minority institutions, it was a case is which the scope of Section 4 of the Employment Exchanges (Compulsory Notification of vacancies) Act, 1959 was considered by the Supreme Court. This was a practice that at the time of recruitment only those candidates were considered for appointment who were sponsored by Employment exchanges. The Supreme Court held that the object of the Act is not to restrict, but to enlarge the field of choice so that the employer may choose the best and the most efficient and to provide an opportunity to the worker to have his claim for appointment considered. Some of the excerpts from para 6 of the judgment are noted below :

"6. It is, therefore, clear that the object of the Act is not to restrict, but to enlarge the field of choice so that the employer may choose the best and the most efficient and provide an opportunity to the worker to have his claim for appointment considered without the worker having to knock at every door for employment. We are, therefore, firmly of the view that the Act does not oblige any employer to employ those persons only who have been sponsored by the employment exchanges."

Another judgment to which a reference has been made is Committee of Management, St. John Inter College v. Giridhari Singh, . In this case, the question before the Supreme Court was, whether a minority institution can terminate the services of an employee without the approval of the Government in terms of a particular rule. The Supreme Court on facts found that the Act which provided for approval of termination by the Government was not at all applicable to the minority institutions. This judgment is not relevant for the purpose of present case.

7. Now, in the light of these decisions it is clear that the right to appoint is part of the management which is guaranteed under Article 30(1) of the Constitution and the employers have a right to choose the teachers for minority educational institutions, however, the State can regulate their appointment with regard to their qualifications. For instance, if a minority institution wants to appoint a person who is not qualified to be a teacher the State can always intervene because the ultimate aim is to impart education and achieve excellence. These institutions cannot be allowed to be run by unqualified persons but at the same time after having laid down the criteria the State cannot impose its own appointees on the institutions which would clearly be an interference in management.

8. Now, let us examine the facts of this case. It is stated that the Government had some surplus staff and this surplus staff in terms of the amended rule will be 'supplied' to the minority institutions whenever there is a vacancy. There is no mechanism provided for testing the suitability of this surplus staff by the management of the institutions. So, the power of appointment is practically taken away from the minority institutions. Secondly, even after being absorbed in the minority institution if a person is found to be unfit or unsuitable by the institution he cannot even be terminated because his employer remains the State Government and again the institution will have to go back to the Government. Therefore, virtually if this policy is continued the minority institutions in the long run would become Government institutions. The learned Additional Advocate-General submitted that there is a difference between the aided and un-aided institutions and it is for only aided posts that the Government wants to get the surplus staff appointed. Since the Government is paying salary for these posts therefore they should have the right to appoint them. This plea, we are afraid, cannot be accepted in view of the Sub-rule (7) of Rule 12 which lays down, "The procedure in respect of aided schools as indicated in Sub-rules 4,5 and 6 above shall apply whether the selection is for an aided post or an unaided post". It is rightly argued by the learned Counsel for the petitioners that providing of education to all the people of this country is basically the duty of the State and if they are paying salary to certain aided posts in private institutions that does not mean that they are doing any favour to those institutions. If the State is paying salary for certain aided posts it is only discharging its duty and for discharging such duty it cannot take away the control and management of the minority institutions in derogation of Article 30(1) of the Constitution of India.

9. The learned Additional Advocate-General also relied on a judgment of Supreme Court in Tribal Education Agriculture and Medical Society v. State of M.P., . In this judgment, Rule 4 of the rules made under M.P. Ashaskiya Shikshan Sanstha (Adhyapakon Tatha Anya Karmachariyon Ke Bharti) Niyam, 1979 was subject-matter of controversy before the Court. Para 4 and 5 of the judgment are reproduced :

"4. In the writ petition the petitioner society has challenged the validity of the Rules but the notice issued by the Court is confined to the question of validity of Rule 4(a) which relates to recruitment by absorption of teachers or other employees of other institutions whose services have been terminated.

5. Dr. J.P. Verghese, the learned Counsel appearing for the petitioner society, has urged that clause (a) of Rule 4 when read with the proviso to Rule 4 means that the minority educational institutions are required to give preference to persons mentioned in clause (a) and that they have no choice in the matter of judging the suitability of such persons. In this connection Dr. Verghese has referred to the expression "for any other reason whatsoever" in Rule 5 and has submitted that the teachers who are required to be absorbed under clause (a) of Rule 4 may be persons whose services have been terminated for a reason which may render them not suitable for appointment in the majority institution but still they ' may have to be appointed in view of Rule 4(a)."

This was challenged before the Madhya Pradesh High Court and the High Court disposed of the case with the following observations:

"so far as laying down the mode or procedure of recruitment of personnel is concerned, there can be no objection so long as there is no interference in the actual recruitment of personnel in the case of minority institutions. All that this sub-clause does is to enable the State Government to fix the scales of pay and lay down the general mode or procedure for recruitment of teachers and other employees and it does not enable any interference by the State Government in the choice of personnel selected by that mode, which continues to remain with the management of the institution. It has not been shown to us that scale of pay in any case has been fixed so high as to be unreasonable and an indirect interference with the running of any such educational institution. It has also not been shown that the mode or procedure of recruitment laid down is such as to amount to an undue interference with the right of management of any educational institution run by any minority."

The Supreme Court agreed with the views of the High Court. The Madhya Pradesh High Court found that, all that sub-clause (a) had done was that it enabled the State Government to fix the scales of pay and laid down the general mode or procedure for recruitment of teachers and other employees. It did not enable any interference by the Government in the choice of personnel selected by that mode which continues to remain with the management of the institution. Therefore, in our view this judgment has not at all altered the law laid down by the nine Judges Bench of the Supreme Court to which a reference has been made herein above.

10. Now, what is done by amendment of Rule 12 is that the power of appointment itself is taken away by the State Government from the Managements of the minority institutions and even the Government has restricted its powers of appointment only to the extent of surplus staff. The net result would be that, neither the State Government nor the institutions would have the choice to take up the best amongst the available qualified candidates. Ex.facie the amendment is ultra vires to Article 30(1) of the Constitution of India and therefore is struck down.

11. The writ petitions are accordingly allowed. No costs.